



Original: **French**

No.: **ICC-01/04-01/06**  
Date: **28 October 2009**

**APPEALS CHAMBER**

**Before:** Judge Sang-Hyun Song, Presiding Judge  
Judge Erkki Kourula  
Judge Anita Ušacka  
Judge Daniel David Ntanda Nsereko  
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF**

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

**Public Document**

***Defence Response to the "Observations des Représentants légaux des victimes en réponse aux documents déposés par l'Accusation et la Défense à l'appui de leurs appels à l'encontre de la décision de la Chambre de première instance I du 14 juillet 2009" dated 23 October 2009***

**Source: Mr Thomas Lubanga Dyilo's Defence Team**

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

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## 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 having enlisted and conscripted children under the age of fifteen years into the FPLC and for having used them to participate actively in hostilities.<sup>1</sup>
2. On 22 December 2008, the Prosecution submitted the public version of the amended document containing the charges against Mr Thomas Lubanga.<sup>2</sup>
3. 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").<sup>3</sup>
4. On 17 July 2009, the Presiding Judge issued 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"*.<sup>4</sup>
5. On 27 August 2009, the majority of Trial Chamber I 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"*<sup>5</sup> ("the Clarification of the Decision").

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<sup>1</sup> ICC-01/04-01/06-803-tEN.

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

<sup>3</sup> ICC-01/04-01/06-2049.

<sup>4</sup> ICC-01/04-01/06-2054.

<sup>5</sup> ICC-01/04-01/06-2093.

6. On 3 September 2009, Trial Chamber I granted the Prosecutor and the Defence leave to appeal the Decision<sup>6</sup> (“the Decision Granting Leave to Appeal”).

7. On 10 September 2009, the Defence filed its appeal against the Decision.<sup>7</sup>

8. On 14 September 2009, the Prosecution submitted its appeal against the Decision.<sup>8</sup>

9. On 15 and 22 September 2009, the Legal Representatives filed applications to participate in the interlocutory appeals lodged by the Defence and the Prosecution against the Decision.<sup>9</sup>

10. On 20 October 2009, the Appeals Chamber granted the Legal Representatives of Victims a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0052/06, a/0051/06, a/0078/06, a/0232/06, a/0233/06, a/0246/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0610/08, a/0611/08 and a/0249/09 leave to participate in the appeals against the Decision.<sup>10</sup>

11. The Appeals Chamber ordered the Legal Representatives to file observations in response to the Prosecution and Defence appeals by 23 October 2009 and invited the Prosecution and the Defence to file their responses, if any, to those observations by 28 October 2009.<sup>11</sup>

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<sup>6</sup> ICC-01/04-01/06-2107.

<sup>7</sup> ICC-01/04-01/06-2112-tENG OA15.

<sup>8</sup> ICC-01/04-01/06-2120 OA16.

<sup>9</sup> ICC-01/04-01/06-2121-tENG OA15 OA16; ICC-01/04-01/06-2122-tENG OA15 OA16; ICC-01/04-01/06-2134-tENG OA15 OA16.

<sup>10</sup> ICC-01/04-01/06-2168 OA16.

<sup>11</sup> *Idem*, p. 4.

12. On 23 October 2009, the Legal Representatives submitted observations on the interlocutory appeals lodged by the Prosecution and the Defence against the Decision of 14 July 2009.<sup>12</sup>

## OBSERVATIONS

### 1 – The first issue under appeal

13. The Defence takes note of the Legal Representatives' position that regulation 55 establishes a "[TRANSLATION] unique process, which is subject to all of the conditions and guarantees provided for cumulatively in its three paragraphs".<sup>13</sup> It nevertheless submits that, contrary to what the victims maintain,<sup>14</sup> this part of the Decision is not an *obiter dictum*, but constitutes the very basis of the findings of the majority.

14. In fact, the majority considers – wrongly, in our opinion – that the Chamber is limited to the facts and circumstances described in the charges only if they are re-characterised at the time of the final judgment,<sup>15</sup> whereas re-characterisation at any other stage during the trial is not subject to such a limitation.<sup>16</sup> Hence the majority could not have reached the same conclusions if it considered that a re-characterisation at this stage of the trial must fit into the limitations of the facts and circumstances described in the charges.

**– The *Decision on the confirmation of charges* is the only document to be taken into account to identify the "facts and circumstances described in the charges"**

15. Although they concede that re-characterisation, even at this stage of the trial, is subject to such a limitation, the Legal Representatives submit that the facts they

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<sup>12</sup> ICC-01/04-01/06-2173 OA15 OA16.

<sup>13</sup> *Idem*, para. 25.

<sup>14</sup> *Idem*.

<sup>15</sup> ICC-01/04-01/06-2040, para. 27.

<sup>16</sup> *Idem*, para. 28.

invoke were described in the charges confirmed against the accused as well as in the Amended Version of the Document Containing the Charges.<sup>17</sup>

16. However, the Amended Document Containing the Charges<sup>18</sup> was prepared by the Prosecutor after the confirmation of charges,<sup>19</sup> and has never been confirmed in any way. The Defence concurs with the observations of Trial Chamber II that the purpose of such a document is to promote a greater understanding of the charges,<sup>20</sup> but that it cannot serve as a reference during the hearings on the merits.<sup>21</sup>

17. The only document to which the Trial Chamber may refer is the *Decision on the confirmation of charges*.<sup>22</sup> Trial Chamber II states that:

It is appropriate to prevent the Chamber from having to consider new facts, which have not expressly been accepted by the Pre-Trial Chamber as this would run contrary to the provisions of the Statute. To grant the Trial Chamber the power to not only modify the legal characterisation of the facts, as permitted by regulation 55 of the Regulations of the Court, but also to modify the facts of which it is seized or to deal with new facts, would confer upon it power not bestowed by the core legal texts.<sup>23</sup>

**– The facts alleged by the Legal Representatives have not been expressly accepted by the *Decision on the confirmation of charges***

18. The facts invoked by the Legal Representatives in their Joint Application have not been expressly accepted by the *Decision on the confirmation of charges*, but have been taken either from the Amended Document Containing the Charges<sup>24</sup> or from the testimony of certain witnesses at trial.<sup>25</sup> Accordingly, such facts cannot serve as a basis for a legal characterisation of the facts by the Trial Chamber.

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<sup>17</sup> ICC-01/04-01/06-2173, para. 26.

<sup>18</sup> ICC-01/04-01/06-1573-Anx.

<sup>19</sup> ICC-01/04-01/06-803-tEN.

<sup>20</sup> ICC-01/04-01/07-1547-tENG, para. 12.

<sup>21</sup> *Idem*, para. 14.

<sup>22</sup> *Idem*, para. 16.

<sup>23</sup> *Idem*, para. 19.

<sup>24</sup> ICC-01/04-01/06-1571-Conf + Conf-Anx.

<sup>25</sup> For example, ICC-01/04-01/06-2173, para. 38.

19. The Legal Representatives submit that the facts they allege constitute “[TRANSLATION] *specific circumstances relating to the facts described in the charges*”,<sup>26</sup> and are an “[TRANSLATION] *integral part*” or “[TRANSLATION] *direct consequence*”<sup>27</sup> of the charges accepted by the Pre-Trial Chamber. They add that these facts were “[TRANSLATION] *stated at trial*”.

20. There is no need to discuss the merit of these claims; it is sufficient to recall that only the facts and circumstances expressly described in the decision on the confirmation of charges may be taken into consideration.

21. For obvious reasons of fairness, the notion of “implicit charges” cannot be contemplated under any circumstances. Article 67(1)(a) orders that the accused be informed “*in detail of the nature, cause and content of the charge*” against him. The accused cannot be required to infer from the charges notified to him other facts which may be used against him within the context of new charges.

22. The “*specific circumstances*” alleged by the Legal Representatives in an attempt to characterise the five new charges which they are seeking to have added must therefore necessarily be stated expressly amongst the “facts and circumstances” described in the *Decision on the confirmation of charges* in order to be taken into account.

23. This is not the case here.

24. The assertion that these “facts and circumstances” were “[TRANSLATION] *stated at trial*” and result from the “[TRANSLATION] *statements of witnesses who have already given evidence before the Trial Chamber*”<sup>28</sup> confirms that they had not previously been the subject of any notification whatsoever.

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<sup>26</sup> Victims’ observations, para. 27.

<sup>27</sup> *Idem*, para. 28.

<sup>28</sup> Victims’ observations, para. 38.

25. It is, however, self-evident that the charges, which were confirmed prior to the commencement of the trial by the Pre-Trial Chamber, are defined exclusively by the *Decision on the confirmation of charges*, and not by all sorts of facts alleged by witnesses during the trial.

26. The Legal Representatives' claim that regulation 55 does not contain any restrictions as to the extent of the re-characterisation of the facts<sup>29</sup> runs directly counter to the very wording of the first paragraph of regulation 55, which states that the re-characterisation must not "exceed[...] the facts and circumstances described in the charges".

## **2 – The second issue under appeal**

### **– The merit of the second issue under appeal**

27. The Legal Representatives submit that it would be premature to ask the Appeals Chamber to determine at this stage the entirety of the evidence which might possibly move the Trial Chamber to re-characterise the facts in this matter.

28. The Defence submits that such a position is the result of an erroneous understanding of the second issue under appeal, which reads as follows:

Whether the Majority of the Chamber erred in determining that the legal characterization of the facts may be subject to change, viz. to include crimes under Article 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.<sup>30</sup>

29. The Appeals Chamber is not being asked to rule on the re-characterisation of the facts in lieu of the Trial Chamber, but rather to determine whether the Trial Chamber erred in deciding that the facts invoked by the Legal Representatives allowed it to add fresh charges, punishable 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.

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<sup>29</sup> *Idem*, para. 34.

<sup>30</sup> ICC-01/04-01/06-2107.



30. Furthermore, the Trial Chamber confirmed that the Majority was indeed contemplating adding new crimes as specifically described in the Statute.<sup>31</sup>

31. Hence the Legal Representatives cannot reasonably maintain that the second issue under appeal falls under the exclusive remit of the Trial Chamber.

**– The offence of sexual slavery**

32. The Legal Representatives submit that the contention that the primary purpose of recruiting girls into the armed forces is to use them as sex slaves is supported by various international instruments and international organisations. They rely on article 21(1)(b) of the Statute to assert that the Chamber may apply such a principle.<sup>32</sup>

33. On this point, the Defence reiterates its position that there is no international convention, or principle or rule in international law, or any national legislation which expressly or implicitly makes sexual slavery one of the components of the crimes of the enlistment, conscription or participation in hostilities of children under the age of fifteen years.<sup>33</sup>

34. Contrary to what the victims assert, this position took as a reference point the “Cape Town Principles”, the “Paris Principles” and the documents originating from the African Union and the UN to which the Legal Representatives refer in their Joint Application. The Legal Representatives made reference *inter alia* to the following documents originating from those two organisations:

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<sup>31</sup> ICC-01/04-01/06-2093, para. 7.

<sup>32</sup> ICC-01/04-01/06-2173, paras. 43 and 44.

<sup>33</sup> ICC-01/04-01/06-2112-tENG, para. 47.

**a) Solemn Declaration on Gender Equality in Africa, adopted by African Union Member States<sup>34</sup>**

- The only passage contained in the Declaration which is relevant to this issue reads as follows:

We, the Heads of State and Government of Member States of the African Union [...] HEREBY AGREE TO [...] (l)aunch, within the next one year, a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves in violation of their Rights as enshrined in the African Charter on Rights of the Child;

- The Defence submits that this declaration, which has no normative value, in no way allows the conclusion that the primary aim of recruiting girls into an armed group is to use them as sex slaves.

**b) Report of the United Nations High Commissioner for Refugees: *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*<sup>35</sup>**

- The Legal Representatives refer specifically to page 72<sup>36</sup> to support their claim that the United Nations explicitly acknowledges that girls are primarily recruited into armed groups for sexual purposes.
- However, they neglect to mention a box on that same page 72 of the Report referring to a United Nations Secretary-General Report to the Security Council in 2000 which reads as follows:

A child soldier is any person under 18 years of age who forms part of an armed force in any capacity and those accompanying such groups other than purely as family members as well as girls recruited for sexual purposes and forced marriage. [emphasis added]

- The Defence adds that this document seeks only to provide guidelines for prevention and response. It is important to distinguish principles of international human rights law, which are designed to protect and are

<sup>34</sup> ICC-01/04-01/06-1891-tENG, footnote 49.

<sup>35</sup> *Idem*, footnote 50.

<sup>36</sup> *Idem*.

interpreted broadly, from principles of criminal law, which are designed to punish and must be interpreted strictly.

35. Not only can the “principles” relied on by the Legal Representatives not be considered “principles and rules of international law” within the meaning of article 21(1)(b), but the Legal Representatives are seeking to give them priority over the Statute and the Elements of Crimes.

36. In fact, all of the facts on which the Legal Representatives rely in support of their Joint Application which is the subject of the Decision constitute offences specifically provided for, as distinct from the offences of enlistment, conscription and participation in hostilities of children under the age of fifteen years. As such “principles” have no normative value, they cannot be used to dismiss the clear provisions of the Statute.

37. Article 21(1)(a) clearly establishes that the Statute must be applied before recourse is taken to principles and rules of international law. It follows that, even if the principles relied on by the Legal Representatives did constitute principles or rules of international law – which is not the case – one would first have to apply the Statute, which describes them as specific crimes, which is equivalent to adding fresh charges and is prohibited by the basic documents, for reasons already explained.

**– The mental element of the crimes of inhuman treatment and cruel treatment**

38. The Defence submits that the Legal Representatives are confusing the concepts of “intent” and “specific purpose” in relation to the mental element of the crimes of inhuman treatment and cruel treatment.

39. In fact, although the Prosecution does not have to show that pain and suffering were inflicted with a specific purpose for these offences – unlike for the

crime of torture – the obligation under article 30 to demonstrate that the material elements of these crimes were committed with intent has not been excluded.

40. Furthermore, the Legal Representatives cannot have recourse to ECHR case law to support the theory that it is not necessary to demonstrate intent to inflict suffering. The Elements of Crimes clearly provide for the need to show that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. The obligation to demonstrate such elements cannot be dismissed by a mere reference to the case law of other courts, since the Chamber must first apply the provisions of the Statute, the Elements of Crimes and the Regulations of the Court.

**FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:**

TO TAKE FORMAL NOTE of the observations contained herein;

TO GRANT the appeal filed by the Defence.

[signed]  
Ms Catherine Mabilie, Lead Counsel

Dated this 28 October 2009, at The Hague