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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
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 Observations on the consequences of the
Appeal Judgment of 8 December 2009**

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Introduction

1. The Prosecution hereby provides its observations on the joint submission by the Legal Representatives of victims on the consequences of the Appeals Chamber's Judgment on Regulation 55.
2. The Prosecution concurs with the Legal Representatives that the circumstances in which the crimes currently charged were committed include the physical and sexual abuse to which the victims were subjected, which must be considered as aggravating circumstances for the purposes of sentencing. However, as the Appeals Chamber emphasised, any exercise of Regulation 55 must be limited to the facts and circumstances "described in the charges".¹ Merely because a factor or circumstance is relevant for sentencing, that does not necessarily make it a "fact or circumstance described in the charges" for the purpose of Regulation 55.
3. The Appeal Judgment reversed the Majority's prior decision on Regulation 55 without remanding the matter for a new determination. The Prosecution submits that the Trial Chamber can therefore consider whether to engage Regulation 55, bearing in mind not just the merits of the proposed recharacterisation, but also the stage of the proceedings and the fair trial rights of the Accused.
4. If it chooses to consider the possibility of recharacterisation, the Trial Chamber should then give notice to the parties, providing details on the elements of the contemplated new legal characterisation and the manner in which these elements are covered by the facts and circumstances described in the charges.²
5. In order to expedite the proceedings, the Prosecution considers that there is no need to engage Regulation 55 at this stage. The Prosecution agrees with the Legal Representatives that the full range of the harms and injuries to the victims, including the cruel treatment and the sexual and gender violence, have been and will continue to be an integral component of this case. Recognizing the sexual and gender violence as part of the harm suffered by children enlisted and used in conflict effectively presents the dimensions of the victims' suffering and the full criminal responsibility of the Accused at trial, and will itself justify an appropriately severe sentence.

¹ As the Appeals Chamber emphasized, see paragraph 93 of the Appeal Judgment.

² Appeal Judgment, para. 109.

Procedural Background

6. The Accused is charged with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. An arrest warrant was issued on 10 February 2006.³ The Prosecution filed its Document Containing the Charges (“DCC”) on 28 August 2006.⁴ The Pre-Trial Chamber confirmed those charges on 29 January 2007.⁵ Based on the Confirmation Decision, the Prosecution filed an amended DCC on 22 December 2008.⁶
7. Trial commenced on 26 January 2009. During the Prosecution’s case, 30 witnesses testified.⁷ On 14 July 2009, the final witness in the Prosecution’s case completed his testimony.⁸
8. On 22 May 2009, the Legal Representatives of the Victims asked the Trial Chamber to consider recharacterisation under Regulation 55 to include the crimes of sexual slavery⁹ and inhuman and cruel treatment,¹⁰ based on their interpretation of evidence that had emerged during the Prosecution’s case.¹¹
9. On 14 July 2009, the day the last prosecution witness testified, the Trial Chamber gave notice under Regulation 55(2) “that it appears to the majority of the Chamber that the legal characterisation of the facts may be subject to change”.¹² Judge Fulford dissented.¹³
10. Both the Prosecution and the Defence appealed the Decision.¹⁴

³ ICC-01/04-01/06-2-tEN.

⁴ ICC-01/04-01/06-356.

⁵ ICC-01/04-01/06-803, pp. 156-157. Three counts involve a time period when, according to the Pre-Trial Chamber’s confirmation decision, the armed conflict in the Democratic Republic of the Congo (DRC) was purely internal; the remaining three counts involve a time period within which the armed conflict was found to be international.

⁶ ICC-01/04-01/06-1571-Conf-Anx.

⁷ The Prosecution called 28 witnesses, and the Trial Chamber called two expert witnesses.

⁸ ICC-01/04-01/06-T-209-CONF-ENG ET.

⁹ Articles 7(1)(g), 8(2)(b)(xxii), and/or 8(2)(e)(vi).

¹⁰ Articles 8(2)(a)(ii) and/or 8(2)(c)(i).

¹¹ ICC-01/04-01/06-1891-tENG. The parties submitted observations - ICC-01/04-01/06-1918; ICC-01/04-01/06-1966; ICC-01/04-01/06-1975.

¹² ICC-01/04-01/06-2049, para. 35. On 27 August 2009, the Majority issued a clarification and guidance on its Decision - ICC-01/04-01/06-2093.

¹³ ICC-01/04-01/06-2069-Anx1, 31 July 2009 (originally filed on 17 July 2009 - ICC-01/04-01/06-2054).

¹⁴ Applications for Leave to Appeal: ICC-01/04-01/06-2074, 12 August 2009 (Prosecution); ICC-01/04-01/06-2073-Conf, 11 August 2009 (Defence). Decision granting leave: ICC-01/04-01/06-2107, 3 September 2009. Appeal Briefs: ICC-01/04-01/06-2120, 14 September 2009 (Prosecution); ICC-01/04-01/06-2112-tENG, 10 September 2009 (Defence).

11. On 8 December 2009, the Appeals Chamber issued its Judgment whereby it reversed the Appealed Decision.¹⁵ It stated that the “Trial Chamber erred in law when finding that Regulation 55 contained two separate procedures and that it was permissible under Regulation 55(2) and (3) to include additional facts and circumstances that are not described in the Charges”.¹⁶ It did not address the second issue, namely whether the Majority was correct in determining that the legal characterisation of the facts may be subject to change.
12. Thereafter, at the status conference held on 9 December 2009, a Legal Representative suggested a discussion on the consequences of the Appealed Decision. Judge Fulford responded: “[...] there is nothing to discuss. The Appeals Chamber has ruled on Regulation 55 and effectively on the application that was made by the victims; and as we see the matter now, the trial simply proceeds on its original basis.” Judge Fulford instructed the Legal Representative to provide submissions if he considered that the legal re-characterization was still a live issue.¹⁷
13. On 15 December 2009, three Legal Representatives filed a joint submission on the consequences of the Appeals Chamber judgment on Regulation 55.¹⁸ The Prosecution hereby provides its Observations on this issue.

Submissions

14. The starting point must be the judgment of the Appeals Chamber. This clarified that any exercise of Regulation 55 must be confined to the facts and circumstances described in the charges, as required by Article 74 (2).
15. The Appeals Chamber did not address the issue whether the facts and circumstances in this case could be susceptible to the change initially requested by the Legal Representatives. Nor did it actively remand this question for a new consideration by the Trial Chamber. Rather, the Appeals Chamber limited itself to reversing the initial decision. The Trial Chamber is therefore free to determine which course of action to take now, including deciding on the convenience and appropriateness of reinitiating the procedure under Regulation 55 at this stage.

¹⁵ ICC-01/04-01/06-2205, OA15 OA16, 8 December 2009 (“Appeal Judgment”).

¹⁶ *Ibid.*, para. 112.

¹⁷ ICC-01/04-01/06-T-222-ENG ET WT 09-12-2009, p. 3, p.4 lines 1-7.

¹⁸ ICC-01/04-01/06-2211 (“Victims’ Observations”).

16. If the Trial Chamber does intend to consider recharacterising the charges, the Prosecution submits that it should make an initial determination as to whether the legal characterizations of the facts may be subject to change within the terms of Regulation 55(2) before requesting submissions from the parties. In light of the judgment of the Appeals Chamber, this determination should provide “details as to the elements of the offences the inclusion of which it contemplated” as well as “how these elements were covered by the facts and circumstances described in the charges.”¹⁹ It would then be on this tangible basis, and not in the abstract, that the parties should be requested to make submissions under Regulation 55(2).
17. In addition, the Trial Chamber should also consider the impact of giving notice that the facts may be recharacterised at this stage on the conduct of the proceedings and the rights of the accused. As the Legal Representatives note, this must be done on a case-by-case basis, i.e. any prejudice must be assessed in the specific circumstances of this case.²⁰ This could include the extent to which initiating proceedings under Regulation 55 would delay the trial; the impact of any delay on the rights of the accused, including the stage of the proceedings and past delays; and the extent to which witnesses would need to be recalled, in light of whether the issues raised by any recharacterisation had already been fully explored in examination and cross-examination.²¹
18. In arguing for the Chamber to exercise its power under Regulation 55, the Legal Representatives emphasise that the incidents of cruel and inhuman treatment and of sexual slavery that emerged from the evidence at trial constitute aggravating circumstances for sentencing, in particular under Rule 145(2)(b).²²
19. The Prosecution concurs on this point. It has consistently maintained, from the opening statement at the trial, that the sexual slavery, sexual abuses, and other acts of violence and cruelty committed against the child soldiers form an integral part of the harm they suffered due to their enlistment and use and will be major factors to be considered in determining the appropriate sentence for the accused.²³ These crimes have had a devastating impact on the children who were victimized, as the

¹⁹ Appeal Judgment, para. 109.

²⁰ Victims’ Observations, para. 34; see also Appeal Judgment, para. 86.

²¹ See further Prosecution Appeal Brief, para. 24, 26.

²² Victims’ Observations, paras. 21-22, see also paras. 23, 26.

²³ See e.g. ICC-01/04-01/06-1966, 12 June 2009, para. 19; ICC-01/04-01/06-T-107-ENG, page 12, line 23 to page 13, line 5. The Legal Representatives themselves acknowledge this, see Victims’ Observations, para. 26.

evidence presented at the trial has amply demonstrated. The Prosecution will therefore be calling for an appropriately severe sentence to reflect the full extent of their suffering.²⁴ The full range of facts regarding the treatment of the children have been and will continue to be presented in this case as aggravating factors, whether or not the Chamber changes the legal characterization of the facts pleaded under Regulation 55.

20. However, the aggravating (or mitigating) factors and the “circumstances [...] of the crime” which will be relevant under Rule 145(1)(b) for *sentencing* are not the same as or limited to the “circumstances described in the charges”.²⁵ Just because a factor or circumstance is appropriate for consideration at sentencing under Rule 145(1)(c) or (2)(b) does not necessarily make it one of the “circumstances *described in the charges*” to be considered for the purposes of a recharacterisation under Regulation 55. There will be factors or circumstances relevant for sentencing that will not have been described in the charges;²⁶ and it is entirely appropriate for the Chamber to take into consideration for sentencing the full range of factors regarding the crime and the damage to victims details of the commission of the crimes and their particular impact on the victims which emerge during the trial.²⁷

²⁴ Rule 145(1)(c) expressly provides that “In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall: [...] give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families”.

²⁵ Contrast Victims’ Observations, para. 23. The Prosecution does not consider the distinction which the Legal Representatives seek to draw between “facts” and “circumstances” (Victims’ Observations, para. 20) to be relevant to the present question. However, it notes that the Appeals Chamber explained what it understood as “facts” in its recent Appeal Judgment, footnote 163: “In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasizes that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute”.

²⁶ Many of the aggravating and mitigating circumstances in Rule 145(2) would not be described in the charges: see by way of example Rule 145(2)(a)(i) and (ii), and (2)(b)(i).

²⁷ While the decision under Article 74(2) is limited to “the facts and circumstances described in the charges”, the determination of sentence under Article 78 is not. The ICTY and ICTR have also considered as aggravating factors, for the purpose of sentencing, circumstances that were not always described in the indictment but arose during trial, including, for example, the particular cruel, violent, and humiliating nature of the acts and the vulnerability of the victims. See, for example, *Prosecutor v Blaskic*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 783; *Prosecutor v Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgement, 22 February 2001, paras. 864, 866-867; *Prosecutor v Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 352; *Prosecutor v Zelenovic*, IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para. 39; *Prosecutor v Jelusic*, IT-95-10-T, Trial Judgement, 14 December 1999, para. 130; *Prosecutor v Muhimana*, ICTR- 95-1B-T, Judgement and Sentence, 28 April 2005, paras. 612, 614). The tribunals have also considered the effect of the crimes on the victims and survivors, as in *Prosecutor v Blaskic*, IT-95-14-T, Judgement, 3 March 2000, para. 787; *Prosecutor v D. Milosevic*, IT-98-29/1-T, Trial Judgement, 12 December 2007, para. 1001, and the circumstances of the offences generally, such as the

21. The Prosecution considers that it is of the greatest importance that the Trial Chamber should consider all information relevant to the scale of victimization. However, recharacterisation of the facts under Regulation 55 is not necessary for it to do so. Indeed, the Legal Representatives acknowledge that even if the facts are recharacterised, this would not even necessarily lead to a higher sentence.²⁸

Relief sought

22. For the reasons set out above, the Prosecution requests that the Trial Chamber considers its Observations as set out herein.



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Dated this 22nd day of December, 2009

At The Hague, The Netherlands

conditions of the camps where the crimes were committed, e.g. *Prosecutor v Delalic et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, paras. 1242-1243.

²⁸ Victims' Observations, para. 29.