

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06  
Date: 27 August 2009

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**SITUATION**

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

**Public**

**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"**

Clarification and further guidance to be notified in accordance with regulation 31 of the Regulations of the Court to:

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

**Counsel for the Defence**

Ms Catherine Mabilie

Mr Jean-Marie Biju Duval

**Legal Representatives of the Victims**

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Louis Gilissen

Mr Jean Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

**Unrepresented Victims**

**Legal Representatives of the Applicants**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section Other**

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following "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'"

## I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 14 July 2009, the Trial 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" ("Majority Decision").<sup>1</sup>
2. The Majority of the Chamber gave notice to the parties and participants that at that stage of the proceedings it appeared to the Majority of the Chamber that the legal characterisation of the facts may be subject to change.<sup>2</sup> It was decided that at an appropriate time the parties and participants would be given the opportunity to make oral or written submissions in accordance with Regulation 55(2) of the Regulations of the Court ("Regulations"). In addition, the Decision notified the parties and participants that Trial Chamber I would, in due course, articulate the procedural steps for a hearing to take place to consider all matters relevant to the possible modification.<sup>3</sup>
3. On 17 July 2009, Presiding Judge Fulford issued the "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

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<sup>1</sup> 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, 14 July 2009, ICC-01/04-01/06-2049.

<sup>2</sup> *Ibid*, paragraph 33.

<sup>3</sup> *Ibid*, paragraph 34.

Regulation 55(2) of the Regulations of the Court’”.<sup>4</sup> On 21 July 2009, the “Decision issuing a corrigendum to the ‘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’ of 17 July 2009” was handed down.<sup>5</sup> A second corrigendum to the Minority Opinion was issued on 31 July 2009.<sup>6</sup> In the Minority Opinion, Judge Fulford rejected the request to trigger the procedure set out in Regulation 55 of the Regulations.<sup>7</sup>

4. On 11 August 2009, the defence filed the “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”.<sup>8</sup> On 12 August 2009, the Office of the Prosecutor (“prosecution”) filed the “Prosecution’s Application for Leave to Appeal 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>9</sup> On 17 August 2009, the victims’ legal representatives filed the “Réponse conjointe des représentants

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<sup>4</sup> 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”, 17 July 2009, ICC-01/04-01/06-2054.

<sup>5</sup> Decision issuing a corrigendum to the "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" of 17 July 2009", 21 July 2009, ICC-01/04-01/06-2061.

<sup>6</sup> Decision issuing a second corrigendum to the "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" of 17 July 2009", 31 July 2009, ICC-01/04-01/06-2069.

<sup>7</sup> *Ibid*, paragraphs 34-45, 53(iv) and (v).

<sup>8</sup> 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 2009, ICC-01/04-01/06-2073. Pursuant to Trial Chamber I’s Order of 14 August 2009, this document was reclassified as public.

<sup>9</sup> Prosecution’s Application for Leave to Appeal 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”, 12 August 2009, ICC-01/04-01/06-2074.

légaux des victimes aux demandes de la Défense et du Procureur 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 » datées respectivement des 11 et 12 août 2009".<sup>10</sup> On 17 August 2009, the prosecution filed a response to the defence's application.<sup>11</sup> A decision of the Chamber on these applications and submissions is pending.

## II. CLARIFICATION AND GUIDELINES

5. On 14 July 2009, the Majority of the Chamber gave notice to parties and participants that the legal characterisation of the facts may be subject to change.<sup>12</sup> The Majority Decision further indicated that the parties and participants would be given the opportunity to make oral or written submissions and a hearing to consider all matters relevant to the possible modification would be held at an appropriate time.<sup>13</sup>

6. As set out in the Majority Decision of 24 July 2009:

"5. The legal representatives also submitted that the following elements weighed in favour of allowing the Chamber to apply Regulation 55 in this case. The facts are consistent with the relevant charges set out in the Statute, specifically the facts stated by a number of the witnesses who testified before the Chamber to date relate to the elements of crimes that fall into Articles 7(1)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi) ("sexual slavery"), 8(2)(a)(ii) ("inhuman treatment") or 8(2)(c)(i) ("cruel treatment")  
[...]

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<sup>10</sup> Réponse conjointe des représentants légaux des victimes aux demandes de la Défense et du Procureur 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 » datées respectivement des 11 et 12 août 2009, 17 August 2009, ICC-01/04-01/06-2079.

<sup>11</sup> 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", 17 August 2009, ICC-01/04-01/06-2080.

<sup>12</sup> 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, 14 July 2009, ICC-01/04-01/06-2049, paragraph 33

<sup>13</sup> *Ibid*, paragraph 34.

33. A condition for triggering the mechanism of Regulation 55(2) is the Chamber's finding that the legal characterisation of facts may be subject to change. The submissions of the legal representatives of the victims and the evidence heard so far during the course of the trial persuade the majority of the Chamber that such a possibility exists [...]"

7. The Majority of the Chamber reiterates that (i) the facts and circumstances indicated by the legal representatives of the victims and (ii) the legal characterisations proposed by them were the basis for triggering the proceedings prescribed in Regulation 55(2) and (3). To avoid any uncertainty, the Majority of the Chamber underlines that the parties and participants shall be guided by the understanding that the specific new facts and circumstances that the Chamber may consider are those listed in the joint application of the legal representatives, as stated in paragraph 33 of the Majority Decision of 14 July 2009.<sup>14</sup> Accordingly, the parties and participants shall be guided by the comprehension that the specific new legal characterisations that the Chamber may consider are the following:

- a. Article 7(1)(g) ("sexual slavery" as a crime against humanity);
- b. Article 8(2)(b)(xxii) ("sexual slavery" as a war crime);
- c. 8(2)(e)(vi) ("sexual slavery" as a war crime);
- d. 8(2)(a)(ii) ("inhuman treatment" as a war crime); and
- e. 8(2)(c)(i) ("cruel treatment" as a war crime).

8. In the view of the Majority of the Chamber, Regulation 55 is a unique device, carefully drafted blending different legal traditions while at the same time remaining consistent with recent human rights jurisprudence regarding the defendant's rights to a fair trial<sup>15</sup> and satisfying the particular demands of

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<sup>14</sup> Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, 22 May 2009, ICC-01/04-01/06-1891.

<sup>15</sup> The jurisprudence of the European Court of Human Rights consistently support the idea that legal characterisations of facts can be changed, provided that the modifications are preceded by sufficient notice to the defence. See the Case of *Abramyan v. Russia*, (Application No. 10709/02, Judgment 9 January 2009), paragraphs 35 and 36 and the Case of *Dallos v. Hungary*, (Application No. 29082/95, Judgment 1 March 2001), paragraphs 3, 48 and 52.

international criminal justice and the interest in the search of the truth. Regulation 55 provides for a procedure that balances each of these concerns, thereby creating a unique procedural regime in accordance with the context of the Statute. As 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.<sup>16</sup> 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.

9. A hearing for parties and participants to make oral submissions and to consider matters relevant to the possible modification, pursuant to Regulation 55(2), will take place in due course.
  
10. Any further submissions from the parties and participants resulting from this clarification regarding the requests for leave to appeal<sup>17</sup> should be filed by 31 August 2009 at 4 p.m. and responses thereto should be filed by 2 September 2009 at 4 p.m.

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<sup>16</sup> 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, 14 July 2009, ICC-01/04-01/06-2049, paragraphs 32, 33 and 35.

<sup>17</sup> 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 2009, ICC-01/04-01/06-2073. Pursuant to Trial Chamber I's Order of 14 August 2009, this document was reclassified as public. Prosecution's Application for Leave to Appeal 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", 12 August 2009, ICC-01/04-01/06-2074. Réponse conjointe des représentants légaux des victimes aux demandes de la Défense et du Procureur 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 » datées respectivement des 11 et 12 août 2009, 17 August 2009, ICC-01/04-01/06-2079.

### III. CONCLUSIONS

11. For the reasons identified heretofore, the Chamber clarifies that:

- a) The parties and participants, when preparing for the hearing referred to in paragraph 9, shall be guided by the understanding that the facts and circumstances indicated by the legal representatives of the victims were the basis for the Chamber triggering the proceedings prescribed in Regulation 55(2) and (3).
  
- b) The parties and participants, when preparing for the hearing referred to in paragraph 9, shall be guided by the understanding that the specific additional legal characterisations indicated by the legal representatives of the victims were the basis for the Chamber triggering the proceedings prescribed in Regulation 55(2) and (3). Thus, the additional legal characterisations that the chamber may consider are the following:
  - a. Article 7(1)(g) ("sexual slavery" as a crime against humanity);
  - b. Article 8(2)(b)(xxii) ("sexual slavery" as a war crime);
  - c. 8(2)(e)(vi) ("sexual slavery" as a war crime);
  - d. 8(2)(a)(ii) ("inhuman treatment" as a war crime); and
  - e. 8(2)(c)(i) ("cruel treatment" as a war crime).
  
- c) Further submissions from the parties and participants resulting from this clarification regarding the requests for leave to appeal referred to in paragraph 10 should be filed by 31 August 2009 at 4 p.m. and responses thereto should be filed by 2 September 2009 at 4 p.m.



Done in both English and French, the English version being authoritative.



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this day 27 August 2009

At The Hague, The Netherlands