

**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:

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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 trial¹³ 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