

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 3 September 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

**Decision on the prosecution and the defence applications for leave to appeal 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”**

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

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Legal Representatives of the Victims

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Detention Section

**Victims Participation and Reparations
Section**

Other

Appeals Chamber

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 Decision on the prosecution and the defence applications for leave to appeal 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 Majority of Trial Chamber I 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” (“Decision”).¹
2. The Decision notified 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.² It was indicated that at an appropriate time the parties and participants will be given the opportunity to present 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 will, in due course, articulate the relevant procedural steps for a hearing at which the Chamber will consider all matters relevant to the possible modification.³
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

¹ 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.

² *Ibid.*, paragraph 33.

³ *Ibid.*, paragraph 34.

characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” (“Minority Opinion”).⁴ 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.⁵ A second corrigendum to the Minority Opinion was issued on 31 July 2009.⁶ In the Minority Opinion, Judge Fulford rejected, first, the suggestion “that Regulation 55 sets out the powers of the Chamber in relation to two distinct stages” and, second, that the “condition for triggering the mechanism of Regulation 55(2)” is met on the basis of “the submissions of the legal representatives of victims and the evidence heard so far during the trial”.⁷

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”,⁸ in which it applied for leave to appeal against the Decision of the Majority on the following four issues:

⁴ 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.

⁵ 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.

⁶ 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.

⁷ *Ibid.*, paragraph 53.

⁸ 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-Conf. Pursuant to Trial Chamber I’s Order of 14 August 2009, this document was reclassified as public.

Defence Issue 1

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions).

The defence submitted that the correct interpretation is that Regulation 55 created a singular procedure. It argued that the Majority in their interpretation have failed to protect the rights of the accused; the decision undermines the fair conduct of the proceedings; and it conflicts with Articles 74(2), 61(9) and 67(1) of the Rome Statute ("Statute"). In support of these general arguments, the defence developed two particular submissions:

Prompt and Detailed Prior Notice

- The defence suggested that a consequence of the Decision of the Majority is that the Trial Chamber, in its final judgment, may characterise "the facts and circumstances described in the charges" without having provided prior notice to the parties or granting them the rights and safeguards in Regulation 55(2) and (3). The defence submitted that the legal characterisation of the facts comprises an essential component of the "charges" which the accused must be informed of "promptly and in detail", pursuant to Article 67(1)(a), to facilitate adequate defence preparation.⁹

Whether the facts and circumstances are described in the Charges

⁹ *Ibid.*, paragraphs 17-24.

- The defence additionally argued that Regulation 55 does not permit the Trial Chamber, during the trial, to modify the characterisation of the facts to include “facts and circumstances” not expressly “described in the charges and any amendments thereto”. It was suggested that the combined effect of Articles 61(9), 67(1) and 74(2) prevents the Chamber from relying on facts and circumstances not expressly included in the documents containing the charges, as confirmed by the Pre-Trial Chamber in its Decision on the Confirmation of Charges.¹⁰

Defence Issue 2

Whether the Majority erred in fact and law in their conclusion that the filing of the legal representatives of 22 May 2009¹¹ potentially triggers the procedure under Regulation 55.

In particular, the defence addressed the suggestion by the victim’s legal representatives that the facts and circumstances justify a modification of the legal characterisation of the facts to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute. It argued, first, that this step added supplementary charges (some of which are graver than the current charges), as opposed to modifying an existing legal characterisation; second, this step would be in breach of Article 61(9) and *ultra vires* the Chamber’s powers under Regulation 55; third, the facts do not support any additional charges brought under the provisions listed above; and, fourth, the addition of further charges at this stage of the trial would be

¹⁰ Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-0106-803; ICC-01/04-01/06-2073, paragraphs 25-30.

¹¹ Demande conjointe des représentants légaux des victimes aux fins de mise en oeuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, 22 May 2009, ICC-01/04-01/06-1891.

manifestly contrary to the fundamental rights of the accused under Articles 67(1)(a) and (b), seriously affecting the fairness of the trial.¹²

Defence Issue 3

Whether the legal representatives of victims are entitled to submit a request that may trigger a modification of the legal characterisation of facts under Regulation 55.¹³

Defence Issue 4

Whether the decision of the Majority contravenes Regulation 55, because the parties and participants have not been informed, with any specificity, of the possible changes to the legal characterisation of facts that may be implemented.¹⁴

5. The defence submitted that the issues raised in the request for leave to appeal satisfy the criteria in Article 82(1)(d) of the Statute for two principal reasons. First, the Decision of the Majority has a potential impact on the fairness and timeliness of the proceedings, and the outcome of the trial. Second, an immediate resolution by the Appeals Chamber of these issues will allow the trial to continue without unnecessary delay.¹⁵
6. 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'".¹⁶ The prosecution seeks to appeal one compendious issue, namely

¹² ICC-01/04-01/06-2073, paragraphs 31-35.

¹³ *Ibid.*, paragraphs 36-39.

¹⁴ *Ibid.*, paragraphs 40-42.

¹⁵ *Ibid.*, paragraphs 40-48.

¹⁶ 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.

“[w]hether 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”.¹⁷ This is essentially the same as **Defence Issue 1**, save as regards the element of adding new charges (which is dealt with hereafter under **Defence Issue 2**). The prosecution submitted that it meets the criteria for granting leave to appeal under Article 82(1)(d) of the Statute for the following reasons.¹⁸

7. First, the issue arises from the Decision, for the purposes of Article 82(1)(d), since it interprets Regulation 55(2) and (3) as permitting the Trial Chamber to add or change charges that “go beyond the facts and circumstances described in the Document Continuing the Charges, upon which the confirmation decision is based”.¹⁹ The prosecution submitted that whether the Majority’s interpretation on this issue is correct constitutes an identifiable subject or topic, arising from the Decision, the resolution of which is essential for the determination of the “judicial cause” under consideration.
8. Second, the issue significantly affects the fair conduct of the proceedings. In particular, the prosecution submitted that: (i) the Decision means that the accused may be tried and convicted on criminal charges based on facts that were not set out in the charging document or considered by the Pre-Trial Chamber at the confirmation hearing; (ii) the principle that a judgment may not extend beyond the factual parameters of the charges is a fundamental aspect of the fairness of the legal process, as enshrined in Article 74(2) of the Statute and, in this regard, it is submitted the Majority Decision affects the rights and obligations of the parties, the victims and the witnesses; (iii) that on

¹⁷ *Ibid.*, paragraph 17.

¹⁸ *Ibid.*, paragraph 18.

¹⁹ *Ibid.*, paragraph 19.

the basis of the Majority's Decision the parties and participants may be unaware of the factual parameters of the case, at the half-way point in the trial, and this "[...] uncertainty impacts on their ability to effectively prepare for the rest of the trial";²⁰ (iv) that impartiality and the appearance of impartiality will be affected if the Judges who defined the charges thereafter take the final decision on them; (v) the Decision undermines the prosecution's role and its ability to exercise the powers - and to fulfil the duties - given to it under the Statute, including by way of seeking an amendment of the charges; and (vii) "[...] the issue affects the accused's rights to a fair trial".²¹

9. Third, the prosecution submitted that the issue affects the expeditious conduct of the trial. In the prosecution's submission, the Majority Decision will initiate a series of procedural steps that will delay the progress of the trial: "[...] there is no doubt that the processes required by the Majority's Decision will delay the conclusion of these proceedings". It is argued that the "issue at hand" will have additional "impacts" on the expeditious conduct of the proceedings that go beyond those inherent in Regulation 55. The prosecution submitted that the Decision will require the parties to "investigate, prepare and address incidents and events that were not pleaded".²² The prosecution further submitted that should the accused be convicted of crimes that are not based "on the facts and circumstances pleaded in the charging document" the Decision would undoubtedly be challenged on appeal, since this event would constitute a new development in the jurisprudence of the international criminal courts. The prosecution submitted that, in light of the above, "allowing the Appeals Chamber to decide the underlying legal issue at the outset will expedite both the trial and appellate proceedings".²³

²⁰ *Ibid.*, paragraph 23.

²¹ *Ibid.*, paragraph 24.

²² *Ibid.*, paragraph 25.

²³ *Ibid.*, paragraph 27.

10. Fourth, the prosecution submitted that the Majority's interpretation will "obviously" affect the outcome of the trial as "[t]he interpretation of Regulation 55 permits the Chamber to consider, and possibly to convict the Accused on, additional or alternative charges founded on facts which are not currently part of the case".²⁴
11. Finally, in the prosecution's submission the immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings as: (i) a prompt reference to the Appeals Chamber and an authoritative determination will help the proceedings move forward by ensuring the proceedings follow the right course (*viz.* it will remove doubts about whether the Decision was correct and map the right course of action, thereby preserving the integrity of the proceedings); (ii) it will "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings and the outcome of the trial";²⁵ (iii) it may avoid delay to the completion of the trial caused by recalling witnesses, the presentation of new evidence, and other inevitable delays, whilst, in contrast, granting leave to appeal "[...] will not cause any substantial delay to [the] proceedings"; (iv) it will allow the Trial Chamber to proceed on firm foundations and it will ensure the Trial Chamber "[...] may proceed without committing fundamental legal error"; and (v) it will advance the other cases before the Court because "[d]elay in this trial to permit the Defence to counter newly established charges will delay upcoming trials" due to the limited availability of courtrooms and court services. Furthermore, it will afford those involved in other cases greater ability to forecast the factual basis and scope of the charges in later trials.²⁶

²⁴ *Ibid.*, paragraph 29.

²⁵ *Ibid.*, paragraph 31, citing *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paragraphs 15, 19.

²⁶ *Ibid.*, paragraphs 32-34.

12. On 17 August 2009, the victims' legal representatives filed the "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".²⁷ The victims' legal representatives submitted that the Trial Chamber should declare the applications for leave to appeal inadmissible on the basis that the impugned Decision is not 'appealable'. The victims' legal representatives submitted that: (i) their filing dated 22 May 2009²⁸ was limited to a request for the initiation of the procedure under Regulation 55; (ii) the subsequent Decision issued by the Trial Chamber is therefore merely a trigger rather than a final determination on whether there should be a legal re-characterisation; (iii) the Decision does not establish any principles or rules besides those relating to the content and application of Regulation 55, nor does it indicate a definitive answer; and (iv) the Decision cannot be understood as a "decision" within the terms of Article 82(1) of the Statute as it does not resolve any substantive issues.²⁹

13. In the alternative, and in the event that the Trial Chamber treats the Decision as a "decision" falling within Article 81(1), the victims' legal representatives submitted that the applications for leave to appeal do not fulfil the criteria contained in Article 82(1)(d), since they do not establish 'appealable' issues. In the legal representatives' submission both filings address issues of law that are relevant to other stages of the proceedings.³⁰

²⁷ 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.

²⁸ ICC-01/04-01/06-1891.

²⁹ ICC-01/04-01/06-2079, paragraphs 15-18.

³⁰ *Ibid.*, paragraph 23.

14. In addition, addressing the defence application, on the first sub-issue of **Defence Issue 1**, the legal representatives submitted that this is not an 'appealable' issue at this stage of the proceedings. The Decision is limited to triggering the mechanism contained in Regulation 55 and notifying the parties and participants of the possibility of a modification of the legal re-characterisation of the facts. The legal representatives submitted that this question may become an 'appealable' issue only at the stage of an appeal on the Article 74 decision, should the Chamber modify the legal characterisation of the facts.³¹
15. As regards **Defence Issues 2 and 3**, the victims' legal representatives submitted that the Decision is limited to a notification to the parties and participants of the possibility that the legal characterisation of the facts may be modified, and thus these two issues are not 'appealable' at this stage of the proceedings.³²
16. The victims' legal representatives particularly noted that the defence has questioned the authority of the victims' legal representatives to request the Chamber to initiate the procedure contained in Regulation 55. In this regard, it is submitted that even if it is contended that they acted *ultra vires* their role in proceedings, the Chamber cannot be prevented from exercising the authority expressly conferred upon it pursuant to Regulation 55.³³
17. On **Defence Issue 4**, the legal representatives submitted that: (i) the Majority Decision indicates that the prosecution, the defence, and the victims' legal representatives will be given the opportunity to make oral and written submissions pursuant to Regulation 55(2), and therefore this issue does not arise out of the Decision; and (ii) Regulation 55 merely requires the Chamber

³¹ *Ibid.*, paragraph 27.

³² *Ibid.*, paragraphs 28-29.

³³ *Ibid.*, paragraphs 31-35.

to give notice of the possibility of a modification and thus it does not require the Chamber to indicate the precise ambit of the potential modification at this stage.³⁴

18. In response to the issue raised by the prosecution on whether Regulation 55(2) creates a distinct legal regime from Regulation 55(1), the legal representatives submitted that this question may constitute an ‘appealable’ issue only at a later stage of the proceedings.³⁵

19. On 17 August 2009, the prosecution filed a response to the defence application.³⁶ The prosecution submitted that **Defence Issue 1** satisfies the requirements for granting leave to appeal, as it reflects the question as raised in the prosecution’s application. Additionally, the prosecution did not oppose the grant of leave for **Defence Issue 4**, since it is closely linked to **Defence Issue 1**.³⁷

20. On **Defence Issue 2**, the prosecution submitted it does not arise from the Decision and generally it does not meet the criteria under Article 82(1)(d) of the Statute (in particular whether its immediate resolution by the Appeals Chamber will materially advance the proceedings). In the prosecution’s submission this issue is raised prematurely, as the Chamber is not bound by the legal re-characterisation proposed by the victims’ legal representatives, and the Decision does not identify which facts or legal characterisation are under consideration or which changes to the legal characterisation of facts, if any, may ultimately be adopted. As to **Defence Issue 3**, the prosecution submitted that the arguments presented by the defence fail to explain how the

³⁴ *Ibid.*, paragraphs 36-37.

³⁵ *Ibid.*, paragraphs 38-42.

³⁶ 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.

³⁷ *Ibid.*, paragraphs 10-13 and 21-22.

issue affects the fairness and expeditiousness of the proceedings or the outcome of the trial, and how its resolution will materially advance the proceedings. It is submitted that the Chamber alone has the power to decide whether Regulation 55 is triggered, whether on its own initiative or upon the request of a party or participant.³⁸

21. On 27 August 2009 the Majority of the Chamber issued a “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’”.³⁹

22. The Majority of the Chamber emphasised that Regulation 55(2) allows for the incorporation of additional facts and circumstances provided that notice to the participants is given and an opportunity to make oral or written submissions concerning the proposed changes is afforded. Those “additional facts”, according to the Majority of the Chamber, 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.⁴⁰

23. The Majority of the Chamber further clarified that:

a) The parties and participants (...) 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 (...) 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:

³⁸ *Ibid.*, paragraphs 14-17 and 18-20.

³⁹ 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”, 27 August 2009, ICC-01/04-01/06-2093.

⁴⁰ *Ibid.*, paragraph 8.

- 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).⁴¹

24. On 31 August 2009, the prosecution filed the "Prosecution's Submissions to Trial Chamber 1's "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'".⁴² In light of the Majority's Clarification of 27 August 2009, the prosecution withdrew its 'concurrence' as regards **Defence Issue 4**, but otherwise it maintained its application for leave to appeal on the one compendious ground identified above.⁴³

II. Relevant Provisions of the Statute

Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁴¹ *Ibid.*, paragraph 11.

⁴² Prosecution's Submissions to Trial Chamber 1's "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", 31 August 2009, ICC-01/04-01/06-2095.

⁴³ *Ibid.*, paragraphs 3 and 10.

III. Analysis and Conclusions

A. General remarks

25. In reaching its conclusions on the applications for leave to appeal, the Trial Chamber has followed the approach set out in its "Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008",⁴⁴ as well as the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008".⁴⁵ Both of these decisions applied Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 'Decision Denying Leave to Appeal'" of 13 July 2006.⁴⁶

26. Accordingly, the Chamber has examined the individual applications for leave to appeal against the following criteria:

- a) Whether the matter is an "appealable issue" arising from the impugned decision;
- b) Whether the issue at hand could significantly affect:
 - i) the fair and expeditious conduct of the proceedings, or
 - ii) the outcome of the trial; and
- c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

⁴⁴ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210.

⁴⁵ Decision on the defence and prosecution requests for leave to appeal the Decision on victims participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191.

⁴⁶ Judgment on the Prosecutor's application for extraordinary review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-01/06-168, paragraphs 9-15.

27. The requirements set out above are cumulative and therefore failure to fulfil one or more is fatal to an application for leave to appeal. The cumulative nature of this test means that if one criterion is not satisfied it is unnecessary for the Chamber to consider whether the other criteria for granting leave are met.
28. The established approach on applications for leave to appeal where the arguments raised by the parties relate to the merits of a substantive issue rather than the test for leave to appeal is that the substantive arguments will not be addressed; instead, focus will be placed by the Chamber solely on the submissions directed towards satisfying the criteria of the test. This is the approach applied by this Decision and thus the substantive arguments have not been considered by the Chamber.

B. The applications for leave to appeal

Defence Issue 1

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions).

29. Both the prosecution and the defence seek leave to appeal this issue. Notwithstanding the fact that the parties have described and presented their arguments on this particular aspect of the Majority Decision in different ways, the underlying point of principle is the same: is Regulation 55 “an indivisible or singular” process, or does it set out “[...] the powers of the Chamber in relation to two distinct stages”. The Chamber is persuaded that this is an appealable issue, which will significantly affect the fair and expeditious

conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber may materially advance the proceedings. In particular, the course of the trial may be significantly changed by the decision on whether a change to the legal characterisation of facts may exceed the facts and circumstances described in the charges and any amendments to them under the Regulation 55(2) and (3) procedure, as identified by the Majority. Generally, this issue is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber, as well as the time needed for future preparation by, and the resources of, the parties and participants. The main contention of the victims' legal representatives in their joint response was that the Decision is not 'appealable' as, *inter alia*, it is merely a trigger rather than a final determination on whether there should be a legal re-characterisation. The Chamber is of the view that even if the Decision is "merely a trigger", as opposed to a final determination, the issue as to whether Regulation 55 creates an indivisible or singular process nonetheless needs to be resolved for the correct application of the Regulation.

30. Accordingly, leave to appeal is granted on this issue (Defence Issue 1 and part of the sole issue advanced by the prosecution).
31. The Chamber is of the view that it is appropriate to merge the prosecution and defence formulations of this ground of appeal, whilst reflecting the conclusions of the Majority, as follows:

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that,

although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.

Defence Issue 2

Whether the Majority erred in law in their conclusion that the filing of the legal representatives of 22 May 2009⁴⁷ potentially triggers the procedure under Regulation 55.

32. **Defence Issue 2** (which incorporates part of the issue on which the prosecution seeks leave to appeal) raises a clear issue of principle, namely whether changing the legal characterisation of the facts can extend to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i), particularly if they are based on facts and circumstances not contained in the charges but as established by the evidence at trial.

33. The Chamber is persuaded that **Defence Issue 2** is an appealable issue, which will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber may materially advance the proceedings. In particular, the course of the trial may be significantly changed by the decision on whether changing the legal characterisation of the facts can extend to including crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i). As with **Defence Issue 1**, this is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber, as well as the time needed for future preparation by, and the resources of, the parties and participants.

34. Given that the focus of **Defence Issue 2** has been directed at the incorporation

⁴⁷ ICC-01/04-01/06-1891.

of the various crimes listed above and that this also featured in the prosecution's application for leave to appeal, the Chamber has reformulated the issue. Leave to appeal is granted in the following terms:

Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, viz. to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.

Defence Issue 3

Whether the legal representatives of victims are entitled to submit a request that may trigger a modification of the legal characterisation of facts under Regulation 55.

35. The defence argued that the victims' legal representatives do not have *locus standi* to submit a request under Regulation 55; it is suggested that only the Chamber can initiate or trigger this procedure. The Majority of Trial Chamber I gave notice on 14 July 2009 to the parties and participants that the legal characterization of facts may be subject to change, on the basis particularly of the submissions of the legal representatives and the "additional facts" that have come to light during the trial. Although the submissions of the legal representatives assisted the Majority in formulating its Decision, the procedure under Regulation 55 (2) and (3) was ultimately triggered by the Majority of the Chamber in its Decision and not by the legal representatives in their application.

36. It follows that **Defence Issue 3** is not an appealable issue that will significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial; furthermore, an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings. Leave to appeal is therefore refused.

Defence Issue 4

Whether the decision of the Majority contravenes Regulation 55, because the parties and participants have not been informed, with any specificity, of the possible changes to the legal characterisation of facts that may be implemented.

37. The defence submitted that in their Decision the Majority of the Chamber failed to comply with the provisions of Regulation 55 by failing to inform the parties and participants of the possible changes to the legal characterisation of facts that may be implemented.

38. However, in the impugned Decision, the Majority of the Chamber expressly set out that:

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"). [...]

[...]

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. Accordingly, the parties and participants have a right to receive early notice.⁴⁸

39. The Majority of the Chamber thereby gave clear notice to the 'participants' (the parties and the legal representatives) that the legal characterisation of the facts may be subject to change, and they identified, with appropriate specificity, the potential area of change.

⁴⁸ ICC-01/04-01/06-2049, paragraphs 5 and 33.

40. In all the circumstances, **Defence Issue 4** is not an appealable issue that will significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial; furthermore, an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings. Leave to appeal is therefore refused.

IV. Conclusions

41. For the reasons set out above, leave to appeal is granted on the following questions:

Question 1

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.

Question 2

Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, *viz.* to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 3 September 2009

At The Hague, The Netherlands