

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 October 2009

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 adjourning the evidence in the case and consideration of Regulation 55

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

The Office of the Prosecutor

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Ms Fatou Bensouda

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Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

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Mr Joseph Keta Orwinyo
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Appeals Chamber**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision adjourning the evidence in the case and consideration of Regulation 55.

I. Background and Submissions

1. On 14 July 2009, the Majority of Trial Chamber I issued its “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” (“Decision”).¹
2. The Decision notified the parties and participants that, at that stage of the proceedings, it appeared to the Majority of the Chamber that the legal characterisation of the facts may be subject to change.² It was indicated that at an appropriate time the parties and participants will be given the opportunity to present oral or written submissions in accordance with Regulation 55(2) of the Regulations of the Court (“Regulations”). In addition, the Decision notified the parties and participants that Trial Chamber I will, in due course, articulate the relevant procedural steps for a hearing at which the Chamber will consider all matters relevant to a possible modification.³
3. On 17 July 2009, Presiding Judge Fulford issued the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with

¹ 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, 14 July 2009, ICC-01/04-01/06-2049.

² *Ibid.*, paragraph 33.

³ *Ibid.*, paragraph 34.

Regulation 55(2) of the Regulations of the Court” (“Minority Opinion”).⁴ On 21 July 2009, the “Decision issuing a corrigendum to the ‘Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009” was handed down.⁵ A second corrigendum to the Minority Opinion was issued on 31 July 2009.⁶ In the Minority Opinion, Judge Fulford rejected, first, the suggestion “that Regulation 55 sets out the powers of the Chamber in relation to two distinct stages” and, second, that the “condition for triggering the mechanism of Regulation 55(2)” is met on the basis of “the submissions of the legal representatives of victims and the evidence heard so far during the trial”.⁷

4. On 11 August 2009, the defence filed the “Requête de la Défense sollicitant l’autorisation d’interjeter appel 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”.⁸
5. On 12 August 2009, the Office of the Prosecutor (“prosecution”) filed the “Prosecution’s Application for Leave to Appeal the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the

⁴ Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 17 July 2009, ICC-01/04-01/06-2054.

⁵ Decision issuing a corrigendum to the “Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” of 17 July 2009”, 21 July 2009, ICC-01/04-01/06-2061.

⁶ Decision issuing a second corrigendum to the “Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” of 17 July 2009”, 31 July 2009, ICC-01/04-01/06-2069.

⁷ *Ibid.*, paragraph 53.

⁸ Requête de la Défense sollicitant l’autorisation d’interjeter appel 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, 11 August 2009, ICC-01/04-01/06-2073-Conf. Pursuant to Trial Chamber I’s Order of 14 August 2009, this document was reclassified as public.

Regulations of the Court’”.⁹

6. On 17 August 2009, the victims’ legal representatives filed the “Réponse conjointe des représentants légaux des victimes aux demandes de la Défense et du Procureur d’interjeter appel 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 datées respectivement des 11 et 12 août 2009”.¹⁰
7. On 17 August 2009, the prosecution filed a response to the defence submissions.¹¹
8. On 27 August 2009 the Majority of the Chamber issued a “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’”.¹²
9. On 31 August 2009, the prosecution filed the “Prosecution’s Submissions on 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

⁹ Prosecution’s Application for Leave to Appeal the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 12 August 2009, ICC-01/04-01/06-2074.

¹⁰ Réponse conjointe des représentants légaux des victimes aux demandes de la Défense et du Procureur d’interjeter appel 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 datées respectivement des 11 et 12 août 2009, 17 August 2009, ICC-01/04-01/06-2079.

¹¹ Prosecution’s Response to “Requête de la Défense sollicitant l’autorisation d’interjeter appel 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”, 17 August 2009, ICC-01/04-01/06-2080.

¹² 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”, 27 August 2009, ICC-01/04-01/06-2093.

change in accordance with Regulation 55(2) of the Regulations of the Court’’.¹³

10. On 3 September 2009 the Chamber issued its “Decision on the prosecution and the defence applications for leave to appeal 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’”.¹⁴

11. The Chamber granted to leave to appeal on the following two questions:

Question 1

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.

Question 2

Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, viz. to include

¹³ 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’”, 31 August 2009, ICC-01/04-01/06-2095.

¹⁴ Decision on the prosecution and the defence applications for leave to appeal 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”, 3 September 2009, ICC-01/04-01/06-2107.

crimes under Articles 7(l)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.

12. On 10 September the defence filed its “Acte d’appel de la Défense relative à la décision intitulée ‘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’”.¹⁵ The defence, *inter alia*, requested suspensive effect of the Majority’s Decision.

13. On 14 September 2009 the prosecution filed the “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”.¹⁶ As the title reveals, the prosecution also applied for an order for suspensive effect of the Majority’s Decision.

14. On 17 September 2009 the Chamber held a status conference in order to discuss, *inter alia*, the potential effect of these appellate proceedings on the Court’s agenda, given the evidence is due to restart on 6 October 2009.¹⁷ Prior to the status conference, it had been anticipated that the evidence of the two court experts (Ms Radhika Coomaraswamy and Professor Kambayi Bwatshia), the three participating victims (a/0225/06, a/0229/06 and a/0270/07) and the defence evidence will be heard in that order, along with witness 15, commencing on 6 October 2009.

15. During the status conference the Chamber, *inter alia*, invited the parties

¹⁵ ICC-01/04-01/06-2112.

¹⁶ 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, 14 September 2009, ICC-01/04-01/06-2120.

¹⁷ Transcript of hearing on 17 September 2009, ICC-01/04-01/06-T-210-ENG.

and the participants to set out their submissions as to the consequences for the trial if the Appeals Chamber either grants or refuses the joint applications for suspensive effect.¹⁸

16. The prosecution submitted that whatever the decision of the Appeals Chamber, the case should continue “as planned”, save that if the application for suspensive effect is refused the case should continue “until such time as there is a Regulation 55 hearing”.¹⁹

17. The defence argued that it is opposed to the evidence continuing until the Appeals Chamber has resolved the Regulation 55 issue, although it had tried to find “another solution”. In essence, the defence contended that whilst a “situation of legal uncertainty” exists, the position of the defence will be “very difficult”. The defence emphasised that if the evidence continues on 6 October 2009 there would be real uncertainty as to the areas that should be the subject of questioning for all the outstanding witnesses in the case (including the defence witnesses). In particular it was suggested that there will be an enduring lack of clarity as to whether counsel should address the charges in their potential new form, as envisaged by the Majority in their Decision. Further, the defence indicated – depending on the substantive decision of the Appeals Chamber – there may be an application to recall a number of prosecution witnesses. The defence suggested that it would be unfair for the accused to be expected to give evidence “on charges which have not yet been defined”.²⁰ It follows, therefore, that in the defence submission even if suspensive effect is not granted, any further evidence and any submissions on the application of Regulation 55 should be postponed until there is a decision of the Appeals

¹⁸ *Ibid.*, page 1, line 16 – page 2, line 25.

¹⁹ *Ibid.*, page 3, lines 2 – 8; page 10, lines 4 – 7.

²⁰ Transcript of Hearing, ICC-01/04-01/06-T-210-FRA, page 3, line 22 – page 6, line 2.

Chamber on the substantive issue.²¹

18. The representatives of victims jointly submitted that the case should continue.

The central submissions advanced were, first, that whatever the result of the appeal, this issue does not concern “the changing of the charges”, and, second, that the facts will remain “those which have been discussed already in this courtroom”.²²

II. Relevant Provisions

19. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered the following provisions:

Article 64(2) of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall have 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 protections of victims and witnesses.

[...]

Article 67(1)(a) of the Statute

Rights of the accused

1. In determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;

[...]

²¹ *Ibid.*, and email communication from the defence to the Chamber through the Legal Advisor to the Trial Division on 23 September 2009. The Chamber notes there are discrepancies between the French and English transcripts of this portion of the hearing. The Registry is therefore instructed to review this transcript and make any corrections that may be necessary.

²² ICC-01/04-01/06-T-210-ENG, page 6, line 15 – page 9, line 25.

III. Analysis and Conclusions

20. As set out above, by Article 67(1)(a) the accused is entitled to a fair hearing, which includes as one of the minimum guarantees that he shall be informed promptly and in detail of the nature, cause and content of the charges. Further, under Regulation 55(2) the Chamber shall ensure, *inter alia*, that the accused has adequate time and facilities for the effective preparation of his or her defence, in accordance with Article 67(1)(b).

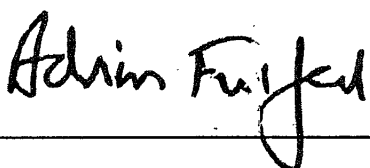
21. The Chamber is persuaded that a necessary precondition for the “effective preparation” of the accused’s defence, at this stage in the trial, is that Mr Thomas Lubanga Dyilo should know whether or not the legal characterisation of the facts may be subject to change, so as to include the elements of sexual slavery, inhuman treatment and cruel treatment. Additionally, he is entitled to know whether or not any potential modification of the legal characterisation of the facts is to be limited by the facts and circumstances contained in the charges. Therefore, now that the prosecution has concluded its evidence, and before the evidence proceeds further, the accused should have certainty as regards these issues. The course of questioning all the outstanding witnesses in the case may be affected by the Appeal Chamber’s decision. If the case continues on 6 October 2009, the defence will be placed in the unfair position of having to choose, on the one hand, between expending its time and resources in preparing for, and presenting its case on the basis of, a legal characterization of the facts that may be subject to change, along with the evidence in support (which may become irrelevant if the appeal is allowed), and, on the other, commencing the presentation of the defence evidence on the original formulation of the charges, when it may later have to adopt a different strategy (if the Decision of the Majority is upheld). In the latter event, the defence may apply to recall many of the witnesses who have

already given evidence. It follows that if the Chamber continues to hear evidence in the case prior to the decision of the Appeals Chamber on the substantive issue, there is too great a risk that the defence will proceed, as least for part of the trial, on a significantly false basis.

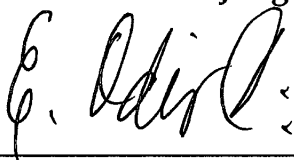
22. Given those conclusions, the inevitable result is that further evidence in this case, along with a more detailed consideration of Regulation 55, cannot occur until the Appeals Chamber has resolved this appeal. The disposal of the applications for suspensive effect will not alter the inability of the Chamber to proceed further until the merits of the joint appeals have been decided.

23. The recommencement date of 6 October 2009 is postponed, and the evidence in this case is adjourned to await the Decision of the Appeals Chamber.


Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 2 October 2009

At The Hague, The Netherlands