The ICC Appeals Chamber Judgment on the Legal Characterisation Facts in *Prosecutor v. Lubanga*: A Commentary*

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1. Introduction

On 7 December 2009, the Appeals Chamber of the International Criminal Court (ICC) issued its judgment in the case of *Prosecutor v. Lubanga*, reversing Trial Chamber I’s decision to change the legal characterisation of the facts in the case.1 The unanimous decision held that while a legal re-characterisation of the facts is not inconsistent with the Rome Statute, general principles of international law or even the rights of the accused, a re-characterisation must not exceed the facts contained in the charges or amendments thereto. The appeals judgment is significant because it offers guidance to those seeking re-characterisation and defendants resisting such efforts. Perhaps most importantly, it underscores the significance of the charging document and the power of the Prosecutor and pre-trial chambers to shape ICC proceedings.

2. Background

2.1 Arrest Warrant

On 10 February 2006, in response to an application by the ICC Prosecutor, Pre-Trial Chamber I (PTC I) issued a warrant for the arrest of Thomas Lubanga Dyilo (Lubanga).2 Lubanga purportedly founded the *Forces patriotiques pour la libération du Congo* (FPLC), the military wing of the *Union des Patriotes Congolais* (UPC), of which he was president.3

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1 *Prosecutor v. Lubanga*, Appeals Judgement, Case No. ICC-01/04-01/06, 7 December 2009 (hereinafter ‘Lubanga Appeals Judgment on the Legal Characterisation of the Facts’).
2 *Prosecutor v. Lubanga*, Warrant of Arrest, Case No. ICC-01/04-01/06, 10 February 2006 (hereinafter ‘Lubanga Arrest Warrant’).
3 *Id.*, at 3.
The FPLC is alleged to have conscripted child soldiers for use in the conflict between various armed groups warring over the allocation of land and natural resources in Ituri, Democratic Republic of the Congo between July 2002 and December 2003. PTC I issued Lubanga’s arrest warrant after finding reasonable grounds to believe that he was criminally responsible for the war crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities.

Lubanga, who was in Congolese custody when PTC I issued the warrant, was surrendered to the ICC on 17 March 2006, and remains in custody at the ICC Detention Centre in The Hague to this day.

2.2 Victims’ Disappointment with the Charges

As early as Lubanga’s transfer to The Hague, victims’ rights activists expressed dismay at the omission of charges of rape and sexual violence in the application for his arrest warrant. Women’s rights advocates noted that there were ample indications that FPLC forces had abducted and sexually abused girls as young as twelve years old; indications they say warranted further investigation and charging by the Prosecutor.

Nearly one year after PTC I issued Lubanga’s arrest warrant, it confirmed the charges of war crimes against him relating to the enlistment, conscription and use of child soldiers. The decision made no mention of sexual abuse.

On 26 January 2009, the ICC opened the first trial in its history when it heard opening arguments in Prosecutor v. Lubanga. The Prosecution spent the next six months presenting evidence of Lubanga’s role in the FPLC and the conscription and use of child soldiers. On 14 July 2009, the Prosecution rested its case.

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4 Id., at 3. See also Situation in the Democratic Republic of the Congo, The Prosecutor v.Thomas Lubanga Dyilo, Case Information Sheet, Case No. ICC-01/04-01/06, 16 September 2009.
5 Lubanga Arrest Warrant at 4.
8 Letter from Brigid Inder to Louis Moreno Ocampo at 3.
9 Prosecutor v. Lubanga, Decision on the Confirmation of the Charges, Case No. ICC-01/04-01/06, 29 January 2007.
10 Prosecutor v. Lubanga, Trial Transcript, Case No. ICC-01/04-01/06, 26 January 2009.
11 Prosecutor v. Lubanga, Trial Transcript, Case No. ICC-01/04-01/06, 14 July 2009.
On 22 May 2009 the legal representatives of the victims filed a request before Trial Chamber I seeking a change in the legal characterisation of the facts in the *Lubanga* case.12

Specifically, the victims’ representatives sought an additional legal characterisation of the facts as sexual slavery, a war crime or crime against humanity under the Rome Statute, and inhuman and/or cruel treatment as a crime against humanity under the Statute. The application for re-characterisation referenced the testimony of numerous prosecution witnesses indicating that the FPLC’s child conscripts endured inhuman and cruel treatment as well as sexual violence.13 The victims’ representatives also highlighted U.N. reports that FPLC child soldiers were exposed to hard labour, food rations and grueling punishment and that girls in particular were recruited by the militia as sex slaves.14 On the basis of such evidence already in the record, the victims’ representatives argued, the charges against Lubanga should be supplemented to include inhuman/cruel treatment and sexual slavery.15

3. The Decision of the Trial Chamber

Under Regulation 55(1) of the Regulations of the Court, a chamber:

> In its decision under article 74, may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.16

While the above provision speaks to a legal characterisation in a final decision, sub-regulation (2) permits a Chamber to change the legal characterisation of the facts “at any time during the trial” provided that, prior to any re-characterisation, the Chamber notifies the parties of such a possibility and allows them any opportunity to make written or oral submissions on the matter.17 Sub-regulation (3) also requires that the defence be afforded “adequate time and facilities” to prepare a defence to any re-characterisation attempt, including the ability to re-examine witnesses, call new witnesses or present new evidence.18

3.1 Majority Opinion

The majority—Judges Elizabeth Benito and Rene Blattmann—grounded their holding that the Chamber has the authority to change the legal characterisation of the facts in the differences between Regulations 55(1), (2) and (3). The majority began by noting that

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12 *Prosecutor v. Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, Case No. ICC-01/04-01/06, 22 May 2009.
13 *Id.*, at paras. 15, 32, 33 and 34.
15 *Id.*, para. 42.
16 Regulations of the International Criminal Court, Regulation 55(1).
17 *Id.*, Reg. 55(2).
18 *Id.*, Reg. 55(3).
Regulation 55(1) clearly circumscribes any legal re-characterisation of the facts in a final decision to the “facts and circumstances described in the charges.”\(^\text{19}\) This sub-regulation, the majority found, allows for substantive legal re-characterisations of facts at the decision stage provided that the factual basis for such re-characterisations does not extend beyond the facts set forth in the charges.\(^\text{20}\) The majority further contrasted re-characterisations at the final decision stage with those made during trial. It noted that, because sub-regulation (2) does not expressly limit a legal characterisation to the facts and circumstances described in the charges, any re-characterisation under this provision—that is, any re-characterisation during trial—can exceed the factual scope of the charges.\(^\text{21}\) As further support for its conclusion, the majority reasoned that the due process procedures set out in sub-regulation (3) would only be necessary if new factual bases for charges were allowed.\(^\text{22}\) “A right to call new evidence or to examine previous witnesses is only relevant to challenge evidence that is provided to substantiate a different factual basis.”\(^\text{23}\)

After finding that the Chamber possessed the authority to change the legal characterisation of the facts beyond the charges, the majority stated that the victims’ representatives’ application and the evidence put forth by the Prosecution to date had persuaded it that there was a possibility that such a re-characterisation would occur.\(^\text{24}\) The majority did not indicate what evidence or submissions triggered the re-characterisation procedure. The decision concluded with notice to the parties that the legal characterisation of the facts “may be subject to change” and the appropriate procedures for their submissions and a hearing on the matter would be forthcoming.\(^\text{25}\)

### 3.2 Fulford Minority

In his minority opinion, Judge Adrian Fulford found as a threshold matter that the interplay between certain articles of the Rome Statute and other Court regulations limits a trial chamber’s authority to change the legal characterisation of the charges. First, Judge Fulford reasoned that Article 61(9) of the Rome Statute and Regulation 52 vest pre-trial chambers with ultimate authority to frame and alter the charges.\(^\text{26}\) Similarly, Article 74(2) limits a trial

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\(^{19}\) *Prosecutor v. Lubanga*, 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, ICC-01/04-01/06, 14 July 2009, para. 28 (quoting Regulation 55(1)).

\(^{20}\) *Id.*, at para. 30.

\(^{21}\) *Id.*, at para. 31.

\(^{22}\) *Id.*, at para. 29-31.

\(^{23}\) *Id.*, at para. 30.

\(^{24}\) *Id.*, at para. 33.

\(^{25}\) *Id.*, at paras. 34-35.

\(^{26}\) *Prosecutor v. Lubanga*, Minority opinion on 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,” ICC-01/04-01/06, 17 July 2009, paras. 7, 10, 12, 15-16. Article 61(9) reads: “After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.” Regulation 52(c) states that the document containing the charges must contain “[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.”
chamber’s final decision to the facts and circumstances described in the charges. After the confirmation of the charges, the Prosecutor may withdraw charges with the permission of the Trial Chamber hearing the case. If, on the other hand, the Prosecutor wishes to add or substitute more serious charges, a new confirmation hearing must be held before the relevant Pre-Trial Chamber. Neither the Rome Statute nor the Regulations of the Court envision a means by which a trial chamber may, upon motion of the victims or even the Prosecutor, augment charges against the accused.

Moreover, Judge Fulford disagreed with the minority’s bifurcation of Regulation 55 and instead found that the regulation provided “an indivisible or singular process” for changing the legal characterisation of the facts. He reasoned that, if sub-regulations (2) and (3) were divorced from sub-regulation (1), the accused would be deprived of notice and opportunity to be heard on a re-characterisation of the facts contained in the final decision, an untenable result under international human rights jurisprudence. Therefore, according to Judge Fulford, Regulation 55 must be read as a single entity. Judge Fulford also found that if a trial chamber were able to change the legal characterisation of the facts during trial in a way that implicated circumstances beyond the charges, so too would the chamber’s final decision rest upon facts and circumstances beyond the charges, a result inimical to Article 74(2), which states that a chamber’s decision “shall not exceed the facts and circumstances described in the charges and any amendments to the charges.”

According to Judge Fulford, the question of whether a proposed change in the legal characterisation of the facts would result in a mere modification of that characterisation or an amendment, addition or substitution of a charge required a case-by-case analysis. He concluded that, in their application for re-characterisation, the Lubanga victims sought the addition of five charges. Despite the victims’ contention that these charges could be supported by the facts contained in the charges, Judge Fulford found that their proposed changes were predicated upon new crimes—e.g., crimes against humanity generally and sexual slavery more specifically—as well as new modes of criminal liability, all of which would necessitate reliance upon additional facts.

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27 Id., at 11. Article 74(2) states: “The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.”
28 Id., at para. 13.
29 Id.
30 Id.
31 Id., at para 4.
32 Id., at paras. 22-25.
33 Id., at para. 27.
34 Id., at para. 29 (quoting Article 74(2)).
35 Id., at para. 19.
36 Id., at para. 40.
37 Id., at paras. 42-44, 48-49.
3.3 Clarification

The Defence and Prosecution both immediately applied for leave to appeal the Trial Chamber’s decision. While these applications were pending, the Trial Chamber issued a clarification on its majority ruling. The clarification explained how the majority reached its conclusion that the victims’ representatives’ submissions as well as the evidence presented at trial to date justified a change in the legal characterisation of the facts in the case. The majority reiterated that the Trial Chamber would consider changing the legal characterisation of the facts to comport with the specific articles cited by the victims’ representatives in the application; namely, those pertaining to war crimes and crimes against humanity on account of Lubanga’s alleged criminal responsibility for sexual slavery and inhuman and cruel treatment. The majority then sought to clarify the scope of legal re-characterisation by stating that, any additional facts and circumstances “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.”

4. Appeals Judgment

The Appeals Chamber considered two issues in its judgment. First, whether in Regulation 55 subsections (2) and (3) can be read separately from subsection (1) and whether subsections (2) and (3) permit a change in the legal characterisation beyond the charges. In deciding this first issue, the Chamber addressed several incompatibilities between Regulation 55 and the Rome Statute and international law that were raised by the Defence. Second, it considered whether Trial Chamber I erred in holding that the legal re-characterisation sought by the victims’ representative in Lubanga may be sought.

4.1 Legality of Changing the Legal Classification of the Facts

4.1.1 Compatibility

As a threshold matter, the Appeals Chamber rejected the Defence’s contention that the plenary of the judges exceed its authority under Article 52(1) of the Rome Statute when it adopted Regulation 55. Article 52(1) authorises the ICC’s judges to adopt Regulations of the Court “necessary for its routine functioning.” The Appeals Chamber recalled that, during a discussion on the Rules of Procedure and Evidence, it was decided that the plenary should...
draft a provision allowing for modification of the legal characterisation of the facts because there were differing views between the common law and Romano-Germanic tradition countries. The plenary elected to draft a regulation on the issue rather than risk uncertainty and inefficient litigation over the question of re-characterisation. As a result, the Chamber found that Regulation 55 was necessary for the “routine functioning” of the Court and thus compatible with Article 52(1).43

Nor did the Appeals Chamber find Regulation 55 to be inherently incompatible with Article 61(9) of the Statute, which authorises the Prosecutor to amend the charges after notifying the accused and receiving permission from the relevant Pre-Trial Chamber.44 The Appeals Chamber found that Article 61(9) did not foreclose the possibility that a Trial Chamber can modify the legal characterisation of the facts sua sponte.45 The Appeals Chamber was also unwilling to accept the Defence’s assertion that the only way to change the legal characterisation of the facts is to hold an additional confirmation hearing.46 In the Chamber’s view, this practice risks “acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect.” Such a reading, the Chamber concluded, contradicts the Statute’s aim of ending impunity.47 Finally, the Appeals Chamber found that Regulation 55 was consistent with international human rights standards because there was no need to resort to international law where the plenary provided Regulation 55 to address the specific practice of re-characterisation.48 Moreover, the Chamber noted that Regulations 55(2) and (3) set out “several stringent safeguards” to ensure that the rights of the accused—notably time and facilities for defence—will be protected.49

4.1.2 Severability

The Appeals Chamber found that Trial Chamber I improperly bifurcated Regulation 55 (1) from Regulations 55 (2) and (3). The Appeals Chamber found that the Trial Chamber’s approach could result in final judgments that adjudicate facts that, though not described in the charges, were introduced during trial through re-characterisation. This result would be at odds with the text and drafting history of Article 74(2) of the Rome Statute which states that “The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.”50 The Appeals Chamber was not comforted by the Trial Chamber’s attempt to narrow the scope of facts it would consider on re-characterisation in its August 27, 2009 Clarification. “The Appeals Chamber disapproves of the use of such clarifications to alter, or to add to, the substance of a decision. Clarifications of this kind are of questionable legality and are undesirable, because they affect the finality of judicial decisions.”51

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43 Lubanga Appeals Judgment on the Legal Characterisation of the Facts, para. 70.
44 Rome Statute, art. 61(9).
45 Lubanga Appeals Judgment on the Legal Characterisation of the Facts, para. 76.
46 See, id., para. 75.
47 Id., para. 77.
48 Id., para. 80.
49 Id., para. 85.
50 Id., paras. 89-91.
51 Id., para. 92.
The Appeals Chamber also found the Trial Chamber’s reading of Regulation 55 to run afoul of Article 61(9) of the Rome Statute. Given that new charges may only be added pursuant to a new confirmation hearing, the introduction of new facts and circumstances during a re-characterisation would give the Trial Chamber the power to extend the trial beyond the facts alleged by the Prosecutor and would thus be “contrary to the distribution of powers under the Statute.”

As a final reason for rejecting the Trial Chamber’s interpretation of Regulation 55, the Appeals Chamber turned to Regulation 52, which in describing the charging document, separates the statement of facts from the legal characterisation of the facts. The Appeals Chamber found that the distinction between a statement of the facts and a legal characterisation of the facts carries over into Regulation 55, thus permitting only a change the former, not the latter.

4.2 Appropriateness of permitting change in legal characterisation of the facts

The Appeals Chamber found Trial Chamber I’s justification for permitting a change in the legal characterisation of the facts “extremely thin” because no details on the elements of the offences to be considered were included nor was there any analysis on how such elements might be covered by the facts and circumstances described in the charges. The Appeals Chamber declined to consider the Trial Chamber’s findings where the Trial Chamber itself had seemingly failed to do so and where the Trial Chamber remained in the best position to assess the charges and evidence presented to date.

The Appeals Chamber thus reversed the Trial Chamber’s decision that called for a change in the legal characterisation of the facts.

5. Significance of the Judgment

Like most judgments arising from the Lubanga case—and appeals judgments in particular—the judgment on the legal characterisation of the facts is a watershed moment in the development of the ICC because it interprets a unique provision of the Rome Statute for the first time. The Chamber’s guidance on the single and indivisible nature of Regulation 55 and demand for thorough factual and legal analysis by trial chambers seeking to re-characterise the facts provides a roadmap for jurists and advocates affiliated with the Court in the years to come.

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52 Id., para. 94.
53 Regulation 52 reads: “The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.”
54 Lubanga Appeals Judgment on the Legal Characterisation of the Facts, para. 97.
55 Id., para. 109.
In addition, this is yet one more decision from the Court that defines the parameters of victims’ participation. While a change in the legal characterisation of the facts does not by definition impact victims’ rights, the fact that this issue arose on an application by the victims’ representative highlights a limit on their voices before the Court. Despite the simmering frustration that victims’ rights groups and women’s advocates have felt with the limited scope of the charges against Lubanga, the Appeals Chamber has made clear that Regulation 55 is not an avenue for circumventing the charging document. More effective advocacy will be needed at the charging stage if victims hope to shape the substantive content of the proceedings.

This last lesson points out that this judgment—while an obvious victory for ICC defendants, who are due certainty and process during the proceedings—is also a victory for the Prosecutor. Time and again the Appeals Chamber reiterated the Prosecutor’s powers under Article 61(9) of the Statute to define the charges. This should comfort Prosecutor Louis Moreno Ocampo, who—as noted earlier—has endured criticism for the manner in which he charged Lubanga. At least he can rest assured that his authority to charge individuals before the ICC remains intact.