

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Presiding Judge Sang-Hyun Song
4 Situation in the Democratic Republic of the Congo - ICC-01/04-01/06
5 In the case of The Prosecutor v. Thomas Lubanga Dyilo
6 Tuesday, 8 December 2009
7 Appeals Hearing
8 (The hearing starts at 4.30 p.m.)
9 (Open session)

10 THE COURT USHER: All rise. The International Criminal Court is now in session.
11 Please be seated.

12 JUDGE SONG: (Microphone not activated)

13 THE COURT OFFICER: (Interpretation) Thank you, your Honour. Situation in the
14 Democratic Republic of the Congo, the Prosecutor against Thomas Lubanga Dyilo, number
15 ICC-01/04-01/06.

16 JUDGE SONG: Yes. Thank you. May I ask the parties and participants to register
17 themselves for the record, perhaps starting with Mr Lubanga -- or the Defence of Mr Lubanga.

18 MS MABILLE: (Interpretation) Thank you, your Honour. The team of the Defence
19 is composed of my colleague Jean Marie Biju Duval; my other colleague Marc Desalliers;
20 Caroline Buteau; and our case manager Sandra D'Angelo; and myself, Catharine Mabile,
21 principal counsel for Thomas Lubanga.

22 JUDGE SONG: Thank you very much. Office of the Prosecutor, please?

23 MR GUARIGLIA: Good afternoon, your Honour. Fabricio Guariglia, Senior Appeals
24 Counsel in the Office of the Prosecutor. And today appearing with me is Mr Reinhold
25 Gallmetzer, Appeals Counsel.

1 JUDGE SONG: Thank you very much. And representatives of the OPCV?

2 MS YAZJI: Good afternoon, your Honour. I am Maria Victoria Yazji, counsel for
3 the Office of Public Counsel for Victims. I am here with Dmytro Suprun, Legal Officer.
4 Thank you.

5 JUDGE SONG: Thank you very much. Then the legal representatives of victims?
6 Anybody?

7 MR KETA: Thank you, your Honour. For the legal representatives of victims,
8 there are two teams: Myself, Counsel Joseph Keta. I represent the first team with my
9 case manager, Sylviane Glodjinon. And for the second team, there is the case manager,
10 Catherine Blot. Thank you.

11 JUDGE SONG: Thank you very much. Today, the Appeals Chamber is delivering its
12 judgment on the appeals of Mr Lubanga Dyilo and of the Prosecutor against the decision
13 of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and
14 participants that the legal characterisation of the facts may be subject to change in
15 accordance with Regulation 55 (2) of the regulations of the Court."

16 The Appeals Chamber decides unanimously as follows:

17 The decision of Trial Chamber I of 14 July 2009 giving notice to the parties
18 and participants that the legal characterisation of the facts may be subject to change
19 in accordance with Regulation 55 (2) of the regulations of the Court is reversed.

20 I shall now summarise the reasons of the Appeals Chamber's judgment. Please
21 note that the actual judgment, which will be filed and notified to the parties and participants
22 shortly, is the authentic version.

23 1. Relevant procedural history.

24 Mr Lubanga Dyilo is currently standing trial before Trial Chamber I for his
25 alleged criminal responsibility for the war crimes of conscripting and enlisting children

1 under the age of 15 years as well as of using them to participate actively in hostilities.

2 In May 2009, after the commencement of the trial, 27 victims participating in
3 this trial filed a joint application requesting the Trial Chamber to add the offences
4 of sexual slavery and inhuman or cruel treatment to the charges brought against Mr Lubanga
5 Dyilo. The victims submitted that the Chamber could do so by modifying the legal
6 characterisation of the facts under Regulation 55 of the regulations of the Court.

7 On 14 July 2009, the Trial Chamber gave notice that it was considering to modify
8 the legal characterisation of facts, pursuant to Regulation 55(2) of the regulations
9 of the Court. It explained that in its view, the subregulations of the Regulation 55
10 create two distinct procedures for changing the legal characterisation of facts applicable
11 at different stages of the trial.

12 In the Trial Chamber's view, the subregulation (1) applies to the judgment stage.
13 At that stage, the Trial Chamber is bound by the facts and circumstances described in
14 the charges or any amendment thereto. According to the Trial Chamber, however, this
15 limitation does not apply to the procedure established by subregulations (2) and (3).
16 Thus, in the opinion of the Trial Chamber, it may use these subregulations to change,
17 in the course of the trial, the legal characterisation of the charges based on additional
18 facts not described in the charges or any amendment thereto.

19 It is this decision that is the subject of the present appeals. The Trial Chamber
20 later clarified that the additional facts must have come to light during the trial and
21 must build a procedural unity with the facts and circumstances described in the charges.

22 Judge Fulford dissented from the impugned decision, considering that Regulation
23 55 "created an indivisible or singular process" and that the change in the charges sought
24 by the victims would require an amendment to the charges under Article 61(9) of the Statute.

25 Mr Lubanga Dyilo and the Prosecutor sought leave to appeal the decision of 14

1 July 2009. Leave was granted on 3 September 2009. Both Mr Lubanga Dyilo and the Prosecutor
2 filed their respective documents in support of the appeal within the time limit stipulated
3 in the relevant provisions of the Rules of Procedure and Evidence and regulations of
4 the Court. The Prosecutor also filed a response to Mr Lubanga Dyilo's document in support.
5 The Appeals Chamber allowed victims to make submissions on the appeals, to which the
6 parties responded.

7 2. Request for extension of the page limit.

8 Before turning to the merits of the appeals, I would like to address a preliminary
9 issue, namely, Mr Lubanga Dyilo's request for an extension of the page limit for his
10 document in support. Mr Lubanga Dyilo sought this extension in order to make submissions
11 on the purported incompatibility of Regulation 55 with certain provisions of the Statute.

12 The Appeals Chamber decided to grant the request because in its view the question
13 of the incompatibility of the Regulation 55 raised by Mr Lubanga Dyilo is implicitly
14 contained in the first issue on appeal.

15 I will now turn to the merits of the appeals.

16 3. First issue on appeal.

17 (A) Submissions on the first issue on appeal.

18 The first issue on appeal is "whether the majority erred in their interpretation
19 of Regulation 55, namely, that it contains two distinct procedures for changing the legal
20 characterisation of the facts applicable at different stages of the trial, and whether
21 under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation
22 of the charges based on facts and circumstances that, although not contained in the charges
23 and any amendments thereto, build a procedural unity with the latter and are established
24 by the evidence at trial."

25 Mr Lubanga Dyilo's principal submission is that Regulation 55 is inherently

1 incompatible with the Statute and therefore may never be applied. In the alternative,
2 he submits that at least the Trial Chamber's interpretation of the regulation is in breach
3 of the Statute.

4 The Prosecutor and the victims refute Mr Lubanga Dyilo's principal arguments
5 or request the Appeals Chamber not to address them, but they agree with many of Mr Lubanga's
6 alternative submissions.

7 (B) Determination of the first issue on appeal.

8 In addressing the first issue on appeal, the Appeals Chamber has followed the
9 twofold structure of Mr Lubanga Dyilo's submissions. Thus, it has first addressed the
10 question of whether Regulation 55 is inherently incompatible with the Statute and then
11 discussed the interpretation given to that provision by the Trial Chamber.

12 (1) Is Regulation 55 inherently incompatible with Articles 52 and 61(9) of the
13 Statute, general principles of international law and with rights of the accused?

14 Mr Lubanga Dyilo first submits that the Judges acted *ultra vires* when adopting
15 Regulation 55 because it affects both the substance of the trial and the rights of the
16 accused.

17 Article 52(1) of the Statute limits the powers of the Judges to adopt regulations
18 of the Court to those "necessary for its routine functioning." The Appeals Chamber recalls
19 that it has been observed that "routine functioning" is a broad concept, which also concerns
20 matters of "practice and procedure" and that the regulations of the Court contain several
21 other important provisions that affect the rights of the accused, *inter alia* on detention
22 and on the scope of legal assistance paid by the Court.

23 Furthermore, while the power given to the Judges to adopt the regulations of
24 the Court is shared with the States Parties pursuant to subparagraph (3) of Article 52
25 of the Statute, none of the States Parties raised any objections to Regulation 55. Thus,

1 the Appeals Chamber is not persuaded that the adoption of Regulation 55 was *ultra vires*.

2 Mr Lubanga Dyilo also avers that Regulation 55 is inherently incompatible with
3 Article 61(9) of the Statute because any modification of the legal characterisation of
4 facts, after the commencement of the trial, would amount to an amendment of the charges
5 and should therefore conform to the procedure set out in Article 61(9) of the Statute.
6 The Appeals Chamber is not persuaded by this restrictive interpretation of Article 61(9)
7 of the Statute.

8 The Appeals Chamber recalls that Article 61(9) addresses primarily the powers
9 of the Prosecutor to seek an amendment of the charges at his own initiative and prior
10 to the commencement of the trial; the terms of the provision do not exclude the possibility
11 that a Trial Chamber modifies the legal characterisation of the facts on its own motion
12 once the trial has commenced.

13 In the Appeals Chamber's view, Article 61(9) of the Statute, and Regulation
14 55, address different powers of different entities at different stages of the procedure
15 and the two provisions are therefore compatible.

16 Thus, the Appeals Chamber is not persuaded that Regulation 55 is inherently
17 incompatible with the Article 61(9) of the Statute.

18 Relying on the ICTY Kupreskic trial judgment, Mr Lubanga Dyilo submits that
19 Regulation 55 does not find support in any general principle of international law and
20 that it is incompatible with the principles established in the case law of the ICTY,
21 which should apply, *mutatis mutandis*, at the court as well.

22 In the view of the Appeals Chamber, Mr Lubanga Dyilo's arguments are misconceived.
23 This is because on the face of the Court's legal texts, there is no general requirement
24 that the provisions of the regulations of the Court must be limited to the codification
25 of general principles of international law. Furthermore, the Appeals Chamber does not

1 consider that the regulations of the Court must necessarily reflect the approach adopted
2 by the ICTY. Therefore, the Appeals Chamber is not persuaded by the argument that Regulation
3 55 does not find support in general principles of international law.

4 Mr Lubanga Dyilo then submits that Regulation 55 is inconsistent with human
5 rights principles. The Appeals Chamber notes that Article 67(1) of the Statute, which
6 guarantees the rights of the accused, reflects internationally recognised human rights,
7 and that pursuant to Article 21(3) of the Statute, "the application and interpretation
8 of law pursuant to this article must be consistent with internationally recognised human
9 rights."

10 Having also considered the jurisprudence of the Inter-American Court of Human
11 Rights and the European Court of Human Rights, the Appeals Chamber is of the view that
12 Article 67(1) of the Statute does not preclude the possibility to modify the legal
13 characterisation of facts after a trial has commenced, pursuant to Regulation 55, as
14 long as the accused is given an adequate opportunity to prepare an effective defence
15 to the new legal characterisation in the charges against him. Whether any delay resulting
16 from the implementation of Regulation 55 denies Mr Lubanga Dyilo his right to be tried
17 without undue delay will then depend upon the circumstances of the particular case.

18 2) The Trial Chamber's interpretation of Regulation 55.

19 Having thus determined that Regulation 55 is not inherently incompatible with
20 the aforementioned provisions of the Statute, but rather complements and completes them,
21 the Appeals Chamber will now turn to the arguments of Mr Lubanga Dyilo and of the Prosecutor
22 regarding the Trial Chamber's interpretation of Regulation 55, which would allow the
23 Trial Chamber to change the legal characterisation "based on facts and circumstances
24 that, although not contained in the charges and any amendments thereto, build a procedural
25 unity with the latter and are established by the evidence at trial." For the following

1 reasons, the Appeals Chamber finds that this interpretation of the provision was flawed.

2 In the Appeals Chamber's view, the Trial Chamber's interpretation of Regulation
3 55 conflicts not only with the wording of Regulation 55 itself, but also with Article
4 74(2) of the Statute, because the latter expressly prevents the Trial Chamber from exceeding
5 the facts and circumstances described in the charges and any amendments thereto in its
6 final decision at the end of the trial.

7 The Trial Chamber's interpretation of Regulation 55 would also circumvent Article
8 61(9) of the Statute and would blur the distinction between the two provisions. Pursuant
9 to Article 54(1) of the Statute, it is the Prosecutor who is tasked with the investigation
10 of crimes under the jurisdiction of the Court and to proffer charges against suspects.
11 To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts
12 and circumstances not alleged by the Prosecutor would be contrary to the distribution
13 of functions under the Statute.

14 Furthermore, the Trial Chamber's interpretation is inconsistent with Regulation
15 52 of the Regulations of the Court, which describes the elements of a document containing
16 the charges and distinguishes facts from their legal characterisation. Regulation 55
17 only refers to a change in the legal characterisation of the facts, but not to a change
18 in the statement of the facts. This indicates that only the legal characterisation could
19 be subject to change, but not the statement of the facts of the Regulations of the Court.

20 As already stated, the Appeals Chamber is of the view that Regulation 55, if
21 properly interpreted and applied, is consistent with internationally recognised human
22 rights. However, if one were to sever sub-regulation (1) from the procedural safeguards
23 in sub-regulations (2) and (3), the compliance of sub-regulation (1) with human rights
24 would not be ensured. This is another clear indication that the Trial Chamber's
25 interpretation of Regulation 55 was flawed.

1 As to Mr Lubanga Dyilo's submission that the addition of an offence or the replacement
2 of a lesser offence with a more serious offence would require an amendment of the charges
3 by the Pre-Trial Chamber, the Appeals Chamber notes that this question goes beyond the
4 scope of the first issue on appeal.

5 4. Second ground of appeal.

6 A. Submissions on the second issue on appeal.

7 The second ground of appeal is "whether the majority of the Chamber erred in
8 determining that the legal characterisation of the facts may be subject to change, namely
9 to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and
10 8(2)(c)(i) of the Statute."

11 Mr Lubanga Dyilo points out that the elements constituting those five new crimes
12 are not described in the charges. He submits that the modification of the legal
13 characterisation of facts contemplated by the Trial Chamber would amount to an
14 (impermissible) amendment of the charges, which, at this stage of the proceedings, would
15 violate his fundamental rights.

16 Emphasising that the notice given by the Trial Chamber was based on a flawed
17 interpretation of Regulation 55, the Prosecutor contends that the Appeals Chamber should
18 not consider the submissions of neither Mr Lubanga Dyilo nor of the victims under the
19 second issue on appeal, because it would be premature.

20 The victims submit the Trial Chamber cannot burden the Appeals Chamber with
21 the task of analysing the entire set of evidence that could potentially lead to the proposed
22 modification of the legal characterisation of facts by the Trial Chamber.

23 B. Determination of the second issue on appeal.

24 The Appeals Chamber does not deem it necessary to address the merits of the
25 submissions under the second issue on appeal, because the Trial Chamber based its finding

1 that the legal characterisation of the facts may be subject to change on a flawed
2 interpretation of Regulation 55.

3 Moreover, the Appeals Chamber notes that the Trial Chamber itself did not go
4 into any details as to the elements of the offences the inclusion of which it contemplated,
5 nor did it consider how these elements were covered by the facts and circumstances described
6 in the charges. Thus, if it considered the second issue, the Appeals Chamber would, for
7 the first time, make an assessment of these questions in its judgment on the appeals,
8 even though the Trial Chamber currently has a much better understanding of the charges
9 and the evidence that has been presented. The Appeals Chamber thus finds that it would
10 be premature to address the arguments raised by Mr Lubanga Dyilo under the second issue.

11 Similarly, as far as Mr Lubanga Dyilo's arguments regarding the purported
12 violation of his fundamental rights are concerned, any discussion by the Appeals Chamber
13 of the issues raised would be abstract and hypothetical.

14 V. Appropriate relief.

15 On an appeal pursuant to Article 82(1)(a) of the Statute, the Appeals Chamber
16 may confirm, reverse or amend the decision appealed. For the reasons I have summarised,
17 the Appeals Chamber is of the view that the Trial Chamber erred in law when finding that
18 Regulation 55 contained two separate procedures and that it was permissible under Regulation
19 55(2) and (3) to include additional facts and circumstances that are not described in
20 the charges. This error materially affected the impugned decision. The Appeals Chamber
21 therefore considers it appropriate to reverse the impugned decision.

22 This concludes my summary of the judgment.

23 Thank you very much. The session is closed.

24 (The hearing ends at 5.05 p.m.)

25