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No.: ICC-01/04-01/06 OA15 OA16

Date: 28 October 2009

THE 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

Prosecution's Response to the Observations of Victims on the Appeals by the Prosecution and the Defence 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"

Source: Office of the Prosecutor

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

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**Unrepresented Applicants for
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Introduction

1. Legal Representatives of Victims have filed consolidated observations on the appeals by the Prosecution and the Defence against a Decision of the Majority of Trial Chamber I,¹ which found that at this stage of proceedings it could consider the possibility of changing the legal characterisation of the facts under Regulation 55(2) of the Regulations of the Court without being bound by the facts and circumstances set out in the charging document.
2. The Legal Representatives agree with the Prosecution on all of the main points raised in the appeals, in particular, that Regulation 55 embodies a single process; that the Appeals Chamber should not decide as the court of first instance whether the facts and circumstances in the Document Containing the Charges can support a different legal characterisation; and that in considering a change to the legal characterisation of the facts, the Trial Chamber is not limited to substituting to a lesser included offence. The Legal Representatives also agree with both the Prosecution and the Defence that the Majority erred in its interpretation that Regulation 55(2) was not restricted to the facts and circumstance set out in the charges.
3. The sole issue on which the Prosecution and the Legal Representatives differ is on the impact of this error. Contrary to the Legal Representatives' submissions, the notification given by the Majority was fundamentally flawed as it was based, at least in part, on consideration of new facts and circumstances beyond those set out in the charges. The Appeals Chamber should therefore remand the matter to the Trial Chamber to decide whether, based on the facts set out in the Document Containing the Charges, it still "appears to the Chamber that the legal characterisation of facts may be subject to change".²

¹ ICC-01/04-01/06-2049 ("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 Regulation 55(2).

Procedural Background

4. The Prosecution refers to the detailed procedural history set out in its Appeal Brief against the Decision,³ and in its Response to the Defence Appeal.⁴
5. Pursuant to a grant of leave by the Appeals Chamber,⁵ on 23 October 2009 the Legal Representatives of the victims filed consolidated Observations on the appeals by the Prosecution and the Defence.⁶
6. The Prosecution hereby files its Response to the Victims' Observations.

The Prosecution's Response to the Observations

Suspensive effect is no longer required

7. The Prosecution and the Defence both requested that the Appeals Chamber grant suspensive effect to this appeal. On 2 October 2009, the Trial Chamber postponed the resumption of trial, including hearing further evidence and a more detailed consideration of Regulation 55, until after the Appeals Chamber decides the merits of this appeal.⁷ As a result, the Prosecution agrees with the Legal Representatives that the request that this Chamber grant suspensive effect to this appeal is moot.⁸

The Legal Representatives and the Prosecution largely concur on all substantive questions

8. In its appeal, the Prosecution demonstrated that Regulation 55 contains a single procedure, and that all of the safeguards contained in its three paragraphs must be applied.⁹ As a result, Regulation 55 allows the Chamber to recharacterise only

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

⁴ See ICC-01/04-01/06-2136 OA15, 23 September 2009, paras. 4-6.

⁵ ICC-01/04-01/06-2168, 20 October 2009.

⁶ ICC-01/04-01/06-2173 ("Victims' Observations").

⁷ ICC-01/04-01/06-2143, paras. 22-23.

⁸ Victims' Observations, para. 17.

⁹ Prosecution Appeal Brief, paras. 5, 14, 24, 46-48.

those facts which are contained in the charges (or any amendment to the charges).¹⁰ The Legal Representatives expressly agree with both the Prosecution and the Defence¹¹ on this core issue in the appeal.¹²

9. The Legal Representatives also agree with the Prosecution that, contrary to the Defence's contention on appeal,¹³ the Trial Chamber's authority to recharacterise facts and circumstances under Regulation 55 is not limited to those cases where the new legal characterisation is a lesser included offense of a crime charged.¹⁴
10. There is also agreement with the Prosecution's opposition to the Defence's argument that any application of Regulation 55 would necessarily violate the rights of the accused. The Prosecution argued that the question of the impact and the rights of the accused must be determined on a case-by-case basis, in light of both the nature of the change (if any) and the measures which the Trial Chamber puts in place to safeguard the rights of the Defence under Regulation 55(2) and (3).¹⁵ Regulation 55 provides an adequate mechanism for this.¹⁶ The Legal Representatives agree with the Prosecution on this question as well.¹⁷

¹⁰ Prosecution Appeal Brief, paras. 4-7, 28-34, 44-45

¹¹ Defence Appeal Brief, para. 8.

¹² Victims' Observations, paras. 25-26: "Les représentants légaux s'associent avec la thèse des appelants selon laquelle la norme 55 du Règlement de la Cour prévoit un processus unique qui est soumis à l'ensemble des conditions et garanties énoncées cumulativement dans ses trois paragraphes. [...] Les représentants légaux n'ont par ailleurs jamais soutenu la thèse selon laquelle la norme 55 du Règlement de la Cour autoriserait la Chambre de première instance à dépasser les faits et circonstances décrits dans les charges."

¹³ The Prosecution also observed that the question of the legality of Regulation 55 *per se*, which the Defence had sought to incorporate by reference, had not been certified for appeal or raised before the Trial Chamber in these proceedings (Prosecution Response to Defence Appeal, paras. 7-8). The Legal Representatives agree that the arguments of the Defence cannot be taken into consideration for this reason (Victims' Observations, paras. 19, 22), although for a reason with which the Prosecution does not agree. In particular, the Prosecution disagrees that a party waives a claim, including its right to seek interlocutory appeal from a subsequent decision, if it does not raise it in an initial application for leave to appeal. Under the Statute, interlocutory appeals may only be lodged if the particular criteria under Article 82(1)(d) are met. Not every decision can or should be appealed, and the Statute thus does not penalize a party for failing to seek to appeal an issue the first time it arises. Instead, it is the particular impact of a decision, and within that decision only the necessary issues, that should justify an application for leave to appeal. Thus, a party's determination that an issue does not meet the requirements for leave to appeal in the context of a given decision cannot prevent it from seeking leave to appeal that same issue if it arises later in a way which affects the fair and expeditious conduct of the proceedings (contrast Victims' Observations, para. 20). And an application for leave to appeal an issue also cannot be conflated with seeking reconsideration of that issue (contrast Victims' Observations, para. 21).

¹⁴ See Prosecution Appeal Brief, para. 49; Prosecution Response to Defence Appeal, paras. 12-15. Victims' Observations, paras. 34, 41.

¹⁵ Prosecution Response to Defence Appeal, paras. 17, 20, 22, 24-26.

¹⁶ Regulation 55 prescribes that if the Trial Chamber is contemplating a change of legal characterisation then it must give the parties the opportunity to make submissions on "all matters relevant to the proposed change", including the impact of the proposed change and the measures would be required in order to respect the rights of the parties. This would include the measures specifically contemplated in Regulation 55(2) and (3), such as the

11. The Legal Representatives thus agree with the Prosecution on the substantive issues in this appeal, and in particular on the core issue that the Majority of the Trial Chamber erred in holding that under Regulation 55(2) and (3) they were not limited to the facts and circumstances set out in the charges.

The sole disagreement between the Legal Representatives and the Prosecution relates to the remedy on appeal

12. The Legal Representatives argue that the erroneous interpretation of Regulation 55 did not impact on the Decision to notify the participants that the legal characterisation of facts may be subject to change.¹⁸ They suggest that although the Majority held that it *could* refer to facts beyond those set out in the charges, this was not necessary in the present case because the facts and circumstances which *are* set out in the charges themselves support the proposed legal characterisations.¹⁹
13. This position, however, is not supported by the Majority's Decision or its subsequent Clarification. The Decision did not identify the facts which the Majority considered might be subject to a different legal characterisation.²⁰ Nonetheless, it was explicitly based on a flawed interpretation of Regulation 55(2).²¹ In its subsequent Clarification, the Majority expressly referred to the facts which were to be re-characterised as "the specific *new* facts and circumstances that the Chamber may consider".²²

possibility of suspending the hearing to ensure that the participants have adequate time and facilities for the effective preparation of their case. See Prosecution Response to Defence Appeal, paras. 20, 24.

¹⁷ See in particular Victims' Observations, paras. 36, 39, 42.

¹⁸ Victims' Observations, para. 25.

¹⁹ Victims' Observations, para. 26.

²⁰ The Decision merely gives the parties notice that "the legal characterisation of facts may be subject to change" (para. 35). See Prosecution Application for Leave to Appeal, ICC-01/04-01/06-2074, 12 August 2009, para. 23 and footnote 37.

²¹ Decision, paras. 27-32.

²² ICC-01/04-01/06-2093, 27 August 2009, para. 7. The Majority went on to rule that, "[a]s explained in the Majority Decision, Regulation 55(2) allows for the incorporation of *additional facts and circumstances* provided that notice to the participants is granted and an opportunity to make oral or written submissions concerning the proposed changes is afforded". Those '*additional facts*' must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges" – para. 8 (emphasis added).

14. The Decision and the Clarification thus reflect the erroneous analysis of the Trial Chamber and cannot be sustained on the basis that the Chamber *could have* reached the same result based on factual findings derived from the Document Containing the Charges. The Trial Chamber in this case made its determination based in part on facts which it acknowledged were *not* part of the charges; and it is impossible to separate the factual bases on which the Trial Chamber made its findings. The Appeals Chamber should not determine at this stage whether the facts and circumstances support the alternative legal characterisations under consideration by the Trial Chamber.²³
15. As a result, the Prosecution submits that the Appeals Chamber should not consider the submissions of either the Defence or of the Legal Representatives providing arguments as to whether the facts and circumstances set out in the charges might support the proposed legal characterisations.²⁴ The course consistent with the procedures in Regulation 55 is thus to overturn the Decision and allow the Trial Chamber to make a new assessment, confined to the facts set out in the charges, to determine if it still “appears to the Chamber that the legal characterisation of the facts may be subject to change”.²⁵



Luis Moreno-Ocampo,
Prosecutor

Dated this 28th day of October 2009
At The Hague, The Netherlands

²³ The Legal Representatives agree in principle that the question of whether the facts and circumstances set out in the charges support the proposed legal characterisations is one which must be decided by the Trial Chamber (having heard submissions from the parties), and not by the Appeals Chamber at this stage: Victims' Observations, paras. 35, 39, 42.

²⁴ See in particular: Defence Appeal Brief, paras. 41-57; Victims' Observations, paras. 28-31, 37-38, 43-45.

²⁵ Prosecution Response to Defence Appeal, para. 21.