

The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in *Prosecutor v. Lubanga*

By [Amy Senier](#)

I. Introduction



On December 7, 2009, the Appeals Chamber of the International Criminal Court (“ICC”) issued its judgment in the case of *Prosecutor v. Lubanga*, reversing the decision by the Trial Chamber I to change the legal characterization of the facts in the case.^[1] The unanimous judgment held that—while a legal re-characterization of the facts is not inconsistent with the Rome Statute, general principles of international law or even the rights of the accused—a re-characterization should not exceed the facts contained in the charges or amendments thereto. The appeals judgment is significant because it stymies efforts by victims to expand the charges against Lubanga to include cruel/inhuman treatment and sexual slavery. It also underscores the power of the ICC Prosecutor to shape the Court’s proceedings.

II. Background

On February 10, 2006, Pre-Trial Chamber I (“PTC I”) issued a warrant for the arrest of Thomas Lubanga Dyilo (“Lubanga”) after finding reasonable grounds to believe that he is criminally responsible for the war crimes of enlisting, conscripting, and using children under the age of fifteen to participate in hostilities.^[2] Victims’ rights activists protested the omission of charges of rape and sexual violence.^[3] On January 29, 2007, PTC I confirmed charges against Lubanga for war crimes for the enlistment, conscription, and use of child soldiers.^[4]

On May 22, 2009, the legal representatives of the victims filed a request before Trial Chamber I seeking a change in the legal characterization of the facts.^[5] The victims argued that, on the basis of evidence already in the record, the charges against Lubanga should be supplemented to include inhuman/cruel treatment and sexual slavery.^[6]

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III. The Decision of the Trial Chamber

Under Regulation 55(1) of the Regulations of the Court, a chamber “may change the legal characterisation of facts . . . without exceeding the facts and circumstances described in the charges and any amendments to the charges.” While this provision addresses legal characterizations in a final decision, sub-regulation (2) permits a chamber to change the legal characterization of the facts “at any time during trial.” Sub-regulation (3) requires that the defence be afforded “adequate time and facilities” to respond to a re-characterization effort.

1) Majority Opinion

A majority of Trial Chamber I held that it could change the legal characterization of the facts because of the differences between Regulation 55(1) and Regulations (2) and (3). The majority noted that Regulation 55(1) allows for substantive legal re-characterizations of facts at the decision stage, provided that the factual basis for such re-characterizations does not extend beyond the facts set forth in the charges.^[7] In contrast, sub-regulation (2) does not expressly limit a legal characterization to the facts and circumstances described in the charges. Thus, the majority reasoned, any re-characterization under Regulation 55(2)—that is, any re-characterization during trial—can exceed the factual scope of the charges.^[8] The majority also found that the due process procedures set out in sub-regulation (3) were included because the drafters envisioned legal re-characterizations beyond the scope of the charges.^[9] Ultimately, the majority held that the victims’ representatives’ application and the evidence put forth by the Prosecution to date had supported a possibility that such a re-characterization would occur.^[10]

2) The Fulford Minority

In his minority opinion, Judge Adrian Fulford found that the interplay between the Rome Statute and the Court’s regulations limits a trial chamber’s authority to change the legal characterization of the charges. First, Judge Fulford reasoned that Article 61(9) of the Rome Statute and Regulation 52 vest pre-trial chambers with sole authority to frame and alter the charges.^[11] Similarly, Article 74(2) limits a trial chamber’s final decision to the facts and circumstances described in the charges.^[12] Neither the Rome Statute nor the Regulations of the Court permit a trial chamber to augment charges against the accused.^[13]

Moreover, Judge Fulford disagreed with the majority’s bifurcation of Regulation 55 and instead found that the regulation provided “an indivisible or singular process” for changing the legal characterization of the facts.^[14] 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-characterization of the facts contained in the final decision, an untenable result under international human rights jurisprudence.^[15] Judge Fulford also found that if a trial chamber were able to change the legal characterization of the facts during trial in a way that implicated facts beyond the charges, so too would the chamber’s final

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decision rest upon facts 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 thereto."^[16]

Judge Fulford concluded that, in their application for re-characterization, the *Lubanga* victims sought the addition of five charges.^[17] He found that the victims' proposed changes were predicated upon new crimes—e.g., crimes against humanity generally, and sexual slavery specifically—as well as new modes of criminal liability, all of which would rely upon additional facts.^[18]

3) Clarification

The Defence and Prosecution immediately applied for leave to appeal the Trial Chamber's decision.^[19] While these applications were pending, the majority issued a clarification on its ruling,^[20] explaining how it reached its conclusion that a change in the legal characterization of the facts in the case was justified by the victims' representatives' submissions and the evidence presented at trial thus far. The majority clarified the scope of legal re-characterization 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."^[21]

IV. 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 characterization beyond the charges. Second, the Appeals Chamber had to determine whether Trial Chamber I erred in holding that the legal re-characterization of the facts in *Lubanga* may be subject to change.

1) Legality of Changing the Legal Classification of the Facts

Compatibility

As a threshold matter, the Appeals Chamber rejected the Defence's contention that the plenary of judges had exceeded its authority under Article 52(1) of the Rome Statute when it adopted Regulation 55. Article 52(1) authorizes the ICC's judges to adopt Regulations of the Court "necessary for its routine functioning." The Appeals Chamber stated that the plenary elected to draft a regulation on re-characterization rather than risk uncertainty and inefficient litigation over the issue. 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).^[22]

Nor did the Appeals Chamber find Regulation 55 to be inherently incompatible with Article 61(9) of the Statute, which authorizes the Prosecutor to amend the charges after notifying the accused and receiving permission from the relevant Pre-Trial Chamber. The Appeals Chamber found that Article 61(9) did not foreclose the possibility that a trial chamber can modify the legal characterization of the facts *sua sponte*.^[23] The Appeals Chamber was also unwilling to accept the Defence's assertion that the only way to change the legal characterization of the facts is to hold an additional

confirmation hearing.^[24] 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.^[25] The Appeals Chamber declined to resort to international law in addressing the legality because, by enacting Regulation 55, the plenary had answered this very question.^[26] Finally, the Chamber noted that Regulations 55(2) and (3) set out "several stringent safeguards" to ensure that the rights of the accused will be protected.^[27]

Severability

The Appeals Chamber found that Trial Chamber I improperly bifurcated Regulation 55 (1) and (2) and (3). According to the Appeals Chamber, the Trial Chamber's approach could result in final judgments adjudicating facts that, though not described in the charges, were introduced during trial through re-characterization. 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."^[28] The Appeals Chamber was not comforted by the Trial Chamber's attempt in its Clarification to narrow the scope of facts it would consider during re-characterization, finding such clarifications to be of "questionable legality."^[29]

The Appeals Chamber also found that the Trial Chamber's reading of Regulation 55 ran 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-characterization would empower trial chamber to extend the trial beyond the facts alleged by the Prosecutor and would thus be "contrary to the distribution of powers under the Statute."^[30]

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 characterization of the facts."^[31] The Appeals Chamber found that the distinction between a statement of the facts and a legal characterization of the facts carries over into Regulation 55, thus permitting only a change of the former, not the latter.^[32]

2) Appropriateness of permitting change in legal characterization of the facts

The Appeals Chamber found Trial Chamber I's justification for permitting a change in the legal characterization of the facts in *Lubanga* "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 described in the charges. The Appeals Chamber declined to consider the Trial Chamber's findings where the Trial Chamber itself had failed to do so and where the Trial Chamber remained in the best position to assess the charges and evidence presented to date.^[33]

The Appeals Chamber thus reversed the Trial Chamber's decision calling for

a change in the legal characterization of the facts.

V. Significance of the Judgment

Like most judgments arising from the *Lubanga* case, the appeals judgment on the legal characterization of the facts is a watershed moment in ICC jurisprudential history because it interprets a unique provision of the Rome Statute. The Chamber's guidance on the single and indivisible nature of Regulation 55, and its demand for thorough analysis by trial chambers seeking to re-characterize the facts, provide valuable guidance for the Court's jurists and advocates.

In addition, this is yet another attempt by the Court to define the parameters of victim participation.^[34] While a change in the legal characterization of the facts does not by definition impact victims' rights, the emergence of this issue from an application by the victims' representative exposes a limit on their participation before the Court. Despite the simmering frustration that victims' rights groups have felt with the limited scope of the charges against Lubanga, the Appeals Chamber has made clear that Regulation 55 may not be used to circumvent the charging document. More effective advocacy will be needed at the charging stage if victims hope to shape the substantive content of the proceedings.

Lastly, in addition to being an obvious victory for ICC defendants, the appeals judgment on the legal characterization of the facts is also a victory for the Prosecutor. Throughout the judgment, 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 his charging of Lubanga. At least the Prosecutor can rest assured that his authority to charge individuals before the ICC remains intact.

About the Author

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Endnotes

[1] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Appeals Judgment (Dec. 7, 2009) [hereinafter *Lubanga Appeals Judgment on the Legal Characterization of the Facts*].

[2] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006) [hereinafter *Lubanga Arrest Warrant*].

[3] See, e.g., Letter from Brigid Inder, Executive Director, Women's Initiative for Gender Justice to Louis Moreno Ocampo, Prosecutor, International Criminal Court (Aug. 2006), available at http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf; Congolese Women's Campaign Against Sexual Violence in the Democratic Republic of the Congo, International Justice (ICC), available at <http://www.rdcviolencesexuelle.org>

</site/en/node/55> (“[D]espite voluminous evidence of sexual violence brought to the attention of the Prosecutor and the International Court in the Lubanga case, the warrant made no mention of any accusation of violence committed against Congolese women and girls”); Beni Declaration by Women’s Rights and Human Rights NGOs from the Democratic Republic of the Congo on the Prosecutions by the ICC, Beni, North Kivu, DRC (Sept. 16, 2007) (cited in Julie Flint and Alex DeWaal, *Case Closed: A Prosecutor without Borders*, WORLD AFFAIRS, n.14 (Spring 2009)).

[4] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of the Charges (Jan. 29, 2007).

[5] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (May 22, 2009).

[6] *Id.* ¶ 42.

[7] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, 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, ¶¶ 28-30 (July 14, 2009) (quoting Regulation 55(1)).

[8] *Id.* ¶ 31.

[9] *Id.* ¶¶ 29-31.

[10] *Id.* ¶ 33.

[11] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, 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,” ¶¶ 7, 10, 12, 15-16 (July 17, 2009). 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.”

[12] *Id.* ¶ 11. Article 74(2) states: “The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.”

[13] *Id.*

[14] *Id.* ¶ 4.

[15] *Id.* ¶¶ 22-25.

[16] *Id.* ¶ 29 (citing Article 74(2)).

[17] *Id.* ¶ 40.

[18] *Id.* ¶¶ 42-44, 48-49.

[19] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Defence Appeal Against the Decision of 14 July 2009 entitled 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 (Sept. 10, 2009).

[20] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, 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 (Aug. 27, 2009); Prosecutor v. Lubanga, Prosecution's Application 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 (Aug. 12, 2009).

[21] *Id.* ¶ 8.

[22] *Lubanga Appeals Judgment on the Legal Characterization of the Facts*, ¶ 70.

[23] *Id.* ¶ 76.

[24] See *id.* ¶ 75.

[25] *Id.* ¶ 77.

[26] *Id.* ¶ 80.

[27] *Id.* ¶ 85.

[28] *Id.* ¶¶ 89-91.

[29] *Id.* ¶ 92.

[30] *Id.* ¶ 94.

[31] 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.

[32] *Lubanga Appeals Judgment on the Legal Characterization of the Facts*, ¶ 97.

[33] *Id.* ¶ 109.

[34] See, e.g., *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence during the Trial (June 26, 2009); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (July 11, 2008).