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3 INTERNATIONAL CRIMINAL COURT

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5 SITUATION DEMOCRATIC REPUBLIC OF CONGO

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7 Case No: ICC-01/04-01/06

8

9 Friday, 13 October 2006

10 10.36 a.m.

11

12 OPEN SESSION - APPEALS CHAMBER

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15 Before: His Honour Judge Kourula, his Honour Judge Kirsch,

16 his Honour Judge Pikis, her Honour Judge Pillay

17 (via audio link) and his Honour Judge Song

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1 [10.36 a.m.]

2 THE USHER: All rise. The International Criminal Court is
3 now in session. Please be seated.

4 JUDGE KOURULA: I will invite the Court Officer to call the
5 situation, or case number.

6 COURT OFFICER: Thank you, your Honour. The situation in
7 the Democratic Republic of the Congo, the case of the
8 Prosecutor versus Thomas Lubanga Dyilo, ICC-01/04-01/06.

9 JUDGE KOURULA: Thank you. Now I will invite the
10 Prosecution to place themselves on the record.

11 MR WITHOPF: Good morning, Mr President, good morning your
12 Honours and good morning to my learned friend from the
13 Defence, and I extend my greetings to everybody in and
14 around the courtroom.

15 For the Prosecution today appears Mr Michael Adenuga,
16 he's an Appeals Counsel; behind Mr Adenuga Mr Ben Batros,
17 he's an Associate Appeals Counsel; and I,
18 Ekkehard Withopf, the Senior Trial Attorney in the
19 Lubanga case.

20 JUDGE KOURULA: Thank you. Now I will invite the Defence to
21 register its presence.

22 MR FLAMME (interpretation): Thank you, President, and thank
23 you counsel. I am Jean Flamme, I am the Defence counsel
24 for Mr Thomas Lubanga Dyilo, that I am representing alone
25 today.

1 JUDGE KOURULA: Thank you very much. Judge Navi Pillay is
2 presently recovering from surgery in south Africa and is
3 therefore unable to be physically present in the
4 courtroom today. However, with the assistance of the
5 Court Management Services, Judge Pillay is able to
6 participate by means of audio conferencing. I would
7 like now to confirm whether Madame Judge Pillay is on the
8 line. Judge Pillay, can you hear me clearly? Where is
9 the phone line?

10 COURT OFFICER: Mr President, for everybody in the courtroom
11 to hear Judge Pillay, you will have to put your
12 headphones on and switch to channel zero, or one.

13 JUDGE KOURULA: Judge Pillay, can you hear us clearly? Yes,
14 this phone is ringing.

15 JUDGE PILLAY: Thank you.

16 JUDGE KOURULA: Judge Pillay?

17 JUDGE PILLAY: Mr President, thank you for arranging this.
18 I am participating in the proceedings by audio link.

19 JUDGE KOURULA: Thank you very much. Good morning,
20 Judge Pillay, thank you for being here with us on the
21 phone line. I would like to make it clear that
22 Judge Pillay fully participated in all the appeals judges
23 meetings for deliberation by way of audio
24 conferencing like this, as well as electronic
25 exchanges.

1 Now I would like to deliver the summary of the judgment.

2 On 19 May 2006, Judge Sylvia Steiner, acting as
3 Single Judge of the Pre-Trial Chamber 1, rendered a
4 decision establishing general principles governing
5 applications to restrict disclosure pursuant to
6 Rules 81(2) and (4) of the Rules of Procedure and
7 Evidence. This decision is the object of this appeal.

8 The Pre-trial Chamber granted the Prosecutor leave to
9 appeal this decision.

10 The Prosecutor's appeal is successful only in part. By
11 majority -- Judge Pikis dissenting -- the Appeals Chamber
12 decided to confirm the decision of the
13 Pre-Trial Chamber 1 that, for the purpose of the
14 confirmation hearing, any restriction on the disclosure
15 to the Defence of the names and/or portions of the
16 statements of the witnesses on whom the Prosecution
17 intends to rely at the confirmation hearing, must be
18 authorised by the Chamber, pursuant to 81(4) of the
19 rules, upon evaluating the exceptionality of the request
20 and the feasibility or insufficiency of less restrictive
21 protective measures; decided to reverse the decision of
22 Pre-Trial Chamber 1 that any Prosecution request pursuant
23 to Article 68 of the Statute and Rule 81(4) of the Rules
24 for non-disclosure of the identity of Prosecution
25 witnesses at the confirmation hearing to ensure their

1 safety or that of their families, shall be granted only
2 if, one, the Prosecution has first sought protective
3 measures from the Victims and Witnesses Unit concerning
4 the relevant witness, and, two, the Prosecution shows
5 that, due to exceptional circumstances surrounding the
6 relevant witness, non-disclosure of identity remains
7 necessary due to infeasibility of protective measures
8 sought, or insufficiency of protective measures adopted
9 within the framework of the protection program of the
10 Victims and Witnesses Unit as a result of the Prosecution
11 request; decided to reverse the decision of Pre-Trial
12 Chamber 1 that any redaction in the statement of
13 witnesses on whose written or oral testimony the
14 Prosecution intends to rely at the confirmation hearing
15 in order not to prejudice the ongoing investigation in
16 the case against Thomas Lubanga Dyilo shall be temporary
17 and shall not be maintained beyond the 15-day time limit
18 provided for in Rules 121(4) and (5) of the rules;
19 decided to reverse the decision of Pre-Trial Chamber 1
20 that all future Prosecution applications under Rule 81(2)
21 shall be filed inter partes so as to notify the Defence
22 of the existence of the application and its legal basis,
23 as well as the related decision; and, finally, decided to
24 reverse the decision of Pre-Trial Chamber 1 that all
25 future applications by the Prosecution or the Defence to

1 restrict disclosure under Rule 81(4) of the Rules shall
2 be filed inter partes so as to notify the other party of
3 the existence of the application, its legal basis, and of
4 any request for ex parte proceedings that might be
5 contained in such an application.

6 Before I address the merits of the appeal, I shall
7 address the two preliminary issues that were raised by
8 the Defence. First of all, the Defence argued that the
9 Prosecutor's appeal did not meet the requirement of
10 Article 83(2) of the Statute and that it should be
11 dismissed on that basis. The Appeals Chamber is not
12 persuaded by this argument of the Defence. Article 83(2)
13 of the Statute does not apply to appeals brought under
14 Article 82(1)(d) of the Statute. The wording of the
15 Article 83 of the Statute indicates that it is only
16 applicable to appeals brought under Article 81 of the
17 Statute against acquittal, conviction or sentence.

18 The second preliminary issue raised by the Defence
19 related to res judicata. The Defence argued that some of
20 the issues raised in this appeal had already been decided
21 by the Pre-Trial Chamber in an earlier decision -- that
22 is, the decision on the final system of disclosure of
23 15 May 2006. Therefore, the Defence argued the
24 Prosecutor could not raise them in this appeal any more.
25 The Appeals Chamber was not persuaded by this argument.

1 The decision of Pre-Trial Chamber 1, 15 May 2006,
2 addressed the final system of disclosure for the purposes
3 of the confirmation hearing. It did not address the
4 question of how the Pre-Trial Chamber would dispose of
5 applications to restrict disclosure under Rules 81(2) and
6 (4) of the Rules of Procedure and Evidence. This latter
7 question was addressed in the impugned decision.
8 I shall now turn to the merits of the appeal. The
9 Prosecutor raised three grounds of appeal that related to
10 different parts of the impugned decision. In respect of
11 the first ground of appeal, regarding the criteria for
12 granting applications for non-disclosure of witness
13 identity, the Appeals Chamber notes that the
14 Pre-Trial Chamber's decision that disclosure is the Rule
15 and non-disclosure is the exception, cannot but be
16 upheld, because it can and should be read as allowing for
17 a case-by-case evaluation of the merits of all future
18 applications.
19 [10.50 a.m.]
20 In accordance with these findings, the Appeals Chamber
21 confirms the decision that non-disclosure of the
22 identities of the witness and of portions of statements
23 made by witnesses to the person in respect of whom a
24 confirmation hearing is held for witness protection
25 purposes, pursuant to Rule 81(4) of the Rules of

1 Procedure and Evidence, would be granted upon evaluating
2 the exceptionality of the request and the infeasibility
3 or insufficiency of less restrictive protective measures.
4 However, the Appeals Chamber determines that the
5 Pre-Trial Chamber's decision was wrong in law to the
6 extent that the Pre-Trial Chamber ruled in its impugned
7 decision that the Prosecutor must seek protective
8 measures from the Victims and Witnesses Unit concerning
9 the relevant witness before requesting non-disclosure of
10 the witness's identity from the Pre-Trial Chamber. The
11 Pre-Trial Chamber erred in law.

12 There is no basis for such a requirement in the Statute,
13 the Rules of Procedure and Evidence or the Regulations of
14 the Court. To the extent that the Pre-Trial Chamber
15 decided that the Prosecutor, before applying to the
16 Pre-Trial Chamber for non-disclosure of the identity of a
17 given witness, would have to seek protective measures
18 from the Victims and Witnesses Unit concerning that
19 witness, the Appeal Chamber reversed the decision.

20 I shall now turn to the second ground of the appeal. The
21 second ground of appeal arises from a decision by the
22 Pre-Trial Chamber that any redaction in the statements of
23 witnesses on whose written or oral testimony the
24 Prosecution intends to rely at the confirmation hearing,
25 in order not to prejudice the ongoing investigation in

1 the case against Thomas Lubanga Dyilo, shall be temporary
2 and shall not be maintained beyond the 15-day time limit
3 provided for in Rules 121(4) and (5) of the Rules. The
4 Pre-Trial Chamber's decision is based on the finding that
5 the investigation in the current case must be brought to
6 an end by the time the confirmation hearing starts,
7 barring exceptional circumstances that might justify
8 later isolated acts of investigation.

9 In relation to the second ground of appeal, the
10 Appeals Chamber determines that the Pre-Trial Chamber
11 erred in finding that the Prosecutor's investigation in
12 respect of Mr Lubanga Dyilo must be brought to an end
13 before the confirmation hearing, barring exceptional
14 circumstances that might justify later isolated acts of
15 investigation.

16 The Prosecutor's investigation may continue beyond the
17 confirmation hearing in relation to the specific and
18 concrete crimes with which the Prosecutor intends to
19 charge the suspect. Pursuant to Article 54(1)(a) of the
20 Statute, the Prosecutor shall, in order to establish the
21 truth, extend the investigation to cover all facts and
22 evidence relevant to an assessment of whether there is
23 criminal responsibility under this Statute and, in doing
24 so, investigate incriminating and exonerating
25 circumstances equally. The duty to establish the truth

1 is not limited to the time before the confirmation
2 hearing.

3 Furthermore, pursuant to Article 61(9) of the Statute,
4 the Prosecutor may amend the charges after the
5 confirmation, if only with the permission of the
6 Pre-Trial Chamber. This must necessarily mean that the
7 investigation may continue after the confirmation of the
8 charges.

9 On the basis of its incorrect opinion as to the temporal
10 scope of the Prosecutor's right to investigate, the
11 Pre-Trial Chamber decided that redactions in order not to
12 prejudice the ongoing investigation could not be
13 maintained beyond 15 days before the commencement of the
14 confirmation hearing. The Appeals Chamber in the present
15 case will not consider whether this decision as to the
16 temporal scope of redactions could be upheld for other
17 reasons. Consequently, the Pre-Trial Chamber's decision
18 on the temporal scope of redactions is reversed.

19 I shall now turn to the third ground of appeal. The
20 third ground of appeal arises from a decision of the
21 Pre-Trial Chamber that all future Prosecution
22 applications under Rule 81(2) shall be filed inter partes
23 so as to notify the defence of the existence of the
24 application and its legal basis, and from a decision on
25 page 20 of the impugned decision that all future

1 applications by the Prosecution or the Defence to
2 restrict disclosure under Rule 81(4) of the rules shall
3 be filed inter partes, so as to notify the other party of
4 the existence of the application, its legal basis and of
5 any request for ex parte proceedings that might be
6 contained in such an application.

7 The impugned decision provides for a set of procedural
8 rights of the participant that are consequential to these
9 decisions. These decisions of the Pre-Trial Chamber are
10 best characterised as an anticipated and general exercise
11 of the Pre-Trial Chamber's discretion.

12 In relation to the third ground of appeal, the
13 Appeals Chamber determines that these decisions by the
14 Pre-Trial Chamber are erroneous, because they do not
15 provide for any exception.

16 The Pre-Trial Chamber's approach that the other
17 participant has to be informed of the fact that an
18 application for ex parte proceedings has been filed and
19 of the legal basis for the application is, in principle,
20 unobjectionable. Nevertheless, there may be cases where
21 this approach would be inappropriate. By making a
22 decision that does not allow for any degree of
23 flexibility, the Pre-Trial Chamber precluded proper
24 handling of such cases. Accordingly, the decision of the
25 Pre-Trial Chamber that formed the object of the third

1 ground of appeal is reversed.

2 This concludes the summary of the judgment of the
3 majority. I shall now give the floor to Judge Pikis, who
4 will summarise his dissenting opinion.

5 JUDGE PIKIS: The history of the proceedings has been
6 summarised by the Presiding Judge. I shall not go into
7 it, save underline that the decision of the Trial Chamber
8 revolves around the elicitation of general principles
9 bearing on the interpretation and application of
10 Rules 81(2) and (4).

11 The principles were not established for the purpose of
12 resolving any matter at issue before the Court. In
13 essence, principles were laid down, pre-empting, thereby,
14 the outcome of pending or anticipated proceedings on
15 issues that might arise under Rules 81(2) and (4).

16 Sequentially to the establishment of these principles,
17 leave was sought by the Prosecutor to state practically
18 every matter arising from the decision for consideration
19 by the Appeals Chamber.

20 First and foremost, the Prosecutor had requested that the
21 Pre-Trial Judge list for consideration and prepare for
22 evaluation to the Appeals Chamber her decision to
23 establish general principles outside the context of
24 resolution of any issue pending before her.

25 This was turned down for the reason stated in my

1 judgment -- I am here orally summarising aspects of my
2 judgment -- for the reason that the subject of disclosure
3 was before the Court generally. As the Presiding Judge
4 mentioned, the Defence raised two objections to the
5 viability of the appeal: firstly, that no grounds of
6 appeal are articulated in the order envisaged by the
7 regulations, as I construe the objection, which is,
8 strictly speaking, and formally speaking, correct, but
9 not so in substance, in the sense that although grounds
10 of appeal are not specified, as such, they put forward
11 the issues listed by the trial Court -- Pre-Trial Court,
12 as the issues of appeal and detailed grounds are
13 advanced, putting forward the reasons that, in the
14 contention of the Prosecutor, render the decision
15 vulnerable to be set aside; and then res judicata, which
16 is explained, is a fundamental principle of law
17 encountered in the major systems of law practically
18 everywhere. Indeed, res judicata is an
19 incident -- important incident of the judicial process,
20 bound up with finality and ultimately certainty in the
21 law. The suggestion of -- the objection of the Defence
22 on this ground also has no merit.

23 Then I come to the substance of my decision and the
24 reasons of my dissent. General principles were evolved
25 outside a pending context and not with a view to

1 resolving an extant issue. It is a fact that immunity on
2 the part of the Pre-Trial Chamber to raise these issues
3 and debate and determine these issues under established
4 general principles, is not an issue on appeal.
5 Nevertheless, the grounds set down for appeal are bound
6 up with the general principles and an integral part of
7 them. Consequently, if we are to review them, it would,
8 in essence, involve the Appeals Court in the same
9 exercise -- that is, issuing or establishing or evolving
10 general principles outside the context of a pending issue
11 in the course.

12 I shall now read from some of the ultimate passages from
13 my judgment, which are material for the reasons for my
14 dissent. The exercise of judicial power is premised on
15 the jurisdiction of a Court. The jurisdiction of a Court
16 extends to the determination of the matter at issue and
17 matters incidental thereto -- the hallmark of the
18 exercise of judicial power -- and through such a
19 determination, the imprint of the judicial power is
20 attached to the solution of the problem, the contest, and
21 everything that goes with it.

22 Outside this course, the Court operates in a vacuum,
23 transcending the object and purpose of judicial power.
24 It is no sanction of a Court of law to establish general
25 principles with a view to mapping out the outcome of

1 future proceedings. The pronouncement of binding legal
2 principles outside the parameters of the adjudicative
3 process is beyond and, more accurately, outside the
4 jurisdiction of the Court.

5 The Rule applicable is elicited by reference to the facts
6 defining the issue before the Court and then only to the
7 extent necessary to resolve it. Theoretical legal
8 exercises have no part in the judicial process.

9 The principles adopted in the decision under review were
10 not established for the purpose of resolving an issue
11 before the Single Judge, but, in the abstract, as the
12 springboard for the resolution of pending or issues
13 likely to arise in the process.

14 Every Chamber of International Criminal Court is
15 competent to deal with every issue amenable to the
16 jurisdiction of the particular branch of the Court, for
17 the purpose of resolving, subject to appeal -- where a
18 right to that end is confirmed -- finally the course
19 before it or any course arising for determination
20 intermediately thereto.

21 [11.05 a.m.]

22 In the exercise of this duty, the Chamber will no doubt
23 explore the role in order to identify the principles
24 applicable to the particular facts of the case with a
25 view to its just resolution. But, even in that context,

1 the Court will not extend the inquiry beyond what is
2 required for the solution of the problem before it. It
3 is no part of the judicial function to enunciate the
4 principles applicable in any given area of law, objective
5 or substantive, or to determine the law applicable to
6 pending or anticipated proceedings outside the
7 adjudicative process for the resolution of extant issues
8 definitive of the course of judicial proceedings.

9 I shall read the ultimate paragraphs of my judgment. And
10 the question arises: "What should be done with the
11 decision under appeal?" The issues raised for
12 consideration by the Appeals Chamber are an integral part
13 of the general principles involved in the decision under
14 review. To review them on appeal would involve the
15 Appeals Chamber in the same process as the Single Judge
16 got herself into. That is to say, engagement in the
17 elicitation of general legal principles outside the
18 decision-making process for the disposition of a matter
19 at issue, exceeding, thereby, the jurisdiction of the
20 Court. The Appeals Chamber would itself assume
21 jurisdiction to pre-judge the law applicable to pending
22 and future proceedings.

23 The issues raised for consideration are an inextricable
24 part of the general principles evoked by the
25 Single Judge. She refused to state the propriety of

1 establishing general principles, as a distinct issue for
2 consideration on appeal, does not alter the character of
3 the issues raised or the nature of the decision taken.
4 The Appeals Chamber receives an appeal for the review of
5 a decision and issues arising therein, dealing with
6 general principles given outside the context of the
7 jurisdiction of the Pre-Trial Chamber.
8 Rule 158 of the Rules of Procedure and Evidence confers
9 power upon the Appeals Chamber to reverse a decision, the
10 subject matter of an appeal. To reverse signifies the
11 following of a course opposite to that taken. In the
12 context of judicial proceedings, the word bears a special
13 meaning: a term of act, importing power to set aside,
14 revoke, annul, overturn a decision. The reverse course
15 entails the annulment of the decision, which can be
16 achieved by revoking the decision made. This is the
17 order I would make.

18 JUDGE KOURULA: It has disconnected.

19 COURT OFFICER: Yes, your Honour, we disconnected with
20 Judge Pillay. We shall establish connection in a minute.

21 JUDGE KOURULA: I will wait, then. Okay, you are
22 reconnected?

23 JUDGE PILLAY: Thank you.

24 JUDGE KOURULA: Did you listen to the delivery of judgment
25 without any difficulty?

1 JUDGE PILLAY: I had no difficulty, Mr President; I heard
2 the judgment and a major portion of the dissent.

3 JUDGE KOURULA: Okay, thank you. The judgment, with the
4 dissenting opinion attached, will be handed down shortly
5 after this session. Now I declare the session closed.
6 Thank you very much.

7 THE USHER: All rise.

8 [11.09 a.m]

9 [The Court adjourned accordingly]

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