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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 Response to the Defence 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 request for suspensive effect

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Introduction

1. Both the Prosecution and the Defence are appealing the Decision of Trial Chamber I,¹ which found that 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 charging document.
2. The Prosecution concurs with the Defence that Regulation 55 establishes a single process whereby any change to the legal characterisation of the facts is subject to specific safeguards. It also agrees that the Appealed Decision, by contemplating an expansion of the factual allegations described in the Document Containing the Charges (“DCC”),² infringes important statutory provisions.
3. Contrary to the Defence’s assertion, however, the Statute and the Rules do not categorically forbid a Trial Chamber from adding new legal characterisations or substituting more severe or different offences for the charges pleaded in the DCC. Instead, recharacterisation is possible so long as the change is based on facts and circumstances set forth in the DCC and the process established by Regulation 55 is followed. Whether the facts set out in the charges can support the elements of the alternative legal characterisations, as well as the impact that the recharacterisations could have on the rights of the defence, are matters which under the terms of Regulation 55 should be first explored before the competent Trial Chamber.

Procedural Background

4. The Prosecution refers to the detailed procedural history set out in its Appeal Brief against the Decision.³
5. On 10 September 2009, the Defence filed its Document in Support of Appeal, which included a request for suspensive effect.⁴ The Defence also filed a separate request for extension of the page limit, in order to incorporate by reference submissions regarding the legality of Regulation 55 which were made in November 2007.⁵

¹ ICC-01/04-01/06-2049 (“Appealed Decision”); ICC-01/04-01/06-2069-Anx1, 31 July 2009 (“Minority Opinion”, originally filed as ICC-01/04-01/06-2054 on 17 July 2009).

² See Appealed Decision, paras. 27-32.

³ See ICC-01/04-01/06-2120 OA15, 14 September 2009, paras. 8-17.

⁴ ICC-01/04-01/06-2112 OA15 (“Defence Appeal Brief”).

⁵ ICC-01/04-01/06-2113 OA15; see also Defence Appeal Brief, paras. 5-6.

6. The Prosecution hereby files its Response to the Defence's Document in Support of Appeal, pursuant to Regulation 65(5), which includes its response to the requests for suspensive effect and extension of the page limit.

The Preliminary Argument of the Defence and the Request for Extension of Pages

7. The Defence first seeks to make a preliminary argument that Regulation 55 is invalid because it is inconsistent with the Statute and the Rules of Procedure and Evidence.⁶
8. The Trial Chamber did not certify for appeal the issue whether Regulation 55 is consistent with the Statute and the Rules. The only certified questions relate to the Majority's interpretation of Regulation 55 and its application in this instance.⁷ Nor did the Defence challenge the validity of Regulation 55 in either its observations on the Legal Representatives' request⁸ or its application for leave to appeal.⁹ Because the argument was neither raised in relation to the impugned Decision nor certified for appeal, the Chamber should reject the incorporated four page submissions.¹⁰

⁶ Defence Appeal Brief, paras. 5-6.

⁷ ICC-01/04-01/06-2107, 3 September 2009. The two issues certified for appeal were: "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 crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute." (emphasis added)

⁸ ICC-01/04-01/06-1975, 19 June 2009. The Defence instead argued only: (i) "*La Norme 55 n'autorise pas l'extension des poursuites à des incriminations additionnelles non visées dans la Décision de confirmation des charges*", (ii) "*Les faits présentés par les représentants légaux comme susceptibles de recevoir les qualifications prévues aux Articles 8-2-a-ii, 8-2-c-i, 7-1-g, 8-2-b-xxii et 8-2-e-vi excèdent le cadre des « faits et circonstances décrits dans les charges »*", and (iii) "*La possibilité pour la Chambre de retenir les qualifications nouvelles discutées ci-dessus porterait gravement atteinte aux droits fondamentaux reconnus à l'accusé par l'Article 67-1 a)b)c) et à l'équité du procès*".

⁹ ICC-01/04-01/06-2073. The Defence sought leave to appeal (i) "*En considérant que la Norme 55 distingue deux processus de requalification applicables à des phases différentes du procès et soumis respectivement à des conditions distinctes, la Chambre procède à une interprétation erronée de ce texte*", (ii) "*En considérant que les observations formulées par les représentants légaux démontrent la possibilité de mettre en oeuvre le processus de requalification prévu par la Norme 55, la Chambre de première instance procède à une appréciation erronée de la situation de fait et de droit et porte gravement atteinte aux droits fondamentaux de l'accusé*", (iii) "*En acceptant d'examiner une demande formulée par les représentants légaux visant à la mise en oeuvre de la Norme 55, la Chambre reconnaît indûment à ceux-ci un droit dont ils ne disposent pas*", and (iv) "*En omettant d'indiquer aux Parties et participants les modifications susceptibles d'être débattues, la Chambre contrevient aux dispositions de la Norme 55.*"

¹⁰ The question of whether a particular Regulation violates the Statute is a threshold question of fundamental importance. Such a question must be identified clearly and articulated fully. The arguments of the Defence before the Trial Chamber, regarding the proper scope or interpretation of Regulation 55, cannot be seen as implicitly including a challenge to its legality. To the contrary, the submissions appear to assume the legality of the provision.

The Prosecution's Response to the First Ground of Appeal

9. The Defence states that Regulation 55 describes a single process whereby any change to the legal characterisation of the facts is subject to the safeguards provided for in the same provision¹¹ and is limited to lesser included offences.¹² It also claims that the Appealed Decision infringes Articles 74(2),¹³ 67(1)(a) and (b)¹⁴ and 61(9).¹⁵

Regulation 55 establishes a single process

10. As the Prosecution argued in its Appeal, Regulation 55 creates a single procedure, not the two separate procedures found by the Trial Chamber. The single procedure allows legal recharacterisation of the facts in the final judgment, but only after the Chamber has adhered to the specific limitations and provided the specific guarantees spelled out in the provision.¹⁶ The Prosecution accordingly concurs with the Defence argument.¹⁷

The Trial Chamber's analysis is contrary in some respects to Relevant Statutory Provisions

11. The Prosecution also concurs that a final decision exceeding the facts and circumstances pleaded in the DCC would violate Articles 74(2),¹⁸ 67(1)(a) and (b)¹⁹ and 61(9).²⁰ As the Defence argues, it is irrelevant that the new facts considered by the Chamber are connected or "build a procedural unity" with the existing charges. The statutory violation remains untouched: the facts are not included in the DCC.²¹
12. However, the Prosecution disagrees with some of the arguments put forward to support the above-mentioned statutory infringements:
- First, the Defence wrongly argues that the Pre-Trial Chamber's decision on confirmation of charges, and not the charging document itself, defines the factual scope of the trial.²² The trial's factual scope is defined by the DCC as confirmed in the decision on confirmation of charges.²³

¹¹ Defence Appeal, paras. 8, 14-15.

¹² *Ibid.*, paras. 18-19, 21-22 and 36 to 38.

¹³ *Ibid.*, paras. 29-31.

¹⁴ *Ibid.*, paras. 11-13, 28, 33.

¹⁵ *Ibid.*, paras. 25-28.

¹⁶ *Ibid.*, para. 8.

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, paras. 29-31.

¹⁹ *Ibid.*, paras. 11-13, 28, 33.

²⁰ *Ibid.*, paras. 25-28.

²¹ *Ibid.*, para. 27. See on this point Prosecution Appeal, para. 35.

²² *Ibid.*, para. 30.

²³ While the Confirmation Decision may not directly address all the facts pleaded, this does not entail that these facts are not confirmed for the purpose of the trial. The factual scope of the trial is defined by the facts in the DCC, as long as they have not been expressly rejected by the Pre-Trial Chamber. The Prosecution notes that the Defence wrongly refers in footnote 20 to the Decision on Confirmation of Charges in the Bemba Case, ICC-

- Second, and contrary to the Defence's submissions, the charges are not "fixed" by the Pre-Trial Chamber.²⁴ The Prosecution has the discretionary authority to define and present the charges before the Pre-Trial Chamber, which under Article 61(7) can authorise them, refuse to authorise them, request additional evidence, or propose a possible amendment.²⁵
- Third, the Defence argues that adding new facts with new legal characterisations constitutes an amendment of charges within the terms of Article 61(9).²⁶ The Prosecution disagrees with the Defence that modification of the legal characterisation would necessarily constitute an impermissible amendment of the charges.²⁷ This is the operation contemplated by Regulation 55, which explicitly deals with the modification of the "legal characterisation of the facts" and not the amendment of the charges. Therefore, a proper application of Regulation 55 (i.e. as a single procedure with the limitations and safeguards described in its three paragraphs) should not be confused with an amendment of the charges.

The Statute and Regulation 55 do not limit the Chamber's authority to substitute or add legal characterisations

13. The Defence states that Regulation 55 only allows the Chamber to consider recharacterising the facts in the context of determining whether the evidence proves a lesser included offence. According to the Defence, Regulation 55 cannot permit adding legal characterisations or amending the original characterisation if the result is a more serious criminal charge.²⁸ However, and as submitted in the Prosecution's Appeal Brief, nothing in the Statute and in the language of Regulation 55 suggests that the Chamber's authority is limited to lesser included offences.²⁹
14. Disputing this purpose of Regulation 55, the Defence refers to the *Kupreskic* judgment to argue that the principle *iura novit curia* does not apply to international criminal courts.³⁰ In that case no prior notice had been given to the parties that the Trial Chamber might change the legal characterisation of the facts. The decision accordingly found that when

01/05-01/08-424, para. 207 to argue that the Trial Chamber is only seized by the facts presented in the Decision on Confirmation of Charges. This paragraph merely indicates that some offences have not been allegedly supported by evidence in the DCC.

²⁴ Defence Appeal, para. 23.

²⁵ Prosecution Appeal, para. 38.

²⁶ Defence Appeal, paras. 25-26.

²⁷ Defence Appeal, paras. 36-38.

²⁸ Defence Appeal, paras. 18-19, 21-22 and 36-38. The latter paragraphs, although placed within the Second Question, correspond better to the First Issue as they refer to the possibility of "adding" new legal figures.

²⁹ See para. 49 and authorities cited therein.

³⁰ Defence Appeal, para. 20 and footnote 12, citing *Kupreskic* Judgment, para. 740.

an accused was not given prior notice that the Chamber may change the legal characterisation of the facts pleaded and established at trial, the application of the principle *iura novit curia* would violate the accused's right to "be informed 'promptly and in detail' of the 'nature and cause of the charge against him'".³¹ In contrast, Regulation 55, when properly applied, provides the accused with advanced notice and adequate time and facilities to prepare his or her defence.

15. Further, and in contrast with other international criminal jurisdictions, the regulatory framework of the ICC includes precise provisions (including Article 74(2) and Regulation 55) incorporating the principle *iura novit curia* and including a process that fully respects the rights of the accused.

The Prosecution's Response to the Second Ground of Appeal

16. The Defence first repeats its argument that the change to the legal characterisation contemplated by the Majority would be an impermissible and substantive modification,³² an argument which the Prosecution has addressed above.³³ It then argues that the facts and circumstances set out in the charges cannot establish the elements of the new legal characterisations considered by the Majority.³⁴ Finally, the Defence argues that any recharacterisation of facts in this instance would gravely prejudice the rights of the Accused.³⁵
17. Some proposed legal characterisations could plausibly be supported by the facts. Whether the pleaded facts support the particular characterisations, and the extent of the time and resources required by the Accused to respond to the new characterisations under Regulation 55(2), are both matters yet to be discussed before the Trial Chamber. The mere fact of triggering Regulation 55 does not in and of itself violate the rights of the Accused, as the Defence argues.

³¹ *Ibid.*, para. 740. The ICTY Chamber found that at the time of the judgment "international criminal rules [were] still in a rudimentary state", and concluded that "[i]n this state of flux the rights of the accused would not be satisfactorily safeguarded were one to [...] allow [...] to convict persons of a specific crime as well as any other crime based on the same facts [...]". The Chamber also foresaw the possibility of a case where "[i]t may happen that, in the course of the trial, the Prosecutor finds that she has not proved beyond reasonable doubt the commission of the crime charged, but that a different offence, not charged in the indictment, has been proved which has different objective or subjective elements." The Chamber concluded that "[i]n these cases the Prosecutor must request the Trial Chamber to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge." *Ibid.*, para 742(a).

³¹ *Ibid.*, para. 740

³² Defence Appeal Brief, paras. 36-38.

³² Defence Appeal Brief, paras. 36-38.

³³ See paras. 13-15, above.

³⁴ Defence Appeal Brief, paras. 39-57.

³⁵ Defence Appeal Brief, paras. 58-74.

Whether the legal characterisations proposed by the Legal Representatives are based on the facts and circumstances set out in the charges

18. The Majority clarified that five additional legal characterisations are being considered as possible changes to the legal characterisation of the facts: three legal characterisations of sexual slavery (as a crime against humanity under Article 7(1)(g) and as a war crime under Articles 8(2)(b)(xxii) and 8(2)(e)(vi)); inhuman treatment (as a war crime under Article 8(2)(a)(ii)); and cruel treatment (as a war crime under Article 8(2)(c)(i)).³⁶
19. The applicability of these legal characterizations, along with other issues identified by Judge Fulford in his Minority Opinion,³⁷ will have to be discussed before, and considered by, the Trial Chamber. They are not questions that the Appeals Chamber should decide at this time.
20. Regulation 55 requires the Trial Chamber to first make a preliminary assessment of whether it appears *possible* that the legal characterisation of the facts *may* be subject to change. Once the Trial Chamber makes this assessment and gives notice to the parties of this possibility and of the facts and potential legal characterisation, the parties have the opportunity to make full and informed submissions on whether such a change to the legal characterisation is possible, the implications of that change, and what measures would be required in order to respect the rights of the parties (i.e. “all matters relevant to the proposed change” – Regulation 55(2)).
21. In this case, the Trial Chamber’s preliminary determination was fundamentally flawed as it was expressly based on a wrong interpretation of Regulation 55.³⁸ This error in the Appealed Decision is the object of the Prosecution’s appeal as well as of the Defence’s first ground of appeal. In relation to the other alternative legal characterisations which could be supported by the facts described in the DCC, the Appeals Chamber should remand the matter to the Trial Chamber for it to consider whether based on the correct facts it still “appears to the Chamber that the legal characterisation of the facts may be

³⁶ ICC-01/04-01/06-2093, 27 August 2009, para. 11(b).

³⁷ Minority Opinion, paras. 46-50

³⁸ Namely, that the exercise of the Chamber’s authority was not limited by the facts and circumstances described in the charges. The Prosecution further notes that neither the Appealed Decision nor the Clarification distinguish which facts the Trial Chamber considered may support which legal characterisations, nor do they distinguish which of the facts were set out in the charges and which were not.

subject to change” under Regulation 55(2). If so, the Trial Chamber would be required to give proper notice to the parties and invite submissions.³⁹

A proper exercise of Regulation 55 does not violate the rights of the Defence in this case

22. Regulation 55, properly applied, fully respects the rights of the Accused. In this case, the DCC and the confirmation decision fully inform the Accused in detail of the facts and circumstances underlying the allegations against him. He has also been informed of the Prosecution’s legal characterisation of those facts. The possibility that those facts and circumstances may be subject to a different legal characterisation does not contravene the principles of a fair trial, so long as the limitations and safeguards in Regulation 55 are respected. As the Accused himself notes, “*Les droits et garanties prévus aux paragraphes 2 et 3 de la Norme 55, conçus pour permettre à l’accusé de préciser sa défense face à de nouvelles qualifications juridiques*”.⁴⁰

23. Regulation 55 does not impose a specific time requirement for the purposes of a Chamber’s provision of notice to the parties. While it is desirable that notice under Regulation 55 be given as early as possible,⁴¹ the language of the provision is clear: the authority may be exercised “at any time during the trial”. The timing of the Legal Representatives’ Observations on Regulation 55 (towards the end of the Prosecution case) is further consistent with the requirement that the Trial Chamber seek submissions “having heard the evidence”. Provided that the procedural safeguards in Regulation 55(2) and (3) can be implemented in a way that preserve the rights of the parties, including the rights of the Accused to adequate time and facilities to prepare and present his defence, then no arguable prejudice arises simply because the Chamber gave notice at the end of the Prosecution’s case.

24. Further, whether the safeguards in Regulation 55(2) and (3) can ensure the fairness of the proceedings must be determined on a case-by-case basis, taking into account all of the circumstances. The “matters relevant to the proposed change”, which the parties are expected to address under Regulation 55(2), include: (a) the additional time and facilities that the Accused would require to prepare and present a defence to the new characterisations; (b) the extent to which new evidence would be required or witnesses would have to be recalled; and (c) whether this process can be conducted while respecting

³⁹ There has not yet been a full discussion on the applicability of the alternative legal characterisations before the Trial Chamber.

⁴⁰ Defence Appeal Brief, para. 34.

⁴¹ Defence Appeal Brief, para. 60.

other fair trial principles, including the right to trial without undue delay, and the interests of victims and witnesses.⁴²

25. The Accused fails to demonstrate that the timing and the proposed recharacterisation causes irreparable prejudice or that the procedures in Regulation 55(2) and (3) cannot sufficiently protect his interests. Mere assertions “*que l’ajout de ces qualifications nouvelles porterait à l’accusé un préjudice grave et irrémédiable affectant l’un de ses droits les plus fondamentaux*”⁴³ or “*que l’ajout de qualifications nouvelles à ce stade du procès serait manifestement contraire au droit de l’accusé à être jugé sans retard excessif*”⁴⁴ do not meet that burden.

26. Absent prejudice *per se*, further discussion of alleged prejudice is premature. After the Appeals Chamber resolves the issues surrounding the interpretation of Regulation 55, on remand to the Trial Chamber the parties and participants will be able to address these issues *if and when* any of the potential recharacterisations remain under consideration. In that case, the Trial Chamber will be able to examine whether the proposed re-characterisations cause any meaningful prejudice, and what type of compensatory measures would be required to neutralise that prejudice, if any.⁴⁵

The Prosecution’s Response to the Request for Suspensive Effect

27. The Prosecution agrees with the Defence’s request that the Appeals Chamber suspend the implementation of the procedure under Regulation 55.⁴⁶ This need not prevent the continuation of those aspects of the trial which are not procedurally in dispute.

Relief Sought

28. For the above referred reasons, and consistent with the relief requested in its own Document in Support of Appeal, the Prosecution requests that the Appeals Chamber:

⁴² Article 68(1).

⁴³ Defence Appeal Brief, para. 69.

⁴⁴ Defence Appeal Brief, para. 74.

⁴⁵ For instance, the Defence can request time from the Trial Chamber under Regulation 55(3) to conduct additional investigations or to recall certain witnesses who have already testified if these measures are necessary to present his defence to the new potential characterisations. However, contrary to the Defence’s suggestion, the possibility of recalling a witness under Regulation 55(3)(b) does not amount to an automatic right to recall every witness.

⁴⁶ Defence Appeal Brief, para. 75. See Prosecution Appeal, paras. 19-21.

- a) grant the Defence Appeal, in so far as it argues that Regulation 55 must be applied as a single procedure and must at all stages be limited to the facts and circumstances set out in the charges (Defence Appeal Brief, paras. 8-15); and
- b) reverse the Appealed Decision.



Luis Moreno-Ocampo,
Prosecutor

Dated this 22nd day of September 2009
At The Hague, The Netherlands