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2 INTERNATIONAL CRIMINAL COURT

3 SITUATION DEMOCRATIC REPUBLIC OF CONGO

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

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Transcription No: ICC-APP-01/04-01/06-T-3-EN

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7 Thursday, 14 December 2006 at 12.47 p.m.

8 OPEN SESSION

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Before: His Honour Judge Sang-Hyun Song (Presiding Judge)
10 His Honour Judge Erkki Kourula
His Honour Judge Philippe Kirsch
11 Her Honour Judge Navanethem Pillay
His Honour Judge Georghios M. Pikis

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13 APPEALS CHAMBER

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1 [12.47 p.m.] ICC-APP-01-04-01-06-T-3-EN

12:38:25 2 OPEN SESSION

12:45:42 3 [Mr Thomas Lubanga Dyilo present]

12:45:53 4 THE USHER: All rise. The International Criminal Court is

12:48:07 5 now in session. Please be seated.

12:48:18 6 [12:48 p.m.]

12:48:28 7 PRESIDING JUDGE SONG: Now I invite the court officer to

12:48:30 8 call the case number.

12:48:34 9 COURT OFFICER: Thank you, Mr President. Situation in the

12:48:39 10 Democratic Republic of the Congo, case of the Prosecutor

12:48:42 11 versus Thomas Lubanga Dyilo, ICC-01/04-01/06.

12:48:47 12 PRESIDING JUDGE SONG: Now I invite the parties to register

12:48:56 13 their presence on the record. First of all, the Office of the

12:49:01 14 Prosecution, please.

12:49:04 15 MR GUARIGLIA: Thank you, Mr President, your Honours.

12:49:06 16 Fabricio Guariglia, Senior Appeals Counsel for the Prosecutor,

12:49:11 17 appearing together with Mr Michael Adenuga, Appeals Counsel,

12:49:13 18 and Mr Ben Batros, Associate Appeals Counsel.

12:49:18 19 PRESIDING JUDGE SONG: Thank you. Then the Defence.

12:49:20 20 MR ROBERTS: Good afternoon, Mr President, your Honours. My

12:49:23 21 name is Geoff Roberts, appearing for the Defence of

12:49:29 22 Thomas Lubanga Dyilo.

12:49:29 23 PRESIDING JUDGE SONG: Thank you. Today, the Appeals

12:49:35 24 Chamber has convened to deliver the judgments in the appeals

12:49:39 25 of Mr Thomas Lubanga Dyilo against two decisions of the

12:49:45 1 Pre-Trial Chamber 1; that is to say, the "First Decision on
12:49:51 2 the Prosecution Requests and Amended Requests for Redactions
12:49:56 3 under Rule 81" of 15 September 2006, and the "Second Decision
12:50:06 4 on the Prosecution Requests and Amended Requests for
12:50:09 5 Redactions under Rule 81" of 20 September 2006.
12:50:09 6 [12:50 p.m.]

12:50:21 7 Both decisions were triggered by the same set of applications
12:50:24 8 by the Prosecutor for authorisation of disclosure of documents
12:50:31 9 prior to the confirmation hearing with redactions under
12:50:36 10 Rule 81 of the Rules of Procedure and Evidence, and both
12:50:42 11 appeals raise similar and overlapping questions. For that
12:50:48 12 reason, I shall summarise the two judgments of the Appeals
12:50:55 13 Chamber together.
12:50:55 14 [12:50 p.m.]

12:50:58 15 The Appeals Chamber has decided to reverse both decisions and
12:51:04 16 to direct the Pre-Trial Chamber to decide anew upon the
12:51:12 17 applications of the Prosecutor that gave rise to the
12:51:16 18 decisions.
12:51:17 19 [12:51 p.m.]

12:51:19 20 The judgments in both appeals were unanimous decisions as far
12:51:25 21 as the outcome of the appeals is concerned. Judge Pikis
12:51:40 22 appends separate opinions to the judgment.
12:51:40 23 [12:51 p.m.]

12:51:46 24 The reason for the reversal of the two decisions of the
12:51:48 25 Pre-Trial Chamber is that both lack sufficient reasoning. The

12:51:51 1 Appeals Chamber finds that there is an obligation on the
12:51:54 2 Pre-Trial Chamber to reason sufficiently its decision because
12:52:00 3 only on the basis of the reasoning will the participants be
12:52:06 4 able to assess the impact of the decisions on their rights and
12:52:12 5 to decide whether or not to seek leave to appeal.

12:52:16 6 [12:52 p.m.]

12:52:19 7 In the first decision, the Pre-Trial Chamber failed to state
12:52:25 8 in sufficient detail the reasons which led the Pre-Trial
12:52:30 9 Chamber to rule that the identities of certain witnesses
12:52:34 10 should not be disclosed to the appellant. In the second
12:52:41 11 decision, the Pre-Trial Chamber failed to state in sufficient
12:52:46 12 detail the reasons for its decision to authorise the
12:52:52 13 disclosure of witness statements and other documents with
12:52:55 14 redactions pursuant to Rule 81(2) of the Rules of Procedure
12:53:03 15 and Evidence.

12:53:03 16 [12:53 p.m.]

12:53:07 17 I should emphasise that the reversal by the Appeals Chamber of
12:53:13 18 the first and second decisions does not entail a finding by
12:53:19 19 the Appeals Chamber that the applications of the Prosecutor to
12:53:23 20 limit disclosure could not be granted pursuant to Rule 81 of
12:53:30 21 the Rules of Procedure and Evidence. Because the impugned
12:53:36 22 decisions were not sufficiently reasoned, the Appeals Chamber
12:53:41 23 does not consider it appropriate to make a conclusive finding
12:53:45 24 in this respect.

12:53:47 25 [12:53 p.m.]

12:53:50 1 I shall now turn to the other grounds of appeal that have been
12:53:54 2 raised by the appellant. In relation to the appeal against
12:54:01 3 the first decision, the appellant has argued that the
12:54:06 4 Prosecutor may not rely on summaries of witness statements at
12:54:10 5 the confirmation hearing if the identities of the relevant
12:54:16 6 witnesses have not been disclosed to the Defence prior to the
12:54:21 7 hearing.

12:54:21 8 [12:54 p.m.]

12:54:24 9 The Appeals Chamber is not persuaded by this argument. The
12:54:30 10 use of summaries of witness statements as a witness protection
12:54:35 11 measure at the confirmation hearing is, in principle,
12:54:40 12 permissible under the relevant provisions of the Statute and
12:54:44 13 the Rules of Procedure and Evidence.

12:54:47 14 [12:54 p.m.]

12:54:48 15 However, since the use of summaries of witness statements
12:54:53 16 under such circumstances affects the ability of the Defence to
12:55:00 17 challenge the evidence that is presented by the Prosecutor,
12:55:04 18 the Appeals Chamber considers that such summaries must be used
12:55:11 19 in a manner which is -- which is not prejudicial to or
12:55:18 20 inconsistent with the rights of the accused and a fair and
12:55:22 21 impartial trial.

12:55:23 22 [12:55 p.m.]

12:55:27 23 Also in relation to the appeal against the first decision, the
12:55:31 24 appellant has argued that the Pre-Trial Chamber's decision did
12:55:36 25 not respect the principle of necessity and proportionality.

12:55:44 1 The Appeals Chamber is of the view that it cannot make a
12:55:49 2 conclusive determination in that respect because the first
12:55:53 3 decision, as I have explained already, lacked sufficient
12:55:58 4 reasoning.
12:55:59 5 [12:55 p.m.]
12:56:02 6 In relation to the appeal against the second decision, the
12:56:06 7 appellant argued, as his second ground of appeal, that the
12:56:11 8 impugned decision was incorrect because it assumed that the
12:56:17 9 Prosecutor could rely at the confirmation hearing on witness
12:56:22 10 statements and documents that contained redactions pursuant to
12:56:27 11 Rule 81(2) of the Rules of Procedure and Evidence -- that is,
12:56:36 12 in order not to prejudice ongoing or further investigations of
12:56:40 13 the Prosecutor.
12:56:41 14 [12:56 p.m.]
12:56:44 15 The majority of the Appeals Chamber is not persuaded by the
12:56:48 16 appellant's argument. The question is governed by the last
12:56:53 17 sentence of Rule 81(2) of the Rules of Procedure and Evidence,
12:56:59 18 which makes the introduction of material or information
12:57:05 19 dependent on adequate prior disclosure.
12:57:09 20 [12:57 p.m.]
12:57:11 21 The majority of the Appeals Chamber considers that this
12:57:14 22 provision allows for a degree of flexibility. Therefore, the
12:57:21 23 majority of the Appeals Chamber finds that, in principle, the
12:57:28 24 Prosecutor may rely at the confirmation hearing on unredacted
12:57:33 25 parts of witness statements and other documents.

12:57:36 1 [12:57 p.m.]

12:57:39 2 To what extent redactions may be maintained, if the Prosecutor
12:57:45 3 relies on information that is redacted in part, will have to
12:57:49 4 be determined on a case-by-case case basis, taking into
12:57:56 5 account the interests of the suspect.

12:57:59 6 [12:57 p.m.]

12:58:01 7 Finally, the appellant, in relation to the second decision,
12:58:06 8 has argued as his third ground of appeal that the impugned
12:58:12 9 decision created privilege for sources of the Prosecutor that
12:58:18 10 is not foreseen in the Statute and the Rules of Procedure and
12:58:23 11 Evidence.

12:58:23 12 [12:58 p.m.]

12:58:24 13 The majority of the Appeals Chamber is not persuaded by this
12:58:27 14 argument for the following reasons. It is true that the
12:58:33 15 Pre-Trial Chamber, when deciding whether or not to authorise
12:58:38 16 the applications for redactions, took into consideration that
12:58:45 17 sources of the Prosecutor had requested that their identities
12:58:50 18 should not be disclosed to the Defence. This alone, however,
12:58:57 19 did not create a privilege for the Prosecutor's sources. The
12:59:03 20 Pre-Trial Chamber did not consider itself bound by these
12:59:08 21 requests, but simply took them into account as one
12:59:14 22 consideration for its decision. This is not impermissible,
12:59:19 23 per se.

12:59:20 24 [12:59 p.m.]

12:59:23 25 As the impugned decision was not sufficiently reasoned, the

12:59:27 1 Appeals Chamber considers that it is not in a position to
12:59:32 2 determine conclusively whether the authorisation of
12:59:37 3 non-disclosure of the Prosecutor's sources in the concrete
12:59:41 4 cases was permissible under Rule 81 of the Rules of Procedure
12:59:47 5 and Evidence.
12:59:47 6 [12:59 p.m.]
12:59:52 7 This concludes my summary of the two judgments. The written
12:59:57 8 judgment will be notified to the participants shortly. I
13:00:01 9 shall now give the floor to Judge Pikis, who will summarise
13:00:08 10 his separate opinions. Okay.
13:00:27 11 JUDGE PIKIS: In appeal 0A5 there is little, if anything, to
13:00:32 12 summarise. I shall read what is recorded. In my opinion, I
13:00:39 13 agree that the judgment must be reversed for lack of due
13:00:42 14 reasoning, as explained in the judgment given.
13:00:42 15 [1:00 p.m.]
13:00:45 16 I cannot, however, associate myself with the approach adopted
13:00:48 17 in the judgment respecting the interpretation and application
13:00:52 18 of Article 68(5) of the Statute, and Rule 81(2) and (4) of the
13:00:59 19 Rules of Procedure and Evidence. My position on these issues
13:01:04 20 is reflected in my separate opinion in appeal 0A6, described
13:01:11 21 by reference to its proper name in the judgment to be
13:01:14 22 delivered today.
13:01:14 23 [1:01 p.m.]
13:01:16 24 I shall not make reference to the background of the issues
13:01:21 25 raised for consideration; they have been narrated in the

13:01:28 1 judgment given.

13:01:29 2 [1:01 p.m.]

13:01:30 3 I address, first, the issue of attempting to provide at all an
13:01:35 4 answer to the issues raised, given that we reversed the
13:01:43 5 decision, a step involving the erasure of the judgment and
13:01:51 6 everything associated therewith in its entirety.

13:01:51 7 [1:01 p.m.]

13:01:55 8 We have three separate and distinct issues and, in as much, as
13:02:03 9 answering the other two issues, is interconnected or relevant
13:02:06 10 to the processes in progress before the Pre-Trial Chamber.

13:02:11 11 And, therefore, their elucidation will both expedite and
13:02:19 12 advance the proceedings. The decision adopted to address them
13:02:26 13 finds me in full agreement.

13:02:27 14 [1:02 p.m.]

13:02:27 15 Now, with regard to the second issue, here I come to the
13:02:32 16 fundamental reasons for my difference with my fellow judges.
13:02:37 17 They lie in the following. Article 61(3)(b) imposes a duty
13:02:46 18 upon the Prosecutor to disclose the evidence -- to disclose to
13:02:53 19 the accused, to the suspect, to the person charged, the
13:02:56 20 evidence upon which he intends to rely at the trial.

13:03:01 21 [1:03 p.m.]

13:03:03 22 Later on in the same Article, provision is made that the
13:03:07 23 Prosecutor may, at the stage of the confirmation hearing,
13:03:15 24 produce a summary of the evidence, and that includes, of
13:03:20 25 course, statements of witnesses.

13:03:21 1 [1:03 p.m.]

13:03:24 2 The amenity of the Prosecutor to do so, under Article 61, in
13:03:31 3 no way absolves him of his duty to acquaint the Defence with
13:03:38 4 the evidence in its original state. That is the first subject
13:03:49 5 that I wish to underline.

13:03:49 6 [1:03 p.m.]

13:03:53 7 Article 68(5) makes possible, in cases of endangerment,
13:04:01 8 serious endangerment, likelihood of serious endangerment of
13:04:06 9 the safety and security of a witness, or his family
13:04:17 10 to -- enables the Prosecutor, or empowers the Prosecutor,
13:04:20 11 better still, to furnish, to provide, instead of the statement
13:04:24 12 itself, a summary thereof.

13:04:26 13 [1:04 p.m.]

13:04:29 14 Now, this is -- a summary in the context of Article 68(3)
13:04:35 15 differs from a summary under the -- under Article 61, in as
13:04:43 16 much as in the former case -- that is, under
13:04:48 17 Article 68(3) -- the Prosecutor may omit from the summary even
13:04:56 18 significant parts of the evidence that affect the safety of
13:05:04 19 witnesses and members of their family. This cannot be done
13:05:11 20 under Article 61.

13:05:11 21 [1:05 p.m.]

13:05:13 22 But Article 68(3) is subject to an important proviso that any
13:05:24 23 summary, or abbreviation or brief statement of the evidence of
13:05:35 24 a witness must not prejudice or be inconsistent with the
13:05:44 25 rights of the Defence. What can prejudice the Defence? What

13:05:50 1 prejudices the Defence is the withholding of evidence
13:05:52 2 essential from making the Defence, and the test relevant to
13:05:56 3 making the Defence and defining the Defence rights is set out
13:06:00 4 again in the Statute, as to the requisites necessary for
13:06:06 5 confirming the charges.
13:06:08 6 [1:06 p.m.]
13:06:10 7 There can be no withholding of evidence under any
13:06:15 8 circumstances that is material for the rights of the
13:06:23 9 defendant, or inconsistent with his rights -- human rights in
13:06:28 10 the subject and the fair and impartial trial. Everything that
13:06:34 11 is necessary for the accused to prepare for his Defence,
13:06:38 12 either at the confirmation hearing, and certainly at the
13:06:44 13 trial -- there is no restriction, of course, under the
13:06:46 14 Statute -- must be disclosed to the Defence.
13:06:48 15 [1:06 p.m.]
13:06:50 16 Then I go to Rule 81(2). Rule 81(2) permits the
13:06:57 17 non-disclosure of evidence by the Prosecutor, and that's all
13:07:07 18 it tackles, in the interests of the sustenance, or for the
13:07:12 19 sake of ongoing -- further or ongoing investigations.
13:07:17 20 [1:07 p.m.]
13:07:18 21 The text refers to material and information, a statement, for
13:07:25 22 the reasons explained in my opinion, in my judgment -- my
13:07:28 23 separate opinion -- encompasses the statement or a piece of
13:07:37 24 documentary evidence in its entirety. If the court approves
13:07:40 25 the application, then the statement is not

13:07:43 1 disclosed -- subject, of course, to the prohibition of its use
13:07:50 2 at the confirmation hearing.

13:07:50 3 [1:07 p.m.]

13:07:54 4 If the Prosecutor intends to use it, then he will have to
13:07:58 5 adduce this statement itself, provided this is done in time as
13:08:05 6 provided in the Statute and the Rules of Procedure and
13:08:09 7 Evidence. There is no halfway house.

13:08:12 8 [1:08 p.m.]

13:08:15 9 Nor do considerations of confidentiality enter into the
13:08:22 10 interpretation and application of Rule 81(2). Confidentiality
13:08:28 11 has a place under the Statute only in relation to the
13:08:34 12 specified circumstances envisaged by the Statute referred to
13:08:39 13 in Article 81(4), which blocks any reference to confidential
13:08:48 14 evidence. There is no second category; you are in other
13:08:55 15 country, or you have confidential evidence defined by
13:08:56 16 reference to any other reason. And that is the position
13:09:01 17 relevant to confidentiality.

13:09:02 18 [1:09 p.m.]

13:09:03 19 It must be said, and I note this in my separate judgment, that
13:09:09 20 even the identity of the witness -- disclosure of the identity
13:09:14 21 of the witness, is subject to the proviso set down in
13:09:20 22 Article 68(5) as to omission from disclosure. This sums up
13:09:30 23 the position that is set out in my separate judgment that will
13:09:35 24 be handed down later today, along with the judgments
13:09:44 25 of -- delivered by the majority.

13:09:50 1 PRESIDING JUDGE SONG: Thank you. Now I declare the session

13:09:52 2 closed.

13:09:53 3 [1:09 p.m.]

13:09:55 4 [At 1:09 p.m. the Appeals Chamber adjourned accordingly]

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