Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **30 March 2011**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

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

Public

Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"), delivers the following Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010:[1]

I. Background and Submissions

1. On 8 May 2009 and 28 October 2009 respectively, the accused filed requests to admit several document into evidence to which reference had been made during defence counsel's examination of certain witnesses.[2] The defence identified the documents it submitted should be admitted, along with those it argued ought to be excluded. The Chamber granted these requests in two oral decisions, admitting the items identified in the defence requests.[3] The Office of the Prosecutor ("prosecution") did not oppose the first application and for the reasons set out in the Decision of 28 October 2009, the Chamber was unpersuaded by the prosecution's objections on the second application.

2. In the second decision, the Chamber dealt with the documents that were not admitted as follows:

> [a]lthough the defence referred to 32 other documents in its application, it does not seek to introduce them into evidence and accordingly the Chamber does not need to

[1] Requête de la Défense aux fins de reconsidération de l'ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010, 11 October 2010, ICC-01/04-01/06-2584-Conf. Due to a clerical error, the Registry did not notify the Office of the Prosecutor of this filing until 20 October 2010.

[2] Requête de la Défense aux fins de dépôt en preuve des documents présentés dans le cadre des contre-interrogatoires de la Défense et portant les numéros MFI-D-0001 à MFI-D-0104, 8 May 2009, ICC-01/04-01/06-1860-Conf; Requête de la Défense aux fins de dépôt en preuve des documents présentés dans le cadre des contre-interrogatoires de la Défense et portant les numéros MFI-D-00105 à MFI-D-00152, 28 October 2009, ICC-01/04-01/06-2177. Documents are assigned MFI ("Marked for Identification") numbers to enter them into the case record if they have not yet been admitted into evidence. Once documents are admitted into evidence, they receive so-called EVD numbers.

[3] Transcript of hearing on 19 May 2009, ICC-01/04-01/06-T-176-Red-ENG CT WT, page 4, line 14 – page 5, line 6 and Transcript of hearing on 9 December 2009, ICC-01/04-01/06-T-222-ENG ET WT, page 30, line 8 – page 33, line 25 respectively.

consider that part of this application further.[4]

3. Therefore, the documents that the defence had expressly excluded from its request were not admitted into evidence, and although they were not assigned EVD numbers, they retained their MFI numbers in the record of the case (instead of being removed from the record).

4. On 12 May 2010, essentially for the efficient administration of the record of the trial, the Chamber issued its "Order on numbering of evidence" ("Order") adopting a revised procedure for numbering exhibits.[5] The Chamber addressed the system generally, including the numbering of videos and video excerpts, and the parties and participants were instructed to review the exhibits that had been assigned MFI numbers in the course of the trial: any objections to their admission into evidence were to be filed by 28 May 2010. In the absence of any submissions, and in accordance with the Chamber's instructions, the Registry assigned EVD numbers to all the documents listed in the annex to the Chamber's Order,[6] which included those addressed in the defence requests of 8 May and 28 October 2009.

5. On 11 October 2010, the defence applied to the Chamber for a review of the Order.[7] The defence submits that it had failed to file objections because it had erroneously understood that the Order was purely administrative.[8] It was only after the defence received the list of the documents that had been assigned EVD numbers that it realized (1) various documents that it had earlier sought to exclude from the record and (2) other documents that by virtue of the jurisprudence of the Chamber are only to be admitted into evidence by way of a discrete decision and under strict conditions, had been

[4] Transcript of hearing on 9 December 2009, ICC-01/04-01/06-T-222-ENG ET WT, page 33, lines 23 –25.
[5] ICC-01/04-01/06-2432.
[6] Notification email from the Registry to the Chamber, the parties and the participants in the present case on 14 June 2010.
[7] ICC-01/04-01/06-2584-Conf.
[8] ICC-01/04-01/06-2584-Conf, paragraph 11.

assigned EVD numbers.[9]

6. The defence submits that the Chamber has the inherent power to reconsider its own decisions, and it relies on previous instances when this has occurred.[10] It suggests that admitting some of the documents will constitute a material error, such as to cause grave prejudice to the judicial process.[11] The defence asks the Chamber to implement its Decisions of 19 May 2009 and 9 December 2009,[12] and it indicates particularly that it had only sought to include excerpts of documents MFI-D-00017 and MFI-D-00071.[13] In addition, the defence argues that documents MFI-D-00166 and MFI-D-00168 were used during the defence examination of two witnesses solely to highlight contradictions or incoherence in their statements, and the parties and the participants did not request their introduction into evidence. Accordingly, it is submitted that it is manifestly inappropriate to assign EVD numbers to these items in their entirety.[14]

7. On 2 November 2010, the prosecution submitted that the defence request should be refused, as it was filed out of time and the deadline for submitting an application for leave to appeal had passed.[15]

8. Following a request from the Chamber,[16] the prosecution filed substantive observations on 17 November 2010.[17] In the event, the prosecution accepts that extracts from MFI-D-00017 and MFI-D-00071 should be admitted into

[9] ICC-01/04-01/06-2584-Conf, paragraphs 12 – 13.
[10] ICC-01/04-01/06-2584-Conf, paragraphs 15, 16 and 18.
[11] ICC-01/04-01/06-2584-Conf, paragraph 17.
[12] ICC-01/04-01/06-2584-Conf, paragraphs 19 – 24.
[13] ICC-01/04-01/06-2584-Conf, paragraph 21.
[14] ICC-01/04-01/06-2584-Conf, paragraphs 25 – 27.
[15] Prosecution's Response to the Defence's "Requête de la Défense aux fins de reconsidération de l'ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010", 2 November 2010, ICC-01/04-01/06-2601, paragraph 5.
[16] Transcript of hearing on 5 November 2010, ICC-01/04-01/06-T-326-ENG ET WT, page 9, line 20 – page 10, line 6.
[17] Prosecution's Further Response to the Defence's "Requête de la Défense aux fins de reconsidération de l'ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010", 17 November 2010, ICC-01/04-01/06-2629.

evidence, and it submits that it is appropriate to remove 67 items from the record.[18] It requests that MFI-D-00121 and MFI-D-00130 retain their present EVD numbers or receive new prosecution EVD numbers as they were used during questioning by both the defence and the prosecution.[19] As document MFI-D-00151 was reassigned a prosecution EVD number pursuant to decision ICC-01/04-01/06-2589-Corr, it is submitted that the status of this item should be unaffected by the defence application.[20] The prosecution further submits that MFI-D-00086 (a drawing by witness DRC-OTP-WWWW-0294) and MFI-D-00136, MFI-D-00137 and MFI-D-00138 (extracts from video DRC-OTP-0082-0016) should also retain their present EVD numbers or receive new prosecution EVD numbers. Although they were used by the defence during the course of questioning, by their very nature they could not be "read" into the transcribed record of the case. Therefore, to maintain a complete court record and to provide the relevant context for the questions and answers, the prosecution suggests that it is necessary and appropriate to admit the drawing and the video excerpts into evidence.[21]

II. Applicable Law

9. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

> **Article 64 of the Statute**
> **Functions and powers of the Trial Chamber**
> [...]
> 2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
> [...]
> 9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:
> (a) Rule on the admissibility or relevance of evidence.

[18] ICC-01/04-01/06-2629, paragraph 5.
[19] ICC-01/04-01/06-2629, paragraph 4.
[20] ICC-01/04-01/06-2629, paragraph 4.
[21] ICC-01/04-01/06-2629, paragraph 4.

[...]

Article 69 of the Statute
Evidence
[...]
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Article 74 of the Statute
Requirements for the decision
[...]
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
[...]

Rule 64 of the Rules of Procedure and Evidence ("Rules")
Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with Article 64, paragraph 10, and Rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

III. The legal basis for reconsideration

10. It is convenient for the Majority to express at the outset their view that Rule 64 of the Rules (entitled "Procedure relating to the relevance and admissibility of evidence") does not apply in these circumstances. First, the purpose of this Rule is to regulate substantive admissibility challenges rather than correcting mistakes, and the parties and participants are required to raise any issues relating to relevance and admissibility at the time the relevant evidence is submitted. Furthermore, the "exceptional" derogation from this requirement (Rule 64(1)) only applies if the issue as regards admissibility was not "known" at the time the evidence was submitted. The structure of the Rule clearly indicates that "knowledge" in this context is what is "known" by the relevant party or participant, and not the Court, not least because any issue that is not known is to be "raised" immediately once it becomes known, and it is for the parties and participants – not the Chamber – to "raise" issues: indeed, the Rule indicates that "the Chamber may request that the issue be raised in writing" (*i.e.* by one of the parties or participants).[22] Finally, at all material times the defence has been aware of all the relevant issues concerning this evidence, and given the documents with their corresponding MFI number were listed in the annexes to the 12 May 2010 "Order on numbering of evidence" (see paragraph 4 and footnote 30 above), it cannot be suggested sustainably that the admissibility issue was not "known" at the time the evidence was "submitted". In this instance the defence made a straightforward mistake about something that at the relevant time was "known" by everyone concerned, having been set out in the relevant Order.

[22] This is similarly reflected in the French text of Rule 64(1) that reads as follows: "... Exceptionellement, une question qui n'était pas connue lors de cette presentation peut être soulevée dès le moment où elle est connue. La Chambre concernée peut exiger une requête écrite à cet effet. ... ". The Spanish version is even clearer with regard to the parties (and not the Chamber) having to raise the issue: "... Excepcionalmente, podrán plantearse inmediatamente después de conocida la causal de falta de pertinencia o inadmisibilidad cuando no se haya conocido al momento en que la prueba haya sido presentada. La Sala podrá solicitar que la cuestión se plantee por escrito. ... ".

11. Instead, in the judgment of the Majority, this application raises an important issue, namely the circumstances when a Chamber of this Court can review or reconsider its Decisions or Orders. Put broadly, there are two situations in particular that need to be addressed. First, whether a Chamber is able to vary its case-management decisions or orders – those that are essentially administrative in nature – and, second, the circumstances when (if at all) a Chamber is entitled to depart from a decision on an issue of substance (*viz.* as regards the law or the facts of the case).

12. As has been indicated by Pre-Trial Chamber II in the Situation in Uganda, certain provisions of the Statute and the Rules grant the parties the right to request a review of a decision by a Chamber in specific circumstances, but the Rome Statute framework does not explicitly provide a procedure for general reconsideration of decisions, once the deadlines for filing an appeal (or a request for leave to appeal) have expired.[23] The Pre-Trial Chamber in that case took a restrictive approach to the Chamber's powers: it considered the particular instances in which the Court's provisions have created the opportunity for reconsideration, and it concluded that "[o]utside such specific instances, the only remedy of a general nature is the interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1 (d) of the Statute [...]".[24] The Pre-Trial Chamber additionally indicated that in its view "[...] the law and practice of the *ad hoc* tribunals [...] cannot *per se* form a sufficient basis for importing into the Court's procedural

[23] Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, 28 October 2005, ICC-02/04-01/05-60, paragraph 18, cited in the following decisions: Decision on the Prosecution Motion for Reconsideration, 23 May 2006, ICC-01/04-01/06-123, page 2; Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, 23 June 2006, ICC-01/04-01/06-166, paragraph 10; Decision on the « Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010 », 16 November 2010, ICC-01/05-01/08-1010, paragraph 9. The specific remedies referred to by the decision are Article 15(5) of the Statute, Article 19(10) of the Statute, Article 61(8) of the Statute, Rule 118(2) of the Rules, Rule 125(3) of the Rules and Rule 135(4) of the Rules.
[24] ICC-02/04-01/05-60, paragraph 18.

framework remedies other than those enshrined in the Statute".[25] Without in any sense questioning the Pre-Trial Chamber's decision not to reconsider its order in that case, in the judgment of the Majority the apparent statement of principle emerging from that case – that Decisions can only be varied if permitted by an express provision of the Rome Statute framework – does not entirely reflect the true position in law.

13. The starting point for considering an application of this kind is the duty on the part of a Trial Chamber to ensure the trial is fair and expeditious, pursuant to Article 64(2) of the Statute. Addressing, first, the administrative element of this issue, it is necessary for the Chamber to be able to make and amend its case-management orders, such as those concerning the court calendar; the order and length of witnesses; the administration of the materials held in the Court's electronic database; and the Court's control over the submissions of the parties and participants. For issues that are entirely administrative in nature, it would cause injustice – indeed it may well lead to absurdity – if the Chamber was unable to alter the procedural orders that, in reality, need constant review as the issues, the evidence and the circumstances of the case evolve. Accordingly, decisions or orders of this kind will, of necessity, need to be varied, sometimes repeatedly.

14. The more difficult issue is the extent to which a Chamber is empowered to reconsider its decisions on matters of substance as regards the law or on the facts of the case. Other Chambers of the Court have already confronted this question, in addition to the Pre-Trial Chamber, as summarised above. In a recent oral decision of Trial Chamber III in the case *The Prosecutor v. Jean Pierre Bemba Gombo*, the Chamber rejected a request by the prosecution to review a decision because the prosecution had failed to provide new information which significantly altered the basis on which the original decision was

[25] ICC-02/04-01/05-60, paragraph 19.

taken,[26] implying clearly thereby that on different facts the Chamber might have been persuaded to amend its earlier approach. Similarly, this Trial Chamber in the *Lubanga* case rescinded one of its orders determining the disclosure obligations of the defence when it upheld the accused's argument that new circumstances had arisen that rendered the original order unfair.[27]

15. The jurisprudence of the *ad hoc* tribunals supports the interpretation that in certain circumstances a Chamber is entitled to depart from its decisions on matters of substance as regards the law or the facts of the case. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the *ad hoc* tribunals are in a clearly comparable position to the Court in this context, and their provisions are equally silent as to the power of reconsideration. In the result, their experience is potentially of direct relevance to the resolution of this issue.

16. In *The Prosecutor v Radovan Karadžić*, a Trial Chamber has recently rehearsed the approach of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in this area:

> The standard for reconsideration of a decision set forth by the Appeals Chamber is that "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'". Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[28]

---

[26] Transcript of hearing on 2 December 2010, ICC-01/05-01/08-T-42-CONF-ENG ET, page 2, line 2 – page 4, line 13. The decision was rendered in open session.
[27] Decision on the defence request for leave to appeal the "Decision on disclosure by the defence", 8 May 2008, ICC-01/04-01/06-1313, paragraphs 23 – 24.
[28] ICTY, *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010; see also ICTY, *Prosecutor v Momčilo Perišić*, IT-04-81-T, Trial Chamber, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision of 4 May 2010 Concerning Adjudicated Facts, 15 October 2010, paragraph 15; ICTY, *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Accused's Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts, 14 September 2010, paragraph 5; ICTY, *Prosecutor v Milan Martić*, IT-95-11-A, Trial Chamber, Decision on Motion for Reconsideration of Oral

17. At the International Criminal Tribunal for Rwanda ("ICTR"), a similar, although by no means identical approach has been adopted that recognises that in exceptional cases Trial Chambers have an inherent power to reconsider their decisions "[...] when (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice".[29]

18. This approach by the *ad hoc* Tribunals reflects the position in many common law national legal systems, in the sense that it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information.[30] The reason for permitting the exercise of this discretion is, not least, that it maintains public confidence in the criminal judicial system, and in the judgment of the Majority the description set out hereinabove of the circumstances in which "irregular" decisions can be varied is to be applied on this application. However, there are strong reasons for recognizing the limits of this approach – most particularly given the need to achieve certainty in the proceedings – and the strong presumption is that a Chamber is bound

---

Decision Issued on 29 February 2008, 10 March 2008, paragraph 5; ICTY, *Prosecutor v Milan Milutinović et al.*, IT-05-87-T, Trial Chamber, Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Lilić, 27 April 2007, paragraph 4. All decisions cite further jurisprudence.

[29] ICTR, *Prosecutor v Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Second Reconsideration of Witness Protective Measures, 15 July 2010, paragraphs 16 – 17; ICTR, *Prosecutor v Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010, 27 January 2011, paragraphs 24–25; see also ICTR, *Prosecutor v Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decision Rendered on 23 September 2009, 7 July 2010, paragraphs 16 – 17. These decisions all cite other jurisprudence.

[30] See for example, from the United Kingdom, R v Rowe [2007] Q.B. 975, paragraphs 20 – 26 (in the context of the Court of Appeal not being strictly bound by the principle of *stare decisis*).

by its own decisions. The Majority, therefore, has carefully borne in mind the need to apply the test – that irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory – *sensu stricto* when addressing the circumstances of this application.

IV. Analysis and Conclusion

19. The question raised by the instant application encompasses both of the situations canvassed above: in one sense this is an administrative issue because it involves the handling of the relevant materials held in the Court's electronic database, but it also concerns a substantive issue of admissibility, namely whether these documents will form part of the materials the Court will consider at the end of the case.

20. The inadvertent assignment of EVD numbers to particular items that should not have been admitted into evidence is a material error that could cause significant prejudice by violating Rule 64(3) of the Rules and by substantively and adversely affecting the body of evidence that will provide the basis for the final decision under Article 74 of the Statute. In these circumstances, the Decision was manifestly unsound and its consequences, if left unremedied, would be manifestly unsatisfactory; therefore, it is appropriate to vary the decision of the Chamber as regards the items addressed by the defence in its applications of 8 May and 28 October 2009 that were not admitted into evidence by the Chamber in its decisions of 19 May and 9 December 2009,[31] and which now have been erroneously assigned EVD numbers following the Chamber's Order of 12 May 2010. The EVD numbers will be deleted, save as

[31] These are documents MFI-D-00002 – MFI-D-00005, MFI-D-00008 – MFI-D-00010, MFI-D-00023, MFI-D-00043 – MFI-D-00045, MFI-D-00048 – MFI-D-00051, MFI-D-00054, MFI-D-00056 – MFI-D-00062, MFI-D-00070, MFI-D-00075 – MFI-D-00079, MFI-D-00081, MFI-D-00090 – MFI-D-00094, MFI-D-00096, MFI-D-00098 and MFI-D-00101 – MFI-D-00104 identified in request ICC-01/04-01/06-1860-Conf of 8 May 2009, as well as documents MFI-D-00105 – MFI-D-00109, MFI-D-00113, MFI-D-00116 – MFI-D-00130, MFI-D-00135, MFI-D-00146 – MFI-D-00150 and MFI-D-00152 identified in the request ICC-01/04-01/06-2177 of 28 October 2009.

regards the material specifically addressed hereafter.

21. MFI-D-00151 has been addressed in a separate decision, when the Chamber ordered that a new EVD number was to be assigned: EVD-OTP-00620.[32] This document, therefore, is unaffected by the present application.

22. In its request of 8 May 2009, the defence sought to admit excerpts of documents MFI-D-00017 (from paragraph 103 of the statement) and MFI-D-00071 (from page DRC-OTP-0206 of the document), as opposed to the documents in their entirety.[33] The prosecution endorses this approach. In these circumstances, it is appropriate to vary the order of 12 May 2010 with the result that the EVD numbers are to be limited to the specified excerpts.

23. MFI-D-00086 and MFI-D-00136, MFI-D-00137 and MFI-D-00138 were referred to in evidence and retaining these items in the trial record is necessary for a proper understanding of the relevant testimony. Furthermore, as the prosecution has observed, the drawing by witness DRC-OTP-WWWW-0294 and the three excerpts of video DRC-OTP-0082-0016 used during the defence examination of witness DRC-OTP-WWWW-0016 by their very nature do not form part of the transcribed record of the case, and they provide the necessary context of the relevant questions that were asked, and the answers given. These items shall, therefore, retain their current defence EVD numbers.

24. The prosecution also used document MFI-D-00121 when examining witness DRC-OTP-WWWW-0055 and document MFI-D-00130 when examining witness DRC-OTP-WWWW-0157.[34] It is necessary in these circumstances, in order to correct a mistake and to avoid unfairness, to delete the old (defence)

[32] Decision on the "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)", 21 October 2010, ICC-01/04-01/06-2589, paragraphs 35 – 39(a). A corrigendum was issued on 25 October 2010, ICC-01/04-01/06-2589-Corr.
[33] ICC-01/04-01/06-1860-Conf, paragraph 6, reiterated in ICC-01/04-01/06-2584-Conf, paragraph 21.
[34] ICC-01/04-01/06-2629, paragraph 4.

EVD numbers and assign new (prosecution) EVD numbers to these two documents.

25. Finally, the defence submits that documents MFI-D-00166[35] and MFI-D-00168[36] that it used when questioning two witnesses solely in order to highlight suggested contradictions or incoherence in their statements should be excluded in their entirety. Given these documents were considered by the witnesses and formed the basis of questions by the defence,[37] they shall retain their current EVD numbers but it will be necessary to bear in mind, when reviewing this evidence, that the statements should be considered solely for the purpose of examining the alleged contradictions and incoherence raised during the course of the defence examination.

26. The Majority reminds the parties and participants that paragraphs 1 – 9 of the original Order remain in force.

27. For the reasons set out above, the Majority determines that:

(a) the documents listed in footnote 31 are to be removed from the record;

(b) the EVD numbers assigned to documents MFI-D-00017 and MFI-D-00071 in their entirety are to be corrected so as to refer only to the excerpts set out in paragraph 18 of this Decision;

(c) MFI-D-00086 and MFI-D-00136, MFI-D01-00137 and MFI-D-00138 are to retain their current EVD numbers;

(d) MFI-D-00121 and MFI-D-00130 are to be assigned new prosecution EVD numbers. The previously assigned defence

[35] EVD-D01-00282.
[36] EVD-D01-00284.
[37] MFI-D-00166 was later used by the defence in the course of questioning defence witness DRC-D01-0032, when the witness was asked if he could identify the signature on this document. Transcript of hearing on 28 April 2010, ICC-01/04-01/06-T-275-CONF-ENG ET, page 26, lines 8 – 22.

EVD numbers are to be deleted;

(e) MFI-D-00166 and MFI-D-00168 are to retain their current EVD numbers.

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

Judge Adrian Fulford **Judge Elizabeth Odio Benito**

Dated this 30 March 2011

At The Hague, The Netherlands

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **30 March 2011**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

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

Public

Separate Opinion of Judge René Blattmann to the Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda\
Ms Sarah Pellet

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. The majority opinion

1. I concur with the majority determination as set out in operative paragraph 27. However, I cannot associate myself with the reasoning developed in the decision. As I will explain below, the judges should not create, and resort to, a *reconsideration* based on the so-called "inherent discretionary powers" of the Chamber if a review mechanism for the variation of a previous order is provided for in the law.

2. The majority opinion questions an order of Pre-Trial Chamber II where that Chamber held that it could not reconsider its own decision. The majority assert that the implied statement of principle that emerged from the decision whereby decisions can only be varied if permitted by an express provision of the Rome Statute framework, does not entirely reflect the true position in law. The true position in law, as intended by the majority opinion, is that the Chamber possesses an inherent power to reconsider its own decisions.

3. In support of its position, the majority has raised the following: (i) jurisprudence of Trial Chamber III suggesting, or rather "implying clearly", that a Chamber can amend its own decisions, in addition to a previous decision of this Chamber; (ii) jurisprudence of the *ad hoc* tribunals which is of direct relevance to the resolution of this issue because the tribunals are in a "clearly comparable position to the Court in this context"; and (iii) an established position in many common law national legal systems that a Court can depart from earlier decisions that would usually be binding.

4. However, the quoted jurisprudence of Trial Chamber III does not support the majority position. In the quoted instance, Trial Chamber III did not review its own previous decision. Importantly, in a written decision which specifically addressed the issue of reconsideration, the same Trial Chamber rejected the notion that such a review mechanism is encompassed in the statutory

framework.[1]

5. The Trial Chamber I decision quoted by the majority was not a unanimous decision. In my dissenting opinion thereto I found that it was not "proper to rescind an order in a decision denying or granting leave to appeal".[2] In that instance, I supported a separate order as the most appropriate mechanism to rescind an order.[3] That separate order would be based, I add, on the statutory powers discussed below in paragraph 16 rather than the inherent powers of the Chamber.

6. The statutory frameworks of the *ad hoc* tribunals do not provide for a review mechanism such as reconsideration. Nonetheless, the jurisprudence of both the ICTR and ICTY indicates that, in exceptional cases, judges have the authority to reconsider previous decisions by virtue of their *inherent discretionary powers*. In my view, the transference into the ICC framework of this jurisprudential development which allows for broad judicial law-making powers requires some analysis.

7. Considerable effort was made in the drafting of the Rome Statute and its Rules of Procedure and Evidence ("Rules") to take into account, and reflect, both the Romano-Germanic and the common law legal systems such that a hybrid system was created. This system, which is much more rigid to judicial amendment than that of the *ad hoc* tribunals,[4] is meant to provide procedural certainty to the parties and the participants and to limit judicial discretion.

---

[1] Decision on the « Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010 », 16 November 2010, ICC-01/05-01/08-1010, paragraphs 9 and 10.

[2] Dissenting opinion of Judge Blattmann to the Decision on the defence request for leave to appeal the "Decision on disclosure by the defence", 8 May 2008, ICC-01/04-01/06-1313, paragraph 22.

[3] Idem.

[4] One scholar, for example, has pointed out that " [...] not only is the Court's procedure very largely framed by the Statute (i.e. established *ne variatur* in reality), but the RPE also escape judicial control, in accordance, it is true, with the internal legal tradition of most countries, but in contradiction with habitual international practice", see Alain Pellet, Applicable Law, in The Rome Statute of the International Criminal Court, A Commentary, Cassese, Gaeta, and Jones, Oxford University Press 2002, Volume II page 1064.

Hence, I cannot agree with the majority opinion that the *ad hoc* tribunals are in a "clearly comparable position to the Court in this context".

8. Finally, the majority argue that the Chamber has a general power to reconsider its own decisions because this reflects the position in many common law national legal systems. As emphasised in the paragraph above, the statutory framework of the ICC is not meant to reflect one legal system or country. In any event, the many common law national legal systems are not represented in the majority decision, save for the quote of one precedent from the UK, which, in my view, does not address the point of contention raised by the present application.[5]

II. The so-called "inherent powers of the Chamber to reconsider its own decisions"

9. The Appeals Chamber has thus far not considered the specific issue of the "inherent power of a Chamber to reconsider its decisions".[6] However, it has disapproved decisions that "clarify", thereby altering or adding to the substance of previous rulings, for the reason that they affect the principle of "finality of judicial decisions".[7] In my opinion, the praetorian making of a power to reconsider decisions would bend this principle to a much greater extent and thus conflict with that reasoning of the Appeals Chamber.

---

[5] The case of R v Rowe is a 2007 decision of the UK Court of Appeal. The appellant was convicted in 2005 by the Central Criminal Court of two counts of possessing an article for terrorist purposes, contrary to section 57(I) of the Terrorism Act of 2000. The appellant appealed against the conviction based on an interpretation of section 57(I) by the Court of Appeal set out in a decision in another case which followed the appellant's conviction at first instance. The Court of Appeal dismissed the Appeal. In so doing, it departed from its earlier interpretation of section 57(I) stating that the interpretation of this section in the previous Court of Appeal decision was "wrongly reached per incuriam." (paragraph 39). In my view, this decision does not imply in any way that the Court has a power to reconsider its own decisions in the same case.

[6] Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, paragraph 49.

[7] Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, paragraph 92.

10. Furthermore, the Appeals Chamber, in one of its earliest judgments, entertained an "application for extraordinary review" lodged against a decision of Pre-Trial Chamber I, which, in turn, had rejected a request for leave to appeal. In so doing, the Appeals Chamber pointed out that Part 8 of the Statute, dealing with appeals, does not in terms confer power or competence on the Appeals Chamber to review a decision not stating a subject for appeal. It argued that the decisions that are subject to appeal are enumerated in Articles 81 and 82 of the Statute and that there is nothing in Part 8 to suggest that a right to appeal arises except as provided therein.[8] In my view, any general power to reconsider previous decisions, if it was intended by the drafters of the Statute, would be accounted for in Part 8 of the Statute. There is nothing in Part 8 to suggest that there are other mechanisms for reviewing the decisions of a Chamber except as provided therein.

11. In my view, according to Article 21(1) of the Statute, the Court shall, first and foremost, apply the statutory framework provided by the Statute, the Rules, and the Elements of the Crimes. Given that there is no express provision generally allowing a Chamber to reconsider its own decisions,[9] in principle, once a decision is released it cannot be corrected but by the Appeals Chamber.

12. Several exceptions to this principle are spelled out within the Statute and the Rules. These provisions have been drafted in such a way that a review mechanism can result from legal interpretation thereof rather than the judicial making of "reconsideration" based on the inherent powers of the Chamber. Pre-Trial Chamber II has identified certain of these exceptions where the Statute expressly permits reconsideration.[10] Namely,

> 10. [...] Review of decisions by the Court is only allowed under specific

[8] 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, paragraphs 34 and 35.
[9] For instance, the Spanish *Ley de enjuiciamiento Criminal* provides for a reconsideration of any decisions of judges at first instance (« reforma») and of decisions of a Trial Chamber (« súplica »). See Articles 217, 236 and 238.
[10] ICC-02/04-01/05-60, paragraph 18.

> circumstances, explicitly provided in the Statute and the Rules. Suffices it to mention here article 15, paragraph 5, of the Statute, allowing the Prosecutor to request the Pre-Trial Chamber to review its denial of authorisation of the investigation, based on new facts or evidence regarding the same situation; article 19, paragraph 10, of the Statute, allowing the Prosecutor to request a review of a decision of inadmissibility of a case when satisfied "that new facts have arisen which negate the basis on which the case had been previously found inadmissible"; article 61, paragraph 8, of the Statute, allowing the Prosecutor to request the Chamber to confirm a charge which had originally not been confirmed, based upon additional evidence; rule 118, subrule 2, of the Rules, allowing the person concerned or the Prosecutor to request the Pre-Trial Chamber to review its ruling on the release or detention of such person; rule 125, sub-rule 3, of the Rules, allowing the Prosecutor to request the Chamber to review its decision not to hold a hearing on the confirmation of the charges in the absence of the person concerned; rule 135, sub-rule 4, of the Rules, allowing the prosecution and the defence to request a review of the determination that the accused is unfit to stand trial.

13. There are other rulings and orders of the Chamber which are by law fundamentally linked with, and conceived in order to adapt to, changing circumstances. The prosecution, for example, has the ongoing duty to disclose to the defence the exculpatory evidence in its possession pursuant to Article 67(2) "as soon as practicable". Under exceptional circumstances, such as those provided for in Rule 81(2) and (4), the Chamber may authorise non-disclosure of information to avoid prejudice to further or ongoing investigations or to protect the safety of witnesses, victims and members of their families. Once those protective measures are no longer necessary, the Chamber should, as it has done as a matter of course, vary the previous rulings and order disclosure. Such variations should not be understood, and have never been considered, as a "reconsideration" of the previous decision based on inherent powers of the Chamber. Rather, the issue is decided anew on the basis of the existence of new circumstances.

14. The same reasoning applies to several issues that are entirely administrative in nature. Case-management orders such as those related to the court calendar, the order of appearance of witnesses, and the length of their

testimony, have been decided anew on the basis that, for instance, the witnesses were not available at the relevant time, because the parties requested more time for their examination of the witness or the witnesses requested extra breaks. There was never a need to explore whether "inherent powers" allowed for this course of action for the simple reason that the Regulations of the Court provide statutory powers thereto. Regulation 43 confers the authority upon the judges to determine the mode of witness testimony as well as the order in which witnesses will be questioned and in which evidence will be presented in order to make the presentation of the evidence fair and effective for the determination of the truth and in order to avoid delays and ensure the effective use of time.

15. Similarly, the Chamber should not resort to such "inherent powers" for the purposes of exercising control over the submissions of the parties and the participants. The Regulations of the Court vest the judges with the authority to vary the time limits for documents filed with the Court (Regulation 35); to extend the page limits (Regulation 37); and to order participants to clarify or provide additional details on any document and to order the participants to address specific issues in their submissions (Regulation 28). The authority that the Chamber possesses to vary orders related to the submissions of the parties and participants are statutory in nature.

III. Rule 64(1) of the Rules of Procedure and Evidence

16. In my opinion, the application at hand does not raise, as asserted in the majority position, the general issue as to the extent to which a Chamber is bound by its earlier decisions or, more broadly, whether decisions are *res judicata* after the deadline for a request for leave to appeal has passed. Rather, the issue is confined to the powers of the Chamber to alter decisions relating to the admissibility of evidence.

17. The Chamber has been vested with a statutory power to revisit previous decisions on the admissibility of evidence by the Rules of Procedure and Evidence. According to Rule 64(1), the Chamber may vary previous decisions either rejecting or admitting evidence, so long as (i) issues relating to admissibility or relevance are raised; (ii) the issues were unknown at the time when the evidence was submitted and they were raised immediately after the issues became known; and (iii) this provision is resorted to "exceptionally".

18. Hereafter, I will refer to circumstances pertaining to any of the substantive stages of the test for the admissibility of evidence (*i.e.*, the relevance, the probative value and the prejudice) as "substantive aspects" and to any other circumstances as "administrative aspects".

19. According to the majority opinion, Rule 64(1) does not apply in the present instance because its purpose is "to regulate substantive admissibility challenges". I cannot but disagree with this argument. I believe, and will explain, that Rule 64(1) is indeed applicable to the situation at hand.

20. The wording of Rule 64(1) does not restrict the notion of unknown issues exclusively to those circumstances involving "substantive aspects" of admissibility, as suggested by in the majority opinion. Furthermore, Rule 64(1) is subsumed under Chapter 4, Section I of the Rules dealing with "Evidence". As such, this Rule is contained within a Chapter that is by no means limited to the regulation of substantive aspects. This reading of the Rule is in keeping with the language of Rule 64(2), which provides that "[a] Chamber shall give reasons for any ruling that it makes on evidentiary matters". The category "evidentiary matters" is far broader in scope than the interpretation of the notion of "admissibility of evidence" that I elaborate in this opinion.

21. Critically, in my view, the purpose of Rule 64(1) is to ensure that the Chamber does not resort in its deliberations under Article 74 of the Statute to evidence that it should not consider in the case. This purpose is suggested in Rule 64(3) and, more broadly, in Article 64(2). This purpose can be defeated not only if *substantive* aspects lead to the admissibility of evidence but also if *administrative* aspects lead to the admissibility of evidence that, in fairness, should not be considered by a Chamber.

22. Hence, I believe that the wording of Rule 64(1), read in the context of the particular sub-section of the Rules in which it is contained, and in light of its purpose, allows for the triggering of a new decision by the Chamber in the event that administrative circumstances led to the admission of evidence into the trial record.

23. One may anticipate that the expression "unknown issues relating to admissibility" could be applicable in circumstances where new facts arise after the submission of the evidence. However, the Rules do not limit the notion of "unknown issues relating to admissibility" to circumstances that did not *exist* at the time the evidence was submitted. Although they may have existed and, in this sense, they fail to be "new facts", they may have been unknown to the party at that time.

24. "Knowledge" is a subjective fact. The Chamber must be satisfied that the party raising an issue related to the admissibility of evidence did not, at the time the evidence was submitted, possess knowledge of the circumstances upon which it requests the decision to be reviewed. The Chamber should also be satisfied that the circumstances were raised immediately after the issues became known to the party.

25. Finally, this provision can only be invoked exceptionally. In analysing the exceptional character of the use of this Rule, the Chamber should bear in mind its duty to ensure that the trial is fair and expeditious, pursuant to Article 64(2) of the Statute. The Chamber should not review decisions on the admissibility of evidence as a matter of course. Rather, such review should only take place in order to prevent unfairness in the trial.

26. In my view, the instant application involves an administrative circumstance which led to the admission of evidence into the trial record. The "Order on the numbering of evidence"[11] ("the Order") first set out a new system for the numbering of evidence according to which the exhibits would receive an EVD number, unless there was an objection, in which case the exhibit would be assigned an MFI number ("Marked for Identification") until such time as the Chamber ruled on the matter. The item would only be included as an exhibit in the trial record if it received an EVD number.[12]

27. Furthermore, parties and participants were instructed to review the exhibits that had been assigned MFI numbers (thus not admitted into evidence) in the course of the trial[13] and raise any objections to their admission into evidence by 28 May 2010. Given that there were no objections or submissions, the Registry assigned EVD numbers to all of the exhibits listed in the annex to the Order.[14]

28. Notably, the exhibits were admitted into evidence absent any discussion as to the "substantive aspects" of their admissibility. Thus, for the purposes of Rule 64(1), in the instant application, administrative issues led to the admission of evidence into the trial record.

[11] Order on numbering of evidence, 12 May 2010, ICC-01/04-01/06-2432.
[12] Ibid, paragraph 5.
[13] Ibid, paragraphs 11 to 13.
[14] Notification mail from the Registry to the Chamber, the parties and participants in the present case on 14 June 2010.

29. In responding to this situation, the defence neither filed objections to the Order nor did it apply for leave to appeal pursuant to Article 82(1)(d), although the possibility existed for both. It was not until four and half months later, far beyond the 28 May 2010 deadline set out in the Order, that the defence filed its submissions.

30. The defence considered the Order to be purely administrative in intent. In its application, the Defence provided the following explanation:

> 11. The Defence, interpreting this order as dealing with purely administrative matters essentially meant for the Registry, paid insufficient attention to paragraphs 10 to 13, and consequently failed to make its observations before the deadline set by the Chamber.[15]

31. Pursuant to Article 5 of the Code of Professional Conduct for Counsel, Counsel has an obligation to perform its duties conscientiously and diligently. This obligation creates a presumption that if a decision was properly notified, Counsel was also informed of its contents and understood its implications.

32. This presumption is of crucial significance for the exercise of the judicial proceedings. A scenario to be avoided is one in which the parties, once the deadline for applications requesting leave to appeal has elapsed, could enable a review mechanism by simply arguing that they did not properly read or understand the contents of a decision. However, in my view, it would be utterly formalistic and indeed unfair to conclude that under no circumstances issues of this sort pertaining to the admissibility of evidence can be raised with the judges. I believe that this is the reason why this provision, and the other exceptions spelled out within the statutory framework, have been drafted in a manner permitting reconsideration either expressly or by means

[15] Requête de la Défense aux fins de reconsidération de l'ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010, 11 October 2010, ICC-01/04-01/06-2584-Conf.

of legal interpretation.

33. As underlined above, the "knowledge" aspect of the Rule 64(1) exception is a subjective fact and, as such, if convincing arguments are advanced by the parties, it should be possible to negate it. If the Chamber is persuaded that the party really did not comprehend, because of a mistake, that the decision involved an administrative aspect leading to the admission of evidence, this could enable the review mechanism provided for in Rule 64(1). A mistake negates the knowledge in that it negates the awareness or understanding of a fact or circumstance.

34. In my view, the procedural history regarding the admission of these exhibits strongly suggests that the defence did not understand that they were being admitted into evidence as a result of the Order. The items that the defence addressed but did not seek to introduce into evidence in the 8 May and 28 October 2009 applications were, as requested, not admitted into evidence by the Chamber in its decisions of 19 May and 9 December 2009. Clearly, it was not in the interest of the defence for these exhibits to be admitted into evidence and the defence had already obtained, before the Order, a ruling rejecting their admission into evidence. It follows that the defence would have undoubtedly objected to the admission of those exhibits had it understood, and thus known the consequences of the Order.

35. Indeed, having duly considered the Order and the Defence's submissions, the Prosecution's Response concedes that "the order has a purely administrative nature".[16] That the Prosecution appears satisfied that the admission of these exhibits into evidence through the Order would only have administrative implications further persuades me of the plausibility of the Defence claim of

[16] Prosecution's Response to the Defence's « Requête de la Défense aux fins de reconsidération de l'ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010 », 11 October 2010, ICC-01/04-01/06, paragraph. 7.

lack of awareness.

36. It is only as a result of the defence's submission of material objections that it failed to advance by 28 May 2010, followed by the prosecution's (further) Response,[17] that the Chamber is now in a position to address the current stance of the parties as to the admissibility of the specific items of evidence involved. Notably, almost one third of the exhibits addressed in the Order will not be eliminated from the trial record as a result of the present decision.[18]

37. If there was a mistake by the Chamber in the Order, it was merely the absence of a clear indication to the parties, who are the ultimate bearers of responsibility for the submission of evidence, that some of the exhibits retaining MFI numbers were rejected as evidence in previous decisions of the Chamber. However, as previously stated, those documents were specifically listed in the annexes to the Order for review by the parties and participants. Nonetheless, a mistake by the Chamber would not exclude the mistake by the defence, and thus, the possibility, once the issue has become known to the Defence, to raise the issue with the Chamber by way of a submission.

38. Finally, there is real potential for unfairness should the exhibits discussed by the defence retain their EVD numbers. Therefore, exceptionally, the

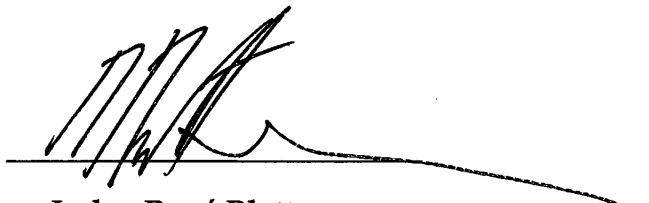
[17] Prosecution's Further Response to the Defence's Requête de la Défense aux fins de reconsidération de l'ordonnance de la Chambre de première instance I portant le numéro ICC-01/04-01/06-2432, datée du 12 mai 2010", 17 November 2010, ICC-01/04-01/06-2629.

[18] Some of the exhibits affected by the 12 May 2010 order have been either addressed in a separate decision (MFI-D-00151 - the Chamber ordered that a new EVD number was to be assigned: EVD-OTP-00620) or requested to be admitted only in part, as opposed to the exhibits in their entirety (MFI-D-00017 and MFI-D-00071). See the Decision on the "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)", 21 October 2010, ICC-01/04-01/06-2589, paragraphs 35 – 39(a). A corrigendum was issued on 25 October 2010, ICC-01/04-01/06-2589-Corr. ICC-01/04-01/06-1860-Conf, paragraph 6, reiterated in ICC-01/04-01/06-2584-Conf, paragraph 21. Furthermore, several other exhibits were (i) referred to in evidence; (ii) created by the witnesses during evidence or (iii) expected to provide the necessary context of the relevant questions that were asked [(i) MFI-D-00086, MFI-D-00136, MFI-D-00137, MFI-D-00138, MFI-D-00166 and MFI-D-00168 (ii) the drawing by witness DRC-OTP-WWWW-0294 and (iii) the three excerpts of video DRC-OTP-0082-0016 used during the defence examination of witness DRC-OTP-WWWW-0016].

documents set out in operative paragraph 27 (a) of the majority opinion are to be removed from the record.

IV. Conclusion

39. Given that a review mechanism for the variation of a previous order on the admission of evidence is provided for in the law, the judges should not create, and resort to, a *reconsideration* based on the so-called "inherent discretionary powers" of the Chamber. In my view, Rule 64(1) provides for a review mechanism which, as explained, is appropriate to deal with the instant application by the defence. As a result, the Order should be varied as described in the operative paragraph 27 of the majority opinion.



Judge René Blattmann

Dated this 30 March 2011

At The Hague, The Netherlands