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**International
Criminal
Court**

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No.: **ICC-01/04-01/06 (OA 5)**

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 "First 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
Mr. Fabricio Guariglia, Senior Appeals Counsel
Mr. Ekkehard Withopf, Senior Trial Lawyer

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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 28 September 2006, entitled "Decision on Second Defence Motion for Leave to Appeal" (ICC-01/04-01/06-489), against the decision of Pre-Trial Chamber I of 15 September 2006, entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC-01/04-01/06-437),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

- (i) The decision of Pre-Trial Chamber I of 15 September 2006 entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" is reversed.
- (ii) Pre-Trial Chamber I is directed to decide anew upon the applications of the Prosecutor for the authorisation of redactions that gave rise to the decision referred to in the preceding paragraph, in light of the present judgment.

REASONS

I. KEY FINDINGS

1. A decision authorising the non-disclosure of the identities of witnesses of the Prosecutor to the defence has to state sufficiently the reasons upon which the Pre-Trial Chamber based its decision.
2. The presentation by the Prosecutor of summaries of witness statements and other documents at the confirmation hearing is permissible even if the identities of the relevant witnesses have not been disclosed to the defence prior to the hearing, provided that such

summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

II. PROCEDURAL HISTORY

3. The “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (01/04-01/06-437; hereinafter: “Impugned Decision”) of 15 September 2006 that is the subject of the present appeal was prompted by six applications by the Prosecutor to the Pre-Trial Chamber. In these applications the Prosecutor had sought authorisation to disclose to Mr. Thomas Lubanga Dyilo (hereinafter: “appellant”) prior to the confirmation hearing copies of certain witness statements, transcripts of witness interviews, investigators’ notes and reports, and other documents in a redacted version (see Impugned Decision, page 3, first paragraph, and footnote 6 thereto). While four of the applications were filed *inter partes*, the details of the redactions sought were contained in annexes that were filed *ex parte*, Prosecutor only. The other two applications were filed *ex parte* in their entirety. The Prosecutor amended his applications in filings between 4 September 2006 and 12 September 2006 (see Impugned Decision, page 5, footnote 14 to the first paragraph). The Pre-Trial Chamber held three *ex parte* hearings in closed session with the Prosecutor and the Victims and Witnesses Unit to hear the applications and amended applications of the Prosecutor.

4. The Impugned Decision relates to some of the witness statements, transcripts of witness interviews, and investigators’ notes and reports for which the Prosecutor had sought authorisation of disclosure with redactions in order not to divulge the identity of the relevant witnesses to the defence. The witness statements and other documents covered by the Impugned Decision are listed in the Annex to the Impugned Decision, which was filed *ex parte*, Prosecutor only, and marked “confidential.” In the fourth paragraph of page 7 of the Impugned Decision, the Pre-Trial Chamber concluded that even if heavily redacted, the unredacted parts of these witness statements and other documents would lead to the identification of the relevant witnesses. The Pre-Trial Chamber considered that under these conditions, it could not grant the applications of the Prosecutor for authorisation to disclose the documents covered by the Impugned Decision to the defence in a redacted version (see Impugned Decision, page 9, first paragraph).

5. Instead of rejecting the applications of the Prosecutor on that basis, the Pre-Trial Chamber considered the conditions under which the content of the witness statements might be introduced by the Prosecutor at the confirmation hearing (see Impugned Decision, page 9,

second paragraph) and ordered the Prosecutor to inform the Pre-Trial Chamber whether the Prosecution

“(i) withdraws from the Prosecution List of Evidence any of the witness statements, transcripts of witness interviews and investigators’ notes and reports of witness interviews included in Annex I to the [Impugned Decision], along with the documents attached to those statements, transcripts, notes and reports; or

(ii) assures the Chamber that the relevant witnesses, or some of those witnesses, have freely consented to the immediate disclosure of their identities to the Defence after having been adequately informed of the risks for their security inherent to such disclosure; or

(iii) seeks the authorisation of the Chamber to rely on summary evidence of the above mentioned witness statements, transcripts of witness interviews and investigators’ notes and reports of witness interviews”.

6. In the fourth to seventh paragraphs of page 10 of the Impugned Decision, the Pre-Trial Chamber set out the nature of the information that would have to be included in such summaries.

7. Subsequent to the Impugned Decision, the Prosecutor filed before the Pre-Trial Chamber summaries of the witness statements and other documents covered by the Impugned Decision, requesting the Pre-Trial Chamber to authorise the use of these summaries at the confirmation hearing and their disclosure to the appellant prior to that hearing. On 4 October 2006, Pre-Trial Chamber I rendered a “Decision concerning the Prosecution Proposed Summary of Evidence” (ICC-01/04-01/06-517; hereinafter: “Decision on Summary Evidence”; an *ex parte*, Prosecutor only and confidential version of that decision was registered under the number ICC-01/04-01/06-515-Conf-Exp). In the Decision on Summary Evidence, the Pre-Trial Chamber authorised the use of some of the summaries provided by the Prosecutor and ordered their disclosure to the appellant prior to the hearing. The Pre-Trial Chamber refused authorisation of the use of the other proposed summaries.

8. On 21 September 2006, the appellant filed a “Request for Leave to Appeal the Impugned Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (ICC-01/04-01/06-456, hereinafter: “Application for Leave to Appeal”). On 28 September 2006, the Pre-Trial Chamber rendered the “Decision on the Second Defence Motion for Leave to Appeal” (ICC-01/04-01/06-489; hereinafter: “Decision Granting Leave to Appeal”) and granted leave to appeal in respect of the following three issues (see Decision Granting Leave to Appeal, page 15):

“(i) whether the impugned decision lacked factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules;

(ii) whether the principle of necessity and proportionality was appropriately applied in deciding on the non-disclosure of identity of some Prosecution witnesses for the purpose of the confirmation hearing;

(iii) whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court’s applicable law”.

9. On 10 October 2006, the appellant filed a document entitled “Defence Appeal Brief in Relation to Impugned Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (ICC-01/04-01/06-546; hereinafter: “Document in Support of the Appeal”). On 20 October 2006, the Prosecutor filed the “Prosecution’s Response to ‘Defence Appeal Brief in Relation to First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” (ICC-01/04-01/06-597-Conf; hereinafter: “Response to the Document in Support of the Appeal”; a public redacted version of that response was registered under the number ICC-01/04-01/06-598). The page and paragraph numbers of the Response to the Document in Support of the Appeal referred to in this judgment are the same in both the confidential and the public redacted versions of that document.

III. MERITS OF THE APPEAL

A. First ground of appeal: lack of factual reasoning

10. As his first ground of appeal, the appellant argues that the factual reasoning given in the Impugned Decision to justify the decision of the Pre-Trial Chamber that the identities of the witnesses should not be disclosed to the defence was insufficient.

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

11. The reasoning in relation to the decision of the Pre-Trial Chamber that the identities of witnesses should not be disclosed to the defence appears in the second, third and fourth paragraphs of page 7, and in the first paragraph of page 8 of the Impugned Decision. These paragraphs read as follows:

“CONSIDERING that the ultimate purpose of the redactions proposed by the Prosecution is to preserve the non-disclosure of the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing because (i) their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage; and (ii) no other protective measure that could significantly minimise such a danger is currently available and feasible;

CONSIDERING that the recent deterioration of the security situation in some parts of the Democratic Republic of the Congo ("the DRC") has had an impact on the range of protective measures currently available to and feasible for witnesses on whom the Prosecution or the Defence intends to rely at the confirmation hearing; and that, in this scenario, and after having carefully examined each individual case, non-disclosure of identity vis-à-vis the Defence for the purpose of the confirmation hearing is currently the only available and feasible measure for the necessary protection of many Prosecution witnesses;

CONSIDERING, however, that after having thoroughly examined all the witness statements, transcripts of witness interviews and documents for which authorisation for redactions has been requested by the Prosecution under rule 81 (4) of the Rules, the Chamber has found that, even if heavily redacted, the unredacted parts of certain witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews would lead to the identification of the relevant Prosecution witnesses;

CONSIDERING that the Prosecution proposal of delaying the transmission to the Defence of the redacted versions of the said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews until a few days before the commencement of the confirmation hearing (i) would be prejudicial to the Defence's preparation of the confirmation hearing due to the number of witness statements and transcripts of witness interviews involved; and (ii) would be an inadequate solution should the charges be confirmed because the identity of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial".

2. *Arguments of the appellant*

12. The appellant argues that the Impugned Decision is not sufficiently reasoned and that this alleged failure "violates the right of the Defence to a fair trial, and may give rise to the conclusion that the decision was arbitrary" (see Document in Support of the Appeal, paragraph 13). To support this claim, the appellant refers to jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY"), which had held that an ICTY Trial Chamber must "indicate its view on all of those relevant factors which a reasonable Trial Chamber would have expected to take into account before coming to a decision" (see Document in Support of the Appeal, paragraph 14). Moreover, the appellant refers to a decision of a Pre-Trial Judge at the ICTY who had held that the provision of sufficient reasoning in applications for protective measures was necessary to enable the accused to decide whether or not to oppose the application (see Document in Support of the Appeal, paragraph 15). In paragraph 16 of the Document in Support of the Appeal, the appellant cites a decision of a Pre-Trial Judge of the ICTY that indicated, by way of example, how an application for protective measures could set out the facts underlying the application without revealing the identity of the witness in question. The appellant notes that the proceedings that led to the Impugned Decision were held *ex parte* and

submits that the *ex parte* character of the proceedings does not obviate “the need to provide particulars in relation to the justification for each witness” and stresses “the impact of the decision on the ability of the Defence to effectively prepare for the confirmation hearing” (see Document in Support of the Appeal, paragraph 15).

13. The appellant submits the following test for a decision pursuant to rule 81 (4) of the Rules of Procedure and Evidence (see Document in Support of the Appeal, paragraph 18):

“There are thus three components of any factual assessment for protective measures; firstly, that the factual circumstances of the particular witness are of such an exceptional nature that non-disclosure of their identity is required to protect their safety or that of their families, secondly, that it be employed only if less restrictive measures are not available and if the measures in question are necessary; and thirdly, that this measure be employed exceptionally, rather than as a general rule.”

14. The appellant argues that in the reasoning of the Impugned Decision, the second component (unavailability of less restrictive measures) was addressed but that the Impugned Decision failed to set out the factual reasoning with respect to the first and the third components of the test (see Document in Support of the Appeal, paragraph 19). In the ensuing paragraphs of his Document in Support of the Appeal, the appellant sets out, mainly by reference to decisions of the ICTY, how the first and third components of the test should be interpreted.

3. *Arguments of the Prosecutor*

15. The Prosecutor, in paragraph 1 of the Response to the Document in Support of the Appeal, states that:

“On the first issue raised by the Appellant, the Prosecution expresses no view on whether the factual findings supporting the authorization of non-disclosure of identities was adequate, although it believes that the level of specificity required in the findings is not the level proposed by the Appellant. The Prosecution would not oppose the Appeals Chamber remanding the matter to the Single Judge for the confined purpose of permitting her further to specify the factual basis for her determinations...”

16. Furthermore, the Prosecutor submits that the “Single Judge had available to her sufficient factual information to make the required determinations, even if they are not explicit in the text of the Decision” (see Response to the Document in Support of the Appeal, paragraph 18). He submits that the reasoning of a decision should not be seen in isolation but considered in light of the surrounding proceedings and in the context of relevant supporting decisions (see Response to the Document in Support of the Appeal, paragraph 20). The

Prosecutor, making reference to decisions of the ICTY, the International Criminal Tribunal for Rwanda and of the European Court of Human Rights, stresses the importance of reasoned decisions and puts the right to a reasoned decision in the context of the right to appeal and the ability of the Appeals Chamber to review decisions in a meaningful way (see Response to the Document in Support of the Appeal, paragraphs 20 and 21).

17. As to the required level of specificity of factual reasoning, the Prosecutor submits that the argument of the appellant is incorrect. The Prosecutor notes that the example cited by the appellant as to the level of specificity (see paragraph 12, above) related to “the level of detail which could be provided in an application for protective measures, when circumstances permit such detail” (see Response to the Document in Support of the Appeal, paragraph 23). The Prosecutor stresses the difference between a confirmation hearing and a trial and argues that for the purposes of the confirmation hearing, the “Chamber should not be required to articulate the particular circumstances of each witness that justify protective measures” (see Response to the Document in Support of the Appeal, paragraph 24). The Prosecutor also refers to a decision of the Special Court for Sierra Leone in the *Norman* case, which held that “it would be unrealistic to expect either the Prosecution or the Defence, at the pre-trial phase, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation” (see Response to the Document in Support of the Appeal, paragraph 25).

4. *Determination by the Appeals Chamber*

18. In relation to the first ground of appeal and for the reasons set out below, the Appeals Chamber determines that the Pre-Trial Chamber erred in not providing sufficient reasoning for its finding that the identities of the witnesses covered by the Impugned Decision should not be divulged to the appellant unless the relevant witnesses consented freely to the immediate disclosure of their identities.

19. The Appeals Chamber notes that the Impugned Decision did not expressly authorise the non-disclosure to the defence of the identities of some of the witnesses of the Prosecutor. Nevertheless, the Pre-Trial Chamber found in the Impugned Decision that, subject to subsequent authorisation by the Pre-Trial Chamber, the use of summaries without disclosure to the defence of the identities of the relevant witnesses would be permissible; this finding was the basis for the Pre-Trial Chamber’s order to the Prosecutor. This is confirmed by the Decision on Summary Evidence, where the Pre-Trial Chamber referred to the Impugned Decision and the affirmation therein that the non-disclosure of the identities of the witnesses

was the only feasible protective measure (see Decision on Summary Evidence, page 3, fourth and fifth paragraphs).

20. 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 by the European Court of Human Rights and by the Appeals Chamber of the ICTY in the cases referred to above applies with similar force to the case at hand.

21. The Impugned Decision fails to address properly three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (article 68 (1), last sentence, of the Statute). With respect to the endangerment of the witnesses or members of their families, the reasoning of the Pre-Trial Chamber does not provide any indication as to why the Pre-Trial Chamber expected that the security of witnesses or their families may be endangered if the witnesses' identities were disclosed to the appellant. Furthermore, the Pre-Trial Chamber did not indicate which of the facts before it led it to reach such a conclusion. In relation to the necessity of the non-disclosure of the identities of the witnesses, the Pre-Trial Chamber only made a general statement that the security situation in some parts of the Democratic Republic of the Congo had an impact on the availability and feasibility of protective measures, without clarifying the factors which it considered relevant for the protection of witnesses. Thus, the appellant has no knowledge of the facts relied upon by the Pre-Trial Chamber for its decision and how the Chamber applied rule 81 (4) of the Rules of Procedure and Evidence to the facts.

22. 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.

23. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the degree of specificity could be reduced because the Impugned Decision related to protective measures prior to the confirmation hearing and not to protective measures prior to the trial. The question raised under the first ground of appeal is not the legal threshold for the authorisation of non-disclosure of the identity of a witness but the adequacy of the reasoning that has to be provided. As has been explained in the preceding paragraphs, the Impugned Decision failed to provide sufficient reasoning in relation to three important elements of a decision authorising the non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence. At a minimum, the Pre-Trial Chamber must provide reasoning to support its findings on these aspects irrespective of the phase of the proceedings.

B. Second ground of appeal: requirements of proportionality and necessity

24. As his second ground of appeal, the appellant asserts that the Impugned Decision failed to meet the requisite test of necessity and proportionality as the Pre-Trial Chamber failed to consider relevant factors enumerated in paragraph 28 of the Document in Support of the Appeal.

1. Relevant part of the Impugned Decision

25. The Pre-Trial Chamber based the necessity of the non-disclosure of the identities of the witnesses upon the premise that no other protective measures were currently available (see Impugned Decision, page 7, second paragraph). The Pre-Trial Chamber discussed and dismissed two potential alternative measures: in the last paragraph of that page, the Pre-Trial Chamber considered that even if the witness statements and other documents were disclosed to the defence with redactions, the relevant witnesses could still be identified. In the first paragraph of page 8 of the Impugned Decision, the Pre-Trial Chamber stated that the proposal of the Prosecutor to delay the disclosure of the redacted versions of the witness statements and other documents until a few days before the confirmation hearing would be inadequate because the identities of the witnesses still would be disclosed a long time before they are called to testify at trial, should the charges be confirmed. Furthermore, delaying the disclosure would be prejudicial to the preparation of the confirmation hearing by the defence. The proportionality of the non-disclosure of the identities of witnesses to the defence was not expressly addressed in the Impugned Decision.

2. *Arguments of the appellant*

26. As to the necessity of non-disclosure, the appellant argues that the current security situation in the Democratic Republic of the Congo restricts the ability of the defence to carry out investigations and, therefore, it is unlikely that information regarding the witnesses in question would be disseminated in the course of the defence investigation (see Document in Support of the Appeal, paragraph 29). The appellant stresses that the disclosure of the identities of all witnesses prior to the commencement of the trial was of great importance and should take place as soon as practicable (see Document in Support of the Appeal, paragraphs 31 and 32).

27. As to the alleged disproportionality of the infringement of the rights of the defence by the non-disclosure of the identities of witnesses, the appellant emphasises *inter alia* the significance of full disclosure for the fairness of the proceedings and the principle of equality of arms. The appellant submits further that in order to respect the principle of proportionality, the Pre-Trial Chamber should have invited the Prosecutor not to rely on the witnesses in question at the confirmation hearing or should have ordered a stay of the proceedings and the provisional release of the appellant (see Document in Support of the Appeal, paragraphs 35 to 48).

3. *Arguments of the Prosecutor*

28. The Prosecutor in the Response to the Document in Support of the Appeal disputes the defence contention that the principle of necessity and proportionality was not met in the Impugned Decision. He submits that the ruling of the Pre-Trial Chamber was discretionary and that the Appeals Chamber should afford deference to that ruling (see Response to the Document in Support of the Appeal, paragraph 29). The Prosecutor submits further that if the Appeals Chamber finds that the factual reasoning given by the Pre-Trial Chamber was insufficient, the Appeals Chamber “may not be in a position to consider whether the Single Judge applied the principles of necessity and proportionality appropriately” (see Response to the Document in Support of the Appeal, paragraph 27).

29. As to the necessity of non-disclosure of the identities of the witnesses to the defence, the Prosecutor submits that non-disclosure was necessary and that the Pre-Trial Chamber had

“abundant factual information to sustain a finding of necessity, before and during the *ex parte* proceedings on protective measures from *inter alia* the neutral and independent perspective of the Victims and Witness [sic] Unit, which the Single

Judge took into consideration prior to making the decision” (see Response to the Document in Support of the Appeal, paragraph 32).

30. As to the argument of the appellant that disclosure was necessary in order to prepare for trial, the Prosecutor submits that the timing of trial-related disclosure was not a matter appropriate for determination on this appeal (see Response to the Document in Support of the Appeal, paragraph 34).

31. As to the proportionality of the non-disclosure of the identities of the witnesses, the Prosecutor argues that “the Appellant has not demonstrated that he has suffered such prejudice, as a result of the failure of the Single Judge to further postpone the confirmation hearing, that it renders the measures ordered disproportionate” (see Response to the Document in Support of the Appeal, paragraph 36). As to the alleged failure to consider non-reliance on the evidence, the Prosecutor argues that the Pre-Trial Chamber in the Impugned Decision invited the Prosecutor to consider proceeding without the relevant witnesses as one option. Furthermore, the Prosecutor recalled that the Pre-Trial Chamber had decided in the Decision on Summary Evidence that the Prosecutor could not rely on some of the summaries that the Prosecutor had proposed because of the risk for the relevant witnesses (see Response to the Document in Support of the Appeal, paragraph 37).

4. *Determination by the Appeals Chamber*

32. In relation to the second ground of appeal, the Appeals Chamber considers that for the reasons set out below, it is not in a position properly to review the correctness or otherwise of the application of the principle of necessity and proportionality in the Impugned Decision.

33. Pursuant to rule 81 (4) of the Rules of Procedure and Evidence, a Chamber shall take *inter alia* “necessary steps” to protect witnesses and members of their families. As the Appeals Chamber has explained already in paragraph 37 of its “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’” of 13 October 2006 (ICC-01/04-01/06-568), “[t]he use of the word ‘necessary’ emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary.” Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures. As has been explained above in relation to the first ground of appeal, the Impugned Decision lacks sufficient reasoning in respect of the necessity of the

non-disclosure of the identities of the witnesses. In the absence of such reasoning, the Appeals Chamber in the present case is not in a position to determine whether the Pre-Trial Chamber properly abided by the principle of necessity.

34. The principle of proportionality, on the other hand, is not explicitly referred to in the relevant provisions of the Statute and of the Rules of Procedure and Evidence, nor is it mentioned in the Impugned Decision. It may be said that the principle of proportionality is encompassed in the reference to the necessity of the protective measure in rule 81 (4) of the Rules of Procedure and Evidence as well as in the last sentence of article 68 (1) of the Statute, which provides that witness protection measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Again, the lack of sufficient reasoning in the Impugned Decision makes it impossible for the Appeals Chamber to determine conclusively whether or not the Pre-Trial Chamber abided by the principle of proportionality.

C. Third ground of appeal: use of summary evidence at the confirmation hearing without disclosure of the identity of the witness

35. As his third ground of appeal, the appellant argues that summary evidence in relation to witnesses of the Prosecutor may not be used at the confirmation hearing if the Pre-Trial Chamber had authorised the non-disclosure of the identities of those witnesses.

1. Decision of the Pre-Trial Chamber

36. The third ground of appeal arises from an order on pages 9 and 10 of the Impugned Decision. The Pre-Trial Chamber ordered the Prosecutor to inform the Pre-Trial Chamber by 25 September 2006 whether he would seek authorisation for the use of summaries in relation to the witness statements and other documents covered by the Impugned Decision and, if so, ordered him to file by 25 September 2006 the proposed summaries “in which all identifying information of the relevant witness shall be excluded”.

37. This decision was based on the consideration that the identities of the relevant witnesses should not be disclosed to the appellant at this stage because “their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage; and ... no other protective measure that could significantly minimise such danger is currently available and feasible” (see Impugned Decision, page 7, second paragraph); that the

redactions proposed by the Prosecutor would still lead to an identification of the relevant witnesses (see Impugned Decision, page 7, fourth paragraph); but that

“articles 61 (5) and 68 (5) of the Statute and rule 81 (4) of the Rules allows [sic] the Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely at the confirmation hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators’ notes and reports of their interviews” (see Impugned Decision, page 9, second paragraph).

2. *Arguments of the appellant*

38. The appellant submits in paragraph 65 of the Document in Support of the Appeal that “a proper interpretation of articles 61(5) and 68(5) and Rule 81(5) requires that the prosecution be precluded from relying on summaries at the confirmation hearing, unless it has previously disclosed the corresponding statements to the Defence.” The appellant argues that the “purpose of utilizing summaries is to protect the witness in question from disclosure to the public, rather than disclosure to the Defence” (see Document in Support of the Appeal, paragraph 51). He argues further that without access by the appellant to the full statements underlying the summaries “it is impossible for the Defence to contest any assertion of probative value made by the Prosecution” (see Document in Support of the Appeal, paragraph 54). The appellant also makes reference to a decision of the Appeals Chamber of the ICTY, which had confirmed a decision by the Trial Chamber in the *Milosevic* case that a dossier compiled by an investigator of the Office of the Prosecutor of the ICTY containing summaries of witness statements could not be admitted into evidence (see Document in Support of the Appeal, paragraphs 56 et seq.).

3. *Arguments of the Prosecutor*

39. The Prosecutor, in paragraphs 42 et seq. of his Response to the Document in Support of the Appeal, contests the argument of the appellant that summaries can only be used to protect the identity of the witness from the public but not from the defence. He submits that nothing in the procedural law of the Court suggests that summaries may only be used if the identities of the relevant witnesses are disclosed to the defence. In relation to the decision of the ICTY cited by the appellant, the Prosecutor submits that the ICTY jurisprudence is inapplicable because it relates to the use of summaries at trial, not at a confirmation hearing (see Response to the Document in Support of the Appeal, paragraph 46).

4. *Determination by the Appeals Chamber*

40. The Appeals Chamber determines in relation to the third ground of appeal that, for the reasons given below, the use of summaries of witness statements and other documents at the confirmation hearing in relation to witnesses of the Prosecutor whose identities have not been disclosed to the defence prior to the confirmation hearing is, in principle, permissible under the Statute and the Rules of Procedure and Evidence, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

41. The Appeals Chamber recalls that the Impugned Decision itself did not authorise the use of specific summaries at the confirmation hearing in the case of the appellant. Rather, in the Impugned Decision the Pre-Trial Chamber found that the use of summaries was one option that the Prosecutor could choose in relation to the witness statements and other documents covered by the Impugned Decision. Subsequent to the Impugned Decision, the Prosecutor submitted summaries to the Pre-Trial Chamber; the Pre-Trial Chamber authorised the use of some of these summaries in its Decision on Summary Evidence. The Decision on Summary Evidence, however, is not the subject of the present appeal. For that reason, the question arising out of the third ground of appeal is not whether specific summaries may be presented by the Prosecutor at the confirmation hearing of the appellant but whether the use of summaries of witness statements and other documents is, in principle, permissible under the Statute and the Rules of Procedure and Evidence if the identities of the relevant witnesses have not been disclosed to the defence prior to the confirmation hearing.

42. Pursuant to article 61 (5), second sentence, of the Statute the Prosecutor at the confirmation hearing

“may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial.”

43. The use of summaries by the Prosecutor at the confirmation hearing pursuant to article 61 (5), second sentence, of the Statute is not subject to any explicit condition. Neither the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre-Trial Chamber prior to their presentation at the confirmation hearing. The use of summaries pursuant to article 61 (5) of the Statute leaves the disclosure obligations of the Prosecutor pursuant to article 61 (3) (b) of the Statute and rules 76 et seq. of the Rules of Procedure and Evidence unaffected.

44. The use of summary evidence pursuant to article 68 (5) of the Statute, on the other hand, is primarily a witness protection measure. The provision reads as follows:

“Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures 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.”

45. The use of summaries pursuant to article 68 (5) of the Statute affects the presentation of evidence by the Prosecutor at the confirmation hearing; the use of summaries as a protective measure also may have an impact on the obligation of the Prosecutor to disclose evidence prior to the confirmation hearing. Pursuant to rule 81 (4) of the Rules of Procedure and Evidence the Pre-Trial Chamber may authorise the non-disclosure of the identity of a witness. In the present case, the Pre-Trial Chamber, seemingly acting on its own motion as provided for in rule 81 (4) of the Rules of Procedure and Evidence, envisaged that the Prosecutor would present the summaries at the confirmation hearing as evidence and that the Prosecutor would not disclose to the defence prior to the confirmation hearing the underlying witness statements or documents but only the summaries thereof, which would not divulge the identities of the witnesses.

46. This approach by the Pre-Trial Chamber is, in principle, permissible under the Statute and the Rules of Procedure and Evidence. Article 68 (5) of the Statute expressly provides that the Prosecutor may submit a summary of evidence instead of the evidence itself for the purpose of any proceedings conducted prior to trial. This includes the presentation of the summaries at the confirmation hearing pursuant to article 61 (5) of the Statute.

47. The Appeals Chamber is not persuaded by the argument of the appellant that pursuant to rule 81 (5) of the Rules of Procedure and Evidence, the Prosecutor may only rely on the summaries at the confirmation hearing if the underlying statements and other documents have been disclosed to the defence prior to the confirmation hearing. Rule 81 (5) of the Rules of Procedure and Evidence reads as follows:

“Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.”

48. Thus, rule 81 (5) of the Rules of Procedure and Evidence does not address the introduction into evidence of summaries at the confirmation hearing pursuant to articles 68 (5) and 61 (5) of the Statute; the provision regulates under what conditions the material and information on the basis of which the summaries were compiled may subsequently be introduced into evidence.

49. The Appeals Chamber is not persuaded by reliance of the appellant on the jurisprudence of the ICTY that the use of summaries is impermissible. As the Prosecutor rightly notes in paragraph 46 of the Response to the Document in Support of the Appeal, the jurisprudence cited by the appellant addresses the use of summaries at trial and not at a confirmation hearing. More importantly, article 61 (5) of the Statute expressly provides for the use of summaries at the confirmation hearing.

50. Furthermore, the presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence, as envisaged by the Pre-Trial Chamber, is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (article 68 (1), fourth sentence, and (5), second sentence, of the Statute). The use of summaries as envisaged by the Impugned Decision may affect the ability of the suspect pursuant to article 61 (6) (b) of the Statute to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects: first, the Prosecutor is authorised to rely on witnesses whose identities are unknown to the defence (anonymous witnesses); secondly, the ability of the defence to evaluate the correctness of the summaries is restricted because the defence does not receive prior to the confirmation hearing the witness statements and other documents that form the basis of the summaries. However, this does not mean that the use of such summaries at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In this context, the Appeals Chamber notes the jurisprudence of the European Court of Human Rights on the use of anonymous witnesses, in particular the case of *Doorson v. The Netherlands* (application no. 20524/92), where the European Court of Human Rights held in paragraph 72 of its judgment of 20 February 1996 that:

“The maintenance of the anonymity of the witnesses [in a criminal trial] presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) ... of the [European] Convention [on Human Rights] can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities...”

51. The Appeals Chamber considers that this analysis of the European Court of Human Rights is relevant for the present appeal as well: where the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing. In cases like the present case, the Pre-Trial Chamber will have to take into account *inter alia* that the ability of the defence to challenge the evidence presented by the Prosecutor at the confirmation hearing is impaired not only by the use of anonymous witnesses but also by the use of summaries without disclosure to the defence of the underlying witness statements and other documents.

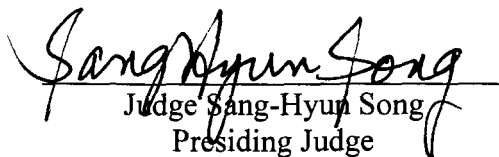
IV. APPROPRIATE RELIEF

52. 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). In the present case and for the following reasons, it is appropriate to reverse the Impugned Decision and to direct the Pre-Trial Chamber to decide anew upon the applications of the Prosecutor for authorisation of redactions that gave rise to the Impugned Decision.

53. The Appeals Chamber has found that the Impugned Decision lacked sufficient reasoning in relation to the finding of the Pre-Trial Chamber that the identities of the witnesses covered by the Impugned Decision should not be disclosed to the defence. The Appeals Chamber considers that this error materially affects the Impugned Decision because it cannot be established, on the basis of the reasoning that was provided, how the Pre-Trial Chamber reached its decision. For that reason, it is appropriate to reverse the Impugned Decision. As the reversal of the Impugned Decision on the basis of the first ground of appeal does not entail a conclusive determination by the Appeals Chamber that the Pre-Trial Chamber could not have authorised the non-disclosure of the identities of the relevant witnesses to the defence in the present case, the Pre-Trial Chamber is directed to decide anew upon the applications that gave rise to the Impugned Decisions, having regard to the findings of the present judgment.

Judge Pikis appends a separate opinion to this judgment in relation to the interpretation and application of article 68 of the Statute and rule 81 of the Rules of Procedure and Evidence.

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 of Judge Georghios M. Pikis

I agree that the judgment must be reversed for lack of due reasoning as explained in the judgment given. I cannot however associate myself with the approach adopted in the judgment respecting the interpretation and application of article 68 (5) of the Statute and rule 81 (2) and (4) of the Rules of Procedure and Evidence. My position on these issues is reflected in my separate opinion in *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo* (OA6) "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", to be delivered today.



Judge Georghios M. Pikis

Dated this 14th day of December 2006

At The Hague, The Netherlands

