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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:

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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]

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[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

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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