



Original: English

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

Date: 31 August 2009

TRIAL CHAMBER I

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

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

Public

Prosecution's Submissions to Trial Chamber I's "Clarification and further guidance to parties and participants in relation to the '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'"

Source: Office of the Prosecutor

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

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1. On 27 August 2009, Trial Chamber I issued its “Clarification and further guidance to parties and participants in relation to the ‘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’”.¹ The Trial Chamber also invited “further submissions from the parties and participants resulting from this clarification regarding the requests for leave to appeal”.² The Prosecution hereby files its submissions on the Clarification.
2. The Clarification indicates “the specific new facts and circumstances” and “the specific new legal characterisations that the Chamber may consider”.³ It further restates that “[...] Regulation 55(2) allows for the incorporation of additional facts and circumstances [...]” and specifies that “[t]hose ‘additional facts’ must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.”⁴
3. The Clarification affects the Fourth Issue raised in the Defence application for leave to appeal.⁵ The Defence argued that in failing to inform the parties and participants of the changes for discussion, the Chamber had contravened the provisions of Regulation 55.⁶ In light of the Chamber’s provision of the relevant new facts and legal characterisations,⁷ the Prosecution submits that the Fourth Issue no longer arises from the Appealed Decision. Therefore, it withdraws its concurrence with the Defence Application on this issue.⁸
4. The Clarification does not affect the remaining three issues referred to in the Defence Application nor in the Prosecution’s Response or in its own Application.
5. Whether Regulation 55(2) entails a separate regime, which permits a Chamber to contemplate facts and circumstances beyond those described in the charging document, remains a live issue. The Clarification does not affect – but confirms –

¹ ICC-01/04-01/06-2093 (“Clarification”).

² *Ibid.*, para. 10.

³ *Ibid.*, para. 7.

⁴ *Ibid.*, para. 8.

⁵ ICC-01/04-01/06-2073 (“Defence Application”).

⁶ *Ibid.*, paras. 40-42. See also the Prosecution’s response to the Defence application (ICC-01/04-01/06-2080, paras. 21-22).

⁷ Clarification, para. 7.

⁸ Prosecution’s Response to “Requête de la Défense sollicitant l’autorisation d’interjeter appeal de la ‘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’ rendue le 14 juillet 2009”, ICC-01/04-01/06-2080, paras. 22-23.

that this issue, which is the only issue for which the Prosecution sought leave to appeal,⁹ continues to arise from the Appealed Decision.¹⁰

6. The Prosecution further submits that the issue raised in the Prosecution's Application continues to meet the requirements for leave to appeal pursuant to Article 82(1)(d), including the fairness of the proceedings. The issue before the Trial Chamber is not whether or in what circumstances the European Court of Human Rights allows conviction for charges not set forth in the charging document,¹¹ but whether Regulation 55 may fairly be interpreted on its own (and consistent with Article 74(2)) to allow a judgment that "exceeds the facts and circumstances described in the charges".¹²
7. The key consideration, which remains unchanged, is that the Chamber will consider *additional facts not contained in the charging document*. The Clarification considers that those additional facts "[...] build a unity, from the procedural point of view, with the course of events described in the charges".¹³ But they are still additional to the facts described in the DCC. As the Prosecution noted in its Application for Leave to Appeal, the fairness of the proceeding and the appearance of fairness are affected when judges both define the charges and take a final decision on these same charges.¹⁴ The Clarification also does not affect the consideration that the Majority Decision intrudes on the Prosecutor's role and ability "to exercise the powers and fulfil the duties" allocated in the Statute, including seeking an amendment of the charges.¹⁵

⁹ ICC-01/04-01/06-2074, 12 August 2009, ("Prosecution's Application"). The issue for which the Prosecution is seeking leave to appeal is "Whether Regulation 55(2) and (3) create a separate regime, distinct from Regulation 55(1), and whether under those provisions a Trial Chamber may change the legal characterisation of the charges or add new charges based on facts and circumstances that are not contained in the charging document but are established by the evidence at trial".

¹⁰ 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, ICC-01/04-01/06-2049, 14 July 2009 ("The Appealed Decision").

¹¹ Clarification, para. 8, footnote 15. The Prosecution respectfully disagrees that the ECtHR cases mentioned in the Clarification support the Majority's interpretation of Regulation 55; it will develop this position before the Appeals Chamber if and when leave to appeal is granted.

¹² The Chamber's assertion that Regulation 55 has created a power of the Chamber "blending different legal traditions while at the same time remaining consistent with recent human rights jurisprudence regarding the defendant's rights to a fair trial" (Clarification, para. 8), goes to the merits of the appeal – that is, whether the Trial Chamber's interpretation of Regulation 55 is correct and effectively entails a violation of the defendant's rights - and accordingly should only be discussed before the Appeals Chamber, if leave to appeal is granted.

¹³ Clarification, para. 8.

¹⁴ Prosecution Application, para. 24.

¹⁵ *Idem*.

8. Thus, the factual notice provided in the Clarification at this stage does not diminish or remove the unfairness that the Appealed Decision causes to parties and participants.¹⁶
9. In its Clarification, the Trial Chamber states that a hearing will be held in due course, for the parties and participants to make oral submission and to consider matters relevant to the possible modification pursuant to Regulation 55(2).¹⁷ The Prosecution respectfully requests that any hearing on the underlying matters be deferred until the Trial Chamber has decided on the pending requests for leave to appeal, and if leave is granted, until the Appeal Chamber has resolved the issue. This would ensure that the trial continues to proceed on a sound basis and in accordance with the Statute, the Rules and the Regulations.

Relief sought

10. For the reasons set out above, the Prosecution maintains its Application that the Trial Chamber grant leave to appeal the Appealed Decision pursuant to Article 82(1)(d). The Prosecution further requests the deferral of any hearing until the Chamber(s) rule(s) on the pending matters.



Luis Moreno-Ocampo
Prosecutor

Dated this 31st day of August, 2009

At The Hague, The Netherlands

¹⁶ The Prosecution further notes that the Chamber's assertion in paragraph 8 of its Clarification seems to confirm the possibility of a trial with continuous factual changes, for instance, if there are renewed applications from the Legal representatives during the presentation of the defence's case.

¹⁷ Clarification, para. 9.