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**International
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Court**



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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

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 »

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

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Introduction

1. On 12 May 2010, the Trial Chamber decided to adopt a revised procedure for the numbering of exhibits “for the efficient administration of the record of the trial”.¹ In accordance with the 12 May 2010 Order, to which neither the Prosecution nor the Defence had responded, the Registry assigned EVD numbers to exhibits bearing MFI numbers listed in Annexes 1, 2 and 3 of said order.² On 11 October 2010, the Defence filed a request for reconsideration by the Trial Chamber of the 12 May 2010 Order, in which it explained that it had not paid sufficient attention to the directions of the Trial Chamber set out therein, had failed to make its observations within the timeline set by the Trial Chamber, but now wished to object to 74 of the exhibits receiving EVD numbers and being admitted into evidence.³
2. On 2 November 2010, the Prosecution filed a response to the Defence Application in which it submitted that the request of the Defence should be denied (i) because it was filed too late and (ii) because of the administrative nature of the Trial Chamber’s decision.⁴
3. In a status conference held on 5 November 2010, the Trial Chamber, while noting the principled objections raised by the Prosecution, requested that the Prosecution file a substantive response to the Defence Application “setting out those documents in particular in relation to which the

¹ ‘Order on numbering of evidence’, ICC-01/04-01/06-2432 (12 May 2010 Order).

² The EVD numbers were confirmed by an e-mail from Registry to the parties and participants on 14 June 2010 at 11.31am.

³ “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”, ICC-01/04-01/06-2584-Conf (Defence Application).

⁴ ‘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 »’, ICC-01/04-01/06-2601.

Prosecution argues they should retain EVD number presently attributed”.⁵

The Prosecution hereby responds as requested.

Submissions

4. The Prosecution submits that the following documents should retain the EVD numbers which have already been attributed to them, or alternatively, receive new prosecution EVD numbers.

(a) MFI-D-00121/EVD-D01-00247 – this document (part of the transcript of the Prosecution’s interview with witness DRC-OTP-WWWW-0055) was referred to not only during cross-examination by the Defence, but also during re-examination by the Prosecution.⁶ The Prosecution notes the Defence position that it does not wish for prior statements used by it during cross-examination to be assigned EVD numbers and admitted into evidence, but recalls that when the Trial Chamber has permitted such documents to be used by the Prosecution in questioning witnesses, EVD numbers have been routinely assigned.⁷ Therefore, in accordance with the practice adopted in the trial thus far and to maintain consistency in the case record, it is appropriate to either retain the existing EVD number or replace it with a new prosecution EVD number.

(b) MFI-D-00130/EVD-D01-00256 – this document (the second statement of witness DRC-OTP-WWWW-0157) was referred to during re-

⁵ Transcript of the hearing on 5 November 2010, ICC-01/04-01/06-T-326-ENG RT at page 12, lines 8-19.

⁶ See the transcript of the hearing on 26 May 2009, ICC-01/04-01/06-T-178-CONF-ENG CT at page 68, lines 9-20. For the Trial Chamber’s decision permitting the Prosecution to refer the witness to an excerpt of this transcript, and ask questions thereupon in re-examination, see page 67, lines 10-16.

⁷ When specific parts of a witness’s prior statement were referred to by the Prosecution during the questioning of a witness (whether during examination in chief or re-examination), these documents were routinely assigned EVD numbers, in addition to the paragraphs or excerpts being read into the record. The Prosecution notes for example DRC-OTP-0126-0086 (statement of witness 0043) – assigned EVD-OTP-00030 and DRC-OTP-0179-0024 (statement of witness 0293) – assigned EVD-OTP-00392.

examination by the Prosecution.⁸ For the reasons set out in (a), above, the Prosecution submits that it is appropriate to retain the existing EVD number or replace it with a new prosecution EVD number.

- (c) MFI-D-00151/EVD-OTP-00620 – this document ("Twelfth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo", dated 18 October 2002) was part of the *Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)* and was admitted into evidence, in full, pursuant to the Trial Chamber's decision of 21 October 2010.⁹ As part of that decision, the Trial Chamber noted that this document

"was erroneously assigned the EVD number EVD-D01-00269 on 11 June 2010 as a document introduced by the Defence, and should be removed from the record. As the document is now admitted into evidence as a document emanating from the prosecution, the Registry is instructed to assign a new (prosecution) EVD number."¹⁰

On 16 November 2010, the Defence EVD number was removed, and this document was assigned prosecution EVD number EVD-OTP-00620. The admission into evidence of, and assignment of an EVD number to, this document should clearly not be affected by the Defence Application.

- (d) MFI-D-00086/ EVD-D01-00225 – this document (a drawing by witness DRC-OTP-WWWW-0294) was referred to by the Defence in its cross-

⁸ See the transcript of the hearing on 9 June 2010, ICC-01/04-01/06-T-188-CONF-ENG CT at page 77, line 24 to page 78, line 16, page 79, lines 11-13. For the Trial Chamber's decision permitting the Prosecution to refer the witness to an excerpt of this statement, and ask questions thereupon in re-examination, see page 62, line 4 to page 63, line 1.

⁹ 'Decision on the "Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)"', ICC-01/04-01/06-2589-Corr (Decision 2589).

¹⁰ ICC-01/04-01/06-2589-Corr, para. 39 (a).

examination of that witness. The Prosecution submits that a drawing – by its very nature – cannot be read out loud into, and therefore form part of, the transcribed record of the case. Therefore, to maintain the completeness of the court record and provide context to the questions and answers, it is necessary and appropriate that the drawing be admitted into evidence and that an EVD number be assigned to it. Accordingly, the EVD number EVD-D01-00225 presently assigned to it should be retained.

- (e) MFI-D-00136, MFI-D-00137 and MFI-D-00138 – these items (extracts of video DRC-OTP-0082-0016¹¹) were played in court by the Defence during its cross-examination of witness DRC-OTP-WWWW-0016. By their very nature, the video extracts of a recording cannot be read into the transcribed record of the case. For the reasons set out in (d), above, it is appropriate for EVD numbers to be assigned to these items. The EVD numbers presently assigned to them should be retained.¹²

5. The Prosecution does not otherwise object to the Defence Application requesting:

- (a) the admission of documents MFI-D-00017 and MFI-D-00071 be limited to specific extracts; and

¹¹ An extract of this same video (from minutes 7:00 to 9:00 – which covers all three excerpts played by the Defence) was used by the Prosecution during the examination-in-chief of this witness and was assigned the EVD number EVD-OTP-00468. The Prosecution respectfully submits that the Trial Chamber's determination whether EVD numbers should be attributed to the three 'Defence' excerpts should not affect the assignment of an EVD number to, and the inclusion in the record of, the 'Prosecution' excerpt of this video.

¹² The Prosecution notes that although these three items were listed in Annex 2 of the 12 May 2010 Order, and were apparently included in the assignment of EVD numbers notified by the Registry by email on 14 June 2010, the items do not appear in eCourt, either under their MFI or (supposed) EVD numbers. Working from the list of items in Annex 2 and the ordering of EVD numbers in the Registry's email, the Prosecution believes that the EVD numbers for these items are supposed to be EVD-D01-00261, EVD-D01-00262 and EVD-D01-00263. Based on the Prosecution's understanding of the 12 May 2010 Order as it relates to the numbering of videos and videos excerpts (paras. 6-9), the full video – DRC-OTP-0082-0016 – should receive an MFI number, which it has (MFI-P-00110), and each portion (extract) of that video should then receive an EVD number (unless there are objections, in which case it would receive a separate MFI number until the issue is determined by the Trial Chamber).

(b) the remaining 67 items be removed from the record of the case.

Relief sought

6. As a result of the foregoing, while preserving its previous procedural objection to the untimeliness of the Defence Application, the Prosecution respectfully submits that items MFI-D-00121, MFI-D-00130, MFI-D-00151, MFI-D-00086, MFI-D-00136, MFI-D-00137 and MFI-D-00138 should retain their assigned EVD numbers pursuant to the 12 May 2010 Order (or in the case of MFI-D-00151, pursuant to Decision 2589) or receive new prosecution EVD numbers. As to the other evidentiary items, the Prosecution does not object to the Defence Application.



Luis Moreno-Ocampo, Prosecutor

Dated this 17th day of November 2010
At The Hague, The Netherlands