



Original: French

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

Date: 11 August 2009

TRIAL CHAMBER I

Before:

**Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann**

**CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Confidential

Defence 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

Source: Mr Thomas Lubanga's Defence Team

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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

I. Procedural History

1. On 29 January 2007, Pre-Trial Chamber I issued the *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.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 8 April 2009, the Legal Representatives of the Victims (“the Legal Representatives”) informed the Trial Chamber (“the Chamber”) of their intention to submit an application under regulation 55.³
4. On 22 May 2009, the Legal Representatives jointly filed an application entitled “Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the *Regulations of the Court*” (“the Joint Application”).⁴
5. On 29 May and 12 June, the Prosecutor filed his observations.⁵
6. On 19 June 2009, the Defence submitted its observations on the Joint Application and on the Prosecution’s further observations.⁶
7. On 26 June 2009, the Legal Representatives submitted their observations in response to the observations of the Defence.⁷

¹ ICC-01/04-01/06-803-tEN.

² ICC-01/04-01/06-1571-Conf + Conf-Anx.

³ ICC-01/04/06-T-167-FRA, p. 25, lines 19 ff.

⁴ ICC-01/04-01/06-1891-tENG.

⁵ ICC-01/04-01/06-1918 and ICC-01/04-01/06-1966.

⁶ ICC-01/04-01/06-1975.

⁷ ICC-01/04-01/06-1998.

8. On 14 July 2009, the Chamber issued 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* (“the Decision”).⁸

9. On 17 July 2009, Presiding Judge Adrian Fulford presented his *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’*.⁹

10. The Defence seeks the Chamber’s leave to appeal the Decision, in particular on the following points:

OBSERVATIONS

I – Issues submitted to the Appeals Chamber and grounds for appeal

1 – In holding that regulation 55 provides for two distinct procedures for re-characterisation, applicable at different stages of the trial, with each subject to separate conditions, the Chamber is misinterpreting that provision.

11. The Chamber considers that regulation 55 makes a distinction according to whether the re-characterisation is contemplated at the end of the trial in the course of final judgment, or at any time during the trial prior to the closure of the hearings.

12. In the former case, the Chamber would be bound by the condition set out in paragraph 55(1) prohibiting it from “exceeding the facts and circumstances described in the charges and any amendments to the charges”, but would not be subject to the requirements set out in paragraphs 55(2) and 55(3).

13. In the latter case, the Chamber could contemplate a “re-characterisation” of the acts being prosecuted without being restricted by “the facts and circumstances described in the charges and any amendments to the charges”, provided that it

⁸ ICC-01/04-01/06-2049.

⁹ ICC-01/04-01/06-2054.

implements the process described in paragraphs 55(2) and 55(3), which contains certain rights and safeguards for the Parties, and for the accused in particular.

14. The Defence seeks to submit to the Appeals Chamber that this analysis of regulation 55 is erroneous, since the authority to re-characterise given by that regulation must be subject to all of the conditions and safeguards set out cumulatively in its three paragraphs.

15. The Defence submits in this respect that neither of the hypotheses considered separately by the Decision fulfils the requirements laid down by the texts governing proceedings before the ICC, by the relevant international instruments or by international jurisprudence.

16. With a view to clarification, this ground of appeal may be considered in terms of the two questions set out below (1-1 and 1-2):

1-1 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)?

17. The Defence seeks to submit to the Appeals Chamber that, in answering this question in the affirmative, the Trial Chamber misinterpreted regulation 55.

18. In particular, the Defence challenges the assertion that “if the modification only concerns the substantive law applicable to the same factual basis that is contained in the relevant charging documents a right to call new evidence is not necessary, and thus, is not expressly conferred on the defendant by Regulation 55(1)”.¹⁰

19. On this point, the Defence concurs with the arguments set out by Presiding Judge Fulford in paragraphs 20 to 28 of his Minority Opinion, namely that the Chamber’s interpretation is inconsistent with the fundamental principle that the

¹⁰ ICC-01/04-01/06-2049, para. 6.

accused must be informed “promptly and in detail of the nature, cause and content of the charge”.¹¹

20. It is well established that the legal characterisations of the acts being prosecuted constitute one of the essential components of the “charges”,¹² of which the accused must be informed “promptly and in detail”.

21. Furthermore, the accused’s choice to dispute in detail certain of the facts set out in the documents containing the charges, and the way in which such a challenge is mounted – in particular through the presentation of evidence – depend directly on the relevance of those facts to the legal characterisations adopted. It is therefore essential that the accused be clearly informed of such characterisations, in order to be able to assess their relevance and to prepare his defence accordingly.

22. Indeed, this is the only information that will enable the accused to mount his defence, not only as to the truth of the facts alleged against him, but also as to whether they are punishable in light of the applicable law; in other words, to be able to mount an effective challenge, in terms of the law, to the validity of the charges against him.

23. That is why, in order to ensure respect for the fundamental rights of the accused, regulation 55 must be understood as instituting an indivisible process enabling the accused, duly informed, to mount an effective defence to the charges, namely, not only as to the material truth of the acts of which he is accused, but also as to the legal characterisations of those acts.

24. Only the implementation of the procedure set out in paragraphs 2 and 3 of regulation 55 can guarantee the effective implementation of this fundamental right.

¹¹ Article 67(1)(a); article 14(3)(a) of the International Covenant on Civil and Political Rights; article 6(3)(a) of the European Convention on Human Rights and Fundamental Freedoms; etc.

¹² ICC-01/04-01/06-2054, paras. 5 to 8.

1-2 Does regulation 55 authorise 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?

25. The Defence seeks to submit to the Appeals Chamber that, in answering this question in the affirmative, the Trial Chamber misinterprets regulation 55.

26. On this point, the Defence fully concurs with the arguments set out by Presiding Judge Fulford in his Minority Opinion, and specifically those of paragraphs 28 to 33.

27. In essence, the Defence seeks to submit to the Appeals Chamber that the combined provisions of articles 74(2), 61(9) and 67(1) prohibit the Trial Chamber from considering and relying on against the accused any facts and circumstances other than those expressly set out in the charges as confirmed by the Pre-Trial Chamber.

28. No authority to re-characterise can be founded on facts – real or alleged – which arose during the trial but were not addressed by the Pre-Trial Chamber in the *Decision on the confirmation of charges*. In holding that the restriction to the “facts and circumstances described in the charges”, as stipulated in regulation 55(1), does not apply to a change in the legal characterisation of the facts during the trial, the Chamber misinterprets its own authority.

29. The Defence seeks to submit to the Appeals Chamber that:

- this interpretation gives the Trial Chamber an authority to “amend the charges” which broadly exceeds the limited authority to “modify the legal characterisation of the facts” bestowed on it by regulation 55, and thus

contravenes the mandatory provisions of the Statute and the Rules of Procedure and Evidence relating to amendment of the charges;¹³

- this interpretation gives the Trial Chamber the authority to consider and rely on against the accused matters of which it has not been legally seized, and contravenes the provisions of article 74(2);
- notwithstanding the rights and safeguards provided for in regulations 55(2) and 55(3), this interpretation seriously infringes the fundamental rights of the accused under article 67(1)(a) and (b), since it means that it is possible at any time to extend the prosecution to include charges of which he has not been promptly notified and for which he has not been able effectively to prepare his defence;
- regulation 55 does not under any circumstances permit the addition of new charges.

30. It follows that the Chamber could not contemplate the process of re-characterisation provided for by regulation 55 without exceeding its authority.

2 – In 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 assessment of the factual and legal situation and seriously undermines the fundamental rights of the accused.

31. In the present case, do the observations of the Legal Representatives establish the possibility of implementing the re-characterisation process provided for by regulation 55?

32. On this point, the Defence fully concurs with the arguments set out by Presiding Judge Fulford in paragraphs 34 to 45 of his Minority Opinion.

33. The Legal Representatives contend that the acts being prosecuted could also be characterised as sexual violence, punishable under articles 7(1)(g), 8(2)(b)(xxii) and

¹³ Article 61(9) and rule 21(4).

8(2)(e)(vi) of the Statute, and cruel and/or inhuman treatment, punishable under article 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.

34. The Defence seeks to submit to the Appeals Chamber that:

- consideration of these five new offences cannot be viewed as a modification of the initial legal characterisations, but as a real amendment to the charges through the addition of further charges, some of which are more serious than the charges confirmed by the Pre-Trial Chamber;¹⁴
- such an amendment of the charges, which, under the terms of article 61(9), is unlawful at the current stage of the proceedings, does not fall within the scope of regulation 55 and is beyond the authority of the Trial Chamber;
- in any event, since the “facts and circumstances” described in the documents containing the charges cannot be characterised so as to disclose the constituent elements of the offences alleged by the Legal Representatives, the condition set out in regulation 55(1) is not met here;
- at the current stage of the proceedings, the addition of these new offences would be manifestly inconsistent with the fundamental rights of the accused (article 67(1)(a) and (b)) and would seriously impair the fairness of the trial.

35. It follows that the Chamber could not contemplate the implementation of the re-characterisation process set out in regulation 55 without exceeding its authority.

¹⁴ ICC-01/04-01/06-2054, para. 43.

3 – In 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.

36. Are the victims entitled to seize the Trial Chamber of an application for the implementation of the procedure to modify the legal characterisation of the facts pursuant to regulation 55?¹⁵

37. The Defence seeks to submit to the Appeals Chamber that the Trial Chamber should have found that it was not open to the Legal Representatives to seize the Chamber of an application of that nature.

38. The Defence emphasises in this respect that, under paragraph 2 of regulation 55, only the Trial Chamber has the power to initiate the procedure under that regulation.

39. In its decision of 13 September 2007,¹⁶ the Chamber only grants the Legal Representatives the right to be “on notice (pursuant to Regulation 55(2)) that there is a possibility that the Chamber may modify the characterisation of the facts [...]”.¹⁷

4 – In omitting to indicate to the Parties and participants the modifications which may be discussed, the Chamber contravenes the provisions of regulation 55

40. The mere statement that there is a possibility that the legal characterisation of the facts may be subject to change, without any indication of the new characterisations to be discussed, does not fulfil the duty to inform set out in regulation 55(2).

41. The Defence seeks to submit to the Appeals Chamber that the Trial Chamber should have indicated in its Decision the new characterisations to be discussed under the re-characterisation process.

¹⁵ ICC-01/04-01/06-1891-tENG, p. 21.

¹⁶ ICC-01/04-01/06-1084, para. 48.

¹⁷ Idem.

42. As matters stand, in the absence of any further details, the accused is completely uncertain as to the charges he is likely to face.

II – Application of the criteria of article 82(1)(d)

A – The Decision involves issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

1 – Fair conduct

43. As stated above, the Trial Chamber’s Decision impairs the fundamental rights of the accused, and more specifically, his right to be informed promptly and in detail of the nature of the charges against him.¹⁸

44. In accepting that, at any time during the trial, there is a possibility of significant change to the charges against the accused, the Decision places the latter in an unacceptable situation of uncertainty which is seriously prejudicial to the preparation and implementation of his defence.

2 – Expeditious conduct

45. Firstly, the trial cannot continue as long as the discussions on the merits of the changes envisaged have not been settled by a decision of the Chamber—which is itself subject to appeal.

46. Secondly, in the event that changes are “authorised” within the meaning of regulation 55, on the one hand the accused will probably have to recall certain witnesses who have already been heard, while, on the other, the Chamber may have to order a stay of the proceedings in order for the accused to have “adequate time and facilities” for the preparation of his defence on the new charges.

47. The implementation of the rights and safeguards set out in paragraphs 2 and 3 of regulation 55 will thus inevitably result in the trial being significantly delayed.

¹⁸ Article 67(1)(a).

3 – Outcome of the trial

48. It goes without saying that any issues related to the characterisation of the charges brought against the accused directly affect the potential outcome of the trial.

B- An immediate resolution by the Appeals Chamber of the issues raised could materially advance the proceedings

49. An immediate resolution of these issues by the Appeals Chamber would prevent the aforementioned delays, the unnecessary tendering of evidence and the recall of witnesses who have already appeared before the Chamber.

FOR THESE REASONS, MAY IT PLEASE THE TRIAL CHAMBER:

TO GRANT the Defence leave to appeal the Decision rendered on 14 July 2009 on all of the issues set out in detail above.

[signed]

Ms Catherine Mabilille, *Avocate à la Cour*

Dated this 11 August 2009

At The Hague, The Netherlands