

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06

Date: 13 October 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 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"**

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor

Mrs. Fatou Bensouda, Deputy Prosecutor

Mr. Fabricio Guariglia, Senior Appeals Counsel

Mr. Ekkehard Withopf, Senior Trial Lawyer

**Counsel for the Defence**

Mr. Jean Flamme

**Legal Assistant**

Ms. Véronique Pandanzyla

*SAS*

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor pursuant to the decision of Pre-Trial Chamber I dated 23 June 2006, entitled “Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal” (ICC-01/04-01/06-166), against the decision of Pre-Trial Chamber I dated 19 May 2006, entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence” (ICC-01/04-01/06-108-Corr),

After deliberation,

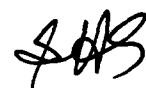
by majority, Judge Pikis dissenting,

*Delivers the following*

## JUDGMENT

(i) The decision of Pre-Trial Chamber I “that, for the purpose of the confirmation hearing, any restriction on disclosure to the Defence of the names and/or portions of the statements of the witnesses on whom the Prosecution intends to rely at the confirmation hearing must be authorised by the Chamber pursuant to rule 81 (4) of the Rules upon evaluating the exceptionality of the request and the infeasibility or insufficiency of less restrictive protective measures” is confirmed.

(ii) The decision of Pre-Trial Chamber I “that any Prosecution request pursuant to article 68 of the Statute and rule 81 (4) of the Rules for non-disclosure of the identity of Prosecution witnesses at the confirmation hearing to ensure their safety or that of their families shall be granted only if: (i) the Prosecution has first sought protective measures from the Victims and Witnesses Unit concerning the relevant witness; and (ii) the Prosecution shows that, due to exceptional circumstances surrounding the relevant witness, non-disclosure of identity remains necessary due to infeasibility of protective measures sought or insufficiency of protective measures adopted within the framework of the protection program of the Victims and Witnesses Unit as a result of the Prosecution request” is reversed.



(iii) The decision of Pre-Trial Chamber I “that any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules” is reversed.

(iv) The decision of Pre-Trial Chamber I “that all future Prosecution applications under rule 81 (2) shall be filed *inter partes* so as to notify the Defence of the existence of the application and its legal basis” as well as the related decisions under (ii) to (vi) on pages 19 and 20 of the impugned decision are reversed.

(v) The decision of Pre-Trial Chamber I “that all future applications by the Prosecution or the Defence to restrict disclosure under rule 81 (4) of the Rules shall be filed *inter partes* so as to notify the other party of the existence of the application, its legal basis, and of any request for *ex parte* proceedings that might be contained in such an application” as well as the related decisions under (ii) to (viii) on pages 20 to 22 of the impugned decision are reversed.

## REASONS

### I. KEY FINDINGS

1. Non-disclosure to the person in respect of whom a confirmation hearing is held of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing or portions of prior statements made by these witnesses is an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed. A Pre-Trial Chamber, when considering a request by the Prosecutor for such non-disclosure pursuant to rule 81 (4) of the Rules of Procedure and Evidence, will take into account all relevant factors and will carefully appraise the Prosecutor’s request on a case-by-case basis. A mandatory application by the Prosecutor to the Victims and Witnesses Unit for protective measures prior to a request to the Pre-Trial Chamber for non-disclosure of the identity of witnesses on whom the Prosecutor intends to rely at the confirmation hearing is not prescribed by the Statute or the Rules of Procedure and Evidence.

2. The Prosecutor's investigation may be continued beyond the confirmation hearing. Such investigations may relate to alleged new crimes as well as to alleged crimes that are encompassed by the confirmation hearing.

3. A Pre-Trial Chamber acts erroneously in deciding how it will exercise its discretion with respect to maintaining future applications pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence *ex parte* if the Chamber does not provide for a degree of flexibility for deciding, on a case-by-case basis, whether and to what extent the application be maintained *ex parte*.

## II. PROCEDURAL HISTORY

4. This appeal concerns the restriction of disclosure to the person in respect of whom a confirmation hearing is held pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence.

5. On 19 May 2006, Judge Sylvia Steiner acting as Single Judge of Pre-Trial Chamber I rendered a "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence" (ICC-01/04-01/06-108-Corr, hereinafter "impugned decision"). In the impugned decision, the Pre-Trial Chamber established "certain general principles governing applications to restrict disclosure pursuant to rule 81(2) and (4) of the Rules" (see impugned decision, paragraph 5), relating to the disclosure of evidence in preparation for the confirmation hearing in respect of Mr. Thomas Lubanga Dyilo. Another decision by the Pre-Trial Chamber entitled "Decision on the Final System of Disclosure and the Establishment of a Timetable" (ICC-01/04-01/06-102, hereinafter "decision on the final system of disclosure") that also addressed the disclosure of evidence in preparation for the confirmation hearing had already been rendered on 15 May 2006.

6. In the impugned decision, the Pre-Trial Chamber decided, *inter alia*, the conditions under which it would grant applications by the Prosecutor for non-disclosure of the identity of Prosecution witnesses to Mr. Lubanga Dyilo prior to the confirmation hearing (see impugned decision, pages 22 to 23); that any redaction in order not to prejudice the ongoing investigation in the case against Mr. Lubanga Dyilo in the statements of witnesses on whose testimony the Prosecutor intends to rely at the confirmation hearing should be temporary and not be maintained beyond the fifteen-day limit provided for in rule 121 (4) and (5) of the Rules of Procedure and Evidence (see impugned decision, page 23); and that all future

applications under rule 81 (2) and (4) of the Rules of Procedure and Evidence would have to be made in *inter partes* filings, so as to inform the other party of the existence of the application, its legal basis, and, with respect to applications under rule 81 (4) of the Rules of Procedure and Evidence, of any request for *ex parte* proceedings that may be contained in such application (see impugned decision, pages 19 and 20).

7. On 24 May 2006, the Prosecutor filed before Pre-Trial Chamber I a “Motion for Reconsideration and, in the Alternative, Leave to Appeal” (ICC-01/04-01/06-125, hereinafter “application for leave to appeal”). In the application for leave to appeal, the Prosecutor requested the Pre-Trial Chamber to reconsider certain aspects of the impugned decision and, in the alternative, sought leave to appeal the impugned decision in respect of these aspects.

8. On 23 June 2006, Judge Sylvia Steiner acting as Single Judge of Pre-Trial Chamber I rendered a “Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal” (ICC-01/04-01/06-166 (public redacted version), hereinafter “decision granting leave to appeal”). The Pre-Trial Chamber rejected the Prosecutor’s motion for reconsideration *in limine* and granted leave to appeal the impugned decision in respect of:

“(i) The issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing;”

“(ii) The issue of the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and the consequent temporary nature of those redactions granted under rule 81 (2) of the Rules in order not to prejudice that investigation; and”

“(iii) The issue of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules.” (Decision granting leave to appeal, page 25.)

9. On 3 July 2006, the Appeals Chamber granted extensions of the page and time limits for the Prosecutor’s document in support of the appeal (ICC-01/04-01/06-177). The “Prosecution’s Document in Support of the Appeal” (ICC-01/04-01/06-183, hereinafter “document in support of the appeal”) was registered on 6 July 2006.

10. On 11 July 2006, the Appeals Chamber granted an extension of the time limit for the filing of the response to the Prosecutor’s document in support of the appeal by five days (ICC-01/04-01/06-190). On 20 July 2006, Counsel for Mr. Lubanga Dyilo filed a document entitled “Conclusions de la défense en réponse au mémoire d’appel du Procureur du 5 juillet

2006" (ICC-01/04-01/06-199, hereinafter "response to the document in support of the appeal").

11. On 21 July 2006, the Prosecutor made an "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (ICC-01/04-01/06-202). On 31 July 2006, the Prosecutor filed a document entitled "Prosecution's Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" (ICC-01/04-01/06-223). On 12 September 2006, the Appeals Chamber rejected the Prosecutor's application for leave to reply and dispensed with consideration of the reply that was filed on 31 July 2006 in its deliberations on the present appeal (ICC-01/04-01/06-424).

### III. PRELIMINARY ISSUES RAISED BY THE DEFENCE

#### A. Purported failure of the Prosecutor to satisfy the requirements of article 83 (2) of the Statute

12. In the response to the document in support of the appeal, Counsel for Mr. Lubanga Dyilo submits that the appeal is inadmissible. Counsel for Mr. Lubanga Dyilo argues that pursuant to article 83 (2) of the Statute, an appeal is only admissible if the proceedings appealed from were unfair in a way that affects the reliability of the decision or sentence or if the decision or sentence was materially affected by an error of fact or law (see response to the document in support of the appeal, paragraph 5). Counsel for Mr. Lubanga Dyilo argues that the Prosecutor merely criticized the decision for not allowing enough flexibility but failed to raise any factual or legal error; he submits that as long as the Prosecutor does not challenge the interpretation by the Pre-Trial Chamber of the law, no error of law is raised. Counsel for Mr. Lubanga Dyilo submits further that the error would need to be grave and significant, and that the Prosecutor failed to demonstrate that the impugned decision would have been different had the Pre-Trial Chamber not made the purported error (see response to the document in support of the appeal, paragraph 6).

13. The Appeals Chamber rejects the argument by Counsel for Mr. Lubanga Dyilo that the Prosecutor's appeal is inadmissible for purported failure to comply with article 83 (2) of the Statute. The appeal cannot be declared inadmissible on that basis because, for the reasons set out below, article 83 (2) of the Statute does not apply to appeals brought from the Pre-Trial Chamber under article 82 (1) (d) of the Statute.

14. Article 83 (2) of the Statute reads as follows:

“If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.”

15. Article 83 (2) (b) refers to the Appeals Chamber having the power to “[o]rder a *new trial* before a different *Trial* Chamber” (emphasis added). The final paragraph of the provision refers to the ability of the Appeals Chamber to remand a factual issue to the original *Trial* Chamber for it to determine; and the final sentence of that paragraph makes specific provision for circumstances where “the decision or sentence” has been appealed “only by the person convicted, or the Prosecutor on that person’s behalf”. These provisions lead to the conclusion that article 83 (2) relates to appeals brought under article 81 of the Statute (against decisions of acquittal or conviction or against sentence) at the conclusion of the trial, as opposed to decisions referred to at article 82 (1) (d) of the Statute, which occur during the course of the proceedings, prior to the conclusion of the trial, and which involve “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

16. Other provisions of article 83 support this conclusion. Article 83 (1) refers to the Appeals Chamber having all the powers of the Trial Chamber, “[f]or the purposes of proceedings under article 81 and this article”. No reference is made to article 82 (1) (d). In addition, article 83 (3) concerns appeals against *sentence*; and article 83 (5) provides for the Appeals Chamber to be able to deliver its judgment in the absence of “the person *acquitted or convicted*” (emphasis added). Once again, those provisions deal with matters that have occurred following the conclusion of the trial. They do not apply to decisions taken during the course of the proceedings, with which article 82 (1) (d) is concerned.

17. Furthermore, the Appeals Chamber refers to the provisions of rule 158 (1) of the Rules of Procedure and Evidence, which provides as follows:

“An Appeals Chamber which considers an appeal referred to in this section may confirm, reverse or amend the decision appealed.”

18. This provision applies to appeals under article 82 (1) (d) of the Statute by virtue of the fact that such appeals are referred to in rule 155, which appears within the section to which rule 158 refers, namely Section III of Chapter 8 of the Rules of Procedure and Evidence entitled “Appeals against other decisions”. The adoption of rule 158 would not have been necessary if article 83 (2) had been intended to apply to appeals brought under article 82 (1) (d) of the Statute.

19. Furthermore, the Appeals Chamber does not find any other basis upon which not to consider the merits of the appeal. The Pre-Trial Chamber granted the Prosecutor leave to bring this appeal under article 82 (1) (d) of the Statute (see paragraph 8, above). Furthermore, the Prosecutor has, as stipulated in regulation 64 (2) read with regulation 65 (4) of the Regulations of the Court, filed a document in support of the appeal setting out the grounds of the appeal and containing the legal and/or factual reasons in support of each ground. Grounds of appeal for appeals brought under article 82 (1) (d) of the Statute can include those grounds that are listed at article 81 (1) (a) of the Statute, which include errors of law. The Prosecutor’s document in support of the appeal sets out three grounds of appeal and argues that the Pre-Trial Chamber made errors of law in respect of each (see *inter alia* document in support of the appeal, paragraphs 2, 5 et seq., 14 et seq., 26 et seq.). Whether the arguments of the Prosecutor are persuasive is a question of the merits of the appeal, not of its admissibility. The Prosecutor also complied with the time and page limits laid down for the document in support of the appeal, as set out in the Regulations of the Court and extended by the Appeals Chamber, following an application by the Prosecutor (see paragraph 9 above).

## **B. *Res judicata* in respect of the first and second grounds of appeal**

20. In respect of the first two grounds of appeal raised by the Prosecutor, Counsel for Mr. Lubanga Dyilo submits that the issues raised under these grounds already were decided upon in the Pre-Trial Chamber decision on the final system of disclosure of 15 May 2006. Counsel for Mr. Lubanga Dyilo notes that the Prosecutor did not apply for leave to appeal that decision. For that reason, Counsel for Mr. Lubanga Dyilo argues, the issues raised under the first two grounds of appeal have become final and the Appeals Chamber thus may not reverse them because this would be in conflict with the principle of *res judicata* (“*chose jugée*”) and



could lead to contradictory decisions (see response to the document in support of the appeal, paragraphs 7, 13 and 14). In respect of the issue raised by the Prosecutor under his first ground of appeal, Counsel for Mr. Lubanga Dyilo refers in particular to paragraph 101 of annex I of the decision on the final system of disclosure; in respect of the issue raised under the second ground of appeal, Counsel for Mr. Lubanga Dyilo refers in particular to paragraphs 130 and 131 of annex I of the decision on the final system of disclosure.

21. For the reasons given below, the Appeals Chamber rejects the argument by Counsel for Mr. Lubanga Dyilo that the Appeals Chamber may not reverse the issues raised under the first two grounds of appeal because they have final effect. The Prosecutor is not precluded from raising the issues in the present appeal.

22. This follows from the following consideration: the decision of Pre-Trial Chamber I of 15 May 2006 addressed the final system of disclosure for the purposes of the confirmation hearing; it did *not* address the question of how the Pre-Trial Chamber would dispose of applications to restrict disclosure under rule 81 (2) and (4) of the Rules of Procedure and Evidence. This latter question was addressed in the impugned decision. In particular, the Pre-Trial Chamber made the following decisions in the impugned decision that provide the basis for the first and second grounds of appeal:

“[T]hat, for the purpose of the confirmation hearing, any restriction on disclosure to the Defence of the names and/or portions of the statements of the witnesses on whom the Prosecution intends to rely at the confirmation hearing must be authorised by the Chamber pursuant to rule 81 (4) of the Rules upon evaluating the exceptionality of the request and the infeasibility or insufficiency of less restrictive protective measures” (see impugned decision, page 22);

“[T]hat any Prosecution request pursuant to article 68 of the Statute and rule 81 (4) of the Rules for non-disclosure of the identity of Prosecution witnesses at the confirmation hearing to ensure their safety or that of their families shall be granted only if: (i) the Prosecution has first sought protective measures from the Victims and Witnesses Unit concerning the relevant witness; and (ii) the Prosecution shows that, due to exceptional circumstances surrounding the relevant witness, non-disclosure of identity remains necessary due to infeasibility of protective measures sought or insufficiency of protective measures adopted within the framework of the protection program of the Victims and Witnesses Unit as a result of the Prosecution request” (see impugned decision, pages 22-23); and

“[T]hat any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules” (see impugned decision, page 23).

23. None of the above decisions appear in the decision on the final system of disclosure. It therefore would not have been possible for the Prosecutor to have brought any appeal in relation to them prior to their determination in the impugned decision. That parts of the reasoning employed in the decision of 15 May 2006 were similar to or overlapped with the reasoning in the impugned decision in the present case does not preclude the Prosecutor from bringing this appeal because the two decisions disposed of different matters.

#### IV. MERITS OF THE APPEAL

##### **A. First ground of appeal: criteria for granting applications for non-disclosure of witness identity**

24. As his first ground of appeal, the Prosecutor argues that the Pre-Trial Chamber made an error of law in its determination of the criteria for granting applications for non-disclosure prior to the confirmation hearing of the identity of those witnesses on whom the Prosecutor intends to rely at that hearing.

##### *1. Decision of the Pre-Trial Chamber*

25. The first ground of appeal relates to two decisions by the Pre-Trial Chamber on pages 22 and 23 of the impugned decision. In the first decision on page 22 of the impugned decision the Pre-Trial Chamber held “that, for the purpose of the confirmation hearing, any restriction on disclosure to the Defence of the names and/or portions of the statements of the witnesses on whom the Prosecution intends to rely at the confirmation hearing must be authorised by the Chamber pursuant to rule 81 (4) of the Rules upon evaluating the exceptionality of the request and the infeasibility or insufficiency of less restrictive protective measures”. Thus, the Pre-Trial Chamber indicated how it would apply the law relating to applications for non-disclosure pursuant to rule 81 (4) of the Rules of Procedure and Evidence. In the second decision by the Pre-Trial Chamber on pages 22 and 23 of the impugned decision, the Pre-Trial Chamber decided “that any Prosecution request pursuant to article 68 of the Statute and rule 81 (4) of the Rules for non-disclosure of the identity of Prosecution witnesses at the confirmation hearing to ensure their safety or that of their families shall be granted only if : (i) the Prosecution has first sought protective measures from the Victims and Witnesses Unit concerning the relevant witness; and (ii) the Prosecution shows that, due to exceptional circumstances surrounding the relevant witness, non-disclosure of identity remains necessary due to infeasibility of protective measures sought or insufficiency of protective measures adopted within the framework of the protection program of the Victims and Witnesses Unit as

a result of the Prosecution request.” Thus, the second decision relates to a procedural step to be followed by the Prosecutor prior to submitting a request for non-disclosure.

26. To support these decisions, the Pre-Trial Chamber pointed out that pursuant to rule 76 of the Rules of Procedure and Evidence the Prosecutor must disclose to the Defence the names of the witnesses on whom he intends to rely at the confirmation hearing (see impugned decision, paragraph 28). The Pre-Trial Chamber noted that non-disclosure of the identity of a witness could be a protective measure pursuant to article 68 of the Statute and rule 81 (4) of the Rules of Procedure and Evidence (see impugned decision, paragraph 29), but considered that non-disclosure of the identity of witnesses could have an impact on the ability of the Defence to fully challenge the Prosecutor’s evidence at the confirmation hearing and on the rights of the Defence pursuant to article 61 (3) and (6) (b) and article 67 (1) (b) of the Statute (see impugned decision, paragraph 30). The Pre-Trial Chamber reasoned that in view of the potential impact of non-disclosure on the rights of the Defence, the non-disclosure of witness identity could only be granted “exceptionally when due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered infeasible or insufficient” (see impugned decision, paragraph 31). The Pre-Trial Chamber also referred to the jurisprudence of the European Court of Human Rights, “according to which, although restrictions on disclosure of relevant evidence might be permissible in certain cases as a result of weighting the rights of the accused against competing interests: (i) ‘Only such measures restricting rights of the defence which are strictly necessary are permissible under Article 6 § 1 [of the European Convention of Human Rights]’; and (ii) ‘In order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by procedures followed by the judicial authorities’” (see impugned decision, paragraph 32, footnotes omitted).

## 2. *Arguments by the Prosecutor*

27. The Prosecutor submits that the Pre-Trial Chamber’s decision on the criteria for non-disclosure of the identity of witnesses prior to the confirmation hearing is flawed in two respects. Firstly, the Prosecutor argues that the decision was wrong in stating that non-disclosure of the identity of witnesses could only be an exception and that the decision “establishes an overly rigid system, tilting from the outset the balance in favour of one of the competing interests by creating a *general rule of disclosure* of the identity of the witnesses on

which the Prosecution intends to rely at the confirmation hearing” (see document in support of the appeal, paragraph 6, emphasis in original). The Prosecutor submits that “a Chamber or Judge should rather approach the required balancing exercise placing all competing interests and values on equal footing, in light of the more limited procedural significance of the hearing” (see document in support of the appeal, paragraph 7) and that the decision on applications for non-disclosure “requires a careful weighing of all competing interests, placed on an equal level, and of all relevant circumstances, on a case-by-case basis” (see document in support of the appeal, paragraph 12). The Prosecutor argues further that the Pre-Trial Chamber failed to take into account that the confirmation hearing is not a trial, that the rights of the Defence must be viewed in light of the particular nature of the confirmation hearing and the relevant standard of proof (see document in support of the appeal, paragraphs 8 to 10), and that the Pre-Trial Chamber failed to properly interpret the jurisprudence of the European Court of Human Rights (document in support of the appeal, paragraph 11).

28. Secondly, the Prosecutor submits that

“the question of the availability and adequacy of protective measures other than non-disclosure/redaction of identifying features should not be construed as a mandatory pre-requisite that must be exhausted prior to any Rule 81(4) application, as the decision does; rather, the availability of such measures may properly form part of the overall analysis to be undertaken by the Judge or Chamber in each case, including considerations as to the most efficient manner to prevent dangers to the life or well-being of victims and witnesses and/or their families.” (See document in support of the appeal, paragraph 12, footnote omitted.)

29. In addition to the specific arguments in relation to the first ground of appeal, the Prosecutor raises a general argument against the impugned decision, claiming that the regime established in the impugned decision:

“can have serious detrimental consequences for the Court's operations, including its ability to provide protection in an effective and resource-efficient manner. For instance, by importing the standards and requirements governing trial-related disclosure to the confirmation hearing stage, the Decision effectively forces the Prosecution and the VWU to concentrate all their efforts pertaining to witness protection prior to that hearing, thereby significantly stretching their limited resources. The impugned ruling does not allow for an alternative and more efficient system, phasing witness protection by incremental steps up to the trial stage.” (See document in support of the appeal, paragraph 3.)

### 3. *Arguments by Mr. Thomas Lubanga Dyilo*

30. Counsel for Mr. Lubanga Dyilo opposes the Prosecutor's arguments in three respects. In relation to the Prosecutor's argument that it is wrong to state that disclosure of the identity of

witnesses is the rule and non-disclosure the exception, Counsel for Mr. Lubanga Dyilo submits in paragraph 9 of the response to the document in support of the appeal that the Prosecutor's argument is mistaken because the principle that disclosure is the rule and that non-disclosure the exception is recognised by rule 76 (1) of the Rules of Procedure and Evidence. Counsel for Mr. Lubanga Dyilo points out that the Prosecutor has never challenged the applicability of rule 76 (1) of the Rules of Procedure and Evidence to proceedings prior to the confirmation hearing. Counsel for Mr. Lubanga Dyilo submits further that it is impossible for the person in respect of whom a confirmation hearing is held to defend himself against redacted evidence and that that person cannot challenge the credibility of a witness without knowing the identity of the witness; for that reason, non-disclosure would only be acceptable in respect of the public, but not in respect of the defence.

31. In respect of the Prosecutor's argument that the Pre-Trial Chamber failed to take into account that the confirmation hearing is of a different character than the trial and that thus the disclosure rules should be adjusted, Counsel for Mr. Lubanga Dyilo notes in paragraph 10 of the response to the document in support of the appeal that this argument is entirely new and had not been part of the Prosecutor's observations on disclosure of 6 April 2006. Counsel for Mr. Lubanga Dyilo also notes that the Prosecutor has never contested that pursuant to rule 121 of the Rules of Procedure and Evidence, the person in respect of whom a confirmation hearing is held enjoys all rights under article 67 of the Statute already in the preliminary stages of the proceedings. Counsel for Mr. Lubanga Dyilo submits that the Prosecutor's argument about the character of the confirmation hearing would make the confirmation hearing merely a formality, which would be in contradiction to the rights of the defence stipulated in article 61 (3), (5) and (6) and article 67 of the Statute and to the presumption of innocence under article 66 of the Statute (see response to the document in support of the appeal, paragraph 11).

32. In relation to the Prosecutor's argument that the principles established in the impugned decision would make a case-by-case decision about non-disclosure impossible, Counsel for Mr. Lubanga Dyilo argues in paragraph 12 of the response to the document in support of the appeal that the Prosecutor has not made clear why the principles could not be applied on a case-by-case basis and that the Prosecutor failed to substantiate his contention.

#### *4. Determination by the Appeals Chamber*

33. In respect of the first ground of appeal, the Appeals Chamber determines that for the reasons given below, the Pre-Trial Chamber's decision was wrong in law to the extent that it

made a prior application by the Prosecutor to the Victims and Witnesses Unit for witness protection measures a prerequisite for an application for non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence.

34. It is not incorrect, as the Prosecutor claims, to state that non-disclosure of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing is an exception. Pursuant to rule 76 (1), first sentence, of the Rules of Procedure and Evidence, “[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses.” Rule 76 is part of Chapter 4 of the Rules of Procedure and Evidence, entitled “Provisions relating to various stages of the proceedings,” which indicates that rule 76 is applicable to the confirmation hearing as well. This interpretation is consistent with article 61 (3) (b) of the Statute, which provides that the person in respect of whom a confirmation hearing is held “[b]e informed of the evidence on which the Prosecutor intends to rely at the hearing.”

35. That exceptions to the principle that the names of witnesses and prior witness statements are to be disclosed may occur follows from rule 76 (4) of the Rules of Procedure and Evidence, which states that “[t]his rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.” Thus, reference is made to witness protection pursuant to rule 81 (4) of the Rules of Procedure and Evidence.

36. Considering the non-disclosure of the names of witnesses and portions of witness statements to be an exception to the general rule of disclosure does not, as the Prosecutor claims, establish an overly rigid system in favour of one of the competing interests. In evaluating an application for non-disclosure of the identity of witnesses or of portions of witness statements, a Pre-Trial Chamber will take into account all relevant factors, and will carefully appraise the Prosecutor’s request on a case-by-case basis. The decision by the Pre-Trial Chamber that disclosure of witness identity and of prior statements is the rule and non-disclosure the exception does not exclude such appraisal on a case-by-case basis. The reference in the decision by the Pre-Trial Chamber to the exceptionality of non-disclosure of the names of witnesses or of portions of prior witness statements should not be understood as implying that necessarily, only a very small number of witness identities will not be disclosed to the person in respect of whom a confirmation hearing is held; whether a request for non-disclosure will be successful will depend on the Pre-Trial Chamber’s case-by-case evaluation.

37. On the basis of this reading of the Pre-Trial Chamber's decision, the Pre-Trial Chamber was also correct in deciding that the non-disclosure of the identity of witnesses or of portions of prior witness statements would be authorised by the Chamber pursuant to rule 81 (4) of the Rules of Procedure and Evidence only after an evaluation of the infeasibility or insufficiency of less restrictive protective measures. Such evaluation has to be made on a case-by-case basis. The Statute and the Rules of Procedure and Evidence place much importance on disclosure to the defence, as is evidenced not only by article 61 (3) (b) of the Statute and rule 76 (1) of the Rules of Procedure and Evidence, but also, for example, by rule 81 (2), third sentence, and rule 81 (5) of the Rules of Procedure and Evidence. Rule 81 (4) of the Rules of Procedure and Evidence itself points in that direction by requiring the Chambers to take the "necessary steps to ensure the confidentiality of information". The 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.

38. The Appeals Chamber is not convinced by the Prosecutor's argument that the Pre-Trial Chamber's decision, as explained in the preceding paragraphs, could have detrimental consequences for the Court's operation because it would force the Court to concentrate its witness protection efforts prior to the confirmation hearing stage. The Pre-Trial Chamber's decision on the exceptionality of non-disclosure must be read as an elaboration, in the manner explained above, of rule 81 of the Rules of Procedure and Evidence and does not lead to greater or lesser witness protection than what the Rules of Procedure and Evidence provide for in any event.

39. It should be noted in this context that the Pre-Trial Chamber's decision that disclosure is the rule and non-disclosure is the exception cannot but be upheld because it can and should be read as allowing for a case-by-case evaluation of the merits of all future applications, as has been set out above. If the decision were read as not allowing for such a case-by-case evaluation, the Pre-Trial Chamber would have acted outside of its competence and jurisdiction. Pursuant to article 61 (3) *in finem* of the Statute, a Pre-Trial Chamber "may issue orders regarding the disclosure of information for the purposes of the [confirmation] hearing." Furthermore, it is the duty of the Pre-Trial Chamber pursuant to rule 121 (2) (b) of the Rules of Procedure and Evidence to hold status conferences "to ensure that disclosure takes place under satisfactory conditions." These provisions give the Pre-Trial Chamber important functions with respect to the regulation of the disclosure process prior to the confirmation hearing, which might involve, within the confines of the applicable law, the issuing of

procedural directions to facilitate the disclosure process. These provisions, however, do not vest a Pre-Trial Chamber with the competence to pre-determine the merits of future applications for authorisation of non-disclosure pursuant to rule 81 (4) of the Rules of Procedure and Evidence. It is fundamental to the exercise of judicial power that applications are adjudicated on a case-by-case basis.

40. To the extent that the Pre-Trial Chamber ruled in its impugned decision that the Prosecutor must seek protective measures from the Victims and Witnesses Unit concerning the relevant witness before requesting non-disclosure of the witness's identity from the Pre-Trial Chamber, the Pre-Trial Chamber erred in law. There is no basis for such a requirement in the Statute, the Rules of Procedure and Evidence, or the Regulations of the Court. Although it may be useful for the Prosecutor in many situations to seek protective measures from the Victims and Witnesses Unit before making a request for non-disclosure to the Pre-Trial Chamber, it would be overly formalistic to require such a prior request to the Victims and Witnesses Unit. In situations where it is clear to the Prosecutor that there is no alternative but to seek non-disclosure of the witness identity, a prior application to the Victims and Witnesses Unit would serve no purpose and potentially could delay the proceedings.

## **B. Second ground of appeal: the temporal scope of the Prosecutor's investigation and of measures pursuant to rule 81 (2) of the Rules of Procedure and Evidence**

41. As his second ground of appeal, the Prosecutor argues that the Pre-Trial Chamber erred in law in finding that the Prosecutor could conduct investigations after the confirmation hearing only in exceptional circumstances and that consequently, measures under rule 81 (2) of the Rules of Procedure and Evidence could not be maintained beyond the fifteen-day time limit provided for in rule 121 (4) and (5) of the Rules of Procedure and Evidence.

### *1. Decision of the Pre-Trial Chamber*

42. The second ground of appeal arises from a decision by the Pre-Trial Chamber on page 23 of the impugned decision that "any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules".



43. This decision was made in the context of the Pre-Trial Chamber's decision on the final system of disclosure, where the Pre-Trial Chamber determined that the Prosecutor should provide Mr. Lubanga Dyilo with the name of a given witness and a copy of his or her previous statements as soon as the Prosecutor had decided to rely on that witness at the confirmation hearing, "unless the single judge authorises otherwise under rule 81" (see decision on the final system of disclosure, page 6).

44. The decision in the impugned decision that is the object of the second ground of appeal thus limits the temporal scope of redactions in witness statements in respect of witnesses on whom the Prosecutor intends to rely at the confirmation hearing: redactions in witness statements that had been authorised pursuant to rule 81 (2) of the Rules of Procedure and Evidence in order not to prejudice the ongoing investigations in respect of Mr. Lubanga Dyilo could not be maintained beyond fifteen days before the confirmation hearing.

45. The Pre-Trial Chamber's decision is based on the finding that the "investigation in the current case must be brought to an end by the time the confirmation hearing starts, barring exceptional circumstances that might justify later isolated acts of investigation" (see impugned decision, paragraph 39, footnote omitted). In paragraph 39 of the impugned decision, the Pre-Trial Chamber referred to the reasoning in the Pre-Trial Chamber's previous decision on the final system of disclosure where the Pre-Trial Chamber had stated in paragraph 130 of annex I to that decision that pursuant to article 61 (4) of the Statute, "the Prosecutor may continue the investigation and may amend or withdraw any charges" prior to the confirmation hearing, but that no provision of the Statute or of the Rules of Procedure and Evidence expressly conferred upon the Prosecutor a right to continue with the investigation after the confirmation hearing. This interpretation is further elaborated in footnote 60 to paragraph 38 of the decision granting leave to appeal, where the Pre-Trial Chamber explained that the finding that, barring exceptional circumstances, the investigation must be completed by the time the confirmation hearing starts

"follows from the literal interpretation of paragraphs (4) and (9) of article 61 of the Statute because while the former explicitly states that the investigation may be continued before the confirmation hearing, the latter does not give the Prosecution such a power once the charges have been confirmed. Furthermore, this finding is supported by a contextual interpretation of article 61 of the Statute in light of (i) the lack of any other statutory provision which explicitly extends [sic] the investigation of a given case beyond the confirmation hearing, and (ii) the structure of the Statute, which first regulates the investigation and the prosecution in Part 5 (including the investigative powers of the Prosecution provided for in article 54 of the Statute) and then in Part 6 regulates the proceedings after the charges have been confirmed[.] This finding is also supported by the object and

purpose of article 61 of the Statute, which seeks to prevent the Prosecution from routinely substantially mutating the evidentiary nature of the case against the defendant between the confirmation of the charges and initiation of the trial[.] Such a mutation would be at odds with the procedural rights of the defendant to fully prepare for and participate in the confirmation hearing granted by article 61 of the Statute.”

## 2. *Arguments by the Prosecutor*

46. The Prosecutor argues that the Pre-Trial Chamber’s decision that redactions in witness statements pursuant to rule 81 (2) of the Rules of Procedure and Evidence were temporary and could not be maintained beyond the time limits stipulated in rule 121 (4) and (5) of the Rules of Procedure and Evidence was erroneous because it wrongly assumed that, barring exceptional circumstances, the Prosecutor had to conclude his investigation in the current case by the time the confirmation hearing started (see document in support of the appeal, paragraph 23). The Prosecutor acknowledges that a state of trial-readiness by the time of the confirmation hearing will generally be expected and accordingly does not disagree with the underlying policy considerations behind the impugned decision. However, he submits that such an expectation should not be elevated into a legally binding obligation (see document in support of the appeal, paragraph 14).

47. The Prosecutor argues that the Pre-Trial Chamber overlooked that, pursuant to article 61 (9) of the Statute, charges may be amended after the confirmation hearing, which “necessarily entails the possibility of investigations continuing after the confirmation hearing” and that the Pre-Trial Chamber’s decision that investigations after the confirmation hearing could only be carried out in exceptional circumstances meant that also the charges could only be amended under exceptional circumstances (see document in support of the appeal, paragraph 17). This result, the Prosecutor argues, would be contrary to the language of article 61 (9) of the Statute, which does not provide that charges could only be amended under exceptional circumstances (see document in support of the appeal, paragraph 17). In respect of the Pre-Trial Chamber’s reasoning that post-confirmation hearing investigations could be to the detriment of the accused, the Prosecutor argues that further investigations could also be to the advantage of the accused, because the Prosecutor is under an obligation to investigate both incriminating and exonerating circumstances (see document in support of the appeal, paragraph 20). Furthermore, the Prosecutor argues that the interests of the accused are properly protected because the accused could oppose the amendment of the charges and in any event has a right to disclosure in a timely manner (see document in support of the appeal, paragraphs 21 and 22). The Prosecutor also refers to the particular nature of the Court and the

features of the situations the Court is called to deal with, “where additional investigative steps post-confirmation hearing may have to take place with some frequency”. The Prosecutor submits that the ongoing nature of the conflicts in the situations that the Court is currently investigating could result in more compelling evidence becoming available only after the confirmation hearing, making particular reference to the effect that security or logistical problems could have on the ability of the Prosecutor to complete certain investigations that were initiated prior to the confirmation hearing by the time of the hearing. Furthermore, he argues that it may become possible to gain access to additional evidence once an area under investigation becomes more secure (see document in support of the appeal, paragraph 18). The Prosecutor also refers to the practice of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda reflecting the Prosecutor’s powers to conduct investigations after confirmation of charges (see document in support of the appeal, paragraph 24).

### 3. *Arguments by Mr. Thomas Lubanga Dyilo*

48. Counsel for Mr. Lubanga Dyilo opposes the arguments of the Prosecutor in relation to the second ground of appeal. In paragraph 15 of the response to the document in support of the appeal, Counsel for Mr. Lubanga Dyilo notes that the finding by the Pre-Trial Chamber that, barring exceptional circumstances, the investigation in respect of Mr. Lubanga Dyilo should be concluded by the start of the confirmation hearing was based on an *a contrario* argument derived from a literal interpretation of article 61 (4) of the Statute and that the Pre-Trial Chamber did not employ a teleological method of interpretation. Counsel for Mr. Lubanga Dyilo argues that it is an obligation of the Prosecutor pursuant to article 54 of the Statute to investigate the truth prior to moving before the Pre-Trial Chamber and refers to article 53 (2) of the Statute and the criteria stipulated therein for the Prosecutor’s decision not to prosecute; Counsel for Mr. Lubanga Dyilo argues that since the deprivation of liberty is a serious matter, the Prosecutor, before seeking the deprivation of liberty of a suspect, is under an obligation to first verify that he has enough evidence against that person and to evaluate both incriminating and exonerating evidence (see response to the document in support of the appeal, paragraph 17). Furthermore, in paragraph 18 of the response to the document in support of the appeal, Counsel for Mr. Lubanga Dyilo argues that the Prosecutor has failed to demonstrate in concrete and precise terms what the problems in the course of investigation in respect of Mr. Lubanga Dyilo had been that would make necessary the continuation of the investigation post-confirmation hearing. Counsel for Mr. Lubanga Dyilo submits by way of a subsidiary argument that if the investigations could not be carried out in a timely manner due

to the ongoing conflict in the region, the Prosecutor would have to consider closing the prosecution pursuant to article 53 (2) (c) of the Statute, because the proceedings might otherwise turn out to be of excessive length, in breach of the rights of the accused (see response to the document in support of the appeal, paragraph 19).

#### 4. *Determination by the Appeals Chamber*

49. In relation to the second ground of appeal, the Appeals Chamber determines that, for the reasons given below, the Pre-Trial Chamber erred in finding that the Prosecutor's investigation in respect of Mr. Lubanga Dyilo must be brought to an end before the confirmation hearing, barring exceptional circumstances that might justify later isolated acts of investigation.

50. The Pre-Trial Chamber's finding that the "investigation in the current case must be brought to an end by the time the confirmation hearing starts" (impugned decision, paragraph 39) is ambiguous. It is unclear whether the phrase "investigation in the current case" refers to the investigation of Mr. Thomas Lubanga Dyilo with respect to the specific charges which the Prosecutor intends to bring in the upcoming confirmation hearing, or whether it extends to the investigation of Mr. Thomas Lubanga Dyilo's potential criminal responsibility for other conduct not encompassed by the charges. As will be explained below, both readings are incompatible with the Statute.

51. The latter reading, which would prevent investigations of crimes not encompassed by the charges, would not be in line with the Statute for the following reason: a confirmation hearing pursuant to article 61 of the Statute is limited to the specific charges as provided in the document containing the charges. The document containing the charges is an assertion by the Prosecutor that he intends to bring a person to trial for the specific crimes set out in the document; it is *not* an assertion that he will not seek to put the suspect on trial for *other* crimes in the future. Furthermore, limiting the right of the Prosecutor to investigate other alleged crimes of the suspect would conflict with article 61 (9) of the Statute. This article provides *inter alia* for a possibility to add further charges until the trial has begun. Thus, it must be possible for the Prosecutor to continue his investigation in respect of crimes that are not covered by the document containing the charges.

52. Even if the Pre-Trial Chamber's finding is read as applying only to the investigation with respect to the specific and concrete crime with which the Prosecutor intends to charge the suspect, the finding is incorrect. Pursuant to article 54 (1) (a) of the Statute, the Prosecutor

shall, “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” The duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth. This is confirmed by article 61 (9) of the Statute, which stipulates *inter alia* that the charges may be amended before the trial has begun. As the Prosecutor rightly pointed out, this indicates that the investigation does not have to stop before the confirmation hearing.

53. The Appeals Chamber is not persuaded by the Pre-Trial Chamber’s interpretation of article 61 (4) of the Statute. The Pre-Trial Chamber is correct in stating that while article 61 (4) of the Statute mentions investigations before the confirmation hearing, nowhere in the Statute are post-confirmation hearing investigations mentioned. To give this omission as much importance as the Pre-Trial Chamber does, is, however, not warranted. Article 61 of the Statute describes the sequence of events in relation to the confirmation of the charges. Pursuant to article 61 (3) (a) of the Statute, the Prosecutor must provide the suspect with a copy of the document containing the charges “[w]ithin a reasonable time before the hearing.” Article 61 (4) of the Statute clarifies that the provision of the document containing the charges alone does not limit the Prosecutor’s flexibility with respect to the charges brought. Before the confirmation hearing, the Prosecutor may continue his investigation, amend or withdraw charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges: pursuant to article 61 (9) of the Statute the Prosecutor may amend the charges after their confirmation *only* with the permission of the Pre-Trial Chamber; in order to add additional charges or substitute charges with more serious charges, a new confirmation hearing must be held; withdrawal of charges after the commencement of the trial is only possible with the permission of the Trial Chamber. The fact that article 61 (9) of the Statute does not make reference to the investigation indicates that the Prosecutor’s flexibility with respect to the investigation that is acknowledged by article 61 (4) of the Statute remains unaffected by the confirmation of the charges; the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation. Furthermore, as the Prosecutor has rightly pointed out in paragraph 17 of the document in support of the appeal, the possibility to amend the charges after their confirmation, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the

confirmation of the charges. If it were otherwise the sole purpose of article 61 (9) of the Statute with respect to the amendment or withdrawal of confirmed charges would be to allow the Prosecutor to correct errors in the evaluation of evidence.

54. The Appeals Chamber notes that, ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing – a matter that the Prosecutor acknowledges (see document in support of the appeal, paragraph 14, referred to at paragraph 45 above). However, for the reasons stated above, this is not a requirement of the Statute. The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing (see document in support of the appeal, paragraphs 18 and 20, referred to at paragraph 46 above).

55. The Appeals Chamber also is not persuaded by the Pre-Trial Chamber's opinion expressed in paragraph 38 of the decision granting leave to appeal, which states *inter alia* that the Prosecutor must be prevented from "routinely undertaking additional investigative steps to fill the gaps in the case against Thomas Lubanga Dyilo after the charges have been confirmed so that by the time the trial starts, the evidentiary nature of the case against which Thomas Lubanga Dyilo must prepare has substantially mutated to his detriment". As the Prosecutor rightly has pointed out in paragraphs 21 and 22 of the document in support of the appeal, the Statute and Rules of Procedure and Evidence provide for mechanisms that ensure that the suspect can properly prepare for the trial even if the investigation of the crimes with which he is charged continues beyond the confirmation hearing. Notably, the obligation of the Prosecutor to disclose material and information does not end once the charges are confirmed. If the Prosecutor in the course of investigations post-confirmation hearing discovers further evidence on which he intends to rely at the trial or which is exonerating, the evidence must be disclosed to the suspect, as provided by the relevant provisions of the Statute and the Rules of Procedure and Evidence. Pursuant to article 64 (3) (c) of the Statute, the Trial Chamber shall "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial." Thus, the rights of the defence to have adequate time and facilities for the preparation of the trial can be safeguarded even if the investigation continues beyond the confirmation of the charges.

56. The Appeals Chamber sees no merit in the argument advanced by Counsel for Mr. Lubanga Dyilo that, based on article 53 (2) of the Statute, the Prosecutor is under an obligation to conclude the investigation prior to moving before the Pre-Trial Chamber even to seek a warrant of arrest. Article 53 (2) of the Statute addresses a situation where the Prosecutor has concluded that there is no sufficient basis for a prosecution and therefore decides *not* to pursue the prosecution of the case any further. Steps leading *towards* prosecution, on the other hand, may be taken in the course of an ongoing investigation: pursuant to article 58 (1) of the Statute, a warrant of arrest may be issued “[a]t any time after the initiation of an investigation” as long as the Pre-Trial Chamber, on the basis of the Prosecutor’s application, is satisfied *inter alia* that there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”. The Pre-Trial Chamber may find “reasonable grounds to believe” even prior to the conclusion of investigations on the basis of the sufficiency of the evidence or other information submitted by the Prosecutor. Similarly, the threshold for the confirmation of charges (“substantial grounds”, article 61 (7) of the Statute) is lower than for conviction (“beyond reasonable doubt”, article 66 (3) of the Statute) and may be satisfied before the end of the investigation. If further investigations lead the Prosecutor to reassess his theory about the suspect’s liability for the crimes charged, he may seek, within the limits of article 61 (9) of the Statute, an amendment or withdrawal of the charges, as necessary.

57. On the basis of its incorrect opinion as to the temporal scope of the Prosecutor’s right to investigate, the Pre-Trial Chamber decided that redactions in order not to prejudice the ongoing investigation could not be maintained beyond fifteen days before the commencement of the confirmation hearing. The Appeals Chamber in the present case will not consider whether this decision as to the temporal scope of redactions could be upheld for other reasons. As has been explained in paragraph 39 above, a Pre-Trial Chamber does not have the competence to pre-determine the merits of future applications made under rule 81 (2) of the Rules of Procedure and Evidence. In the absence of any specific application, the Appeals Chamber therefore will not consider the matter any further.

**C. Third ground of appeal: the regime encompassed by the term “*ex parte*” in the context of rule 81 (2) and (4) applications**

58. As his third ground of appeal, the Prosecutor argues that the Pre-Trial Chamber made an error of law in determining that Mr. Lubanga Dyilo must be informed, without exception, of

the existence and legal basis of any application by the Prosecutor pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence that is made *ex parte*.

### 1. *Decision of the Pre-Trial Chamber*

59. The third ground of appeal arises from a decision of the Pre-Trial Chamber on page 19 of the impugned decision that “all future Prosecution applications under rule 81 (2) shall be filed *inter partes* so as to notify the Defence of the existence of the application and its legal basis;” and from a decision on page 20 of the impugned decision that “all future applications by the Prosecution or the Defence to restrict disclosure under rule 81 (4) of the Rules shall be filed *inter partes* so as to notify the other party of the existence of the application, its legal basis, and of any request for *ex parte* proceedings that might be contained in such an application”. To the extent necessary, any details of such applications should be filed *ex parte* in an annex to the applications (see impugned decision, pages 19 and 20). The impugned decision provides for a set of procedural rights of the participant that are consequential to these decisions (see the decisions by the Pre-Trial Chamber under (ii) to (viii) on pages 20 to 22 of the impugned decision in respect of applications pursuant to rule 81 (2) of the Rules of Procedure and Evidence and the decisions under (ii) to (viii) on pages 20 to 22 of the impugned decision in respect of applications pursuant to rule 81 (4) of the Rules of Procedure and Evidence).

60. The Pre-Trial Chamber derived the obligation to file *inter partes* any applications made under rule 81 (2) and (4) of the Rules of Procedure and Evidence and to file *ex parte* only those details of the application that require such treatment from the right of the person in respect of whom a confirmation hearing is held to be present at that hearing, as this right extends to all proceedings before the hearing (see impugned decision, paragraph 8). The Pre-Trial Chamber pointed out that a few provisions of the Statute and the Rules of Procedure and Evidence provide for *ex parte* proceedings but that *ex parte* proceedings were the exception and not the general rule (see impugned decision, paragraphs 9 to 12). The Pre-Trial Chamber opined further that:

“[...] insofar as *ex parte* proceedings in the absence of the Defence constitute a restriction on the rights of the Defence, *ex parte* proceedings under rule 81 (4) of the Rules shall only be permitted subject to the Prosecution showing in its application that:

- i. it serves a sufficiently important objective;
- ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and



iii. the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.”  
(See impugned decision, paragraph 13, footnote omitted.)

61. The Pre-Trial Chamber referred to regulation 24 (4) of the Regulations of the Registry, to the practice of national jurisdictions and the jurisprudence of the European Court of Human Rights (see impugned decision, paragraphs 14 and 15), and to the Pre-Trial Chamber’s oral decision of 26 April 2006, where the Pre-Trial Chamber had held that

“it is the Chamber’s view that it is the prevention of Defence’s access to the specific content of any proceeding under rules 81 and 82 of the Rules, as opposed to depriving the Defence from any knowledge of the fact that such proceedings exist, what can really contribute to the protection of victims and witnesses, the preservation of ongoing investigations and the protection of the confidentiality of the information” (quote taken from impugned decision, paragraph 16).

## 2. *Arguments by the Prosecutor*

62. The Prosecutor raises three broad arguments under his third ground of appeal. Firstly, he submits that there may be *ex parte* applications of which the other participant is not aware and that for that reason, the Pre-Trial Chamber’s decision misinterprets the meaning of *ex parte* and is erroneous in law. He cites examples of national as well as international jurisdictions where the other party to proceedings is not always aware of the existence of an *ex parte* application (see document in support of the appeal, paragraphs 27 to 29). Secondly, he questions the assumption by the Pre-Trial Chamber that non-disclosure to the defence of the fact that an application pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence has been made could never serve the protection of the confidentiality of information; he argues that there may be situations where the disclosure of the fact that an application was filed is “tantamount to revealing the identity of the provider” (see document in support of the appeal, paragraph 31). Thirdly, the Prosecutor submits that the assumption by the Pre-Trial Chamber that *ex parte* applications are always prejudicial to the defence is not necessarily correct and cites as an example redactions that are made to witness statements that are unrelated to the person in respect of whom a confirmation hearing is held (see document in support of the appeal, paragraph 33); in view of the interests of victims’ protection and the protection of ongoing investigations also in respect of other suspects, he argues that the decision by the Pre-Trial Chamber was not flexible enough (see document in support of the appeal, paragraph 34) and that the decision should not have been made an enforceable legal standard (see document in support of the appeal, paragraph 35).

### 3. *Arguments by Mr. Thomas Lubanga Dyilo*

63. Counsel for Mr. Lubanga Dyilo in paragraph 20 of the response to the document in support of the appeal points out that nowhere in rule 81 (2) of the Rules of Procedure and Evidence is it stated that the application of the Prosecutor should be submitted *ex parte*; rule 81 (2) only stipulated that the matter be heard *ex parte*. Counsel for Mr. Lubanga Dyilo refers to rights of the person in respect of whom a confirmation hearing is held and to the principle that any restriction of these rights must be proportional (see response to the document in support of the appeal, paragraphs 20 to 23); he points out that without notification to the defence that an application has been made *ex parte*, the proceedings would be completely secret, which would be inconsistent with fundamental rights (see response to the document in support of the appeal, paragraph 24).

64. Counsel for Mr. Lubanga Dyilo contests the argument by the Prosecutor that the defence may be able to identify the source of information if the defence is only aware that an application by the Prosecutor has been filed (see response to the document in support of the appeal, paragraph 23).

### 4. *Determination by the Appeals Chamber*

65. In relation to the third ground of appeal, the Appeals Chamber determines that, for the reasons explained below, the decision by the Pre-Trial Chamber that whenever an application pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence is filed *ex parte*, the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as of its legal basis and, with respect to an application under rule 81 (4), of any request for *ex parte* proceedings that might be contained in such an application is erroneous to the extent that it does not provide for any exception.

66. This decision by the Pre-Trial Chamber must be seen in light of the discretion of a Chamber to determine, within the framework of the applicable law, whether applications by participants are kept *ex parte* or are made *inter partes* and whether or not to hold proceedings on an *ex parte* basis. The decision of the Pre-Trial Chamber that is the object of the third ground of appeal is an anticipated and general exercise by the Pre-Trial Chamber of this discretion.

67. The decision of the Pre-Trial Chamber that is the object of the third ground of appeal does not provide for any flexibility. The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been

filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.

#### **D. Appropriate relief**

68. Pursuant to rule 158 (1) of the Rules of Procedure and Evidence, the Appeals Chamber on an appeal under article 82 (1) (d) of the Statute may “confirm, reverse or amend the decision appealed.”

69. The Prosecutor, in paragraph 36 of the document in support of the appeal, requests the Appeals Chamber to “allow the Prosecution’s grounds of appeal, reverse those ‘general principles’ from the Decision that have been impugned and substitute its own legal findings for the Single Judge’s in relation to the said principles, in accordance with the arguments advanced in [the document in support of the appeal].”

70. Counsel for Mr. Lubanga Dyilo, on page 12 of the response to the document in support of the appeal, requests the Appeals Chamber to reject the Prosecutor’s appeal.

71. The relief sought by the Prosecutor can only be granted in part.

72. In respect of the Prosecutor’s first ground of appeal, the Appeals Chamber has determined that the Pre-Trial Chamber’s decision on page 22 of the impugned decision that the non-disclosure of the identities of witnesses and of prior statements made by witnesses to the person in respect of whom a confirmation hearing is held for witness protection purposes pursuant to rule 81 (4) of the Rules of Procedure and Evidence would be granted upon evaluating the exceptionality of the request and the infeasibility or insufficiency of less restrictive protective measures was not erroneous. Consequently, it is appropriate to confirm the Pre-Trial Chamber’s decision in that respect.

73. To the extent that the Pre-Trial Chamber decided that the Prosecutor, before applying to the Pre-Trial Chamber for non-disclosure of the identity of a given witness, would have to seek protective measures from the Victims and Witnesses Unit concerning that witness (see impugned decision, pages 22 and 23), the Appeals Chamber has determined that the decision was erroneous. Consequently, the Pre-Trial Chamber’s decision is reversed to that extent.

74. In respect of the Prosecutor's second ground of appeal, the Appeals Chamber has determined that the Pre-Trial Chamber's finding relating to the temporal scope of the Prosecutor's right to investigate was incorrect. Consequentially, the decision by the Pre-Trial Chamber that "any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules", which was based solely on the Pre-Trial Chamber's erroneous finding, must be reversed.

75. In respect of the Prosecutor's third ground of appeal, the Appeals Chamber has determined that the Pre-Trial Chamber's decision that whenever an application for measures pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence is filed *ex parte*, the other participant in an *inter partes* filing must be made aware of the existence of the application as well as its legal basis and, with regard to an application under rule 81 (4), of any request for *ex parte* proceedings that might be contained in such an application is erroneous to the extent that the decision does not provide for any exception. The Appeals Chamber determines that it is appropriate to reverse the Pre-Trial Chamber's decision with respect to *ex parte* applications completely. This follows from the following consideration: the Pre-Trial Chamber's decision that is the object of the third ground of appeal is an anticipated exercise of the Pre-Trial Chamber's discretion. If the Appeals Chamber would amend the decision to allow for more flexibility, it would exercise discretion in the Pre-Trial Chamber's stead, which, in the present case, would not be appropriate, not least because the discretion was exercised in the abstract.

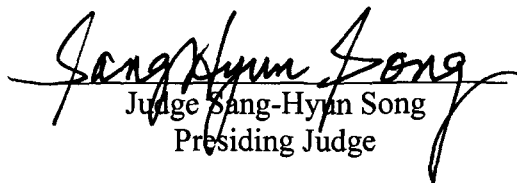
76. The Pre-Trial Chamber's decision is reversed also to the extent that it concerns applications by Mr. Lubanga Dyilo pursuant to rule 81 (4) of the Rules of Procedure and Evidence. As an error has been identified in the decision by the Pre-Trial Chamber, it is appropriate in the present case to correct that error also in respect of the other participant because the error is made in the same decision.

77. As the decision of the Pre-Trial Chamber that whenever an application for *ex parte* proceedings pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence is filed, the other participant must be made aware in an *inter partes* filing of the fact that such an application was made as well as its legal basis is reversed, the related decisions by the Pre-Trial Chamber under (ii) to (vi) on pages 19 and 20 of the impugned decision in respect of

applications pursuant to rule 81 (2) of the Rules of Procedure and Evidence and the related decisions under (ii) to (viii) on pages 20 to 22 of the impugned decision in respect of applications pursuant to rule 81 (4) of the Rules of Procedure and Evidence are reversed as well.

Judge Pikis appends a dissenting opinion to this judgment.

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

  
Judge Sang-Hyun Song  
Presiding Judge

Dated this 13<sup>th</sup> day of October 2006

At The Hague, The Netherlands

## Dissenting opinion of Judge Georgios M. Pikis

1. It is in the Statute that a Pre-Trial Chamber may designate (appoint) one of its members to exercise, subject to the limitations set out in article 57 (2) of the Statute, its jurisdiction in any given matter pending before the Court (see also article 39 (2) (b) (iii)). In exercise of this power, Pre-Trial Chamber I appointed Judge Steiner to deal with issues preliminary to the hearing for the confirmation of the charges against Mr. Lubanga Dyilo.<sup>1</sup>

2. Rule 121 (2) (b) of the Rules of Procedure specifically provides that a single judge charged with the aforesaid task may hold a status conference “to ensure that disclosure takes place under satisfactory conditions.” Addressing herself to these questions, the single judge invited<sup>2</sup> the parties to make their representations and soon after heard them viva voce at a hearing<sup>3</sup> convened on the basis of an “agenda”<sup>4</sup>, i.e. a list itemizing the subjects to be examined by the Chamber, to deal with issues pertaining to the disclosure of information and material. The parties submitted their views in writing<sup>5</sup> and subsequently orally at the hearing before the Pre-Trial Chamber, further supplemented by written submissions<sup>6</sup>. Items 9 and 10 of the agenda related to the elicitation of the intention of the Prosecutor to submit applications with regard to the non-disclosure of witness statements or parts thereof. In fact, on the day of the oral hearing, the Prosecutor had filed<sup>7</sup> such an application (ex parte) under the provisions of rule 81 (2) and (4) of the Rules of Procedure and Evidence seeking the sanction of the single judge for the non-disclosure or the disclosure in a redacted form of certain witness

<sup>1</sup> *Situation en République Démocratique du Congo Affaire le Procureur c/Thomas Lubanga Dyilo* « Décision désignant un juge unique dans l'affaire le Procureur c/Thomas Lubanga Dyilo » 22 mars 2006 (ICC-01/04-01/06-51).

<sup>2</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure” 23 March 2006 (ICC-01/04-01/06-54) and “Decision Requesting Further Observations From the Prosecution and the Duty Counsel for the Defence on the System of Disclosure” 27 March 2006 (ICC-01/04-01/06-58).

<sup>3</sup> See transcript of the hearing of 24 April 2006 (ICC-01-04-01-06-T-4-CONF-EN) resumed on 26 April 2006 (ICC-01-04-01-06-T-5-CONF-EN).

<sup>4</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Decision on the Agenda of the Hearing of 24 April 2006” 20 April 2006 (ICC-01/04-01/06-82).

<sup>5</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Prosecution’s Observations on Disclosure” 6 April 2006 (ICC-01/04-01/06-67) and « Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006 » 6 avril 2006 (ICC-01/04-01/06-68).

<sup>6</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Prosecution’s Final Observations on Disclosure” 2 May 2006 (ICC-01/04-01/06-91) and “Observations of the Defence relating to the system of disclosure in view of the Confirmation Hearing” 2 May 2006 (ICC-01/04-01/06-92).

<sup>7</sup> Dated 21 April 2006, registered on 24 April 2006.



statements in the interest of a) the efficacy of ongoing and further investigations and b) the protection of witnesses.<sup>8</sup> The aforesaid application was in due course amended.<sup>9</sup> Meantime, the Defence petitioned the Pre-Trial Chamber that they be given the opportunity to be heard in any application of the Prosecutor under rule 81 (2) and (4) after prior communication to them of the relief sought though not the relevant statements.<sup>10</sup>

3. At the hearing of 24 April 2006 extended to 26 April 2006, the single judge did not hear the issues specified under items 9 and 10 of the agenda.<sup>11</sup> They were set down for separate consideration with the participation of the Prosecutor only. These issues were the subject of a hearing held on 2 May 2006.<sup>12</sup> As can be gathered, the Prosecutor intimated to the single judge that further ex parte applications would be made in due course with a view to authorization of non-disclosure or screened disclosure of certain witness statements.

4. The single judge issued her decision on disclosure on 15 May 2006 giving directions as to the manner in which it should be made.<sup>13</sup> The Prosecution, she determined, should disclose “to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements”<sup>14</sup>.

5. At the time the decision on disclosure was given, as already indicated, there were pending an ex parte application<sup>15</sup> of the Prosecutor under rule 81 (2) and (4) of the Rules of Procedure and Evidence and a Defence motion<sup>16</sup> relating to the manner in which the Pre-Trial Chamber should advert to applications of such a kind. Without more ado, four days later, the single judge issued a second decision entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of

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<sup>8</sup> See document dated 21 April 2006 (ICC-01/04-01/06-83-US-Exp).

<sup>9</sup> Document dated 8 May 2006 (ICC-01/04-01/06-95-US-Exp).

<sup>10</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Defence Motion Regarding Ex Parte Hearing of 2 May” 4 May 2006 (ICC-01/04-01/06-93).

<sup>11</sup> See transcripts of the hearing (ICC-01-04-01-06-T-4-CONF-EN and ICC-01-04-01-06-T-5-CONF-EN).

<sup>12</sup> See transcript of the hearing (ICC-01-04-01-06-T-6-CONF-EN).

<sup>13</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Decision on the Final System of Disclosure and the Establishment of a Timetable” 15 May 2006 (ICC-01/04-01/06-102).

<sup>14</sup> *Ibid.*, page 6.

<sup>15</sup> Document dated 21 April 2006 (ICC-01/04-01/06-83-US-Exp) supplemented by document dated 8 May 2006 (ICC-01/04-01/06-95-US-Exp).

<sup>16</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Defence Motion Regarding Ex Parte Hearing of 2 May” 4 May 2006 (ICC-01/04-01/06-93).

Procedure and Evidence”<sup>17</sup>. After outlining the history of the proceedings, the single judge considered, in her words, “that a need exists to establish certain general principles governing applications to restrict disclosure pursuant to rule 81 (2) and (4) of the Rules.”<sup>18</sup>. And true to her word, she evolved general principles relevant to the scope, interpretation and application of the provisions of rule 81 (2) and (4) of the Rules of Procedure and Evidence. She directed among other things that all future Prosecution applications under rule 81 (2) and (4) of the Rules of Procedure and Evidence as well as applications of the Defence under rule 81 (4) of the Rules of Procedure and Evidence should conform to the general principles enunciated in her judgment. And their resolution should be governed by the principles laid down therein.

6. The Prosecutor sought leave to appeal the decision, nearly every aspect of it, and asked the Pre-Trial Chamber to refer under the provisions of article 82 (1) (d) of the Statute a corresponding number of issues for consideration by the Appeals Chamber.<sup>19</sup>

7. First and foremost, he asked the single judge to state for consideration the propriety of the decision of the Pre-Trial Chamber to establish general principles of procedural and/or substantive law outside the context of a pending application or proceeding before the court and without hearing the parties on the matters addressed therein. In his view it was outside the jurisdiction and beyond the authority of the Pre-Trial Chamber to evolve “principles” that “constitute binding rules”<sup>20</sup> with a view to establishing the legal framework for the resolution of pending and, more importantly, matters anticipated to arise relevant to the application of rule 81 (2) and (4) of the Rules of Procedure and Evidence.<sup>21</sup> The invitation to set down the aforesaid issue for consideration by the Appeals Chamber was turned down by the single judge in light of the history of the proceedings and the association of the principles established with disclosure generally.<sup>22</sup>

8. The single judge defined the following three issues, deriving from the general principles that she had pronounced and the reasoning associated therewith, for consideration by the Appeals Chamber:

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<sup>17</sup> 19 May 2006 (ICC-01/04-01/06-108).

<sup>18</sup> *Ibid.*, paragraph 5.

<sup>19</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Motion for Reconsideration and, in the Alternative, Leave to Appeal” 24 May 2006 (ICC-01/04-01/06-125).

<sup>20</sup> *Ibid.*, paragraph 53.

<sup>21</sup> *Ibid.*, paragraphs 53 to 55.

<sup>22</sup> *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal” 23 June 2006 (ICC-01/04-01/06-166), paragraphs 17 to 25.



“(i) The issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing;

(ii) The issue of the temporal scope of the ongoing investigation of Mr. Thomas Lubanga Dyilo and the consequent temporary nature of those redactions granted under rule 81 (2) of the Rules in order not to prejudice that investigation; and

(iii) The issue of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules.”<sup>23</sup>

Evidently, the issues raised revolve around the general principles enunciated by the court; the principles evolved are not invoked for the resolution of any application before it. Neither the above three issues nor the remaining ones, not singled out as subjects of the appeal, were intended to resolve any matter pending before the Chamber.

9. The first question concerns the criteria relevant to the non-disclosure of prosecution witness statements for the witnesses’ protection. The second question, imprecisely as the issue is defined, relates to the temporal scope of non-disclosure of statements of witnesses and amenity on the part of the Prosecutor to extend his investigations in the case beyond the confirmation hearing. The third issue is succinctly defined. It raises the question of the procedural regime generally governing applications under rule 81 (2) and (4) of the Rules of Procedure and Evidence.

10. The Prosecutor advanced a number of arguments in support of his propositions that the view taken by the single judge of the general principles reflected in the three issues under review is erroneous, inviting the Appeals Chamber to reverse the decision.<sup>24</sup>

## I. DEFENCE OBJECTIONS TO THE APPEAL

### A. Grounds of appeal

11. The Defence for its part questions the viability of the appeal.<sup>25</sup> Because, firstly, it does not conform to the requisites of article 83 (2) of the Statute and secondly, because it does not

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<sup>23</sup> *Ibid.*, page 25.

<sup>24</sup> See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* “Prosecution’s Document in Support of the Appeal” 5 July 2006 (ICC-01/04-01/06-183), paragraph 36.

<sup>25</sup> See *Situation en République Démocratique du Congo Affaire le Procureur c/Thomas Lubanga Dyilo* « Conclusions de la défense en réponse au mémoire d’appel du Procureur du 5 juillet 2006 » 20 juillet 2006 (ICC-01/04-01/06-199).



establish grounds of appeal disclosing the error or errors vitiating the first instance judgment.<sup>26</sup>

12. The first submission of the Defence is ill-founded. To begin, the Prosecutor explains in detail the errors allegedly invalidating the decision of the Pre-Trial Chamber with regard to every one of the three issues. Equally untenable is the suggestion that article 83 (2) of the Statute finds application in appeals coming under article 82 (1) and (2) of the Statute. By the plain terms of paragraphs 1 and 2 of article 83, its application is confined to appeals under article 81 (1) and (2) of the Statute.

13. Respecting the second ground, article 82 (1) (d) of the Statute confers a right of appeal without specifying the ground or grounds upon which the impugned decision may be challenged. The implications of this apparent lacuna are examined hereafter.

14. An appeal by way of review imports competence to examine the correctness of the decision which is the subject of the appeal. It is a necessary incident of the conferment of appellate jurisdiction to review a decision of a first instance court. Article 4 of the Statute provides that the "Court" shall have the legal capacity necessary for the exercise of its functions and the fulfilment of its purposes. Ponderation of the grounds upon which a decision may be reviewed is an incident of appellate jurisdiction. Such grounds are invariably linked to the purposes for which appellate jurisdiction is conferred upon the Appeals Chamber which in the case of article 82 (1) and (2) of the Statute boil down to power to review the correctness of the decision. A correct judgment is one legally and factually well-founded. Consequently, the grounds of appeal must be defined by reference to the legal and factual foundation of the decision under review. Legal errors may arise from the misapplication of adjectival or substantive law. The factual substratum and its soundness constitute the second element of the equation. The powers of the Appeals Chamber in an appeal under article 82 (1) and (2) of the Statute set out in rule 158 (1) of the Rules of Procedure and Evidence lend support to the view expressed above. The Appeals Chamber may "confirm, reverse or amend the decision appealed". Examination of the correctness of the decision under appeal is a prerequisite for the exercise of the aforesaid powers. Ultimately, the grounds upon which a decision can be impugned are no different from those enumerated in article 81 (1) (a) of the Statute. To these grounds one must necessarily add those affecting a fair trial that should pervade the judicial process as evident from the provisions of article 21 (3) of the Statute.

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<sup>26</sup> *Ibid*, paragraphs 5 and 6.

15. The Regulations of the Court make it incumbent upon the parties to specify the grounds of appeal together with the reasons, legal and/or factual that support them (regulation 64 of the Regulations of the Court). The appeal of the Prosecutor does not in strictness comply with the requirements of regulation 64 (2) made applicable by regulation 65 (4) of the Regulations of the Court but does so in substance inasmuch as the reasons allegedly invalidating the decision are specified under each one of the three issues listed for consideration. Such reasons disclose the errors of substantive and adjectival law that render, in the view of the Prosecutor, the decision of the single judge vulnerable to be set aside. The respondent was in no way prejudiced by lack of knowledge of the case of the Prosecutor or any failure on his part to articulate his grounds with clarity. Hence, non-compliance with or deviation from the relevant regulation on the part of the Prosecutor had no noticeable effect on the efficacy of the appeal nor did it deprive the respondent of the necessary knowledge of the case of his counterparty.

## B. *Res judicata*

16. Further, in their response to the appeal, the Defence questioned the validity of two of the three issues (one and two) as proper subjects for appeal for the reason that they relate to matters previously determined by the single judge and as such are the subject of finalized litigation viz. *res judicata* (“chose jugée”).<sup>27</sup> *Res judicata* is a principle of law generally acknowledged as an essential feature of judicial proceedings, interwoven with the finality of judicial determinations and ultimately the efficacy of the judicial process. Judgment- and decision-making within the judicial process are institutionally associated with finality. The court brings judgment to bear on the resolution of the issues arising before it. The very notion of a “decision” made in judicial proceedings imports determination of a matter at issue.<sup>28</sup>

17. Under English common law, *res judicata* in its simplest form denotes that a cause of action determined on its merits or an issue incidental to the cause cannot be re-litigated by the same parties before a court of law. The parties are estopped from making the same cause or issues incidental thereto the subject of fresh litigation.<sup>29</sup> So, we have subject-matter estoppel<sup>30</sup> in relation to the cause itself and issue estoppel<sup>31</sup> with regard to interim determinations. A

<sup>27</sup> *Ibid*, paragraphs 7 and 14.

<sup>28</sup> See *Garner B. A.* (Editor in chief) “Black’s Law Dictionary” (Eighth Edition, Thomsen West, 2004), page 436.

<sup>29</sup> See *Andrews N.* “English Civil Procedure” (Oxford, 2003), paragraphs 40.10 to 40.30.

<sup>30</sup> Also referred to as “cause of action estoppel”, “claim preclusion”. In the United States, *res judicata* is referred to only as “claim preclusion”, a concept distinct from “issue preclusion” (see *Friedenthal J. H., Kane M. K., Miller A. R.* “Civil Procedure” (Third Edition, St. Paul, Minn., 1999), paragraph 14.2).

<sup>31</sup> Also referred to as “collateral estoppel”, “issue preclusion”.

fortiori, the same applies to interlocutory decisions given in the process of litigation. *Res judicata* is foremost a principle of civil litigation. The rule against double jeopardy in criminal proceedings serves the same purpose. Moreover, the determination of an issue arising in the cause of criminal proceedings will likewise seal the fate of the issue within the context of the cause. Any attempt to re-litigate the issue would derail the proceedings off their course. And as such it will be stopped. In essence, subject-matter and issue estoppel in the above sense have their place in criminal proceedings too.<sup>32</sup> Re-litigating an issue settled by a judicial decision would unreasonably protract the proceedings to the detriment of the principle that justice should be administered within a reasonable time.

18. In the Romano-Germanic system of law, a corresponding principle applies not necessarily under the same name<sup>33</sup> or subject to rules identical to those of the English common law. There too, an issue finally disposed of in judicial proceedings cannot be revisited.<sup>34</sup> And the same applies to civil as well as criminal proceedings where the concept of *ne bis in idem* is deeply rooted.<sup>35</sup> The European Court of Justice acknowledged *chose jugée – res judicata* as an important principle of law interwoven with legal certainty.<sup>36</sup>

19. In either system re-litigation or re-determination of a matter decided upon is impermissible, unless, of course, jurisdiction is specifically conferred upon the court to revisit an issue under given circumstances.

20. In her decision of 15 May 2006, the single judge did not dispose of proceedings founded under rule 81 (2) and (4) of the Rules of Procedure and Evidence pending before her. Non-disclosure of witness statements is an exception to the rule (see rule 76 (1) of the Rules of Procedure and Evidence). A question of non-disclosure can only arise upon an application

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<sup>32</sup> See Barnett P. "Res Judicata, Estoppel, And Foreign Judgments" (Oxford, 2001), paragraph 1.19.

<sup>33</sup> Examples are France: "*chose jugée*" and Germany: "*Rechtskraft*".

<sup>34</sup> See *Encyclopédie Dalloz*, "Répertoire de droit pénal et de procédure pénale, Tome II, Ch-Dén, Chose Jugée", (1967), paragraphs 11 to 13; *Meyer-Gossner L.*, "Strafprozessordnung" (47th Edition, Beck, München, 2004), Einl., paragraphs 163 to 189.

<sup>35</sup> See *Encyclopédie Dalloz*, "Répertoire de droit pénal et de procédure pénale, Tome II, Ch-Dén, Chose Jugée", (1967), paragraph 5; *Meyer-Gossner L.*, "Strafprozessordnung" (47th Edition, Beck, München, 2004) Einl., paragraph 171.

<sup>36</sup> European Court of Justice, Case 234/04 *Rosmarie Kapferer v. Schlank & Schick GmbH*, Judgment, 16 March 2006, paragraph 20, available in: Westlaw: "In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question [...]"; Case C-224/01, *Gerhard Kobler v. Republik Österreich*, Judgment, 30 September 2003, paragraph 38, available in: Westlaw; Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, Judgment, 1 June 1999, paragraphs 46 and 47, available in: Westlaw.

of the Prosecutor made under rule 81 (2) and (4) of the Rules of Procedure and Evidence. Hence, the single judge was in no way impeded or precluded from addressing proceedings arising under the provisions of rule 81 (2) and (4) of the Rules of Procedure and Evidence. Statements in the decision of 15 May 2006 bearing on the interpretation and application of rule 81 (2) and (4) of the Rules of Procedure and Evidence are nothing other than dicta not directed at resolving a matter arising under rule 81 (2) and (4) of the Rules of Procedure and Evidence. Hence, the issues addressed by the single judge in the decision under appeal were not determined by her decision of 15 May 2006. Therefore, *res judicata* cannot be erected under any circumstances as a barrier to the exploration and range of application of the provisions of rule 81 (2) and (4) of the Rules of Procedure and Evidence.

21. Subject to the demurral of the Defence to the validity of the appeal earlier noted, their position is that the general principles stated by the single judge are correct and should be upheld on appeal.

## II. JURISDICTIONAL LIMITATIONS TO DECISION-MAKING

22. In the case of *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, (ICC-01/04-168) the Appeals Chamber had occasion to review the legal framework of article 82 (1) (d) of the Statute and the issues the resolution of which may justify reference of a decision for consideration by the Appeals Chamber. The following passage from the above judgment illuminates the nature of an issue that may form the subject of a decision to be made the subject-matter of an appeal under article 82 (1) (d) of the Statute:

“Only an ‘issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”<sup>37</sup>

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<sup>37</sup> *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, (ICC-01/04-168), paragraph 9.



23. The general principles governing the application of rule 81 (2) and (4) of the Rules of Procedure and Evidence, the theme of the decision, constitute the subject of the appeal. The principles were evolved outside the framework of resolution of a matter at issue and without hearing the parties on the establishment of such principles. The question is further complicated by the fact that the principles enunciated were meant to pre-empt determination of pending and future proceedings and more than that any proceedings under rule 81 (2) and (4) of the Rules of Procedure and Evidence. The course taken is judicially unorthodox.

24. The exercise of judicial power is premised on the jurisdiction of a court. The jurisdiction of a court extends to the determination of the matter at issue and matters incidental thereto; the hallmark of the exercise of judicial power. And through such a determination the imprint of the judicial power is attached to the solution of the problem, the contest and everything that goes with it. Outside this course, a court operates in a vacuum, transcending the object and purpose of judicial power. It is no function of a court of law to establish general principles with a view to mapping out the outcome of future proceedings. The pronouncement of binding legal principles outside the parameters of the adjudicative process is beyond and more accurately outside the jurisdiction of a court. The law applicable is elicited by reference to the facts defining the issue before the court and then only to the extent necessary to resolve it. Theoretical legal exercises have no part in the judicial process.

25. The principles adopted by the decision under review were not established for the purpose of resolving an issue before the single judge but in the abstract as the springboard for the resolution of pending or issues likely to arise in the process. Every Chamber of the International Criminal Court is competent to deal with every issue amenable to the jurisdiction of the particular branch of the Court for the purpose of resolving, subject to appeal, where a right to that end is conferred, finally the cause before it or any issue arising for determination intermediately thereto. In the exercise of this duty, the Chamber will no doubt explore the law in order to identify the principle(s) applicable to the particular facts of the case with a view to its just resolution. Even in that context the court will not extend the inquiry beyond what is required for the solution of the problem before it. It is no part of the judicial function to enunciate the principles applicable in any given area of law (adjectival or substantive) or to determine the law applicable to pending or anticipated proceedings outside the adjudicative process for the resolution of extant issues definitive of the course of judicial proceedings.



26. The last sentence of Article 61 (3) of the Statute empowers the Pre-Trial Chamber to issue orders affecting the disclosure of information for the purposes of the confirmation hearing. In exercise of this power, the single judge issued the orders deemed necessary in her decision of 15 May 2006. A motion for non-disclosure in any form can only be addressed in the context of an application to that end (rule 81 (2) and (4) of the Rules of Procedure and Evidence). It is beyond the jurisdiction of the Pre-Trial Chamber to forestall a decision of such a matter by the establishment or evolvment of general principles pre-defining the position of the court on the resolution of an issue in the cause. That the Defence favoured such a course is of no consequence; no one can authorize judicial deliberation outside the context of a matter at issue.

27. The conclusion to which I am driven is that the decision of the Pre-Trial Chamber referred to the Appeals Chamber with a view to appellate adjudication is not the offspring of the judicial process as it was not designed to nor did it resolve a matter or issue pending before the single judge. The decision did not dispose of an issue in the judicial cause and as such it lacked the attributes of judicial determination. A judgment of a court is intended and serves the purpose of determining a cause or matter pending before it.<sup>38</sup> Yet, the decision given in this case can be made the subject of an appeal under article 82 (1) (d) of the Statute, because of its implications on future proceedings. As noted in the judgment of the Appeals Chamber in *Situation in the Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"<sup>39</sup>, the impact of a decision on future proceedings before the Court is a factor to be duly evaluated in setting down an issue for appellate consideration. And the decision under appeal was meant to prejudge pending and anticipated proceedings.

28. The appellate process is not confined to the review of decisions emanating from the proper exercise of judicial power but extends to any decision originating from the exercise or purported exercise of judicial power.<sup>40</sup> In the latter case, there are more cogent reasons still for the exercise of appellate jurisdiction. The Appeals Chamber can set the judicial process aright, a principal object of appellate jurisdiction.

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<sup>38</sup> *Garner B. A.* (Editor in chief), "Black's Law Dictionary" (Eighth Edition, Thomsen West, 2004), pages 436, 858.

<sup>39</sup> 13 July 2006 (ICC-01/04-168).

<sup>40</sup> Aspects of the subject under review are discussed in the English case *R v. Longworth* (HL) [2006] 1 All ER 887.



### III. REMEDY

29. And the question arises what should be done with the decision under appeal? The issues raised for consideration by the Appeals Chamber are an integral part of the general principles evolved in the decision under review. To review them on appeal would involve the Appeals Chamber in the same process as the single judge got herself into, i.e. engagement in the elicitation of general legal principles outside the decision-making process for the disposition of a matter at issue, exceeding thereby the jurisdiction of the court. The Appeals Chamber would itself assume jurisdiction to prejudge the law applicable to pending and future proceedings.

30. The issues raised for consideration are an inextricable part of the general principles evolved by the single judge. That she refused to state the propriety of establishing general principles as a distinct issue for consideration on appeal does not alter the character of the issues raised or the nature of the decision taken. The Appeals Chamber is seized of an appeal for the review of a decision and issues arising therein dealing with general principles given outside the context of the jurisdiction of the Pre-Trial Chamber. Rule 158 (1) of the Rules of Procedure and Evidence confers power upon the Appeals Chamber to reverse a decision, the subject-matter of an appeal. To “reverse” signifies the following of a course opposite to that taken. In the context of judicial proceedings, the word bears a special meaning, a term of art, importing power to “set aside, revoke, annul”<sup>41</sup>, “overturn”<sup>42</sup> a decision.<sup>43</sup> The reverse course entails the annulment of the decision, which can be achieved by revoking the decision made. This is the order I would make.



**Judge Georgios M. Pikis**

Dated this 13<sup>th</sup> day of October 2006

At The Hague, The Netherlands

<sup>41</sup> *Brown L.* (Editor in chief), *The Shorter Oxford English Dictionary* (Oxford University Press, 2002, Fifth Edition) Volume 2, N-Z, page 2566.

<sup>42</sup> *Garner B. A.* (Editor in chief), *Black's Law Dictionary* (Eighth Edition, Thomsen West, 2004), page 1344.

<sup>43</sup> The term used in the French text of the Statute is “infirmer” meaning according to *Cornu G.* (Editor), “Vocabulaire juridique” (Paris, Fourth Edition, 2003), page 468, “[r]éformation ou annulation partielle ou totale, par le juge d’appel, de la décision qui lui est déferée”.