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TRIAL CHAMBER I

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

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

Public

Prosecution's Response to "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la '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' rendue le 14 juillet 2009"

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I. Introduction

1. On 14 July 2009 a Majority of Trial Chamber I issued 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”.¹ The majority Decision gave “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”.² It added that the possible recharacterisation is not confined to “the facts and circumstances described in the charges and any amendments to the charges”.³ Judge Fulford dissented.⁴
2. On 11 August the Defence filed an application for leave to appeal, raising four issues.⁵ On 12 August the Prosecution filed its application for leave to appeal, raising one issue.⁶ The Prosecution hereby responds to the Defence Application.
3. The First Issue raised in the Defence Application challenges the Majority’s interpretation that Regulation 55 sets out two distinct procedures and its explanation of the principles governing both procedures. It is parallel to the single issue presented in the Prosecution’s Application. For the reasons stated in its Application, the Prosecution submits that the First Issue satisfies the requirements for granting leave to appeal.
4. The Fourth Issue as framed by the Defence, which has to do with the Majority’s statement that the Decision provides the notice required under Regulation 55, is closely linked to the First Issue. Appears to impact on the fair conduct of the proceedings. For that reason, the Prosecution does not oppose the Application for leave to raise that issue on appeal.

¹ ICC-01/04-01/06-2049 (“the Decision”).

² Decision, para. 35.

³ Decision, paras. 27-32. Instead, the Majority concludes that Regulation 55(2) and (3) permits it to change, or add new, charges in the pending case -- even if those changed or new charges are based on facts elicited for the first time at trial, and that were never pleaded by the Prosecution or presented to or considered by the Pre-Trial Chamber.

⁴ ICC-01/04-01/06-2069-Anx1, 31 July 2009 (“Minority Opinion”). The Prosecution notes that the Application refers to the first filing of the Minority Opinion (ICC-01/04-01/06-2054, 17 July 2009) and not the second and final corrigendum. Nevertheless, the Application’s references to the Minority Opinion are not affected by the clerical corrections indicated in the corrigenda.

⁵ Requête de la Défense sollicitant l’autorisation d’interjeter appel de la ‘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’ rendue le 14 juillet 2009, 11 August 2008, ICC-01/04-01/06-2073. The Defence Application, originally filed as Confidential, was re-classified as Public pursuant a Trial Chamber I’s Order on 14 August 2009.

⁶ ICC-01/04-01/06-2074 (hereinafter, “the Prosecution Application”), para. 17: “Whether 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.”

5. The Prosecution opposes the Second and Third Issues. The Second Issue, related to the alleged misapprehension by the Majority of the legal and factual circumstances and consequences of the Decision upon the rights of the accused, is prematurely raised. The Defence fails to demonstrate that the Third Issue meets the requirements for leave to appeal.

II. Procedural Background

6. Both the Defence and the Prosecution have applied for leave to appeal the Trial Chamber's decision. The procedural background is set out in detail in the Prosecution's Application⁷ and in the Defence Application.⁸

III. The four issues for which the Defence seeks leave to appeal⁹

7. The Defence seeks leave to appeal the following issues:
- First Issue: In finding that Regulation 55 draws a distinction between two different recharacterisation procedures applicable at discrete stages of the proceedings and each being subject to distinct requirements, the Chamber has misinterpreted the text of the Regulation.¹⁰
 - i. First sub-issue (1-1): Does Regulation 55 confer on the Trial Chamber the power to recharacterise "the facts and circumstances described in the charges" in its final judgment without providing prior notice to the Parties or granting them the rights and safeguards in paragraphs 55(2) and 55(3)?¹¹
 - ii. Second sub-issue (1-2): Does Regulation 55 confer on the Trial Chamber the power to change the characterisation of facts and give consideration to "facts and circumstances" other than those expressly

⁷ ICC-01/04-01/06-2074, 12 August 2009.

⁸ ICC-01/04-01/06-2073, 11 August 2009.

⁹ The English translation of the four issues is internal and unofficial. The Court has not yet provided an official translation of the Defence Application.

¹⁰ *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.* Application, paras. 11-16.

¹¹ *La Norme 55 autorise-t-elle la Chambre de première instance à procéder, dans son jugement final, à une requalification des « faits et circonstances décrits dans les charges » sans en informer préalablement les Parties ni les faire bénéficier des droits et garanties prévus aux paragraphes 55-2 et 55-3 ?.* Application, paras. 17-24.

"described in the charges and any amendments to the charges" during the trial, on the condition that the provisions of paragraphs 55(2) and 55(3) are implemented?¹²

- Second Issue: In finding that the legal representatives' observations establish the possibility that the Regulation 55 recharacterisation procedure may be triggered, the Trial Chamber has misapprehended the legal and factual circumstances and has seriously violated the fundamental rights of the accused.¹³
- Third Issue: In agreeing to entertain the legal representatives' application for implementation of Regulation 55, the Chamber has improperly afforded them a right which they do not enjoy.¹⁴
- Fourth Issue: In failing to inform the Parties and Participants of the changes for discussion, the Chamber has contravened the provisions of Regulation 55.¹⁵

8. As established by the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.¹⁶
9. In this instance, the Defence puts forward identical arguments in support of its claim that each of the four issues meet the criteria under Article 82(1)(d).¹⁷

¹² *La Norme 55 autorise-t-elle la Chambre de première instance, au cours du procès, à modifier la qualification des faits poursuivis en retenant d'autres « faits et circonstances » que ceux expressément « décrits dans les charges et toute modification qui y aurait été apportée », sous réserve que le dispositif prévu aux paragraphes 55-2 et 55-3 soit mis en oeuvre ?*. Application, paras. 25-30.

¹³ *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*. Application, paras. 31-35.

¹⁴ *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*. Application, paras. 36-39.

¹⁵ *En omettant d'indiquer aux Parties et participants les modifications susceptibles d'être débattues, la Chambre contrevient aux dispositions de la Norme 55*. Application, paras. 40-42.

¹⁶ *Situation in Uganda*, ICC-02/04-01/05-20, 19 August 2005, para. 22.

¹⁷ See Application paras. 43-44, indicating how the Decision of the Majority impacts on the **fairness** towards the accused, as his fundamental rights are affected (e.g. the right to know the charges against him promptly and in detail), on the **expeditiousness** of the proceeding (the defence could recall witnesses and ask for a suspension to prepare the new charges, see para. 45); on the **outcome** of the process (e.g. the charges against the accused, see para. 48); and how an immediate resolution by the Appeals Chamber will **materially advance the proceedings** (as it will avoid the useless presentation of new evidence and recalling witnesses, see para. 49).

IV. Arguments

The First Issue: the interpretation and application of Regulation 55

10. The Application's First Issue challenges the Majority's conclusion that Regulation 55 provides two recharacterisation regimes: (i) recharacterisation that occurs in the final decision (under Regulation 55(1)), which cannot exceed the facts and circumstances set out in the charges and any amendments thereto, and (ii) recharacterisation during the proceedings (under Regulation 55(2) and 55(3)), which is not limited to the facts set out in the charging documents.¹⁸ The Defence submits that both prongs of the Majority's statutory interpretation are incorrect.¹⁹
11. The Defence presents the First Issue divided into two sub-issues wherein it separately addresses the two procedures found by the Majority in Regulation 55. The Defence challenges the existence of two different procedures within Regulation 55 and argues that this provision should be interpreted as establishing a single procedure with the safeguards and guarantees described in all three paragraphs. Applying either of the separate procedures independently, without the safeguards contained in the other paragraphs, fails to adequately protect the rights of the accused and the fair conduct of the proceedings and conflicts with Articles 74(2), 61(9) and 67(1).
12. The First Issue - with its two sub-issues - places before the Chamber substantively the same question as that raised in the Prosecution's application for leave to appeal: the correct interpretation and application of Regulation 55(1), (2), and (3). The Prosecution considers that the First Issue constitutes an identifiable "issue" arising from the Decision as defined by the Appeals Chamber²⁰ and meets the requirements of Article 82(1)(d). For the reasons set out by the Prosecution in its Application for Leave to Appeal,²¹ this issue significantly affects the fair and expeditious conduct of the proceedings. This issue also affects the outcome of the trial. In addition, the

¹⁸ Application, paras. 11-13.

¹⁹ Application, para. 14.

²⁰ The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one." *Situation in the DRC*, ICC-01/04-01/06-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

²¹ ICC-01/04-01/06-2074, paras. 19-34.

immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings.

13. Thus, the Prosecution agrees that the Issue is appealable under the criteria set forth by this Court and does not oppose granting leave to Appeal on that issue.

The Second Issue: Erroneous assessment of the legal and factual circumstances and violation of the fundamental rights of the accused

14. The Second Issue challenges the legal representatives' observations that triggered the Majority's Decision to consider recharacterisation.²² It appears to contend that the request of the legal representatives entails the addition of five new charges (some of a superior gravity), rather than changing the legal characterisation of the facts. According to the Defence, these modifications of the charges would contravene Article 61(9) and would impair the fundamental rights of the accused under Article 67(1)(a) and (b) and the fairness of the proceedings.²³ It also argues that the facts do not support the elements of the charges proposed by the legal representatives.
15. The Application fails to demonstrate that the Second Issue arises from this Decision and meets the criteria under Article 82(1)(d). At this stage the Issue is premature. The Legal Representatives have proposed concrete legal recharacterisations, but the Chamber is not bound by those proposals. Moreover, the Majority does not identify either which facts or legal characterisations it is considering;²⁴ or which recharacterisations, if any, it might ultimately adopt. Whether the facts support any proposed recharacterisation can only be determined once those facts are identified. The Chamber will not adopt any new characterisation without giving the parties the opportunity to make submissions.
16. If this Chamber grants the Applications for Leave to Appeal on the First Issue regarding interpretation and application of Regulation 55, the Appeals Chamber decision will guide the Trial Chamber on the factual scope to be considered and on the procedures to follow in considering any change to the legal characterisation or addition to the charges. Even if leave to appeal is not granted, the Trial Chamber will still solicit observations and indicate the new facts and legal characterisations.

²² Decision, para. 31.

²³ Application, para. 34.

²⁴ See the Fourth Issue raised in the Application, paras. 40-42.

Under either scenario, the parties will be able to consider the substantive decision of the Trial Chamber and, if appropriate, can seek leave to appeal the decision regarding specific charges.

17. This issue identified by the Defence may well require the attention of the Appeals Chamber in due course, but at present it does not appear to fully arise from the Decision. Given the further procedures that the Majority contemplates, its immediate resolution of this issue by the Appeals Chamber also may not materially advance the proceedings. Because it is premature, the Prosecution opposes granting leave to appeal the Second Issue at this stage.

The Third Issue: The legal representatives' authority to request the implementation of Regulation 55 to the Chamber

18. The Defence states that Regulation 55(2) does not authorize the victims or their legal representatives to seize the Chamber with a request to recharacterise the facts and circumstances.²⁵
19. The Prosecution acknowledges that “whether the victims may request the Chamber to trigger the procedure under Regulation 55” may constitute an issue arising from the Decision as defined by the Appeals Chamber.²⁶ Nevertheless, the Application fails to demonstrate that the Third Issue meets the criteria set forth in Article 82(1)(d). The arguments presented do not explain how the Third Issue affects the fairness and expeditiousness of the proceedings or the outcome of the trial and how its resolution by the Appeals Chamber will materially advance the proceedings. That is so because, regardless whether it considers the possibility on its own initiative or upon a request or observation by a party or participant, it is ultimately for the Chamber alone to decide whether Regulation 55 shall be triggered.²⁷
20. Thus, the Prosecution opposes granting leave to appeal on the Third Issue.

²⁵ Application, paras. 36-38.

²⁶ The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” *Situation in the DRC*, ICC-01/04-01/06-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

²⁷ Stahn C., “Modification of the legal characterization of facts in the ICC system”, *Criminal Law Forum*, vol. 16, 2005, p. 26.

The Fourth Issue: Notice pursuant to Regulation 55(2)

21. The Defence argues that the Majority's assertion that there is a possibility that "the legal characterisation of facts may be subject to change" - without specifying which new legal characterisations the Majority is considering - does not meet the requirement set forth in Regulation 55(2).²⁸
22. The Prosecution notes that the Majority also explains that further information will be forthcoming, stating that "At an appropriate stage of proceedings the defence, the prosecution and the victims' legal representatives shall be given the opportunity to make oral and written submissions [...]. In due course, the Trial Chamber will articulate the procedural steps for a hearing to take place to consider all matters relevant to the possible modification."²⁹ However, it concurs that this does not clarify whether the Majority, in paragraph 35 of the Decision,³⁰ provides the "notice to the participants" required in Regulation 55(2)³¹ or merely informs them that it will do so at a later stage. If paragraph 35 is the final notice, and if the Chamber does not intend to identify with greater precision the new legal characterisations, the Prosecution agrees with the Defence that the adequacy of that notice presents an appealable issue.

²⁸ Application, para. 40.

²⁹ Decision, para. 34.

³⁰ Decision, para. 35: "*The 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*".

³¹ Regulation 55(2) reads "If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to 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. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change".

V. Relief sought

23. For the reasons set out above, the Prosecution requests that the Trial Chamber grant the Application regarding the First and Fourth Issues, and that it reject the remaining submissions.



Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of August, 2009

At The Hague, The Netherlands