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Date: **9 October 2006**

PRE-TRIAL CHAMBER I

Before: **Judge Claude Jorda, Presiding Judge**
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: **Mr Bruno Cathala**

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

Public

Prosecution's Response to the Defence Request for Interim Release

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Background

1. On 10 February 2006, following the 12 January 2006 "Prosecutor's Application for Warrant of Arrest"[1] (Arrest Warrant Application), the Pre-Trial Chamber issued a warrant of arrest against Thomas LUBANGA DYILO.[2] The Pre-Trial Chamber found that there are reasonable grounds to believe that Thomas LUBANGA DYILO is criminally responsible under Article 25(3)(a) of the Statute for (i) the war crime of enlisting children under the age of fifteen punishable under Article 8(2)(b)(xxvi) or Article 8(2)(e)(vii) of the Statute, (ii) the war crime of conscripting children under the age of fifteen punishable under Article 8(2)(b)(xxvi) or Article 8(2)(e)(vii) of the Statute, and (iii) the war crime of using children under the age of fifteen to participate actively in hostilities punishable under Article 8(2)(b)(xxvi) or Article 8(2)(e)(vii) of the Statute.[3]

2. On 16 March 2006, Thomas LUBANGA DYILO was arrested at the request of the Court.[4] On 17 March 2006, he was surrendered to the Court.[5] Since then, Thomas LUBANGA DYILO is detained in the Court's Detention Centre.

3. On 23 May 2006, the Defence for Thomas LUBANGA DYILO filed the "REQUETE DE MISE EN LIBETRE"[6] (Application), requesting the Pre-Trial Chamber to order the release of Thomas LUBANGA DYILO. On 13 June 2006,

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[1] Prosecutor's Application for Warrant of Arrest, confidential, 12 January 2006.
[2] Warrant of Arrest, public, 10 February 2006.
[3] See Warrant of Arrest, at page 4.
[4] See Report from the Registrar on the Execution of the Request for Arrest and Surrender, confidential, 23 March 2006, at page 3.
[5] See Report from the Registrar on the Execution of the Request for Arrest and Surrender, confidential, 23 March 2006, at page 4.
[6] REQUETE DE MISE EN LIBERTE, public, 23 May 2006.

the Prosecution filed the "Prosecution's Response to Application for Release",[7] requesting to reject the Application. On 24 July 2006, the Pre-Trial Chamber issued the "Décision invitant la République démocratique du Congo et les victimes de l'affaire en cause à présenter leurs observations sur les procédures menées en vertu de l'article 19 du Statut"[8] (24 July 2006 Decision), qualified the Application as a challenge to jurisdiction,[9] and invited the DRC and the victims a/0001/06 to a/0003/06 (victims) to submit observations.[10] Following the submission of the observations of the DRC[11] and the victims,[12] the Prosecution[13] and the Defence[14] filed their respective Responses.[15] On 3 October 2006, the Pre-Trial Chamber issued the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute" (3 October 2006 Decision),[16] and dismissed the Application.[17]

4. On 20 September 2006, the Defence filed the "Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the

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[7] Prosecution's Response to Application for Release, confidential, 13 June 2006.
[8] Décision invitant la République démocratique du Congo et les victimes de l'affaire en cause à présenter leurs observations sur les procédures menées en vertu de l'article 19 du Statut, public, 24 July 2006.
[9] See 24 July 2006 Decision, at page 3. The Pre-Trial Chamber followed the respective submission of the Prosecution, see at paragraphs 6 and 7 of the Prosecution's Response to Application for Release.
[10] See 24 July 2006 Decision, at page 4.
[11] OBSERVATIONS DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO, confidential, 24 August 2006.
[12] Observations des victimes a/0001/06, a/0002/06 et a/0003/06 quant à l'exception d'incompétence soulevée par la défense dans la requête du 23 mai 2006, public, 24 August 2006.
[13] Prosecution's Response to the Observations of the DRC and the Observations of the Victims in Application of Article 19 of the Statute, confidential, 7 September 2006.
[14] Defence Response to the Observations of the DRC and the Observations of the Victims in the Application of Article 19 of the Statute, confidential, 8 September 2006.
[15] "Defence Response to the Observations on the DRC and the Observations of the Victims in the Application of Article 19 of the Statute", confidential, 8 September 2006, and "Prosecution's Response to the Observations of the DRC and the Observations of the Victims in Application of Article 19 of the Statute", confidential, 7 September 2006.
[16] Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, public, 3 October 2006.
[17] See 3 October 2006 Decision, at page 12.

rights of the Defence and Thomas Lubanga Dyilo"[18] (Request). The Defence *inter alia* requested the Pre-Trial Chamber to order that Thomas LUBANGA DYILO be immediately granted provisional release.[19]

5. On 22 September, the Single Judge issued the "Decision Establishing a Deadline in relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo" (22 September 2006 Decision),[20] and set both the Prosecution and the Representatives of the victims a deadline to file a response by 9 October 2006.[21]

Discussion

6. The Prosecution submits that the facts provided by the Defence do not justify interim release of Thomas LUBANGA DYILO, neither pursuant to Article 60(2) and Article 58(1) of the Statute nor pursuant to Article 60(4) of the Statute.

7. The conditions set forth in Article 58(1) of the Statute are met. Moreover, Thomas LUBANGA DYILO has not been detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor, Article 60(4) of the Statute.

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[18] Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo, public, 20 September 2006.
[19] See Request, at page 15. – The Prosecution has noted that the Defence has twice - in paras. 49 and 54 - combined the matter of "immediate conditional release" with the statement "pending the decision" of the Chamber on the challenge to jurisdiction. The Prosecution in line with the 22 September 2006 Decision has chosen to not interpret this language in the sense that with the 3 October 2006 Decision the Request became redundant. In the view of the Prosecution, this interpretation is supported by the fact that in the section "Relief Sought" the Defence has made its request for provisional release unconditioned.
[20] Decision Establishing a Deadline in relation to the Defence Request for the Interim Release of Thomas Lubanga Dyilo, public, 22 September 2006.
[21] See 22 September 2006 Decision, at page 3.

Accordingly, the interests of justice[22] require Thomas LUBANGA DYILO's continued detention.

26 September 2006 status conference

8. On 26 September 2006, the Pre-Trial Chamber convened a status conference. Though in a different context, matters related to the Request were discussed at that status conference.[23] Accordingly, the Prosecution includes its respective submission by reference in the present filing.

Conditions set forth in Article 58(1) of the Rome Statute

9. The Prosecution submits that the conditions set forth in Article 58(1) continue to be met.

10. The condition in Article 58(1)(a) of the Statute is satisfied: With the issuance of the arrest warrant against Thomas LUBANGA DYILO the Pre-Trial Chamber has considered the evidence and other information as being sufficient to establish reasonable grounds to believe that Thomas LUBANGA DYILO has committed the crimes as detailed in the Arrest Warrant Application. Since the issuance of the arrest warrant against Thomas LUBANGA DYILO, the evidence and other information has not changed. In continuing to discharge the Prosecution's duty pursuant to Article 54(1)(a) of the Statute to investigate incriminating and

[22] In respect of the "interests of justice" as the ultimate consideration for the Pre-Trial Chamber's determination see: Karim A. A. Khan, Commentary to Article 60, in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Paragraph 10 at page 777. See also ECtHR, *Klamecki v Poland*, 25415/94 [2002] ECHR 363 (28 March 2002), at para. 74.
[23] See transcript of the status conference of 26 September 2006.

exonerating circumstances equally, the further evidence gathered by the Prosecution has not resulted in the Prosecution changing its view that there are reasonable grounds to believe that Thomas LUBANGA DYILO has committed the crimes as detailed in the Arrest Warrant Application. To the contrary, the evidence establishes substantial grounds in terms of Article 61(5) of the Statute to believe that Thomas LUBANGA DYILO committed the crimes with which he is charged in the Prosecution's "Document Containing the Charges".[24] In this context, the Prosecution notes that the Defence in the Request has neither put forward arguments nor has it provided any evidence to rebut the Prosecution's assertion that reasonable grounds to believe exist that Thomas LUBANGA DYILO committed the crimes as detailed in the Arrest Warrant.

11. The first two of the three alternative[25] conditions in Article 58(1)(b), namely that the arrest appears to be necessary (i) to ensure Thomas LUBANGA DYILO's appearance at trial and (ii) to ensure that Thomas LUBANGA DYILO does not obstruct or endanger the investigation or the court proceedings, are also met. In this context, the Prosecution notes that the Defence - having focussed in the Request on Article 60(4) of the Statute - has not made any factual submissions in relation to Article 58(1)(b).[26]

12. The detention of Thomas LUBANGA DYILO continues to be necessary to ensure his appearance at trial. The Prosecution recalls its submission in the Arrest

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[24] Document Containing the Charges, Article 61(3)(a), confidential and public redacted version, 28 August 2006.

[25] The conditions in Article 58(1)(b) are, as shown by the word "or", alternative conditions.

[26] The Prosecution also notes, as a general observation, that the Defence, as a characteristic feature of the Request, has not provided many facts that match the submissions on the law and/or the jurisprudence that in the view of the Defence are applicable.

Warrant Application[27] and incorporates it by reference. The Prosecution submits that Thomas LUBANGA DYILO's far reaching national and international contacts will allow him to be in a position to easily flee and disappear if granted interim release.

13. The detention of Thomas LUBANGA DYILO continues to be necessary to ensure that he does not obstruct or endanger the investigation and the Court proceedings. The Prosecution recalls its submission in the Arrest Warrant Application[28] and incorporates it by reference. Furthermore, and in particular, the Prosecution refers to its comprehensive oral submission during the closed session *ex parte* Court hearing on 23 May 2006[29] and also incorporates it by reference. As a result of these submissions, the Prosecution submits that Thomas LUBANGA DYILO is both prepared and in a position to target and/or to let individuals acting on his behalf target individual witnesses and thus obstruct or endanger the Court proceedings.

Thomas LUBANGA DYILO is not detained for an unreasonable period of time

14. Thomas LUBANGA DYILO has been detained for the Court since 16 March 2006. Consequently, as of the day of the instant filing, he has been detained for six months and twenty-four days. The Prosecution submits that the duration of the detention of Thomas LUBANGA DYILO does not constitute "an unreasonable period" in terms of Article 60(4) of the Statute.

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[27] Specific reference is made to paragraphs 187 to 194, and in particular to paragraphs 189 to 191.
[28] Specific reference is made to paragraphs 195 to 199, and in particular to paragraphs 196 and 197.
[29] Reference is made to the (English) transcript of the 23 May 2006 closed session *ex parte* Court hearing, at pages 7 to 19, and in particular at pages 9 to 11 and 16/17.

15. In the view of the Prosecution,[30] the time Thomas LUBANGA DYILO spent in custody in the DRC prior to his arrest for and surrender to the Court - since 19 March 2006 - cannot have any bearing on the determination of the Request. The Prosecution recalls the 3 October 2006 Decision, in which the Pre-Trial Chamber determined that there is no evidence indicating that the arrest and detention of Thomas LUBANGA DYILO prior to 14 March 2006[31] was the result of any concerted action between the Court and the DRC authorities.[32] Whilst being detained in the DRC, Thomas LUBANGA DYILO was not detained "at the behest of" the Office of the Prosecutor nor was he in the Court's "constructive custody":[33] The arrest and detention of Thomas LUBANGA DYILO was not triggered by a request or any other involvement of the Office of the Prosecutor (OTP), nor had the OTP or any other organ of the Court prior to the notification of the Auditeur Général des FARDC of the DRC pursuant to Article 87 of the Statute on 15 March 2006 made a request to keep Thomas LUBANGA DYILO in custody.

16. The law does not detail what may be considered as "unreasonable" in terms of Article 60(4) of the Statute. For the reasons detailed below, the Prosecution submits that any detention within a range of months only cannot be considered as "unreasonable".[34]

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[30] Contrary to the Defence's suggestion, see Request, at para. 48. - The Prosecution notes that the Pre-Trial Chamber has adopted the Prosecution's view in its 3 October 2006 Decision.

[31] The Prosecution notes that the 14 March 2006 is the date on which the Request for Cooperation was transmitted to the DRC authorities.

[32] See 3 October 2006 Decision, at page 11.

[33] The Prosecution refers to para. 15 of the Prosecution's Response to Application for Release and footnotes 47 and 48.

[34] The Prosecution emphasizes that by making that statement, the Prosecution is not considering that any detention that exceeds, for example, one year should automatically be considered as "unreasonable". The

17. Rule 118 provides guidance. In determining that the ruling on detention shall be reviewed by the Pre-Trial Chamber "at least every 120 days", Rule 118(2) indicates that the duration of pre-trial detention within the range of months has not been considered unreasonable *per se* by the legislator. Rule 118(3) provides a further indication to the extent that it requires a mandatory hearing on the issue of interim release "at least once every year", thus implicitly suggesting that pre-trial detention can extend beyond one year.

18. The discussions in the context of the Preparatory Works support this interpretation. The Prosecution draws the attention of the Pre-Trial Chamber to the Preparatory Committee reports from the 55th Preparatory Committee meeting in December 1997 to the 57th meeting in April 1998 which include the following: "The person may be detained prior to trial *for a maximum of one year;*[35] however, *this period may be extended up to an additional year*[36] by the [Presidency] [Pre-Trial Chamber] if the Prosecutor can demonstrate that he or she will be ready for trial within that period and can show good cause for the delay."

Prosecution submits that any determination can only be made on a case-by-case basis taking into account the particularities of each case. The Prosecution refers to the jurisprudence of the ECtHR – see ECtHR, *Klamecki v Poland*, 25415/94 [2002] ECHR 363 (28 March 2002), at para. 74 – which details that "According to the Court's case-law, the question of whether or not a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, overweighs the rule of respect for individual liberty." The same principle was applied by the ICTY, see *The Prosecutor v Delalic*, Decision on the Motion for Provisional Release filed by the Accused Zejnil Delalic, ICTY, 25 September 1996, at para. 26; and *The Prosecutor v Mrda*, Decision on Darko Mrdja's Request for Provisional Release, 15 April 2003, at para. 42; and *The Prosecutor v Seselj*, Decision on Defence Motion for Provisional Release, 23 July 2004, at para. 11.

[35] *Emphasis* by the Prosecution.

[36] *Emphasis* by the Prosecution.

19. Decisions on Applications for provisional release at the ICTY and ICTR have repeatedly found that pre-trial detention exceeding one year is not *per se* unreasonable.[37] Despite the fact that the pre-trial proceedings of the ICTY differ significantly from the ICC proceedings, to the extent that there is no pre-confirmation detention envisioned in the ICTY law, the similarities between the circumstances in which both Courts work[38] call for similar considerations in balancing the right of the detained person with the interests of justice.[39]

20. The jurisprudence of the European Court for Human Rights (ECtHR) does not militate for a different approach; to the contrary, it confirms the Prosecution's position. In determining whether the length of detention on remand has been unreasonable and thus contrary to Article 5(3) of the European Convention on Human Rights, the ECtHR has considered, *inter alia*, the actual length of detention,[40] the length of detention in relation to the nature of the offence and the

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[37] See *The Prosecutor v Seselj*, Decision on Defence Motion for Provisional Release, 23 July 2004, at para. 11: "The Trial Chamber notes that the duration of pre-trial detention is a factor relevant to its decision whether to continue detention. While the Accused has already spent 15 months in pre-trial detention, in light of the legal and factual complexity of the case, and in particular the number of witness statements that has to be disclosed to the Accused and the relevant procedural actions, this period is not unreasonable and does not *per se* constitute a ground for allowing the Motion. In any event this fact must be considered in light of all relevant factors." See also, *The Prosecutor v Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defence Motion for the Provisional Release of the Accused, 21 February 2001, where a request for provisional release was denied despite a five-year long remand; and *The Prosecutor v Mrdja*, Decision on Darko Mrdja's Request for Provisional Release, 15 April 2003, where detention on remand of over ten months was found not to exceed those periods which the ECtHR or the Human Rights Committee have found to be reasonable for comparable cases.

[38] The similarities include, *inter alia*, the distance of the Court to the region where the crimes were committed, the lack of enforcement mechanisms, and the need to rely on cooperation of the local authorities.

[39] In respect of the "interests of justice" see: Karim A. A. Khan in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, 10 to Article 60. See also, in applying this principle, *The Prosecutor v. Jokic*, Order on Miodrag Jokic for Provisional Release, February 20, 2002, para. 18; and *The Prosecutor v. Limaj et al*, Decision on Provisional Release of Fatmir Limaj, September 12, 2003, at page 8.

[40] In *Klamecki v Poland*, at para. 76, the ECtHR considered a period of detention of seven months to be "not very significant", even when that period immediately followed a period of seventeen months during which the accused has been in remand (but in respect of which the ECtHR made no findings, as it lacked

penalty to be expected in the event of conviction, the conduct of the accused relating to his role in delaying the proceedings, the difficulties in the investigation of the case, such as its complexity of the facts, the number of witnesses and the need to obtain evidence abroad, and the conduct of the judicial authorities.[41]

21. The Prosecution submits that in the present case that the need to obtain evidence overseas in an extreme complex and difficult environment, combined with the very exceptional circumstances the Court is facing in discharging its statutory duty to provide for the protection of victims and witnesses as a result of the recent deterioration of the security situation in certain parts of the DRC and the impact of this deterioration on the range of available and feasible protective measures[42] must be taken into account in determining whether any delays are justified.

22. Furthermore, the Prosecution notes that in the instances the ECtHR determined that Article 5(3) of the ECHR was violated, the duration of pre-trial detention of the individuals concerned significantly exceeded the current duration of Thomas LUBANGA DYILO's pre-trial detention.[43]

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jurisdiction). The ECtHR also found the seven month remand to be in conformity with the "reasonable time" requirement in Article 5(3) of the ECHR, as the detention had been justified by the national authorities' reasonable suspicion that the accused had committed the alleged crimes and his release could jeopardize the proceedings.

[41] See ECtHR, *Neumeister v Austria*, 27 June 1968, Series A, No 8, at pages 33 *et seq.*

[42] The Prosecution notes that the Single Judge has put significant emphasis on these considerations in the 3 October 2006 "Decision concerning the Prosecution Proposed Summary Evidence", at page 3.

[43] See, for example, ECtHR, *Neumeister v Austria and Klamecki v Poland*, in which detention on remand lasted over two years. - The Prosecution notes that the Defence has refrained from providing the respective information.

The duration of Thomas LUBANGA DYILO pre-trial detention is not due to inexcusable delay by the Prosecutor

23. The Prosecution submits that the duration of Thomas LUBANGA DYILO's pre-trial detention is not caused by a delay of the Prosecution.[44]

Reasons for the re-scheduling and cancellation of the dates of the Confirmation Hearing

24. The Prosecution recalls the reasons why the first date of the Confirmation Hearing, initially scheduled for 27 June 2006, had to be postponed: The 24 May 2006 "Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure"[45] (24 May 2006 Decision) states, *inter alia*, the following reasons:[46] "Considering that the witnesses referred to in the Prosecution's Submission require that their identities and un-redacted versions of their statements be only disclosed to the Defence after the protection measures sought by the Prosecution have been fully implemented; and that, according to Victims and Witnesses Unit, the protection measures sought by the Prosecution for the witnesses referred to in the Prosecution's Submission can only be fully implemented towards the end of August 2006 and after thorough evaluation of their necessity by the Unit;" and

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[44] The Prosecution submits that in the absence of a delay there is no reason to make submissions on the notion of "inexcusable delay". Furthermore, the "unreasonable period" and the "inexcusable delay" requirements are conjunctive in nature. In addition, the Prosecution notes that even if the Pre-Trial Chamber finds that pre-trial detention has continued for an unreasonable period and is caused by inexcusable delay by the Prosecutor, it is not obliged to release the detainee. See Karim A.A. Khan, Commentary to Article 60 in Triffterer, at pages 779 to 781. In the same context, Khan points out that Article 60(4) does not provide for interim release in situations in which the delay was caused by other factors - which would be beyond the control of the Prosecution - such as resource problems.

[45] Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure, public, 24 May 2006.

[46] See 24 May 2006 Decision, at page 4.

"Considering that the Single Judge agrees with the Prosecution in that the identities of the said witnesses must be included in the Prosecution Charging Document and List of Evidence that the Prosecution must file 30 days before the confirmation hearing pursuant to rule 121(3) of the Rules;".

25. Accordingly, the 27 June 2006 Confirmation Hearing was postponed due to reasons of witness protection, an aspect that in this particular context was dealt with by the Registry's Victims and Witnesses Unit (VWU).[47]

26. A similar consideration applies in respect of the date of the Confirmation Hearing that in the 24 May 2006 Decision was scheduled for 28 September 2006. The 20 September 2006 "Décision sur le report de l'audience de confirmation des charges"[48] (20 September 2006 Decision) details, in making, *inter alia*, reference to Article 68 of the Statute, that "une partie des éléments de prévue sur lesquelles le Procureur entend se fonder à l'audience de confirmation des charges n'est pas encore accessible à la Défence" and "que la Chambre est d'avis, en vue du bon exercice des droits de la Défense, et notamment en vue de sa préparation pour l'audience de confirmation des charges, que ladite audience doit être reportée,". The Prosecution submits that the reason that certain parts of the evidence are not yet available to the Defence is that the Prosecution's Applications pursuant to Rule 81(4), requesting the authorisation of the Single Judge for the non-disclosure of the identity of witnesses, were still pending at the time of the 20 September 2006 Decision.

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[47] The Prosecution emphasizes that in its view VWU has provided for the protection of the witnesses concerned within a very reasonable period of time.

[48] Décision sur le report de l'audience de confirmation des charges, public, 20 September 2006.

27. Thus, the cancellation of the 28 September 2006 Confirmation Hearing was again directly linked to issues pertaining to the protection of witnesses.

Rule 81 Applications

28. As a preliminary remark, the Prosecution notes that the Defence is speculating, wrongly, when suggesting "that the Prosecutor bears special responsibility for the delays in processing Rule 81 applications".[49] Furthermore, the Prosecution notes that the Defence is improperly failing to distinguish Rule 81 Applications in respect of witness statements and in respect of documents.[50]

29. Contrary to the suggestions of the Defence, the Prosecution has done its utmost, in the context of its Applications pursuant to Rule 81 to avoid delays. The Prosecution recalls the facts as follows:

(i) On 21 April 2006, the Prosecution filed its first Application pursuant to Rule 81(2) and Rule 81(4). The Prosecution attached a number of witness statements with proposed redactions and sought rulings of the Pre-Trial Chamber pursuant to Rules 81(2) and 81(4).

(ii) On 26 April 2006, the Single Judge scheduled an *in camera* hearing for 2 May 2006, in order to discuss, *inter alia*, the 21 April 2006 Application. During the 2 May 2006 hearing, the Single Judge raised various concerns regarding the 21 April 2006 Application.

[49] See Request, at paras. 14 and 15.
[50] See Request, at para. 15.

(iii) In light of these concerns, the Prosecution reviewed the proposed redactions to witness statements attached to the 21 April 2006 Application and made changes to the proposed redactions. On 9 May 2006, the Prosecution submitted its Supplemental Briefing Provided in Respect of the Application pursuant to Rule 81(2) and Rule 81(4) of 21 April 2006[51] seeking the same relief but attaching amended proposed redactions to the witness statements originally submitted.

(iv) On 19 May 2006, the Single Judge issued the Decision establishing General Principles governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute[52] (19 May 2006 Decision). In the 19 May 2006 Decision, the Single Judge determined the general procedure to be applied by either Party seeking non-disclosure of information under Rules 81(2) and (4). In paragraph 31 of the 19 May 2006 Decision, the Single Judge decided that "non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing can be authorised only exceptionally when, due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered unfeasible or insufficient."[53]

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[51] Supplemental Briefing Provided in Respect of the Application pursuant to Rule 81(2) and Rule 81(4) of 21 April 2006, 9 May 2006.

[52] Decision Establishing General Principles governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, 19 May 2006.

[53] See 19 May 2006 Decision, at para. 31.

(v) On 22 May 2006, the Single Judge issued the "Decision on the Prosecution Filing of 19 April 2006 and Application of 24 April 2006"[54] (22 May 2006 Decision). The Single Judge decided that the Prosecution must proceed with any applications under Rules 81(2) and (4) in the manner ordered in the 19 May 2006 Decision.[55]

(vi) In compliance with the 19 May 2006 Decision, the Prosecution on 14 June 2006, after a meeting with VWU on 7 June 2006 to discuss the parameters of the Prosecution's information, submitted its list with the names of the witnesses concerned to VWU.

(vii) On 24 July 2006, the VWU submitted its Recommendations of the Registrar on Protective Measures for Prosecution Witnesses (the Registry Recommendations), in an *ex parte* filing, not accessible to the Prosecution.[56] On 26 July 2006, the Prosecution filed the Prosecution's Request for Access to *Ex Parte* Filings[57] in which the Prosecution requested access to the Registry's Recommendations on the basis that the Prosecution required the information in order to determine the necessity to request authorization of redactions pursuant to Rule 81(4) and to comment on the views of VWU. On 31 July 2006, the Single Judge granted the Prosecution's request and instructed the Registry to

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[54] Decision on the Prosecution Filing of 19 April 2006 and Application of 24 April 2006, confidential and public redacted versions, 22 May 2006. The Pre-Trial Chamber referred to the Prosecution's 21 April 2006 as the "24 April 2006" Application.

[55] See 22 May 2006 Decision, at page 5.

[56] Recommendations of the Registrar on Protective Measures for Prosecution Witnesses, Under Seal, *Ex Parte*, 24 July 2006.

[57] Prosecution's Request for Access to *Ex Parte* Filings, under seal, *ex parte*, 26 July 2006.

notify the Registry Recommendations to the Prosecution.[58] On 1 August 2006, the Prosecution received the Registry Recommendations.

(viii) On 14 August 2006, the Prosecution filed its urgent "Request for *Ex Parte* Hearing" (14 August 2006 Request). In the 14 August 2006 Request, the Prosecution raised its concerns in detail in respect of the Registry Recommendations and requested the Single Judge "- in light of the deadlines for the Prosecution's Rule 81(4) applications - to urgently schedule an ex parte hearing with the Prosecution and the VWU in order to address in detail the VWU Recommendations." On 18 August 2006, the Single Judge rendered the "Decision on the Prosecution Urgent Request for Ex Parte Hearing", and scheduled a hearing for 23 August 2006, at 15:00 hours. The hearing took place as scheduled. The Prosecution afterwards submitted its remaining Rule 81 Applications by the deadline of 28 August 2006.[59]

30. In light of these facts, the Prosecution submits that as a result of the procedural history of the case it was not in a position to file its respective Applications any earlier. Thus, the Prosecution has not delayed proceedings.

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[58] Decision on the Prosecution Request for Access to the Registry Recommendations, Under Seal, *Ex Parte* only available to the Prosecution, 31 July 2006.

[59] The subsequent filings were amended applications resulting from concerns raised by the Single Judge in various *ex parte* Court hearings.

Disclosure of potentially exculpatory materials

31. The Prosecution notes that the Defence is misstating[60] the facts by submitting that "[T]he Prosecution has continued to disclose exculpatory documents beyond the stipulated deadline of 28 August 2006, the latest disclosures being 11 and 19 September 2006."[61]

32. The Prosecution recalls the following:

(i) The "stipulated deadline" of 28 August 2006, to which the Defence is making reference, reads as follows:[62] "The parties shall make every effort to agree on the frequency of the exchanges with a view to ensuring that *most*[63] of potentially exculpatory materials within the scope of article 67(2) of the Statute in the current case against Thomas Lubanga Dyilo are disclosed as soon as practicable and no later than 28 August 2006;". Whilst the Prosecution has disclosed "most" of the potentially exculpatory materials,[64] it was not duty bound to disclose *all* of the potentially exculpatory materials.

(ii) Disclosure of potentially exculpatory evidence pursuant to Article 67(2) of the Statute is an ongoing obligation. Thus, the Prosecution is under

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[60] Whilst the Prosecution in the context of the Rule 81 applications realizes that the Defence due to the widely *ex parte* character of these proceedings is lacking all elements to avoid speculation, the Prosecution in the present context notes that the Defence, having all information at hand, is misstating the facts by omitting crucial portions of the respective Decision of the Single Judge.

[61] See Request, at para. 11.

[62] See 24 May 2006 Decision, at page 6.

[63] *Emphasis* by the Prosecution.

[64] The Prosecution makes reference to its various reports during the status conferences on disclosure on 24 and 26 April 2006, 24 May 2006, 23 June 2006, 14 July 2006, 24 and 29 August 2006, 5 and 26 September 2006.

the obligation to continue searching for and providing materials falling within the broad scope of Article 67(2) of the Statute throughout the proceedings and thus also throughout the pre-Confirmation Hearing phase.

33. Against this background, the Prosecution opposes any suggestion of the Defence that it has caused a delay by disclosing materials of potentially exculpatory nature after 28 August 2006.

E-Court Protocol

34. The Prosecution has noted that the Defence is - again - misstating the facts in respect of the Prosecution's compliance with the E-Court Protocol in submitting that "the Prosecution had unilaterally decided not to comply with the protocol attached to the Single Judge's decision of 15 May 2006".[65]

35. The Prosecution clarifies the facts as follows: After the Single Judge had issued the 15 May 2006 "Decision on the Final System of Disclosure and the Establishment of a Timetable",[66] the Parties, in compliance with the Court's order of 23 June 2006,[67] entered into a negotiation process with the Defence, coordinated by the Registry. This process resulted on 20 July 2006 in the Registry's "Submission of a New Version of the E-Court Protocol Prepared Jointly by the Office of the Prosecutor, the Defence and the Registry".[68] After

[65] See Request, at para. 12.
[66] Decision on the Final System of Disclosure and the Establishment of a Timetable, public, 15 May 2006.
[67] See the (English) transcript of the 23 June 2006 Court hearing, at pages 65 to 82.
[68] Submission of a New Version of the E-Court Protocol Prepared Jointly by the Office of the Prosecutor, the Defence and the Registry, public, 20 July 2006.

further litigation, the Single Judge on 28 August 2006 issued the "Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version for their Presentation During the Confirmation Hearing"[69] (28 August 2006 Decision). Following the 28 August 2006 Decision, the Prosecution on 31 August 2006 filed its "Request for Extension of Time, Clarification and Provision of Information".[70] On 1 September 2006, the Single Judge in the "Decision on the Prosecution Request for Extension of Time, Clarification and Provision of Information"[71] provided both the necessary information and clarification. Accordingly, from 1 September 2006 onwards, the Prosecution was in a position to implement the E-Court Protocol.

36. The Prosecution submits that in light of these facts there is no delay caused by the Prosecution.

Request

37. Accordingly, the Prosecution requests the dismissal of the Request.

Luis Moreno-Ocampo
Prosecutor

Dated this 9th day of October 2006
At The Hague, The Netherlands

[69] Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version for their Presentation During the Confirmation Hearing, public, 28 August 2006.
[70] Request for Extension of Time, Clarification and Provision of Information, public, 31 August 2006.
[71] Decision on the Prosecution Request for Extension of Time, Clarification and Provision of Information, public, 1 September 2006.

ANNEX
LIST OF AUTHORITIES

A. JURISPRUDENCE

(a) ICTY

Prosecutor v. Delalic et al., IT-96-21, Decision on the Motion for Provisional Release filed by the Accused Zejnil Delalic, ICTY, 25 September 1996, at para. 26
http://www.un.org/icty/celebici/trialc2/decision-e/60925PR2.htm

Prosecutor v Seselj, IT-03-67-PT, Decision on Defence Motion for Provisional Release, 23 July 2004, at para. 11
http://www.un.org/icty/seselj/trialc/decision-e/040723.htm

Prosecutor v. Jokic, IT-01-42-PT, Order on Miodrag Jokic for Provisional Release, 20 February 2002, at para. 18
http://www.un.org/icty/strugar/trialc1/order-e/20220PR117242.htm

Prosecutor v. Limaj et al, IT-03-66-PT, Decision on Provisional Release of Fatmir Limaj, 12 September 2003, at page 8
http://www.un.org/icty/limaj/trialc/decision-e/030912.pdf

Prosecutor v. Mrdja, IT-02-59-PT, Decision on Darko Mrdja's Request for Provisional Release, 15 April 2003, at para. 41 et seq.
http://www.un.org/icty/mrdja/trialc/decision-e/030415.htm

(b) ICTR

The Prosecutor v Kanyabashi, Case No. ICTR-96-15-T, Decision on Defence Motion for the Provisional Release of the Accused, 21 February 2001
http://69.94.11.53/default.htm

(c) European Court of Human Rights

Klamecki v Poland, App. No. 25415/94, ECHR, Judgment of 28 March 2002, at para. 74
http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=2974&sessionId=8715419&skin=hudoc-en&attachment=true

Neumeister v Austria, App. No. 1936/63, ECHR, Judgment of 27 June 1968, at page 33 *et seq.*
http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=126&sessionId=8715440&skin=hudoc-en&attachment=true

B. SECONDARY MATERIALS

Books

Karim A. A. Khan, Commentary to Article 60, in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, para. 10 at page 777.