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TRIAL CHAMBER I

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

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

Public Document

Joint Response of the Legal Representatives of the Victims to the Applications of the Defence and the Prosecutor, Dated 11 and 12 August 2009 Respectively, 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* Rendered on 14 July 2009

Source: Legal Representatives of Victims a/0001/06 to a/0003/06, a/0047/06 to a/0052/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0227/06, a/0229/06 to a/0233/06, a/0236/06, a/0238/06 to a/0240/06, a/0244/06, a/0245/06, a/0248/06 to a/0250/06, a/0001/07 to a/0003/07, a/0005/07, a/0054/07 to a/0060/07, a/0063/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0188/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07 to a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0007/08, a/0122/08 to a/0126/08, a/0130/08, a/0149/08, a/0404/08 to a/0407/08, a/0409/08, a/0612/08 and a/0613/08

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

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I. BACKGROUND

1. On 29 January 2007, Pre-Trial Chamber I issued its *Decision on the confirmation of charges*, in which it found, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the armed forces of the UPC/FPLC (“the UPC/FPLC”) and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi), 8(2)(e)(xii) and 25(3)(a) of the Rome Statute between early September 2002 and 13 August 2003.¹
2. On 23 December 2008, the Prosecution submitted the public version of the amended document containing the charges against Thomas Lubanga Dyilo.²
3. On 26 January 2009, during her opening statements, Ms Bapita referred to the widespread practice of acts of sexual violence perpetrated systematically against children, girls in particular, who were forcibly recruited into the UPC/FPLC.³
4. At the hearing of 8 April 2009, Mr Walley informed the Chamber that the Legal Representatives of the Victims planned to submit a joint application pertaining to the implementation of regulation 55 of the Regulations of the Court, given that the facts related to the recruitment of child soldiers are also linked to facts concerning sexual slavery.⁴

¹ See *Decision on the confirmation of charges* (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06-803-tEN, p. 156.

² See “Prosecution’s Provision of the Amended Document Containing the Charges”, 23 December 2008, ICC-01/04-01/06-1573 and “Annex 1”, ICC-01/04-01/06-1573-Anx1.

³ See transcript of the hearing of 26 January 2009, ICC-01/04-01/06-T-107-ENG ET, p. 52, line 18, to p. 57, line 8.

⁴ See transcript of the hearing of 8 April 2009, ICC-01/04-01/06-T-167-ENG ET, p. 26, line 24, to p. 27, line 7.

5. On 22 May 2009, the Legal Representatives submitted their joint application for the implementation of the procedure under regulation 55 of the Regulations of the Court⁵ (“the Joint Application”).

6. On 29 May 2009, the Prosecution filed its response to the Joint Application.⁶ And on 12 June 2009, following an oral decision of the Trial Chamber,⁷ it filed further observations on the matter.⁸

7. On 19 June 2009, the Defence filed its response to the Joint Application and to the Prosecution’s further observations.⁹ On 26 June 2009, the Legal Representatives of the Victims filed their Observations on the said response.¹⁰

8. On 14 July 2009, Trial Chamber I rendered 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*¹¹ (“the Notification”).

9. On 17 July 2009, the Presiding Judge of Trial Chamber I issued his *Minority opinion on the ‘Decision giving notice to the parties and participants that the legal*

⁵ See “Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the *Regulations of the Court*”, 22 May 2009, ICC-01/04-01/06-1891-tENG.

⁶ See “Prosecution’s Response to the Legal Representatives’ *‘Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour’*”, 29 May 2009, ICC-01/04-01/06-1918.

⁷ See transcript of the hearing of 3 June 2009, ICC-01/04-01/06-T-185-CONF-ENG RT, pp. 1-2 and 53-54.

⁸ See “Prosecution’s Further Observations Regarding the Legal Representatives’ Joint Request Made Pursuant to Regulation 55”, 12 June 2009, ICC-01/04-01/06-1966.

⁹ See “Defence Response to the ‘Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court of 22 May 2009’ and to the ‘Prosecution’s Response of the Court of 12 June 2009 to the Legal Representatives’ *‘Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour’ datée du 12 juin 2009*”, 19 June 2009, ICC-01/04-01/06-1975-tENG.

¹⁰ See “Observations of the Legal Representatives of the Victims on the Defence Response of 19 June 2009-tEN”, 26 June 2009, ICC-01/04-01/06-1998.

¹¹ See *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 (“the Notification”).

characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.¹²

10. On 11 August 2009, the Defence submitted an “Application 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* rendered on 14 July 2009”¹³ (“the Defence Application”).

11. On 12 August 2009, the Prosecution filed an “Application 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 (“the Prosecution Application”).

12. Acting pursuant to rule 24(2) of the Rules of Procedure and Evidence, the Legal Representatives respectfully submit the following observations in response to the Applications of the Defence and the Prosecution.

II. THE NOTIFICATION OF 14 JULY 2009 CANNOT CONSTITUTE AN APPEALABLE DECISION

13. Under regulation 55(2) of the Regulations of the Court, “[i]f, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to

¹² See *Minority opinion on 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’*, 17 July 2009, ICC-01/04-01/06-2054. See also *Decision issuing a corrigendum to the ‘Minority opinion on 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’ of 17 July 2009’*, 21 July 2009, ICC-01/04-01/06-2061 and *Decision issuing a second corrigendum to the ‘Minority opinion on 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’ of 17 July 2009’*, 31 July 2009, ICC-01/04-01/06-2069.

¹³ See “Application 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* rendered on 14 July 2009”, 11 August 2009, ICC-01/04-01/06-2073-Conf-tENG. (“the Defence Application”).

¹⁴ See “Prosecution’s Application 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*”, 12 August 2009, ICC-01/04-01/06-2074 (“the Prosecution’s Application”).

change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions".

14. On 14 July 2009, acting pursuant to this regulation, Trial Chamber I rendered a *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*,¹⁵ in which it stated expressly that “[t]he purpose of this decision is to comply with the Chamber’s responsibility, established in Regulation 55(2), to give notice to the parties and participants that it appears to the majority of the Chamber that the legal characterisation of facts may be subject to change”.¹⁶

15. It should be noted in this regard that the Joint Application of the Legal Representatives was limited to requesting the Trial Chamber to “trigger the procedure for legal recharacterisation of the facts under regulation 55 of the Regulations of the Court”.¹⁷

16. The Notification thus confines itself to giving the parties and participants notice of the possibility that the legal characterisation of the facts may be subject to change. This view is supported by the fact that the Chamber itself explains that “[a]t an appropriate stage of 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)”.¹⁸

17. In its Application, the Defence itself acknowledges that at the close of those discussions the Chamber must render a decision, which will be subject to appeal, in order to determine whether the changes envisaged are justified¹⁹ — which would appear to confirm that nothing has yet been decided in this matter.

¹⁵ See the Notification, footnote 11 above.

¹⁶ *Ibid.*, para. 35.

¹⁷ See the Joint Application, footnote 5 above, p. 21.

¹⁸ See the Notification, footnote 11 above, para. 34.

¹⁹ See the Defence Application, footnote 13 above, para. 45.

18. The terms of the Notification itself simply refer to implementation of the procedure provided in regulation 55(2) of the Regulations of the Court, without prejudging the issue of re-characterisation. Furthermore, the Notification does not set out any legal principle or rule, other than the requirements of the said regulation, nor, *a fortiori*, does it impose a mandatory solution.²⁰ It follows that the Notification cannot be regarded as a decisional instrument, since it does not settle any substantive issue, and hence cannot be considered an appealable decision within the meaning of article 82(1) of the Rome Statute.

19. This conclusion accords perfectly with Black's Law Dictionary, which defines an "appealable decision" as:

"[a] decree or order that is sufficiently final to receive appellate review or an interlocutory decree or order that is immediately appealable by statute";²¹

And a "decision" as:

"[a] judicial determination after consideration of the facts and the law".²²

20. Although there is no existing case-law on the actual definition of a "decision" at the International Criminal Court, or even at the *ad hoc* international tribunals, it should be pointed out that the International Criminal Tribunal for the former Yugoslavia ("the ICTY" or "the Tribunal") has had to render decisions on similar issues on several occasions in the case of *Prosecutor v. Vojislav Šešelj*. Thus, on a number of occasions, Trial Chamber I and the Presidency of the Tribunal have rejected applications by the accused on the grounds that the decisions concerned by the appeal applications were not in fact decisions.²³

²⁰ See the Notification, footnote 11 above, in particular para. 33.

²¹ See Garner, B. A. (ed.), *Black's Law Dictionary*, Eighth Edition, West, 2004, p. 436.

²² *Idem*.

²³ See ICTY, *Prosecutor v. Vojislav Seselj, Decision on appeal against the decision of the Registry of 20 January 2006* (The President), IT-03-67-PT, 7 April 2006. This decision is available in English only at the following address: <http://www.icty.org/x/cases/seselj/tdec/en/060407.htm>. See also the *Decision on motion to review Registrar's Decision (Submission no. 124)* (Trial Chamber I), IT-03-67-PT, 22 November 2006.

21. In circumstances akin to those of the present case, in his decision of 7 April 2006, the President of the Tribunal stated:

The “decision” of 20 January 2006 is not in fact a decision of the Registrar refusing the assignment of counsel [...] [r]ather, it is a response by the Registry to a submission filed by Seselj [...]. The 20 January 2006 response does not refuse Seselj’s request but outlines the procedure that Seselj must follow, and the qualifications that legal associates are required to possess, for the Registry to recognise them as legal associates and grant them the access requested by Seselj.²⁴

22. Accordingly, the Legal Representatives request the Trial Chamber to declare the Applications of the Defence and the Prosecution to be inadmissible.

II. IN THE ALTERNATIVE

23. Should the Chamber consider that the Notification is of a decisional nature, the Legal Representatives of the Victims, having examined the criteria laid down in article 82(1)(d) of the Rome Statute, submit that this Notification does not raise any issue, and does not therefore satisfy those criteria.

A. The criteria of article 82(1)(d) of the Rome Statute

24. The Legal Representatives recall that the previous case-law of the Court has already established that the two criteria set out in article 82(1)(d) of the Rome Statute are complementary, and that each one has to be established cumulatively in order for leave to appeal to be granted.²⁵

25. More specifically, article 82(1)(d) of the Rome Statute limits the possibility of appeal to “[a] decision that involves an issue that would significantly affect the fair and

2006 and the *Decision on request for certification to appeal several oral decisions* (Trial Chamber I), IT-03-67-PT, 28 December 2006. These decisions are available in English only at the following addresses: <http://www.icty.org/x/cases/seselj/tdec/en/061122.pdf> and <http://www.icty.org/x/cases/seselj/tdec/en/060407.htm> respectively.

²⁴ See ICTY, *Prosecutor v. Vojislav Seselj, Decision on appeal against the decision of the Registry of 20 January 2006*, footnote 23 above, para. 2.

²⁵ See *Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58* (Pre-Trial Chamber II), ICC-02/04-01/05-20-US-Exp, 19 August 2005 and *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal* (Appeals Chamber), ICC-01/04-168, 13 July 2006.

expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

26. In this respect, the Appeals Chamber has previously stated that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.²⁶ The Appeals Chamber further found that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,²⁷ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.²⁸ The Chamber further considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial.’”²⁹

B. Applying the criteria of article 82(1)(d) of the Rome Statute to the Defence and Prosecution Applications

27. The Legal Representatives submit that neither the Defence Application nor the Prosecution Application meets the criteria of article 82(1)(d) of the Rome Statute, since neither of them demonstrates the existence of one or more issues that may constitute the subject of an appeal. The Defence confines itself to putting forward disparate arguments relating to legal points outside the scope of the Notification, and which in any event concern distinct stages of the proceedings. The Prosecution, for its part, also addresses an issue outside the scope of the Notification, as that issue concerns a later stage of the proceedings.

²⁶ See the *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal* (Appeals Chamber), ICC-01/04-168, 31 July 2006, para. 8.

²⁷ *Ibid.*, para. 9.

²⁸ *Idem.*

²⁹ *Ibid.*, para. 10.

1. Applying the criteria to the Defence Application

28. The first issue put forward by the Defence is:

“Does regulation 55 authorise the Trial Chamber to change, in its final judgment, the characterisation of the “facts and circumstances described in the charges” without previously informing the Parties or allowing them to enjoy the rights and safeguards set out in paragraphs 55(2) and 55(3)?”³⁰

29. However, this issue could only constitute an appealable issue in the event of an appeal against the accused’s conviction, assuming that the Trial Chamber were indeed to proceed in this way at this later stage. Thus this issue in no sense falls within the scope of the Notification, which in fact, on the contrary, confines itself to informing the parties and participants of the possibility of the facts being re-characterised, without, however, coming to any decision on the matter.³¹

30. Furthermore, the reference to regulation 55(1) of the Regulations of the Court is simply an *obiter dictum*. Thus the Notification talks only of applying regulation 55(2) of the Regulations of the Court, and expressly states that the safeguards provided in this paragraph and in the following one will be respected, thus rendering this issue moot.

31. Likewise, the Defence argues that the Notification raises the issue of whether *“regulation 55 authorises [...] the Trial Chamber to modify the characterisation of the facts during the trial, by accepting “facts and circumstances” other than those expressly “described in the charges and any amendments to the charges”, as long as the provisions of regulation 55(2) and 55(3) are implemented”*.³² It further maintains that: *[i]n holding that the observations of the Legal Representatives establish the possibility of implementing the re-characterisation process provided for by regulation 55, the Trial Chamber errs in its*

³⁰ See the Defence Application, footnote 13 above, paras. 17-24.

³¹ See paras. 13-20 above.

³² See the Defence Application, footnote 13 above, paras. 25-30.

*assessment of the factual and legal situation and seriously undermines the fundamental rights of the accused”.*³³

32. The Legal Representatives further submit that these two issues could only constitute appealable issues in the event of a decision to re-characterise the facts, assuming that the Trial Chamber were subsequently so to decide. At this stage of the proceedings, the Chamber has confined itself to implementing regulation 55(2) of the Regulations of the Court by giving notice to the parties and participants of the existence of such a possibility.³⁴ It follows that these issues do not fall within the scope of the Notification.

33. The Defence further contends that “[i]n agreeing to consider an application from the Legal Representatives for the implementation of regulation 55, the Chamber wrongfully grants them a right which they do not have”.³⁵

34. The Legal Representatives note that the Defence has never challenged the victims’ right to ask the Chamber to implement regulation 55 of the Regulations of the Court, even though it had the opportunity to do so.³⁶ Accordingly, the Legal Representatives consider that the Defence cannot, at this stage, assert such a ground of appeal, and hence this cannot constitute an appealable issue. Moreover, the Chamber cannot be prevented from exercising a power expressly accorded to it in the Court’s texts, on the pretext that participants had no right to request it to do so.

³³ *Ibid.*, paras. 31-35.

³⁴ See paras. 13-21 above.

³⁵ See the Defence Application, footnote 13 above, paras. 36-39.

³⁶ See “Defence Response to the ‘Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court of 22 May 2009’ and to the ‘Prosecution’s Response of the Court of 12 June 2009 to the Legal Representatives’ *“Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour’ datée du 12 juin 2009”*”, footnote 9 above, in particular paras. 10 and 11. See also *“Observations des représentants légaux des victimes sur la Réponse de la Défense datée du 19 juin 2009”*, footnote 10 above, para. 9.

35. Lastly, the Defence considers that “[i]n omitting to indicate to the Parties and participants the modifications which may be discussed, the Chamber contravenes the provisions of regulation 55”.³⁷

36. The Legal Representatives note that this issue does not in any way fall within the scope of the Notification, as the Chamber is at pains expressly to make clear that “[a]t an appropriate stage of 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)”.³⁸

37. It should further be noted that regulation 55 of the Regulations of the Court does not require the Chamber to indicate the changes which may be discussed subsequently, but only to give notice of the possibility of the legal characterisation of the facts being modified.

2. Applying the criteria to the Prosecution Application

38. For its part, the Prosecution considers that the Notification raises the following issue:

*[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.*³⁹

39. This issue is precisely the same as the first issue raised by the Defence, which for its part contends that “[i]n holding that regulation 55 provides for two distinct procedures for recharacterisation, applicable at different stages of the trial, with each subject to separate conditions, the Chamber is misinterpreting that provision”.⁴⁰

³⁷ See the Defence Application, footnote 13 above, paras. 40-42.

³⁸ See the Notification, footnote 11 above, para. 34. See also para. 16 above.

³⁹ See the Prosecution Application, footnote 14 above, para. 17.

⁴⁰ See the Defence Application, footnote 13 above, paras. 11-15.

40. The Legal Representatives accordingly refer back to their observations on the first three issues put forward by the Defence,⁴¹ and maintain that the issue raised by the Prosecution could only be considered an appealable issue at a later stage of the proceedings, and does not therefore fall within the scope of the Notification.⁴²

41. In consequence, since the identification of appealable issues is a pre-condition for the Trial Chamber to grant leave to appeal under article 82(1)(d) of the Rome Statute as interpreted through the practice of the Court,⁴³ it follows that, as the Applications of the Defence and the Prosecution do not address any issue, leave to appeal cannot be granted on this basis.

42. Accordingly, the Legal Representatives respectfully request the Trial Chamber to dismiss the Defence and Prosecution Applications on grounds of inadmissibility.

FOR THESE REASONS,

MAY IT PLEASE TRIAL CHAMBER I

As principal submission: to declare the Applications of the Defence and the Prosecution to be inadmissible, since 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* simply constitutes a notification pursuant to regulation 55(2) of the Regulations of the Court;

In the alternative: to dismiss the Applications of the Defence and the Prosecution on grounds of inadmissibility, since they do not meet the criteria of article 82(1)(d) of the Rome Statute.

⁴¹ See paras. 28-32 above. It is appropriate to note that, in section II(B)(1) above, the Legal Representatives have applied the criteria of article 82(1)(d) of the Rome Statute to the two issues submitted by the Defence "*with a view to clarification*". See the Defence Application, footnote 13 above, paras. 16 *et seq.*

⁴² See paras. 13-21 above.

⁴³ See paras. 24-26 above.

[signed] **[signed]**

Luc Walley Paolina Massidda Carine Bapita Buyangandu
(absent at signing)

Dated this 17 August 2009

At The Hague, The Netherlands; Brussels, Belgium; Kinshasa, DRC.