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**International
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No.: **ICC-01/04-01/06 (OA 6)**

Date: 14 December 2006

THE APPEALS CHAMBER

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

Registrar: Mr. Bruno Cathala

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

Public document

Judgment

on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Thomas Lubanga Dyilo pursuant to the decision of Pre-Trial Chamber I of 4 October 2006, entitled “Decision on Third Defence Motion for Leave to Appeal” (ICC-01/04-01/06-514), against the decision of Pre-Trial Chamber I of 20 September 2006, entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (ICC-01/04-01/06-453-Conf-Exp),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

- (i) The decision of Pre-Trial Chamber I of 20 September 2006 entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” is reversed to the extent that it authorises the Prosecutor to disclose to the appellant witness statements and documents with redactions.
- (ii) Pre-Trial Chamber I is directed to decide anew upon the authorisation of disclosure of witness statements and documents with redactions, as referred to in the preceding paragraph, in light of the present judgment.

REASONS

I. KEY FINDINGS

1. A decision pursuant to rule 81 (2) of the Rules of Procedure and Evidence authorising disclosure prior to the confirmation hearing of witness statements or other documents to the defence with redactions must state how the Pre-Trial Chamber came to such a conclusion; the reasoning should also state which of the facts before it led the Pre-Trial Chamber to reach its conclusion.

2. At the confirmation hearing, the Prosecutor, in principle, may rely on the unredacted parts of witness statements and other documents even if they were disclosed to the defence prior to the hearing with redactions authorised pursuant to rule 81 (2) of the Rules of Procedure and Evidence.

II. PROCEDURAL HISTORY

3. The “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” of Pre-Trial Chamber I of 20 September 2006 (ICC-01/04-01/06-453-Conf-Exp; hereinafter: “Impugned Decision”) was triggered by a set of applications and amended applications (see Impugned Decision, page 3, first paragraph, and page 4, fourth paragraph) by the Prosecutor for authorisation of disclosure of witness statements and other documents with redactions to the defence prior to the confirmation hearing of Mr. Thomas Lubanga Dyilo (hereinafter: “appellant”). Generally, the Prosecutor filed these applications with annexes that were marked confidential, *ex parte*, Prosecutor only, containing the relevant witness statements and other documents in which the proposed redactions were highlighted, but legible. Some of these statements and documents also contained redactions that the Pre-Trial Chamber had authorised in previous decisions.

4. In the Impugned Decision, the Pre-Trial Chamber *inter alia* authorised disclosure with redactions in relation to a number of witness statements and other documents (see Impugned Decision, pages 11 to 15). The appellant was notified of the Impugned Decision only in a version in which the names of the witnesses concerned and some other details had been redacted (ICC-01/04-01/06-455; hereinafter: “Redacted Version of the Impugned Decision”). All the page and paragraph numbers of the Impugned Decision referred to in this judgment are the same in both the public and the confidential versions of that decision.

5. On 27 September 2006, the appellant applied for leave to appeal the Impugned Decision (ICC-01/04-01/06-483; hereinafter: “Application for Leave to Appeal”). On 4 October 2006, the Pre-Trial Chamber rendered its “Decision on Third Defence Motion for Leave to Appeal” (ICC-01/04-01/06-514; hereinafter: “Decision Granting Leave to Appeal”), granting leave to appeal in relation to the following three issues:

“(i) whether the part of [the] Decision based on rule 81 (2) of the Rules lacks factual reasoning in light of the fact that it was issued during *ex parte* proceedings on requests for redactions so as not to prejudice further investigations;

(ii) whether the requirement that the Prosecution is prohibited from relying at the confirmation hearing on evidence protected under rules 81 (2) and (4) without

adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document, and particularly whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence that has been disclosed to the Defence in only a redacted form;

(iii) whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules and, in particular, under which conditions restrictions to the disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules” (see Decision Granting Leave to Appeal, pages 14 and 15).

6. On 16 October 2006, the appellant filed the “Defence Appeal Brief in Relation to Second Decision on Prosecution Requests and Amended Requests for Redactions under Rule 81” (ICC-01/04-01/06-577; hereinafter: “Document in Support of the Appeal”). On 27 October 2006, the Prosecutor filed the “Prosecution’s Response to ‘Defence Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” in both a public redacted version (ICC-01/04-01/06-625; hereinafter: “Response to the Document in Support of the Appeal”) and in a confidential, *ex parte*, Prosecutor only, version (ICC-01/04-01/06-624-Conf-Exp).

7. The applications and amended applications of the Prosecutor referred to in paragraph 3, above, also led the Pre-Trial Chamber to render its “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” of 15 September 2006 (ICC-01/04-01/06-437; hereinafter: “First Decision on Requests for Redactions”), disposing of applications for disclosure with redactions not covered by the Impugned Decision in the present appeal. The First Decision on Requests for Redactions is the subject of the appeal proceedings 01/04-01/06 OA 5, judgment in which is also being delivered today.

III. THE REQUEST FOR EXPEDITED SUBMISSION OF THE RESPONSE TO THE DOCUMENT IN SUPPORT OF THE APPEAL AND ITS *EX PARTE* FILING

8. The Appeals Chamber notes that in paragraph 60 of the Document in Support of the Appeal, the appellant requested the Appeals Chamber to

“request the Prosecution to consider submitting its response [to the Document in Support of the Appeal] on an expedited basis in order to facilitate the resolution of this issue prior to the confirmation hearing”.

9. The Appeals Chamber did not consider the above request as an application for a variation of the time limit pursuant to regulation 35 of the Regulations of the Court but as a

mere suggestion to the Appeals Chamber. The Appeals Chamber did not deem it appropriate to act upon this suggestion because the appellant himself had made use of the entire time afforded to him by regulation 65 (4) of the Regulations of the Court for the submission of his Document in Support of the Appeal.

10. The Appeals Chamber draws attention to the fact that in its consideration of the present appeal, it took into account only the public version of the Prosecutor's Response to the Document in Support of the Appeal and not the *ex parte* version of it. The Prosecutor had not provided any explanation as to why he filed an *ex parte* version of the Response to the Document in Support of the Appeal. The Appeals Chamber considers that in such circumstances it would be inappropriate to take into account a filing of a participant that was not notified to the other participant.

IV. MERITS OF THE APPEAL

A. First ground of appeal: lack of factual reasoning

11. As his first ground of appeal, the appellant submits that the Impugned Decision lacks sufficient factual reasoning in relation to authorisations for non-disclosure based on rule 81 (2) of the Rules of Procedure and Evidence.

1. Relevant part of the decision of the Pre-Trial Chamber

12. The factual reasoning in the Impugned Decision consisted of the following: in the second paragraph of page 7 of the Impugned Decision, the Pre-Trial Chamber stated that it had "carefully examined the redactions proposed by the Prosecution in each of the hundreds of documents, witness statements and transcripts of witness interviews" and that "as a result of that examination, several *ex parte* hearings ... have been held". Furthermore, the Pre-Trial Chamber reasoned as follows:

"CONSIDERING that, according to rule 81 (2) of the Rules, so as not to prejudice further or ongoing investigations, the single judge may authorise the non-disclosure of materials or information to the Defence which in principle the Prosecution is required to disclose in accordance with its disclosure obligations; and that none of [the] redactions proposed by the Prosecution under rule 81 (2) of the Rules is based on the need to protect information related to the ongoing investigation in the current case against Thomas Lubanga Dyilo" (see Impugned Decision, page 7, last paragraph).

"CONSIDERING that all the Prosecution requests and all amended requests refer to documents and to statements and transcripts of the interviews of witnesses on whom the Prosecution intends to rely at the confirmation hearing; and that most of

them were taking [sic] in the context of the investigation of the Prosecution of the DRC situation and prior to the unsealing of the warrant of arrest for Thomas Lubanga Dyilo” (see Impugned Decision, page 8, third paragraph).

13. The Pre-Trial Chamber went on to state:

“CONSIDERING that there is a need to authorise several redactions in several of the documents, witness statements and transcripts of witness interviews contained in the Prosecution requests and amended requests so as:

(i) not to prejudice further investigations, which *inter alia* includes protecting the identity of:

a. Prosecution sources when the relevant organisation has expressly requested that its identity not be revealed to the Defence at this stage of the proceedings, and when the person supplying the document to such an organisation or the contact person(s) of such organization in the DRC currently resides in a risk area;

b. Prosecution sources when the individual who transmitted the document to the Prosecution currently resides in a[n] area of risk;

c. Persons who are believed not to be Prosecution sources, are referred to in handwritten notes which are not part of the content of the relevant documents, and are currently leaving [sic], or many [sic] be currently leaving [sic], in areas of risk;

(ii) to protect the identities of certain witnesses on whom the Prosecution intends to rely at the confirmation hearing;

(iii) to protect the identities of the other witnesses on whom the Prosecution may decide to rely at trial in the present case if the charges against Thomas Lubanga Dyilo are confirmed; and/or

(iv) to protect the identity of alleged victims of the crimes which are part of the present case against Thomas Lubanga Dyilo” (see Impugned Decision, page 9, second paragraph).

14. Furthermore, the Pre-Trial Chamber noted:

“CONSIDERING that none of the redactions authorised in the present decision seem to affect any potentially exculpatory information;

CONSIDERING that the Prosecution proposed redactions to certain documents on which it intends to rely at the confirmation hearing, on the one hand, are necessary for the preservation of further investigations and/or the protection of victims and Prosecution witnesses, and, on the other hand, make the document at face value wholly irrelevant in the present case, which is confined to the alleged enlistment, conscription and active use in military operation of children under the age of fifteen; and that there is therefore no need to authorise any redaction to the said documents because, according to article 69 (4) of the Statute, they cannot be admitted into evidence for the purpose of the confirmation hearing” (see Impugned Decision, page 10, first and second paragraphs).

15. The first section of the dispositive part of the Impugned Decision lists the statements, investigators' reports and related documents pertaining to eight witnesses (see Impugned Decision, pages 11 and 12, paragraphs (i) to (xi)) without expressly indicating the rule pursuant to which the redactions were authorised.

16. In the dispositive part relating to the redactions sought for other documents, the Pre-Trial Chamber took up the language that it had used in its reasoning on page 9, second paragraph of the Impugned Decision (reproduced in paragraph 13, above): in paragraph (i) on page 12 and 13 of the Impugned Decision, the Pre-Trial Chamber stated that "the Prosecution source is an organisation which has expressly requested that its identity not be revealed to the Defence at this stage of the proceedings; and ... the person supplying the document to that organisation or being the contact person(s) of such organization in the DRC currently resides in a risk area", which corresponds to subparagraph (i) (a) of the second paragraph on page 9 of the Impugned Decision; in paragraph (ii) on page 13 of the Impugned Decision the Pre-Trial Chamber stated that the redactions cover "only the name of the individual who transmitted those documents to the Prosecution", which corresponds to subparagraph (i) (b) of the second paragraph on page 9 of the Impugned Decision; similarly, the language used in paragraphs (iii) to (viii) on pages 13 to 15 takes up elements of the reasoning in the second paragraph of page 9 of the Impugned Decision. No express reference was made to the rule pursuant to which the redactions were authorised.

2. *Arguments of the appellant*

17. The argument of the appellant that the Impugned Decision lacks factual reasoning for invoking rule 81 (2) of the Rules of Procedure and Evidence consists of three parts: first, the appellant argues that the Impugned Decision fails to provide sufficient information regarding the reasons for invoking rule 81 (2) of the Rules of Procedure and Evidence and, in particular, the prejudice that the disclosure might cause to the ongoing or further investigations (see Document in Support of the Appeal, paragraphs 4 to 9). The appellant argues that it is not clear from the Impugned Decision whether any redactions were authorised pursuant to rule 81 (2) of the Rules of Procedure and Evidence (see Document in Support of the Appeal, paragraphs 6 and 11). He submits that the lack of clarity was unnecessary as the Prosecutor had already stated publicly that he was investigating other alleged crimes of the appellant (see Document in Support of the Appeal, paragraph 8).

18. Second, the appellant argues that the Pre-Trial Chamber in the Impugned Decision failed to set out for each document individually why the redactions to the witness statements

and other documents were necessary. The Pre-Trial Chamber, the appellant argues, adopted a “blanket approach to protective measures”, abrogating its “duty to adjudicate the merits of each request” (see Document in Support of the Appeal, paragraph 10). Furthermore, the appellant notes that the Impugned Decision “does not contain any indicia which would lead the Defence to believe that the Single Judge analysed and confirmed that the documents conform to the criteria set out in article 54(3)(3) [sic]” of the Statute (see Document in Support of the Appeal, paragraph 13).

19. Third, the appellant argues that the lack of factual reasoning was neither necessary nor proportionate and that the Pre-Trial Chamber failed to take appropriate counter-balancing measures to remedy the infringement of the right of the defence to be heard. He submits that the Pre-Trial Chamber could have provided more extensive reasoning in a confidential *inter partes* annex to the Impugned Decision (see Document in Support of the Appeal, paragraph 14) and that the duty to provide reasons was even more important because the proceedings that had led to the Impugned Decision had been held *ex parte*. The reasoning of the Impugned Decision was the only basis for the defence to ascertain the impact of the non-disclosure on the defence rights and to decide whether or not the defence should seek leave to appeal (see Document in Support of the Appeal, paragraphs 16 et seq.).

20. The appellant does not make any submissions as to the obligation of the Pre-Trial Chamber to provide factual reasoning. Instead, the appellant seeks to incorporate by way of a general reference the arguments he had made in relation to the appeal 01/04-01/06 OA 5 in his “Defence Appeal Brief in Relation to First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” of 10 October 2006 (ICC-01/04-01/06-546; hereinafter: “OA 5 Document in Support of the Appeal”; see Document in Support of the Appeal, paragraph 3, footnote 3). In paragraphs 6 et seq. of the OA 5 Document in Support of the Appeal, the appellant had submitted that there was an obligation to provide factual reasoning.

3. *Arguments of the Prosecutor*

21. The Prosecutor refutes the arguments of the appellant in relation to the first ground of appeal. He objects to the incorporation of arguments of the appellant that were made in the OA 5 Document in Support of the Appeal. The Prosecutor, however, makes reference *inter alia* to the submissions in his response of 20 October 2006 to the OA 5 Document in Support of the Appeal (01/04-01/06-597-Conf). He requests the Appeals Chamber to take into account the arguments made in these filings if the Appeals Chamber decides to consider the

appellant's references to the OA 5 Document in Support of the Appeal (see Response to the Document in Support of the Appeal, paragraph 11).

22. The Prosecutor recalls that leave to appeal was granted only in relation to the question of whether the factual reasoning for redactions authorised pursuant to rule 81 (2) of the Rules of Procedure and Evidence was sufficient and submits that for that reason, the Appeals Chamber may not consider whether the factual reasoning for redactions authorised pursuant to other provisions was sufficient (see Response to the Document in Support of the Appeal, paragraph 16).

23. The Prosecutor accepts that the Impugned Decision failed to specify in the dispositive part of the decision the specific rule under which the Pre-Trial Chamber acted in relation to the authorisation of disclosure with redactions. He submits, however, that it is nevertheless possible to identify the relevant provisions by analysing the reasoning of the Impugned Decision and the procedural context in which the Impugned Decision was rendered: the Prosecutor submits that in relation to the witness statements, investigators' reports and related documents pertaining to eight witnesses (see Impugned Decision, pages 11 and 12, paragraphs (i) to (xi)) the legal basis for the authorisation for redactions can be identified on the basis of the applications of the Prosecutor, where electronic markings had been used to indicate whether redactions were sought pursuant to rule 81 (2) or (4) of the Rules of Procedure and Evidence (see Response to the Document in Support of the Appeal, paragraph 21). He submits that the reasoning for the authorisation of redactions of these witness statements pursuant to rule 81 (2) of the Rules of Procedure and Evidence was not deficient (see Response to the Document in Support of the Appeal, paragraph 24).

24. The Prosecutor argues further that in relation to redactions which were authorised so as to protect further investigations, it was "not an abuse of the Pre-Trial Chamber's discretion to find it may prejudice those further investigations to disclosure [sic] to the defence of elements of the Prosecution's investigation *other than* the one which relates to the charges proposed for confirmation" and that the Pre-Trial Chamber "need not necessarily find that the defence creates some 'special' risk at this stage in the proceedings" (see Response to the Document in Support of the Appeal, paragraph 25). He argues that while more reasoning must be provided for redactions under rule 81 (4) of the Rules of Procedure and Evidence, "there is no compelling reason that the Appellant should have access to any information on investigations outside the present case" (see Response to the Document in Support of the Appeal, paragraph 27) and that human rights jurisprudence accepts that in criminal proceedings competing

interests must be weighed against the rights of the defence to disclosure, such competing interests including national security, the need to protect witnesses at risk of reprisals and the need to keep secret police methods of investigation of crime; that “national legal systems also widely recognize the importance of being able to protect ongoing investigations”; and that it is important to encourage and facilitate the voluntary cooperation of a range of entities with the Court (see Response to the Document in Support of the Appeal, paragraph 28).

25. In relation to the documents for which redactions were authorised in paragraphs (i) to (viii) on pages 12 to 15 of the Impugned Decision, the Prosecutor argues that “[e]ither some or all of the documents listed in paragraphs (i), (ii) and (iii) ... and in paragraphs (vi) and (vii) ... come within the issue under appeal” (see Response to the Document in Support of the Appeal, paragraph 31). The Prosecutor submits that the redactions authorised in paragraphs (iv), (v) and (viii) on pages 12 to 15 of the Impugned Decision were not based on rule 81 (2) of the Rules of Procedure and Evidence. The Prosecutor submits that the legal basis for the authorisation of redactions of the documents mentioned in sub-paragraphs (i), (ii) and (iii) of the last paragraph on page 15 of the Impugned Decision was rule 81 (4) of the Rules of Procedure and Evidence (see Response to the Document in Support of the Appeal, paragraph 30, first bullet point).

26. Furthermore, the Prosecutor submits that the Pre-Trial Chamber knew in respect of each redaction the nature and content of the information proposed for redaction and therefore could assess any prejudicial impact. The Prosecutor explains that many of the redactions pertained to information that was “completely peripheral”. Therefore, the Prosecutor argues, the authorisation of the redactions was “entirely reasonable” (see Response to the Document in Support of the Appeal, paragraph 33).

27. The Prosecutor explains that some redactions concerned telephone numbers or names of “individuals whom the Prosecution does not know” and that the redactions were necessary in order to prevent them being mistakenly taken for Prosecution sources (see Response to the Document in Support of the Appeal, paragraph 34). The Prosecutor submits furthermore that redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence may be authorised on the basis that potential sources may be expected to be less cooperative “when the institution conducting those investigations discloses such information, even in the absence of any relevance of that information to a current proceeding” and that in any event, the redactions also could have been authorised pursuant to rule 81 (4) of the Rules of Procedure and Evidence (see Response to the Document in Support of the Appeal, paragraph 34).

4. *Determination by the Appeals Chamber*

28. In relation to the first ground of appeal and for the reasons given below, the Appeals Chamber determines that the Impugned Decision was erroneous because it lacked sufficient reasoning in relation to the authorisation of disclosure of witness statements and other documents with redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence.

29. The Appeals Chamber notes that the appellant has sought to incorporate arguments made in relation to the appeal 01/04-01/06 OA 5 in his Document in Support of the Appeal in the present appeal. The Appeals Chamber disapproves of this practice. The arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court.

30. The Appeals Chamber explains in paragraph 20 of today's judgment on the appeal 01/04-01/06 OA 5 in relation to the First Decision on Requests for Redactions that decisions authorising the non-disclosure to the defence of the identities of witnesses on whom the Prosecutor intends to rely at the confirmation hearing need to be sufficiently reasoned. This paragraph reads as follows:

“Decisions of a Pre-Trial Chamber authorising the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. The Statute and the Rules of Procedure and Evidence emphasise in various places the importance of sufficient reasoning (by way of example, see, in the context of evidentiary matters, rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to “give reasons for any rulings it makes”). The Appeals Chamber notes in this context the judgment in the case of *Hadjianastassiou v. Greece* (application number 12945/87) of 16 December 1992, where the European Court of Human Rights held in paragraph 32 of its judgment that as part of the fair trial guarantees of article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 as amended by Protocol 11 (213 United Nations Treaty Series 221 et seq., registration no. 2889; hereinafter: “European Convention on Human Rights”), courts are required to “indicate with sufficient clarity the grounds on which they based their decision.” The European Court of Human Rights went on to state that “[i]t is this, inter alia, which makes it

possible for the accused to exercise usefully the rights of appeal available to him.” The cases of the European Court of Human Rights cited by the Prosecutor in the footnotes to paragraphs 19 to 21 of the Response to the Document in Support of the Appeal, although not relating to criminal proceedings, also confirm the importance of a reasoned decision for the right to a fair trial. Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible (see *Prosecutor v. Momir Nikolić*, “Judgement on Sentencing Appeal”, 8 March 2006, Case No. IT-02-60/1-A, paragraph 96; *Prosecutor v. Dragoljub Kunarac et al.*, “Judgement”, 12 June 2002, Case No. IT-96-23 & 23/1-A, paragraph 41). In paragraph 11 of its “Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release” of 1 November 2005 in the case of *Prosecutor v. Milutinović et al.* (Case No. IT-05-87-AR65.1), the Appeals Chamber of the ICTY held that “as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision”. Although in the present case the right of the appellant to appeal the Impugned Decision was conditional on the granting of leave by the Pre-Trial Chamber pursuant to article 82 (1) (d) of the Statute and rule 155 (1) of the Rules of Procedure and Evidence, the analysis of the European Court of Human Rights and of the Appeals Chamber of the ICTY in the cases referred to above applies with similar force to the case at hand.”

31. The same applies to decisions that authorise the disclosure with redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence. The reasoning must state how the Pre-Trial Chamber came to the conclusion that disclosure of witness statements and other documents with redactions pursuant to rule 81 (2) of the Rules of Procedure could be authorised; the reasoning should also state which of the facts before it led the Pre-Trial Chamber to reach its conclusion.

32. The reasoning in the Impugned Decision is insufficient because it is not clear from the reasoning what facts, in the evaluation of the Pre-Trial Chamber, justified the authorisation of the redactions. To a large extent, the Pre-Trial Chamber only limited itself to reciting the substance of the provisions concerning authorisations of disclosure with redactions without providing any information as to how it applied these provisions to the facts of the case. The Impugned Decision fails to set out expressly which redactions are being authorised under rule 81 (2) of the Rules of Procedure and Evidence. It equally fails to make any express reference to the facts which it considers justify the application of rule 81 (2) of the Rules of Procedure and Evidence. It is possible to surmise that certain redactions have been authorised under that provision, but nowhere is the factual and legal basis for those redactions explicitly considered together. Furthermore, the Pre-Trial Chamber did not address, even in general terms, why the Chamber considered that the disclosure of sources of the Prosecutor and any other matters in relation to which it authorised redactions could prejudice further investigations.

33. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the factual reasoning in the Impugned Decision was sufficient because the legal and factual basis for the authorisation of the redactions could be understood by reference to the applications of the Prosecutor that led to the Impugned Decision. The reasons for a decision should be comprehensible from the decision itself. It is not sufficient for the Pre-Trial Chamber to identify simply which filings were before it. The decision must set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached. Furthermore, these applications of the Prosecutor were filed *ex parte*, Prosecutor only, and for that reason, the appellant did not have access to them. In this context, the Appeals Chamber recalls paragraph 22 of today's judgment on the appeal 01/04-01/06 OA 5, which reads as follows:

"The Appeals Chamber is not convinced that the insufficiency of the reasoning is justified because of the *ex parte* character of the proceedings that led to the Impugned Decision. The *ex parte* character of the proceedings itself did not reduce the need for the Impugned Decision to be properly reasoned, but made the provision of proper reasoning more necessary because the appellant could not rely on the context in which the Impugned Decision was made to determine how the Pre-Trial Chamber reached its decision. If the provision of the full reasoning would have led to the identification of the witness in question or would otherwise have disclosed information that needed to be protected, the Pre-Trial Chamber could have considered whether the full reasoning should be provided in a decision marked confidential and *ex parte*, Prosecutor only, with a separate redacted version made available to the defence. Thus, the reasoning of the Pre-Trial Chamber at least could have been reviewed properly by the Appeals Chamber in case of an appeal. In such a situation, the reasoning that would not be made available to the defence should be kept to that which is strictly necessary."

34. The Appeals Chamber will not consider the other arguments of the Prosecutor, which address the question of whether the authorisation of the redactions was justified. This question must be distinguished from whether the reasoning in the Impugned Decision was sufficient: it may well be that there was good cause for the Pre-Trial Chamber to authorise the redactions. The question that arises under the first ground of appeal, however, is not whether the redactions were justified but whether the factual reasoning in the Impugned Decision was sufficient.

B. Second ground of appeal: reliance at the confirmation hearing on unredacted parts of witness statements and other documents that contain redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence

35. As his second ground of appeal, the appellant submits that the Pre-Trial Chamber was wrong in stating that the Prosecutor could rely at the confirmation hearing on unredacted

portions of witness statements and other documents if these statements and documents were disclosed to the defence prior to the hearing with redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence.

1. Relevant part of the Impugned Decision

36. The second ground of appeal of the appellant arises from a finding of the Pre-Trial Chamber on page 10, third paragraph, of the Impugned Decision, which reads as follows:

“CONSIDERING further that, without prior adequate disclosure to Thomas Lubanga Dyilo, the Prosecution cannot rely on those parts of the documents, witness statements and transcripts of witness interviews for which redactions are authorised in the present decision; and that the probative value of the unredacted parts of the said documents, witness statements and transcripts of witness interviews may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber”.

37. On page 14 of the Decision Granting Leave to Appeal, the Pre-Trial Chamber granted leave to appeal in relation to the following issue:

“whether the requirement that the Prosecution is prohibited from relying at the confirmation hearing on evidence protected under rules 81 (2) and (4) without adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document, and particularly whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence that has been disclosed to the Defence in only a redacted form”.

2. Arguments of the appellant

38. In the view of the appellant, if a witness statement or other document is disclosed containing redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence, this “not only goes to the weight and probative value of the material in question, but the very question as to whether such evidence can be relied on at the confirmation hearing” (see Document in Support of the Appeal, paragraph 23). The appellant argues that this follows from the last sentence of rule 81 (2) of the Rules of Procedure and Evidence and from the consideration that rule 81 (2) of the Rules of Procedure and Evidence does not provide for any balancing test that would oblige the Pre-Trial Chamber to take into account the interests of the suspect (see Document in Support of the Appeal, paragraph 24). He argues that if the Prosecutor were allowed to rely on documents containing redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence, such redactions potentially would be of unlimited scope because the Prosecutor could always claim that the investigations have not been concluded. The appellant argues that the exercise of prosecutorial discretion not to bring further charges

against the appellant at this time should not infringe the rights of the defence (see Document in Support of the Appeal, paragraphs 25 and 26). The appellant argues furthermore that the Prosecutor is not under an obligation to present all his evidence at the confirmation hearing. Therefore, the appellant submits, the Prosecutor may decide not to rely on specific documents if their disclosure could prejudice his investigations. In such a case, the Prosecutor would not be obliged to disclose the relevant documents to the defence (see Document in Support of the Appeal, paragraph 27).

39. The appellant also refers to the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY") that were in force when the Rules of Procedure and Evidence of the Court were adopted and argues that the Court's provisions on non-disclosure to protect investigations mirror those of the ICTY. He cites jurisprudence of the ICTY in relation to these provisions that restrictions to disclosure in order not to prejudice ongoing or further investigations could not be authorised for witness statements (see Document in Support of the Appeal, paragraphs 29 to 32). The appellant argues that the rationale behind the ICTY Rules of Procedure and Evidence and of the jurisprudence of the ICTY, is that the defence must be in position to assess properly the credibility of the witnesses and documents on which the Prosecutor intends to rely (see Document in Support of the Appeal, paragraph 33). The appellant acknowledges that the jurisprudence of the International Criminal Tribunal for Rwanda (hereinafter: "ICTR") on the corresponding rule of the ICTR Rules of Procedure and Evidence permitted redactions to witness statements in order not to prejudice ongoing investigations. However, pursuant to the jurisprudence of the ICTR, such redactions must be withdrawn prior to the presentation of the evidence in court (see Document in Support of the Appeal, paragraph 34).

40. The appellant argues furthermore that he will suffer prejudice if he receives only redacted versions of witness statements and documents. He submits that without full disclosure his ability to challenge the evidence is impaired because even if the redacted portions did not relate directly to the charges, they might be relevant to testing the reliability of a witness or the chain of custody, potential collusion or undue influence, and the authenticity of the document in question (see Document in Support of the Appeal, paragraphs 35 and 36). The appellant argues that the Pre-Trial Chamber, which lacks investigative powers, "cannot replace or compensate for the absence of an effective or vigorous Defence, mounted on the basis of instructions from Thomas Lubanga Dyilo" and that the redactions infringe the fairness of the proceedings and make the appellant a passive observer (see Document in Support of the Appeal, paragraph 37).

41. The appellant does not make any submissions on the authorisation of disclosure with redactions pursuant to rule 81 (4) of the Rules of Procedure and Evidence.

3. *Arguments of the Prosecutor*

42. The Prosecutor contests the arguments of the appellant. The Prosecutor stresses that pursuant to rule 81 (2), third sentence, of the Rules of Procedure and Evidence, disclosure must be *adequate* and that in order to determine the adequateness of disclosure, one has to take into account that disclosure in the present case is for the purpose of the confirmation hearing and not for trial. The Prosecutor notes that the jurisprudence of the ad-hoc tribunals on which the appellant relies relates to trial proceedings and as such is not relevant in the case at hand. The Prosecutor submits that the confirmation hearing is not a full-blown adversarial hearing and that the Prosecutor at the hearing may, for example, rely on summary evidence, which also may impair the ability of the suspect to challenge the evidence presented by the Prosecutor (see Response to the Document in Support of the Appeal, paragraphs 39 to 41). The Prosecutor argues that the authorisation of redactions by the Pre-Trial Chamber involves a balancing exercise (see Response to the Document in Support of the Appeal, paragraph 41). He also notes that in the last sentence of rule 81 (2) of the Rules of Procedure and Evidence, the words “material or information” are used and not “documents” or “statements” and submits that therefore, the rules do not dictate that “disclosure must be determined inflexibly by the unit of the entirety of a ‘statement’ or a ‘document’” (see Response to the Document in Support of the Appeal, paragraphs 42 and 43).

4. *Determination by the Appeals Chamber*

43. In relation to the second ground of appeal and for the reasons stated below, the Appeals Chamber determines that in principle, the Prosecutor at the confirmation hearing may rely on unredacted parts of witness statements and other documents that contain redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence.

44. Decisive for the second ground of appeal is the interpretation of the last sentence of rule 81 (2) of the Rules of Procedure and Evidence, which provides that where non-disclosure has been authorised pursuant to rule 81 (2) of the Rules of Procedure and Evidence

“... 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.”

45. According to the appellant, the last sentence of rule 81 (2) of the Rules of Procedure and Evidence precludes the Prosecutor under all circumstances from presenting at the confirmation hearing witness statements or other documents that were disclosed to the defence prior to the hearing with redactions authorised pursuant to that provision. The Appeals Chamber, by majority, is not persuaded by the interpretation of the appellant of the last sentence of rule 81 (2) of the Rules of Procedure and Evidence. As the Prosecutor correctly notes, this interpretation neglects that the pertinent words in that sentence are “such material or information”, referring to the material or information for which non-disclosure has been authorised by the Pre-Trial Chamber in order not to prejudice the investigations of the Prosecutor. Such authorisation may cover, depending on the circumstances of the case, the entire witness statement or document, or parts thereof. The Appeals Chamber, by majority, agrees with the Prosecutor that rule 81 (2) of the Rules of Procedure and Evidence

“does not dictate ... that 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 the confirmation hearing at all” (see Response to the Document in Support of the Appeal, paragraph 42).

46. As a consequence, if only parts of a witness statement or document are not disclosed to the defence prior to the confirmation hearing, the Prosecutor, in principle, may rely on those parts that have been disclosed at the confirmation hearing. To what extent redactions may be authorised or maintained if the Prosecutor seeks to introduce information that is disclosed to the defence only in part will need to be determined upon the facts of the individual case, taking into account the interests of the defence and the need for a fair and impartial trial.

47. The Appeals Chamber, by majority, is not persuaded by the argument of the appellant that even information that is completely unrelated to the charges is necessarily essential to the defence. The appellant submits that such information may be important *inter alia* to test the credibility of a witness. At the confirmation hearing, the suspect has the right to challenge the evidence presented by the Prosecutor (article 61 (6) (b) of the Statute). As a corollary to this right, the suspect has a right to be informed, prior to the hearing, of the evidence on which the Prosecutor intends to rely (article 61 (3) (b) of the Statute). The right to challenge the evidence, however, must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. Pursuant to article 61 (7) (a) of the Statute, the Pre-Trial Chamber shall confirm those charges in relation to which it has determined that there is sufficient evidence to establish substantial grounds to believe that the suspect committed the crime charged. As the threshold for the confirmation of the charges

is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested.

48. The Appeals Chamber in the present appeal will not make a determination as to whether or not the Prosecutor may rely at the confirmation hearing on witness statements or other documents that were disclosed to the defence with redactions authorised pursuant to rule 81 (4) of the Rules of Procedure and Evidence. Although the Pre-Trial Chamber in the Decision Granting Leave to Appeal had defined the issue as encompassing this question, the appellant has limited his arguments on appeal to redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence. Thus, the Appeals Chamber considers that it would be inappropriate in the present case to address redactions pursuant to rule 81 (4) of the Rules of Procedure and Evidence in relation to the second ground of appeal.

C. Third ground of appeal: creation of a privilege for sources of the Prosecutor

49. As his third ground of appeal, the appellant argues that the Impugned Decision creates a privilege for the sources of the Prosecutor that neither the Statute nor the Rules of Procedure and Evidence provide.

1. Decision of the Pre-Trial Chamber

50. The third ground of appeal arises from a statement by the Pre-Trial Chamber in subparagraph (i) of the second paragraph of page 9 of the Impugned Decision that there is a need to authorise several redactions in order:

“(i) not to prejudice further investigations, which *inter alia* includes protecting the identity of:

a. Prosecution sources when the relevant organisation has expressly requested that its identity not be revealed to the Defence at this stage of the proceedings, and when the person supplying the document to such an organisation or the contact person(s) of such organization in the DRC currently resides in a risk area;

b. Prosecution sources when the individual who transmitted the document to the Prosecution currently resides in a[n] area of risk;

c. Persons who are believed not to be Prosecution sources, are referred to in handwritten notes which are not part of the content of the relevant documents, and are currently leaving[sic], or many[sic] be currently leaving[sic], in areas of risk” (the full second paragraph is reproduced in paragraph 13, above).

51. On the basis of this reasoning, the Pre-Trial Chamber authorised in the dispositive part of the Impugned Decision redactions to several documents.

2. *Arguments of the appellant*

52. The appellant argues that the Impugned Decision raises two questions, namely, first, whether “organisations may provide information to the Prosecution for use in proceedings, subject to the proviso that their identities not be disclosed to the Defence, and secondly, whether persons who are neither victims nor witnesses, but who live in an area of risk’ [sic] qualify for protection under the Statute and Rules” (see Document in Support of the Appeal, paragraph 39).

53. The appellant acknowledges that the Prosecutor may enter into agreements to facilitate the cooperation of States, intergovernmental organisations or persons. He emphasises, however, that such agreements must be consistent with the Statute (article 54 (3) (d) of the Statute) and argues that such agreements may not be fundamentally detrimental to the rights of the defence (see Document in Support of the Appeal, paragraphs 40 and 41).

54. The appellant submits that pursuant to the jurisprudence of the ICTY on provisions that mirror article 54 (3) (e) of the Statute, once the information provider has agreed to the disclosure, the provider cannot impose further restrictions (see Document in Support of the Appeal, paragraphs 42 to 44). The appellant argues that if the Prosecutor is circumscribed from accepting additional conditions in the context of agreements under article 54 (3) (e) of the Statute, he must also be circumscribed from accepting conditions to disclosure in relation to agreements under article 54 (3) (d) of the Statute. He argues that the Prosecutor must seek cooperation in a way that is consistent with the rights of the defence (see Document in Support of the Appeal, paragraph 47).

55. The appellant submits furthermore that redactions relating to (putative) sources of the Prosecutor could not be authorised under rule 81 (4) of the Rules of Procedure and Evidence either. He argues that rule 81 (4) of the Rules of Procedure and Evidence only provides for redactions in relation to witnesses and victims and members of their families (see Document in Support of the Appeal, paragraphs 49 to 52). Furthermore, the appellant submits that there is no necessity not to disclose the identities of sources of the Prosecutor to the defence as it is widely known that several non-governmental organisations have cooperated with the Prosecutor. The appellant refers to jurisprudence of the ICTY on protective measures for the benefit of non-governmental organisations, which has held that the “extension of protective

measures to persons associated with a witness ‘must be sufficiently proximate to warrant protective measures, particularly the extraordinary protective measure of closed session testimony’” (see Document in Support of the Appeal, paragraph 55). The appellant argues furthermore that in order to justify non-disclosure to the defence “it is necessary to establish that disclosure to the Defence team ... would create a real and objective likelihood of risk to the person in question” and submits that the mere fact that the person lived in an area of risk does not in itself suffice (see Document in Support of the Appeal, paragraph 56).

56. The appellant submits that the authorisation of redactions of prosecution sources is prejudicial to the defence because it curtails the ability of the defence to analyse the chain of custody or, if the redactions pertain to the content of a document, whether the allegation is hearsay (see Document in Support of the Appeal, paragraphs 57 to 59).

3. *Arguments of the Prosecutor*

57. The Prosecutor refutes the submissions of the appellant. He argues that the Pre-Trial Chamber in the Impugned Decision did not permit any source of the Prosecutor to condition cooperation with the Office of the Prosecutor on the proviso that its identity not be disclosed to the defence. Rather, the Prosecutor argues, the Pre-Trial Chamber “took a measured approach” in relation to each document, weighing the risk that disclosure might cause against the prejudice to the defence (see Response to the Document in Support of the Appeal, paragraph 46). Therefore, the Prosecutor submits, the authorisation of redactions was not automatic but discretionary and on a case-by-case basis (see Response to the Document in Support of the Appeal, paragraphs 47 and 48).

58. Furthermore, the Prosecutor argues that although the Pre-Trial Chamber had authorised the redactions in question pursuant to rule 81 (2) of the Rules of Procedure and Evidence in order not to prejudice further investigations, the Pre-Trial Chamber could have authorised these redactions also pursuant to rule 81 (4) of the Rules of Procedure and Evidence. The Prosecutor contends that the appellant misinterpreted rule 81 (4) of the Rules of Procedure and Evidence as only providing for redactions in relation to witnesses and victims, and members of their families. The Prosecutor argues that rule 81 (4) of the Rules of Procedure and Evidence refers to article 54 of the Statute and that pursuant to article 54 (3) (f) of the Statute, the Prosecutor may request the protection of *any* person (see Response to the Document in Support of the Appeal, paragraphs 50 to 52).

59. As to the prejudice that the appellant suffered, the Prosecutor argues that 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” (see Response to the Document in Support of the Appeal, paragraph 53). The Prosecutor submits that the appellant has not suffered any prejudice at this stage of the proceedings because the Pre-Trial Chamber had been able to evaluate the significance of the redactions and that none of the redactions pertained to exculpatory information. The Prosecutor emphasises that the Pre-Trial Chamber had exercised discretionary power and had done so judiciously (see Response to the Document in Support of the Appeal, paragraphs 53 and 54).

4. *Determination by the Appeals Chamber*

60. The Appeals Chamber notes that the appellant raises two issues under the third ground of appeal, namely, first, whether organisations may provide information to the Prosecutor subject to the proviso that their identities not be disclosed to the defence, and second, whether the Statute and the Rules of Procedure and Evidence provide for protective measures for individuals who are neither witnesses nor victims nor their family members.

61. In relation to the first issue, the Appeals Chamber, by majority, considers that the arguments of the appellant are framed too broadly for the present appeal. The Impugned Decision did not address generally under what conditions the Prosecutor may conclude agreements with information sources, nor was there any reason to do so. Rather, the Impugned Decision *inter alia* authorised the disclosure of witness statements and other documents with redactions in a situation where the sources of the Prosecutor had requested the non-disclosure of their identities to the defence at this stage of the proceedings. Thus, any agreements that the Prosecutor might have concluded with information sources or any conditions on cooperation that such sources might have imposed would only be relevant for the present appeal if the Pre-Trial Chamber considered them as binding for the purposes of authorisation of disclosure with redactions.

62. There is no indication that the Pre-Trial Chamber considered itself bound by any agreements between the Prosecutor and his sources or a request by such sources for non-disclosure. As the Prosecutor correctly notes, the Pre-Trial Chamber considered that there was a need to authorise redactions in order to protect the identities of sources of the Prosecutor because such disclosure may prejudice further investigations. That the Pre-Trial Chamber, in coming to this conclusion, took into account requests for non-disclosure by the sources of the Prosecutor is not *per se* impermissible.

63. As to the second issue raised under the third ground of appeal, the Appeals Chamber, by majority, considers that in light of the insufficient reasoning in relation to the redactions authorised under rule 81 (2) of the Rules of Procedure and Evidence in the Impugned Decision, the Appeals Chamber is unable to determine conclusively whether information relevant to the sources of the Prosecutor covered by the Impugned Decision could be redacted pursuant to rule 81 of the Rules of Procedure and Evidence. Whether a source can be protected under these provisions has to be analysed on a case-by-case basis and cannot be decided in the abstract.

V. APPROPRIATE RELIEF

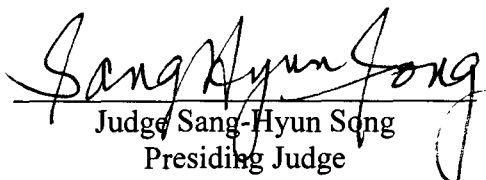
64. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).

65. In the present case, because the Appeals Chamber has determined that the Impugned Decision lacked sufficient reasoning in relation to the authorisation of disclosure of witness statements and other documents with redactions pursuant to rule 81 (2) of the Rules of Procedure and Evidence, it is appropriate to reverse the Impugned Decision to the extent that it authorised the disclosure of witness statements and other documents to the defence with redactions. The Pre-Trial Chamber should consider the matter anew and provide sufficient reasons for its decision. The Appeals Chamber considers that it is appropriate to reverse all authorisations of disclosure with redactions even though the first ground of appeal related only to the factual reasoning for rulings pursuant to rule 81 (2) of the Rules of Procedure and Evidence because the Impugned Decision did not clearly indicate under which provision the redactions were authorised, nor did the Pre-Trial Chamber identify in the Decision Granting Leave to Appeal which parts of its disposition in the Impugned Decision it considered to be affected by the first ground of appeal.

66. As a result of the insufficient reasoning of the Impugned Decision, the Appeals Chamber in the present judgment has not made any determination about whether the Pre-Trial Chamber came to correct or erroneous conclusions in relation to the specific redactions which it authorised. It is for that reason that the Pre-Trial Chamber is directed to decide anew upon the applications of the Prosecutor for authorisation of redactions that gave rise to the Impugned Decision, in light of the present judgment.

Judge Pikis appends a separate opinion to this judgment in respect of the second and third grounds of appeal.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song
Presiding Judge

Dated this 14th day of December 2006

At The Hague, The Netherlands

Separate Opinion by Judge Georgios M. Pikis:

1. I agree that the judgment under appeal is not duly reasoned and therefore it does not conform to the requisites of a fair trial. Therefore, I join in the reversal of the decision.

I. PRELIMINARY MATTERS

2. Ordinarily, the reversal of a decision sweeps away the judgment in its entirety and every matter associated therewith. In this case, the reversal of the decision is made by reference to one of the three issues certified for consideration by the Pre-Trial Chamber. And the question arises whether the other two issues merit separate consideration by the Appeals Chamber. It appears that the issues posed affect the basic legal framework within which questions of non-disclosure and matters sequential thereto may be addressed. As far as it may be gathered, the issues identified for consideration by the Appeals Chamber may significantly affect the fair and expeditious conduct of the proceedings; their resolution will sequentially materially advance the proceedings. In such circumstances, answering them to the extent plausible will pave the way to confront them in light of the decision of the Appeals Chamber. And inasmuch as the Pre-Trial Chamber will examine anew the subject-matter of the application, the elucidation of the issues raised will no doubt both expedite the proceedings before the Pre-Trial Chamber and contribute to the fairness of their outcome. Therefore, in line with my fellow Judges of the Appeals Chamber, I shall provide answers to the questions, save that I shall do so in a separate judgment as I differ from them in the analysis of the dynamics of the issues posed, on the one hand, and the answers to be given, on the other.

II. SECOND ISSUE

“(ii) whether the requirement that the Prosecution is prohibited from relying at the confirmation hearing on evidence protected under rules 81 (2) and (4) without adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document, and particularly whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence that has been disclosed to the Defence in only a redacted form.”

3. To answer the question, it is necessary to review the obligation of the Prosecutor under the Statute to disclose the evidence on which he will rely at the confirmation hearing, non-disclosure of any part of it and the legal regime governing amenity to adduce undisclosed evidence before the Pre-Trial Chamber.



A. Obligation to disclose evidence

4. Article 61 (3) (b) of the Statute imposes a duty upon the Prosecutor to inform the defence of the evidence on which he intends to rely at the confirmation hearing. The decision rests with him, subject to the duty cast by article 67 (2) of the Statute to necessarily disclose to the defence exculpatory evidence. The obligation to disclose conforms to the notion of a fair trial requiring the Prosecutor to apprise the defence of the evidence upon which the prosecution shall rely, a step necessary for the preparation of the defence of the person charged or the accused. The discharge of this duty is regulated by rules 76 and 77 of the Rules of Procedure and Evidence.

5. Article 61 (3) of the Statute gives expression to the rights of the accused under article 67 (1) (b) of the Statute requiring that he/she be afforded with "adequate time and facilities for the preparation of the defence", a right likewise assured to the person charged by virtue of rule 121 (1) of the Rules of Procedure and Evidence.

6. Non-disclosure disentitles the Prosecutor from relying on the evidence at the confirmation hearing, as article 61 (3) (b) of the Statute indicates, unless such a course is specifically authorized by the Statute or the Rules of Procedure and Evidence. The duty to disclose must be discharged the latest 30 days prior to the confirmation hearing (rule 121 (3) of the Rules of Procedure and Evidence) and exceptionally 15 days beforehand (rule 121 (4) of the Rules of Procedure and Evidence).

7. The Prosecutor is not bound to adduce before the Pre-Trial Chamber a witness' statement or a piece of documentary evidence in its entirety. Article 61 (5) of the Statute gives him/her the option to submit a summary instead. Such a summary must invariably reveal the essence and substance of the evidence. The summary must no doubt include reference to the provenance of a witness' statement, i.e. the identity of the person making it and in the case of documentary evidence wherefrom it originates. Authority to substitute a summary for the statement itself or a document does not absolve the Prosecutor of the duty to disclose the evidence (a witness' statement or a document) untrammelled to the person charged, who would be free to make use of it in any challenge of the evidence of the witness under article 61 (6) (b) of the Statute. The production of a summary of the statement of a witness itself or other evidence under article 61 (5) of the Statute rather than the statement of the witness itself is meant to provide a compendious way of laying the Prosecutor's case before the Pre-Trial Chamber.



8. By way of exception to the rule laid down in article 61 (3) (b) of the Statute, article 68 (5) empowers the Prosecutor to withhold disclosure of a witness' statement from the defence and provide him/her in lieu of it with a summary, if deemed necessary, and to the extent necessary, for the protection of witnesses where disclosure would gravely endanger their safety or that of their families. Such a summary may leave out even significant aspects of a statement or a documentary piece of evidence. Disclosure of such parts of the evidence may be withheld prior to the commencement of the trial but not afterwards.

9. Rule 81 (4) of the Rules of Procedure and Evidence entitles the Pre-Trial Chamber acting on its own motion or at the request of "the Prosecutor, the accused or any State" to address an issue of non-disclosure under article 68 of the Statute with a view to the protection not only of witnesses but victims too and members of their families empowering the court to authorize even the non-disclosure of their identity prior to the commencement of the trial.

10. Rule 81 (4) of the Rules of Procedure and Evidence confers on the court power to examine issues affecting the non-disclosure of evidence including any decision of the Prosecutor as to what may not be disclosed in a summary under article 68 (5) of the Statute. The Prosecutor himself may seek the directions of the court as to what may or may not be held back.

11. Non-disclosure in the interest of the safety of witnesses and their families is subject to an important proviso. The non-disclosure should not be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" as expressly written down in article 68 (5) of the Statute. The accused is prejudiced when deprived of knowledge of evidence necessary for making his/her defence. The defence rights of the suspect and the accused are defined by articles 55 (2) and 67 of the Statute, incorporating the fundamental human rights of the subject of judicial proceedings. Article 21 (3) of the Statute establishes that the Statute must be applied in accordance with internationally recognized human rights of which the aforesaid rights form part. Article 68 (5) of the Statute provides that measures taken in the interest of the safety of witnesses or their families, including non-disclosure of evidence "shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." If non-disclosure of any part or aspect of the evidence prejudices the rights of the accused, it is not permissible. The prohibition of non-disclosure of evidence, the withholding of which is prejudicial to the rights of the accused, is not subject to any balancing exercise. Evidence material for the making and preparation of one's defence must necessarily be disclosed. It cannot be withheld for any reason. And that extends to the



identity of a witness too. The provisions at the end part of article 68 (5) of the Statute leave no room for exceptions. The test for confirming charges is laid down in article 61 (7) of the Statute, “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” Its provisions have a direct bearing on the identification of the rights of the defence at the confirmation hearing.

B. Confidential information – rule 81 (4) of the Rules of Procedure and Evidence

12. Confidential information for the purposes of rule 81 (4) of the Rules of Procedure and Evidence is information so classified by articles 54, 72 and 93 of the Statute. The Statute prohibits the disclosure and use of information classified as confidential under the Statute. Such exceptions as there may be are specified in the corresponding articles of the Statute. Article 54 (3) (f) of the Statute imposes a total ban on the use of every piece of information coming within its purview. Aside from the above categories of evidence, there is no right to withhold disclosure of evidence and information on grounds of confidentiality either under sub-rule 2 or sub-rule 4 of rule 81 of the Rules of Procedure and Evidence.

C. Rule 81 (2) of the Rules of Procedure and Evidence

13. Rule 81 (2) of the Rules of Procedure and Evidence empowers the Prosecutor to move the Chamber for leave not to disclose material or information that he is bound to disclose under the terms of the Statute to the defence if so to do would prejudice further or ongoing investigations. Any such motion of the Prosecutor is to be heard *ex parte*. A witness’ statement qualifies in the context of rule 81 (2) of the Rules of Procedure and Evidence as “material” a word embracing in a relevant context evidence in the cause (see Shorter Oxford Dictionary (Volume I, A-M), 5th Edition, 1718; see also Blacks Law Dictionary, 7th Edition, page 991). Arguably, a witness’ statement qualifies as information too in the context of rule 81 (2) of the Rules of Procedure and Evidence.

14. Rule 81 (2) refers to the non-disclosure of a statement in order to avert prejudice to further or ongoing investigations. It does not refer to nor does it authorize partial disclosure or the disclosure of a statement in a redacted¹ form.



¹ “Redaction” is a term of art in a legal context, as may be discerned from Black’s Law Dictionary (8th Edition, 2004 West, St. Paul, Minnesota.): “The careful editing of a document, esp. to remove confidential references or offensive material [...]”.

15. Once non-disclosure of evidence is allowed, its production is prohibited unless timely prior disclosure is made to the defence. To my mind, rule 81 (2) of the Rules of Procedure and Evidence does not authorize the disclosure of a witness' statement in a redacted statement or a summary thereof under any circumstances. Rule 81 (2) of the Rules of Procedure and Evidence envisages the disclosure or non-disclosure of a compact piece of evidence or information which is the subject-matter of the rule.

16. A piece of evidence like a witness statement or information is a unified entity that cannot be pierced. It cannot be fragmented because it entails alteration of or detraction from its content. Rule 81 (2) of the RPE makes no provision for partial disclosure of a set piece of evidence or information. Unambiguously, it provides that where disclosure of evidence or information is likely to prejudice further or ongoing investigations, the court may authorize its non-disclosure. There is no halfway house allowing the disclosure of parts of the evidence or information through a process of redaction of its content. The price of non-disclosure is prohibition of the use of the evidence in court proceedings, a fetter that may subsequently be removed by adequate prior disclosure.

III. THIRD ISSUE

"(iii) whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules and, in particular, under which conditions restrictions to the disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules."

17. What is stated in relation to the second equally applies to the third issue. Non-disclosure of evidence imports prohibition of its use at the confirmation hearing. Hence, the authorization of non-disclosure cannot embarrass the defence. Consequently, no privilege is conferred on the Prosecutor.

18. On the other hand, if the Prosecutor decides to rely on the evidence at a stage subsequent to the authorization of non-disclosure, he may do so on condition of timely prior disclosure to the defence. Where this occurs no conceivable damage can be inflicted on or suffered by the defence as full knowledge of the evidence will be gained in time for the preparation of their case.





Judge Georghios M. Pikis

Dated this 14th day of December 2006

At The Hague, The Netherlands

