

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-01/06 OA15**

Date: **14 September 2009**

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyun Song  
Judge Akua Kuenyehia  
Judge Erkki Kourula  
Judge Anita Ušacka  
Judge Daniel David Ntanda Nsereko

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

**Public**

**Prosecution's Document in Support of Appeal against 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" and urgent request for suspensive effect**

**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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## Introduction

1. On 14 July 2009, the Majority of Trial Chamber I, following a request of the Legal Representatives of the Victims, found that at the current stage of the *Lubanga* trial proceedings it could consider the possibility of re-characterisation of facts under Regulation 55(2) of the Regulations of the Court without being bound by the facts and circumstances set out in the original charging documents. The Majority reasoned that Regulation 55(1), which prohibits the Trial Chamber from “exceeding the facts and circumstances described in the charges”, defines a power of the Trial Chamber that is “distinct from the powers conferred by Regulation 55(2)”;<sup>1</sup> that Regulation 55(2) is applicable at a “distinct stage”;<sup>2</sup> and that it is “subject to a number of different and specific safeguards.”<sup>3</sup> The Majority concluded that it may expand the factual allegations described in the document containing the charges (“DCC”),<sup>4</sup> so long as it gives notice to the parties, solicits submissions, and – in accordance with Regulation 55(3) – allows measures to protect the rights of the accused to defend against the new charges.<sup>5</sup>
2. The Prosecution takes due note of the interest of the Legal Representatives of the Victims in ensuring awareness of crimes allegedly committed by the Accused which are not in the DCC. However, the Prosecution, as any other organ of the Court, is constrained by the parameters set by the Statute. The Prosecution further notes that it stated in June 2006 that the issue of other crimes allegedly committed by the Accused will be revisited at the end of the trial.<sup>6</sup>
3. The Prosecution submits that the Majority’s Decision violates both Article 74(2) and Regulation 55. Article 74 (2) establishes that the legal re-characterization of the charges cannot “exceed the facts and circumstances described in the charges”.

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<sup>1</sup> Appealed Decision, para. 29.

<sup>2</sup> Appealed Decision, para. 28.

<sup>3</sup> Appealed Decision, para. 29.

<sup>4</sup> See Appealed Decision, paras. 27-32.

<sup>5</sup> The Majority also decided that “[A]t an appropriate stage of the proceedings the defence, the prosecution and the victims’ legal representatives shall be given the opportunity to make oral or written submissions according to Regulation 55(2). In due course, the Trial Chamber will articulate the procedural steps for a hearing to take place to consider all matters relevant to the possible modification.” (Appealed Decision, para. 34)

<sup>6</sup> See ICC-01/04-01/06-170, para. 10: “The Prosecution explicitly emphasizes that his decision does not exclude that he may continue his investigation into crimes allegedly committed by Thomas Lubanga after the close of the present proceedings. In the event that these additional investigations establish reasonable grounds to believe that Thomas Lubanga is criminally responsible for additional crimes, the Prosecutor will apply to the Pre-Trial chamber for a new warrant of arrest... or will submit a further documents containing the charges for confirmation by the Pre-Trial Chamber respectively”

4. The language of Regulation 55 is also clear. It only authorises the Chamber to modify the legal characterisation of the facts and makes no reference to the possibility of changing the facts set out in the charges.<sup>7</sup> Additionally, the Regulations of the Court cannot modify the Statute and the Rules. The same Trial Chamber I in this case has held previously that “if use of Regulation 55 conflicted with any statutory provision or one contained in the Rules of Procedure and Evidence, then the latter take precedence.”<sup>8</sup> Regulation 55 cannot contradict Article 74; it implements it.<sup>9</sup>
5. Regulation 55 provides for a *single* process regulating the manner in which a Trial Chamber shall exercise its “authority [...] to modify the legal characterisation of facts”.<sup>10</sup> Sub-regulation 1 sets out the Chamber’s authority and restates its limits under Article 74(2), namely that any modification of the legal characterisation of facts shall not exceed “the facts and circumstances described in the charges and amendments to the charges”. Sub-regulation 2 defines the procedure that must be followed in case it appears to the Chamber that the legal characterisation of facts may be subject to change. Finally, sub-regulation 3 clarifies that the procedure under sub-regulation 2<sup>11</sup> must in particular ensure the protection of the rights of the accused under Articles 67(1)(b) and (e).
6. The Prosecution notes that its interpretation of Regulation 55 is the one that the Majority itself had adopted in a prior decision in this same case, referred to in paragraph 4 above. In that decision, the Trial Chamber unanimously found that Regulation 55 was not in conflict with Article 74(2) because it “allow[s] for a modification of the legal characterisation of the facts *rather than an alteration or amendment to the facts and circumstances described in the charges*”.<sup>12</sup> The Majority in the Appealed Decision offers no reasons justifying departure from this precedent.

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<sup>7</sup> Emphasis added. In accordance with the principles of statutory interpretation, the inclusion of one is the exclusion of the other (*inclusio unius est exclusio alterius*). Given that the Regulations prescribe the different elements of the charges just three regulations earlier, the fact that they limit the power to modify to one such element (the legal characterisation of the facts) makes it clear that they cannot form the basis for modifying any of the other elements (including the statement of the facts).

<sup>8</sup> ICC-01/04-01/06-1084, para. 31.

<sup>9</sup> As stated by one commentator, “Regulation 55 does not institute a new procedural device *per se*. It simply clarifies an *interpretative choice* offered to the judges of the Court under Articles 74(2)” (Stahn C., “*Modification of the legal characterization of facts in the ICC system*”, Criminal Law Forum, vol. 16, 2005, p. 13).

<sup>10</sup> See prior decision of this Trial Chamber (ICC-01/04-01/06-1084, para. 47); see also Minority Opinion of Judge Fulford, paras. 4 and 21-33.

<sup>11</sup> See Regulation 55(3): “For the purpose of sub-regulation 2 ...”

<sup>12</sup> (Emphasis added). Trial Chamber I went on and stated that “[...] so long as the facts and the circumstances as described in the charges are not exceeded, pursuant to Regulation 55 it is possible to give those facts and circumstances a different legal characterisation, so long as no unfairness results”. (Emphasis added). See also Minority Opinion, para. 31.

7. The Majority Decision thus violates fundamental provisions of the Statute, adversely impacting on the fairness of the proceedings including the right of the Accused and the prerogatives of the Prosecution. The Prosecution submits that the Majority Decision affects the division of functions between the Prosecution and Chambers of the Court under the Statute. In order to protect the rights of the accused, the Prosecutor and the Judges have clear distinctive roles under the Statute. The Prosecutor presents charges before the Judges, who decide on those charges. As it has been stated, “[t]he judges cannot themselves take cognizance of facts the Prosecutor has not pursued. In other words, the judge cannot be both judge and prosecutor”.<sup>13</sup> The selection of charges falls within the exclusive ambit of the Prosecution. Chambers of this Court have not been vested by the Statute with the authority to re-write those charges in the absence of a specific initiative to that effect by the Prosecution.

### Procedural Background

8. An arrest warrant was issued against the Accused on 10 February 2006, alleging that the Accused enlisted and conscripted children under the age of 15 and used them to participate actively in hostilities.<sup>14</sup> The Accused first appeared before the Court on 20 March 2006.<sup>15</sup> The Prosecution filed its DCC on 28 August 2006.<sup>16</sup>
9. On 29 January 2007, the Pre-Trial Chamber confirmed six counts alleging crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.<sup>17</sup> Based on the Confirmation Decision, the Prosecution filed an amended DCC on 22 December 2008.<sup>18</sup>
10. On 13 December 2007, prior to the commencement of the trial, the Trial Chamber gave notice to the parties and participants of the possibility that the Chamber might recharacterise the facts and circumstances regarding the armed conflict to determine in all counts that the conflict was internal and not international.<sup>19</sup> The Chamber explained that “the terms of Regulation 55 do not involve any conflict with the main relevant provision,

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<sup>13</sup> Terrier F., “The procedure before the Trial Chamber”, in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court*, Vol. II, (Oxford, Oxford University Press, 2002), p. 1314.

<sup>14</sup> ICC-01/04-01/06-2-tEN.

<sup>15</sup> ICC-01/04-01/06-T-3-EN ET, pp. 6-7.

<sup>16</sup> ICC-01/04-01/06-356.

<sup>17</sup> ICC-01/04-01/06-803, pp. 156-157. Three counts involve a time period when, according to the Pre-Trial Chamber’s confirmation decision, the armed conflict in the Democratic Republic of the Congo (DRC) was purely internal; the remaining three counts involve a time period within which the armed conflict was found to be international.

<sup>18</sup> ICC-01/04-01/06-1571-Conf-Anx.

<sup>19</sup> ICC-01/04-01/06-1084, paras. 48-50.

Article 74(2), because they allow for a modification of the legal characterisation of the facts rather than an alteration or amendment to the facts and circumstances described in the charges.”<sup>20</sup>

11. Trial commenced on 26 January 2009. During the Prosecution’s case, 30 witnesses testified.<sup>21</sup> On 14 July 2009, the final witness in the Prosecution’s case completed his testimony.<sup>22</sup>
12. On 22 May 2009, the Legal Representatives of the Victims asked the Trial Chamber to consider recharacterisation under Regulation 55 to include the crimes of sexual slavery (Articles 7(1)(g), 8(2)(b)(xxii), and/or 8(2)(e)(vi)) and inhuman and cruel treatment (Articles 8(2)(a)(ii) and/or 8(2)(c)(i)), based on their interpretation of evidence which had emerged during the Prosecution’s case.<sup>23</sup> The parties submitted observations.<sup>24</sup>
13. On 14 July 2009, the day the last prosecution witness testified, the Trial Chamber gave notice under Regulation 55(2) “that it appears to the majority of the Chamber that the legal characterisation of the facts may be subject to change.”<sup>25</sup> The Majority Decision concluded that at this stage of proceedings, it could consider the possibility of recharacterisation of facts under Regulation 55(2) without being bound by the facts and circumstances set out in the original charging materials. Instead, it considered that it may expand the factual allegations, so long as it gives notice to the parties, solicits submissions, and – in accordance with Regulation 55(3) – allows measures to protect the rights of the accused to defend against the new charges.
14. Judge Fulford dissented.<sup>26</sup> In his Minority Opinion, Judge Fulford in the first place noted that the Regulations must be read subject to the Statute and the Rules,<sup>27</sup> and stated that Regulation 55 authorised the Trial Chamber “to modify only those facts and circumstances that were set out in the Document Containing the Charges, as confirmed by the Pre-Trial Chamber.”<sup>28</sup> Judge Fulford considered that Regulation 55 contains a single procedure, in which the power to recharacterise the facts at the end of trial, in paragraph (1), is qualified by the safeguards set out in paragraphs (2) and (3).<sup>29</sup> Judge Fulford also

<sup>20</sup> *Ibid*, para. 47.

<sup>21</sup> The Prosecution called 28 witnesses, and the Trial Chamber called two expert witnesses.

<sup>22</sup> ICC-01/04-01/06-T-209-CONF-ENG ET.

<sup>23</sup> ICC-01/04-01/06-1891-tENG.

<sup>24</sup> ICC-01/04-01-06-1918; ICC-01/04-01/06-1966; ICC-01/04-01/06-1975.

<sup>25</sup> ICC-01/04-01/06-2049 (“Appealed Decision”), para. 35.

<sup>26</sup> ICC-01/04-01/06-2069-Anx1, 31 July 2009 (“Minority Opinion”). The Minority Opinion was originally filed on 17 July 2009 (ICC-01/04-01/06-2054).

<sup>27</sup> Minority Opinion, para. 6.

<sup>28</sup> Minority Opinion, para. 10; see also paras. 46-50.

<sup>29</sup> Minority Opinion, paras. 33, 53(i), see also paras. 21-31.

considered Regulation 55 to be further circumscribed by Article 61(9), pursuant to which an amendment, substitution or addition of charges is exclusively a function of the Pre-Trial Chamber, and that any modification of the legal characterisation of the charges under Regulation 55 must not constitute an amendment of those charges.<sup>30</sup> Judge Fulford concluded that the request of the Legal Representatives was in substance to add additional charges, rather than a change in the legal characterisation of the facts, and that he would reject the request on that basis.<sup>31</sup>

15. Both the Prosecution and the Defence sought leave to appeal the Decision. The Prosecution sought leave to appeal one issue,<sup>32</sup> while the Defence sought leave to appeal four issues.<sup>33</sup>
16. On 27 August 2009, the Majority issued a clarification and guidance on its Decision, in which the Majority clarified that “Regulation 55(2) allows for the incorporation of additional facts and circumstances [which] 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.”<sup>34</sup> It also explained that it intended to consider the charges set out in the Legal Representatives’ request.<sup>35</sup>
17. On 3 September 2009, the Trial Chamber granted leave to appeal the Decision in respect of two issues, which fully encompass the issue that the Prosecution sought leave to appeal.<sup>36</sup>
18. The Prosecution hereby files its Document in Support of Appeal, pursuant to Regulation 65(4). It also requests that the Appeals Chamber grant suspensive effect, pursuant to Article 82(3) and Rule 156(5).<sup>37</sup>

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<sup>30</sup> Minority Opinion, paras. 12-17, 53(ii). Judge Fulford considered that the distinction between modifying the legal characterisation of facts and amending, adding or substituting a charge would have to be determined on a case-by-case basis – see paras. 18-20, 53(iii).

<sup>31</sup> Minority Opinion, paras. 34-45, 53(iv) and (v).

<sup>32</sup> ICC-01/04-01/06-2074, 12 August 2009 “[w]hether 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”.

<sup>33</sup> ICC-01/04-01/06-2073-Conf, 11 August 2009.

<sup>34</sup> ICC-01/04-01/06-2093, para. 8.

<sup>35</sup> The Prosecution filed submissions in response to this clarification, in which it maintained that the clarification did not affect the core issue on which it had sought leave to appeal; and that it also did not affect three out of the four issues on which the Defence had sought leave to appeal. (ICC-01/04-01/06-2095, 31 August 2009)

<sup>36</sup> ICC-01/04-01/06-2107. The Trial Chamber considered that the issue the Prosecution sought leave to appeal “is essentially the same as Defence Issue 1, save as regards the element of adding new charges (which is dealt with hereafter under Defence Issue 2)” (ICC-01/04-01/06-2107, para. 6). The Chamber granted leave to appeal both of these issues, and thus granted leave to appeal the Prosecution’s issue in its entirety.

<sup>37</sup> The Prosecution recalls that the Appeals Chamber has recently ruled in an appeal under Article 82(1)(b) and Rule 154, that “as a practice, it is preferable that a request for suspensive effect - which, given the nature of the

### Urgent Request for Suspensive Effect

19. The Prosecution submits that suspensive effect is appropriate in this instance to ensure that the Trial Chamber does not conduct proceedings and take decisions on an erroneous basis, and also to allow the uncontroversial aspects of the trial to continue while this appeal is pending.
20. The Appeals Chamber has previously granted suspensive effect on the basis that the issue under appeal “could lead to the Trial Chamber considering additional material in the trial with resulting effects on the fairness and expeditiousness of the trial. In addition, implementation of these determinations could result in the rendering of decisions [...] that may be premised on incorrect assumptions, forcing the parties to seek leave to appeal these decisions”;<sup>38</sup> and that “[i]mplementation of these impugned determinations prior to the issuance of the judgment on appeal could mean that the trial might commence on the basis of an incorrect legal framework.”<sup>39</sup> The same reasoning applies in this instance. Continuing the procedure under Regulation 55 based on facts and circumstances not set out in the charges (a) will require consideration of additional material; (b) will impact on the fair and expeditious conduct of the trial; (c) could result in decisions based on incorrect premises which the parties may in turn seek to appeal; and (d) could mean that the remainder of the trial is conducted on the basis of an incorrect legal framework.
21. In addition, as Judge Fulford notes in his Minority Opinion, granting suspensive effect would “preserve the timeliness of the current trial.”<sup>40</sup> Granting suspensive effect will allow the trial to proceed on the undisputed current charges,<sup>41</sup> while the Appeals Chamber considers how Regulation 55 shall be applied in these circumstances.<sup>42</sup> The Prosecution

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request, ought to be decided as expeditiously as possible - should be presented in the appeal together with the reasons in support of the request as prescribed in rule 156 (5) of the Rules of Procedure and Evidence.” (ICC-01/05-01/08-499 OA2, 3 September 2009, para. 10) However, the Prosecution notes that in an appeal under Article 82(1)(d) and Rule 155, there is no separate “appeal” which is filed independently of the document in support of appeal.

<sup>38</sup> ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras. 19-20.

<sup>39</sup> ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, para. 23. The Appeals Chamber also considered that suspensive effect was appropriate because the impugned ruling “is important in so far as it hinges on an interpretation of [the provision, in that instance Article 68 (3)] which if reversed on appeal, would have far reaching consequences on the fairness of the proceedings and the rights of the accused.”

<sup>40</sup> Minority Opinion, para. 54.

<sup>41</sup> ICC-01/04-01/06-1891-tENG, para. 47. The charges chosen by the Prosecution, and the criminal offences contained therein, are not in dispute. Rather, the Legal Representatives submit that “an additional legal characterisation may be applied to the same facts since they may constitute a violation of several prohibitions set out in the *Rome Statute*.” The Majority appear to accept this, referring in their clarification to “the additional legal characterisations that the chamber may consider.” (ICC-01/04-01/06-2093, 27 August 2009, para. 11(b)) See also Clarification by the Trial Chamber, which confirms that the “specific new facts and circumstances ... are those listed in the joint application of the legal representatives” (para. 7).

<sup>42</sup> If in light of the judgment of the Appeals Chamber, the Trial Chamber still considers that there is a basis to initiate the proceedings under Regulation 55, then it could do so at that point. The Accused would have an opportunity to prepare and present his defence against any additional legal characterisations which the Chamber



makes this request on an urgent basis, in light of the fact that the Trial Chamber has already set a date on which the trial against the accused is scheduled to resume.<sup>43</sup> A prompt decision by the Appeals Chamber on this request will enable this schedule to be maintained in the interests of the expeditiousness of the proceedings.

### **The Prosecution's Ground of Appeal**

#### *The relevant findings of the Majority*

22. In the Appealed Decision, the Majority of Trial Chamber I made the following findings:

27. [...] Regulation 55 sets out the power of the Chamber in relation to two distinct stages". One stage is defined in Regulation 55(1) by referring expressly to Article 74 of the Statute [...]. Pursuant to Article 74(2) of the Statute, [a final] decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. In harmony with Article 74, Regulation 55(1) confers on the Chamber, in that final stage, the power to change the legal characterisation of facts with one express limitation: "without exceeding the facts and circumstances described in the charges and any amendments to the charges".

28. On the other hand, Regulation 55(2) defines a distinct state in which this sub-regulation operates. In contrast to Regulation 55(1), the former applies "at any time during the trial". The power to change the legal characterisation of facts at this stage also has limitations, namely those specified in Regulation 55(2) and (3). However, the latter sub-regulations do not require that the modification is done "without exceeding the facts and circumstances described in the charges and any amendments to the charges".

29. Notably, a potential change in the legal characterisation of facts at this state is subject to a number of different and specific safeguards clearly set out in Regulation 55(2) and (3). Those safeguards ensure that the modification is implemented in accordance with the right of the accused to a fair trial. [...]

[...]

32. It follows that the limitations provided in Regulation 55(1) to the "facts and circumstances described in the charges" are not applicable to [a situation that is] governed by Regulation 55(2) and (3).

23. In a separate filing, the Majority clarified that the additional facts, which according to Regulation 55(2) may be incorporated "must in any event have come to light during the

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considers. The Prosecution submits that this right will not be materially affected by continuing the trial on the present facts, charges and legal characterisations while the appeal is pending. On the other hand, the timely conduct and disposition of the trial is best served by suspending the implementation of the Decision.

<sup>43</sup> ICC-01/04-01/06-T-200-CONF-ENG, 26 June 2009, p. 29, line 18 – p. 30, line 1.

trial and build a unity, from the procedural point of view, with the course of events described in the charges”.<sup>44</sup>

24. The Prosecution submits that, as will be demonstrated below, the Majority erred in law<sup>45</sup> in concluding that Regulation 55 establishes two separate procedures: one under which the Chamber may change the charges at the end of the trial, without notice to the parties (Regulation 55(1)); and a second distinct procedure under which the Chamber may change the charges based on new facts that emerge during the trial, provided that the safeguards in Regulation 55(2) and (3) are met. The Majority’s ruling in the Decision to base its change to the legal characterisation on facts and circumstances which are not described in the charges violates both Regulation 55 and core provisions of the Statute.

*The Issue for which leave to appeal has been granted*

25. In its decision granting Leave to Appeal, the Trial Chamber certified the following issue:

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto build a procedural unity with the latter and are established by the evidence at trial.<sup>46</sup>

26. The issue is primarily one of statutory interpretation. Because Regulation 55 is designed to implement the processes under the Rome Statute, that document is the primary source to be examined.<sup>47</sup> It sets out the procedures, rights and duties of the parties and governs

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<sup>44</sup> Clarification, para. 8.

<sup>45</sup> As the Prosecution has previously submitted (see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-1219 OA9, 10 March 2008, footnote 19), for errors of law the appropriate standard is *de novo* review by the Appeals Chamber. The Appeals Chamber ought to review any alleged errors of law to determine whether the decision was correct, and substitute its own judgment on the correct legal interpretation, without showing any deference to the finding of the original Chamber. As the ICTY and ICTR Appeals Chambers have consistently held, the Appeals Chamber is “the final arbiter of the law of the International Tribunal” – see e.g. *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para 14; *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para 10; *Rutaganda v Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para 20.

<sup>46</sup> ICC-01/04-01/06-2107, 3 September 2009, p. 22. The Prosecution notes that in phrasing the second part of Question 1, the Trial Chamber departed from the language of Regulation 55, where referring to a change of “the legal characterisation of the *charges*”, as opposed to the “legal characterisation of facts”.

<sup>47</sup> Article 21(1) sets out the hierarchy of sources of applicable law which the Court shall apply. The first source is the Statute (along with the Rules of Procedure, and Evidence and the Elements of Crimes). See further *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 23.

the processes before this Court. Whether other legal systems permit a different process, or how that process would work, is relevant only if the Statute is not clear. In this case, however, the Statute is clear. It reflects the deliberate choices by the drafters, and its provisions and those deliberate choices must be respected.

27. Under the Rome Statute, the Prosecution files the document containing charges, upon which the criminal prosecution is based.<sup>48</sup> That charging document formulated by the Prosecution, as confirmed by the Pre-Trial Chamber in its confirmation decision, forms the foundation of the trial. This fundamental proposition has been ignored in the Appealed Decision.

*The final decision of the Trial Chamber under Article 74 cannot exceed the facts and circumstances described in the charges and any amendments to the charges - Article 74 (2)*

28. The Trial Chamber's role under the Rome Statute is to adjudicate the question of guilt or innocence. In so doing, it is limited by the facts and circumstances described in the charges and any amendments to the charges, as expressly mandated by Article 74(2). It has been stated that "[t]he purpose of regulations like article 74 in international and national law is to establish certain cornerstones as the indispensable requirements for the final decision." Such decision "closes a criminal procedure which has to be oriented to the rule of law and the basic principles of a fair trial. To guarantee that both aspects are respected when the Trial Chamber reaches its findings some of these principles, indispensable for an international criminal jurisdiction, are mentioned in the different paragraphs of article 74".<sup>49</sup>

29. "Charge" is not defined in the Statute. Regulation 52 clarifies that the charges contain both a "statement of facts" and a "legal characterisation of the facts".<sup>50</sup> The language of Regulation 55 *in toto*, including Regulation 55(2), is clear and only authorises the Chamber to modify the latter element, i.e. the legal characterisation of the facts. Regulation 55 makes *no reference* to the possibility of changing the facts set out in the

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<sup>48</sup> Article 61(3)(a).

<sup>49</sup> See Triffterer O., "Article 74", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 2008), p.1391, [10].

<sup>50</sup> Regulation 52 specifies the content of the document containing the charges or DCC, firstly mentioned in Article 61(3)(a). In particular, the document shall contain (a) the full name of the person and any other relevant identifying information; (b) a statement of the facts; and (c) a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28. See also Minority Opinion, para. 8.

charges.<sup>51</sup> Rather, Regulation 55 read as a whole recognises that those facts are fixed, as required by Article 74(2) and as emphasised by the explicit language of Regulation 55(1).

30. The Prosecution notes that this interpretation of the relevant provisions was the one that the Majority itself had adopted in a prior decision in this same case. In that decision, referred to in paragraphs 4 and 6, above, the Trial Chamber unanimously found that Regulation 55 was not in conflict with Article 74(2) because it “allow[s] for a modification of the legal characterisation of the facts *rather than an alteration or amendment to the facts and circumstances described in the charges*”.<sup>52</sup> The Majority in the Appealed Decision offers no reasons justifying departure from this precedent.
31. The drafting history of the provision as well as the existing commentaries further support the conclusion that the Chamber’s judgment under Article 74 must be limited to the facts and circumstances described in the charges and any amendments to the charges, and that the Statute does not allow for any exception to this principle. The current text of Article 74(2) originated in a proposal from 13 August 1996, which indicated that “[t]he judgment may not go beyond the acts and circumstances described in the indictment, or amended indictment, if any”.<sup>53</sup> The proposal explained that “the principle of consistency between indictment and judgment is established: the court may not hand down a judgment on acts which have not been included in the indictment or an amendment thereto.”<sup>54</sup> This proposal was carried over for the subsequent negotiations.<sup>55</sup> Before its adoption in Rome, the term “indictment” in the original proposal was replaced by “charges”,<sup>56</sup> presumably to reflect the introduction of the confirmation of charges hearing in the Statute.<sup>57</sup>

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<sup>51</sup> In accordance with the principles of statutory interpretation, the inclusion of one is the exclusion of the other (*inclusio unius est exclusio alterius*). Given that the Regulations prescribe the different elements of the charges just three regulations earlier, the fact that they limit the power to modify to one such element (the legal characterisation of the facts) makes it clear that they cannot form the basis for modifying any of the other elements (including the statement of the facts).

<sup>52</sup> (Emphasis added) Trial Chamber I went on and stated that “[...] so long as the facts and the circumstances as described in the charges are not exceeded, pursuant to Regulation 55 it is possible to give those facts and circumstances a different legal characterisation, so long as no unfairness results”. (Emphasis added) See also Minority Opinion, para. 31.

<sup>53</sup> Rules of Procedure: Working Paper, submitted by Argentina, UN Doc. [A/AC.249/L.6](#), 13 August 1996, Rule 104(C).

<sup>54</sup> *Ibid.*

<sup>55</sup> Two weeks after it was tabled, the proposal was redrafted to read “The judgment shall not exceed the facts and circumstances described in the indictment or in its amendment, if any”. See Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the Accused, UN Doc. [A/AC.249/CRP.14](#), 27 August 1996.

<sup>56</sup> Report of the Working Group on Procedural Matters: Addendum, UN Doc. [A/CONF.183/C.1/WGPM/L.2/ADD.5](#), 9 July 1998, Article 72(2).

<sup>57</sup> Report of the Working Group on Procedural Matters Addendum, UN Doc. [A/CONF.183/C.1/WGPM/L.2/ADD.2](#), 4 July 1998, footnote 2 (“The Working Group decided that the word “indictment” should be replaced by the word “charges” throughout Part 6.”).

32. Commentators to the Statute reiterate that “[t]he scope of the trial depends on the charges admitted for trial by the confirmation of the Pre-Trial Chamber according to article 61 or “any amendments to the charges”,<sup>58</sup> and “[t]he judges cannot themselves take cognizance of facts the Prosecutor has not pursued. In other words, the judge cannot be both judge and prosecutor.”<sup>59</sup>
33. Thus, both negotiating history and scholarly writings confirm the position that a Trial Chamber remains at all times bound by the facts and circumstances pleaded by the Prosecution as confirmed by the Pre-Trial Chamber.
34. In addition, the Appeals Chamber has ruled that “the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber’s authority to the determination of those issues.”<sup>60</sup> Accordingly, a decision based on facts and circumstances not included in the charges would fall outside the scope of the relevant Chamber’s proper exercise of jurisdiction in the case.
35. The Prosecution notes that the Majority has recently clarified that the additional facts which according to its interpretation of Regulation 55(2) may be incorporated “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.”<sup>61</sup> Although limiting the degree to which a Chamber may exceed the facts and circumstances included in the charges, this clarification does not correct the error of the Majority. In fact, the Clarification confirms the Chamber’s thinking that “Regulation 55(2) allows for the incorporation of additional facts and circumstances provided that notice to the participants is granted and an opportunity to make oral or written submissions concerning the proposed changes is afforded”.<sup>62</sup>
36. Finally, and as the Prosecution has already stated in prior submissions, if facts constitutive of offences under the Statute – but not charged in the instant case - are unveiled during

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<sup>58</sup> Triffterer O., “Article 74”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 2008), p. 1396.

<sup>59</sup> Terrier F., “The procedure before the Trial Chamber”, in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court*, Vol. II, (Oxford, Oxford University Press, 2002), p. 1314.

<sup>60</sup> ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 63. The Appeals Chamber refers in its footnote 59 to paragraph 15 of the Prosecution’s Document in Support of Appeal against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, ICC-01/04-01/06-1219. In that paragraph, the Prosecution defined the parameters as “the facts and circumstances of the case as included in the charges.”

<sup>61</sup> Clarification, para. 8.

<sup>62</sup> *Ibid.*

trial, the Prosecution can present new charges before the Pre-Trial Chamber, including those new facts and its corresponding legal characterisation.<sup>63</sup>

The Prosecutor's exclusive power to present and amend the charges

37. The Rome Statute, and particularly Articles 61(3) and 61(9), assigns to the Prosecutor the exclusive power to present and amend charges.

38. Under Article 61(3)(a) the Pre-Trial Chamber cannot define or amend the charges *proprio motu*; <sup>64</sup> the same principle applies to the Trial Chamber.<sup>65</sup> The role of the Pre-Trial Chamber in the confirmation hearing is to evaluate whether the evidence presented by the Prosecutor is sufficient to send the case to trial.<sup>66</sup> Accordingly, it may confirm or decline the charges or request the Prosecution to consider an amendment to the charges.<sup>67</sup> Even then, it is for the Prosecution to make the final determination on the proposed amendment and whether to submit an amended DCC.<sup>68</sup>

39. Article 61(9) confirms the Prosecution's exclusive power to amend charges.<sup>69</sup> In addition, the provision appears to set a deadline for the exercise of such power, including to add new charges or to substitute those included in the DCC with more serious charges, only "after the charges are confirmed and before the trial has begun". Therefore, a literal

<sup>63</sup> The Prosecution argued, *inter alia*, that under the Statute, a subsequent prosecution may be brought if it is not based on conduct that formed the basis of crimes which have already been prosecuted (see Prosecution's Response to "Observations de la Défense sur la 'Requête de la Défense aux fins de cessation des poursuites' datée du 2 juin 2008", 12 January 2009, ICC-01/04-01/06-1595). These submissions were advanced when the Accused sought an order from the Chamber that the Prosecution may not investigate or prosecute him in the future for other crimes arising out of the circumstances underlying the pending charges. This same Trial Chamber supported the Prosecution's position and in an oral decision of 16 January 2009, ICC-01/04-01/06-T-104-ENG ET, pp. 6-10, stated that the ongoing investigations did not render the instant trial unfair despite "[... the Accused] may at some stage in the future have to meet other different charges in relation to another case".

<sup>64</sup> The Prosecution submits that it is the Prosecution and not the Pre-Trial Chamber as the Minority Opinion (para. 13) advances, which has the power to frame and alter the charges. See article 61(3) and 61(9). The Pre-Trial Chamber pursuant to article 61(7) will either confirm or decline those charges or adjourn the hearing and request further evidence or an amendment.

<sup>65</sup> By inference of Article 64.

<sup>66</sup> See Shibahara K., "Article 61" in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Baden Baden, Nomos Verlagsgesellschaft, 1999), p. 784, [1].

<sup>67</sup> Article 61(7).

<sup>68</sup> See ICC-01/05-01/08-388, para. 38: "The wording of article 61(7)(c)(ii) of the Statute is formulated in a discretionary fashion, leaving it for the Prosecutor to decide whether to amend the relevant charge". See also para. 39: "The Chamber holds the view that it is the responsibility of the Prosecutor to build and shape the case according to his statutory mandate pursuant to article 54(1)(a) of the Statute. The responsibilities of the Chamber lie in exerting judicial oversight during the pre-trial proceedings and rendering its decision in accordance with article 61(7) of the Statute." *Friman* notes that the provision of article 61(7)(c)(ii) indicates that the Court is bound by the Prosecutor's legal classification of the conduct in question. See *Friman*, H. "[The Rules of Procedure and Evidence in the Investigative Stage](#)", in Fischer, H. *et al.* (eds.) *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin Verlag Arno Spitz: Berlin 2001), at fn. 47.

<sup>69</sup> However, after the charges are confirmed, the exercise of this power is subject to the permission of the Pre-Trial Chamber.

reading of this provision indicates that once the trial has begun, the Prosecution may only seek to withdraw the charges, with the permission of the Trial Chamber.<sup>70</sup>

40. The drafting history of Article 61(9) further confirms a legislative choice in favour of granting the Prosecution the exclusive power to amend the charges. Initially, the International Law Commission had assigned to the Prosecutor the exclusive power to amend the “indictment”.<sup>71</sup> During the discussions of the Preparatory Committee two possible alternatives were considered: (a) either the Pre-Trial Chamber could amend the charges or request the Prosecutor to do so, *or* (b) the Prosecutor had exclusively this power.<sup>72</sup> Finally, the second option was chosen in Rome and Article 61(9) reflects the drafters’ intention to provide the Prosecutor with exclusive authority in amending the charges.<sup>73</sup>
41. Consequently, Regulation 55 cannot alter the fundamental scope of the case by incorporating new facts and circumstances not contained in the Prosecution’s charging instrument.

*Regulation 55 must be read subject to the Statute and the Rules*

42. The Prosecution submits that the Regulations of the Court cannot modify the Statute and the Rules. Article 21(1)(a) states that the Court shall apply “[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.” The Regulations can neither expand nor limit a power conferred on a Chamber by the Statute or the Rules,<sup>74</sup> or create a new power that does not derive from the Statute or the Rules. Much

<sup>70</sup> Article 61(9). While the Minority Opinion states that after the commencement of the trial, the only available measure is that the Prosecutor, with leave, may withdraw the charges, Triffterer allows the “Chamber on a motion of the Prosecutor decide on an amendment of charges ‘after notice to the accused’” during the trial for reasons of practicality and considering the interpretation and application of articles 64(6)(a), 61(11) and 61(9). (Emphasis added) See Triffterer O., “Article 74”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos: 2008), p. 1396, [28].

<sup>71</sup> Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, General Assembly, Forty-ninth Session Supplement No.10 (A/49/10), p.94.

<sup>72</sup> See Report Preparatory Committee on the Establishment of an International Criminal Court, 4-15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, p. 23; Preparatory Committee on the Establishment of an International Criminal Court, 16 March-3 April 1998, Report of the Inter-Sessional Meeting from 19 to 30 January in Zutphen, Netherlands, UN Doc. A/AC.249/1998/L.13, 4 February 1998, p. 96.

<sup>73</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records, Vol.III, Reports and other documents, pp. 114-115.

<sup>74</sup> In relation to the Regulations of the Registry (“RR”), which, like the Regulations of the Court (“RC”) are a subsidiary instrument, the Appeals Chamber has ruled that “the Regulations of the Registry are in place ‘to govern the operation of the Registry’ (rule 14 of the Rules of Procedure and Evidence) and that they ‘shall be read subject to the Statute, the Rules and the Regulations of the Court (regulation 1 (1) of the Regulations of the Registry). As such, [the RR] cannot alter the scheme otherwise contained within the Statute and the Rules of Procedure and Evidence” (ICC-01/04-01/07-776, OA7. 26 November 2008, para. 81). Applying this principle to the RC, they cannot alter the scheme set out in the Statute and the Rules. See also ICC-01/04-556 OA4 OA5

less can the Regulations confer an authority that is incompatible with the Statute or the Rules.

43. According to Article 52(1), the Regulations of the Court deal with matters of “routine functioning” of the Court “in accordance with the Statute and the Rules of Procedure and Evidence”. In turn, Regulation 1(1) states that the Regulations of the Court “shall be read subject to the Statute and the Rules”. Article 64(1) further provides that “[t]he functions and powers of the Trial Chamber [...] shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence”.<sup>75</sup> The same Trial Chamber I in this case held previously that “if use of Regulation 55 conflicted with any statutory provision or one contained in the Rules of Procedure and Evidence, then the latter take precedence.”<sup>76</sup> Hence, Regulation 55 can not contradict Article 74; rather, the former must be interpreted as a device implementing the latter.<sup>77</sup>
44. Contrary to the Majority’s view, it is immaterial that the recharacterisation exceeding the facts and circumstances of the charges is made during the trial and not at the end of it.<sup>78</sup> Any judgment entered on the basis of new facts and circumstances beyond those set out in the charges would entail a violation of Article 74(2), regardless of the procedural stage at which those facts were enunciated for the first time.<sup>79</sup>
45. Hence, the issue before the Appeals Chamber is not whether or in what circumstances different national legal traditions allow convictions for facts and circumstances not included in the charging document, as contended by the Majority,<sup>80</sup> but whether Regulation 55 may be interpreted to allow a Chamber to enter a judgment that “exceeds the facts and circumstances described in the charges”.<sup>81</sup>

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OA6, 19 December 2008, para. 49: “Regulation 86 (6) of the Regulations of the Court does not envisage participation outside the confines of rule 89 of the Rules. It merely regulates victim participation under article 68 (3) of the Statute.”

<sup>75</sup> See also Minority Opinion of Judge Fulford, para. 6.

<sup>76</sup> (ICC-01/04-01/06-1084, para. 31).

<sup>77</sup> As stated by one commentator, “Regulation 55 does not institute a new procedural device *per se*. It simply clarifies an *interpretative choice* offered to the judges of the Court under Articles 74(2)” (Stahn C., “*Modification of the legal characterization of facts in the ICC system*”, Criminal Law Forum, vol. 16, 2005, p. 13).

<sup>78</sup> Appealed Decision, paras. 27-28.

<sup>79</sup> See Decision, paras. 28-29; Minority Opinion of Judge Fulford, para. 29.

<sup>80</sup> See Clarification, para. 8, where the Majority finds that “Regulation 55 is a unique device carefully drafted 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”.

<sup>81</sup> National practice or the jurisprudence of the ECtHR may be relevant to interpret the procedural provisions of Regulation 55, so as to ensure that it is in full compliance with the accused’s rights to a fair trial under Articles 21(3) and 67(1). However, these sources are irrelevant for the determination of the issue before the Appeals Chamber.



46. Furthermore, as stated by Judge Fulford, the position adopted in the Appealed Decision is inconsistent with the approach taken in human rights jurisprudence.<sup>82</sup> The Prosecution submits that the ECtHR cases quoted by the Chamber in its Clarification are taken out of context and do not support the Majority's position.<sup>83</sup> The cases are cited to endorse the Majority's finding of a distinct procedure under Regulation 55(2) that allows the Chamber to exceed the facts originally charged as long as it provides prompt notice to the participants. Nevertheless, the cases (with a factual scenario substantially different from the instant case) refer to situations where domestic courts *only* altered the legal characterisation of the facts at the judgment stage without prior notice to the accused. The factual scope of the charges remained untouched.<sup>84</sup> The ECtHR reiterated the above cited principles<sup>85</sup> and found that lack of notice (regarding the new legal characterisation) prior to the judgment impaired the accused from exercising a proper defence.<sup>86</sup>

*Separating Regulation 55 into two different procedures<sup>87</sup> circumvents safeguards which are necessary under Regulation 55(1), further demonstrating the error*

47. The Prosecution submits that the Majority's conclusion that "a right to call new evidence or to examine previous witnesses is only relevant to challenge evidence that is provided to substantiate a different factual basis" is incorrect.<sup>88</sup> Even if the same facts are given a new legal characterisation, the parties must still make submissions on how those same facts relate to the elements of the different crime or mode of liability. However, the Majority's interpretation of Regulation 55(1) allows the Chamber to change the legal characterisation

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<sup>82</sup> Minority Opinion, para. 22. The ECtHR has repeatedly stated that the accused has "the right to be informed not only of the 'cause' of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts (see for instance, *Pélissier and Sassi v. France*, Application No.25444/94, Judgment 25 March 1999, para. 51). Whilst the Court acknowledges the possibility of a legal re-characterization of the charged facts, it states that notice shall be given at a time which does not deprive the accused from the "possibility of exercising their defence rights [...] in a practical and effective manner and, in particular, in good time". Thus, learning the new legal characterization in the final judgment is "plainly [...] too late" (*ibid.*, para. 62).

<sup>83</sup> Clarification, para. 8, footnote 15: *Abramyan v. Russia*, Application No. 10709/02, Judgment 9 January 2009; *Dallos v. Hungary*, Application No. 29082/95, Judgment 1 March 2001. The Prosecution notes that the former case was also cited in the Minority Decision, para. 24, to challenge the Majority's ruling.

<sup>84</sup> *Abramyan v. Russia*, para. 28; *Dallos v. Hungary*, para. 16.

<sup>85</sup> *Abramyan v. Russia*, paras. 34-35; *Dallos v. Hungary*, para. 47.

<sup>86</sup> *Abramyan v. Russia*, para. 36; *Dallos v. Hungary*, para. 48.

<sup>87</sup> Decision, para. 29: "The powers conferred on the Chamber pursuant Regulation 55(1) are distinct from the powers conferred by Regulation 55(2). This explains why the provision of adequate time and facilities for the effective preparation of the defence as well as an opportunity to examine witnesses or present evidence is mandatory only under Regulation 55(2)." The same applies equally to the requirement that the Chamber "shall [...] give the participants the opportunity to make oral or written submissions", contained in Regulation 55(2).

<sup>88</sup> Appealed Decision, para. 30.

of the facts pleaded without providing any notice under sub-regulation 2, and accordingly also without the safeguards enshrined in sub-regulation 3.

48. New legal characterisations mean that new issues may become relevant,<sup>89</sup> different elements must be proven, and different lines of defence may be available. It would be unfair to the Prosecution and to the accused if they were denied any right to make submissions, to call new evidence, or to re-examine previous witnesses in order to fully explore the new issues and to address the new legal elements.

Regulation 55 allows a change to the legal characterisation of the facts pleaded, without conflicting with Article 61(9) or being confined to lesser “included offences”

49. In contrast to the interpretation proposed by Judge Fulford, nothing in Regulation 55 suggests that it is limited to permitting recharacterisation of a charge as a lesser “included offence”. Regulation 55 only requires that its application is consistent with the facts and circumstances contained in the charge.<sup>90</sup> There is no conflict with Article 61(9) if the Trial Chamber examines the facts and circumstances pleaded and proven by the Prosecution and, after considering the legal characterisation proposed by the Prosecution and giving the parties notice and hearing submissions, determines that a different characterisation may be appropriate.<sup>91</sup> Such a decision is consistent with Article 74(2); and the procedures in Regulation 55(2) and (3) ensure that other provisions of the Statute such as Articles 21(3) and 67(1) are respected.<sup>92</sup>

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<sup>89</sup> A different legal characterisation may also change the relevance of existing facts and circumstances included in the document containing the charges, or of other evidence which has already been heard.

<sup>90</sup> Minority Opinion, para. 20.

<sup>91</sup> Contrast Minority Opinion, paras. 18, 41-45.

<sup>92</sup> In this manner the principle of *iura novit curia* embodied in Regulation 55 can properly operate as a “device to counter accountability gaps.” See Carsten Stahn, “Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55”, 16 *Criminal Law Forum* (2005), pp. 3 and 25.

### **Relief Sought**

50. For the above referred reasons, the Prosecution requests that the Appeals Chamber:

- a) urgently suspend enforcement of the Appealed Decision pending its decision in this case; and
- b) reverse the Appealed Decision



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**Luis Moreno-Ocampo,  
Prosecutor**

Dated this 14<sup>th</sup> day of September 2009  
At The Hague, The Netherlands