



Original: **French**

No.: ICC-01/04-01/06

Date: 22 May 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 Document

**Joint Application of the Legal Representatives of the Victims for the
Implementation of the Procedure under Regulation 55 of the *Regulations of the
Court***

Source: The Legal Representatives of Victims a/0001/06 to a/0003/06, a/0047/06 to a/0052/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0227/06, a/0229/06 à/0233/06, a/0236/06, a/0238/06 to a/0240/06, a/0244/06, a/0245/06, a/0248/06 to a/0250/06, a/0001/07 to a/0003/07, a/0005/07, a/0054/07 to a/0060/07, a/0063/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0188/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07 to a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0007/08, a/0122/08 to a/0126/08, a/0130/08, a/0149/08, a/0404/08 to a/0407/08, a/0409/08, a/0612/08 and a/0613/08

Document 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 Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Ms Sarah Pellet

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 29 January 2007, Pre-Trial Chamber I issued its *Decision on the confirmation of charges* (the “Decision on the confirmation of charges”) in which it found, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of 15 years into the armed forces of the UPC/FPLC (the “UPC/FPLC”) and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi), 8(2)(e)(xii) and 25(3)(a) of the *Rome Statute* between early September 2002 and 13 August 2003.¹

2. On 23 December 2008, the Prosecution submitted the public version of the amended document containing the charges against Thomas Lubanga Dyilo² (the “Amended Document Containing the Charges”).

3. On 26 January 2009, in her opening statement, Ms Bapita referred to the widespread practice of acts of sexual violence perpetrated systematically against children – girls in particular – who were forcibly recruited into the UPC/FPLC.³

4. At the hearing of 8 April 2009, Mr Walley informed the Chamber that the Legal Representatives of the Victims intended to submit a joint application pertaining to the implementation of regulation 55 of the *Regulations of the Court* insofar as the facts related to the recruitment of child soldiers are also linked to the facts concerning sexual slavery.⁴

¹ See *Decision on the confirmation of charges* (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06-803-tEN (the “Decision on the confirmation of charges”), p. 156.

² See “Prosecution’s Provision of the Amended Document Containing the Charges”, 23 December 2008, ICC-01/04-01/06-1573 (the “Amended Document Containing the Charges”) and “Annex 1”, ICC-01/04-01/06-1573-Anx1.

³ See transcript of the hearing of 26 January 2009, ICC-01/04-01/06-T-107-ENG ET, p. 52, line 18 to p. 57, line 8.

⁴ See transcript of the hearing of 8 April 2009, ICC-01/04-01/06-T-167-ENG ET, p. 26, line 24 to p. 27, line 7.

5. Accordingly, the Legal Representatives respectfully submit a joint application pertaining to the implementation of the procedure provided for by regulation 55 of the *Regulations of the Court*.

II. APPLICABILITY OF REGULATION 55 OF THE *REGULATIONS OF THE COURT*

6. Under regulation 55(1) of the *Regulations of the Court*, the Trial Chamber has the authority to change the legal characterisation of facts (i) to accord with the crimes under articles 6, 7 or 8 of the *Rome Statute*, or to accord with the form of participation of the accused in the said crimes under articles 25 and 28 of the *Rome Statute*, (ii) without exceeding the facts and circumstances described in the charges and any amendments to the charges.

7. Under regulation 55(2) of the *Regulations of the Court*, the Chamber may exercise its authority under regulation 55(1) at any time during the trial.

8. While regulation 55(3) of the *Regulations of the Court* deals with the procedural safeguards granted to the accused, regulation 55(2) grants the participants in the proceedings (i) the right to be given notice of the Chamber's intention to change the legal characterisation of facts, (ii) the right to prepare effectively for the consideration of all matters relevant to the proposed change, and (iii) the right to make oral or written submissions concerning the proposed change. However, regulation 55 of the *Regulations of the Court* does not state how the procedure under that regulation may be applied or whether the parties or participants may also trigger this procedure.

9. The Trial Chamber has acknowledged explicitly that the term "participants" set out in regulation 55(2) of the *Regulations of the Court* is not restricted to the

“parties” to the proceedings, but also includes other participants,⁵ including the Legal Representatives of the Victims.

10. It follows that the Legal Representatives may submit to the Trial Chamber observations on the possibility of implementing a procedure to change the legal characterisation of facts pertaining to the case of *The Prosecutor v. Thomas Lubanga Dyilo* under regulation 55 of the *Regulations of the Court*.

11. In any event, the Legal Representatives submit that the personal interests of the victims they represent are affected by the application of the said regulation. Indeed, almost all of those victims are former child soldiers who were forcibly recruited into the UPC/FPLC when they were under the age of 15 years and were subsequently sent to training camps where they underwent military training.⁶ During that training, all of those victims suffered inhuman and/or cruel treatment. Furthermore, the young girls were subjected to various acts of sexual violence and were sexually enslaved. It follows that all of those victims have a direct and personal interest in seeing that the acts of sexual violence and inhuman and cruel treatment suffered by the UPC/FPLC recruits following their recruitment receive an appropriate legal characterisation under regulation 55 of the *Regulations of the Court*.

12. The right of a court to recharacterise facts of a case is recognised by a significant majority of national legal systems,⁷ at least in civil-law systems.⁸ In any event, however, this right is widely sanctioned by international courts. Thus, like the

⁵ See *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, 13 December 2007, ICC-01/04-01/06-1084, para. 48.

⁶ The other victims are their parents.

⁷ See AMBOS, K. and MILLER, D., “Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective”, *International Criminal Law Review*, vol. 7, 2007, p. 360.

⁸ See STAHN, C., “Modification of the legal characterisation of facts in the ICC system”, *Criminal Law Forum*, vol. 16, 2005, pp. 4 to 6.

Permanent Court of International Justice,⁹ the International Court of Justice itself applies the principle *jura novit curia*.¹⁰

13. Furthermore, international human rights jurisprudence as established, *inter alia*, by the European Court of Human Rights (“ECHR”) and the Inter-American Court of Human Rights also recognises the right for a court to recharacterise facts of the case. Thus, applicants before the ECHR have never challenged *per se* the possibility for national courts to recharacterise facts, even though they have systematically challenged the conditions under which such a recharacterisation had been effected in the course of their trial.¹¹ The key principle articulated by the ECHR in this regard is that any recharacterisation of facts carries with it the obligation to enter not only into the facts but also into the merits of the case, which entails a requirement for the accused to have adequate time and facilities for the preparation of his or her defence.¹² At the same time, the ECHR has never imposed any formal requirement as to how to apply the procedure for recharacterisation of facts or any particular manner of informing the accused of the facts as modified.¹³ Lastly, the Inter-American Commission on Human Rights held that:

[A]ccording to the jurisprudence of the inter-American system, both the Commission and the Court have the authority, in accordance with the general principle of law *iura novit curia*, to apply provisions of the Convention based upon the acts or situations denounced in

⁹ See PCIJ, “*Lotus*”, Judgment of 7 September 1927, PCIJ Series A, No. 10, p. 31.

¹⁰ See, *inter alia*, ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits, Judgment of 25 July 1974, ICJ Reports 1974, para. 17. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, para. 29, and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, ICJ Reports 1992, para. 311. See also VERHOEVEN, J., “*Jura novit curia et le juge international*”, in *Völkerrecht als Wertordnung/Common Values in International Law: Festschrift für/Essays in Honour of Christian Tomuschat*, Norbert Paul Engel Verlag, e.K, 2006, pp. 648 to 652. Lastly, see International Law Association, *Final Report: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, 2008, pp. 8 to 12, available at:

<http://www.ila-hq.org/download.cfm/docid/985890F9-BF95-45C9-A47EB7B52082CDC4>.

¹¹ See *inter alia* ECHR, *Miroux v. France*, No. 73529/01, 16 September 2006, paras. 29 to 38; *I.H. v. Austria*, No. 42780/98, 20 April 2006, paras. 22 to 39; *Pélissier and Sassi v. France*, No. 25444/94, 25 March 1999, paras. 51 to 63.

¹² *Idem*.

¹³ See *Pélissier and Sassi v. France*, No. 25444/94, 25 March 1999, para. 53; *Kamasinski v. Austria*, No. 9783/82, 19 December 1989, para. 79.

*a petition in circumstances where a petitioner has not specifically alleged violations of those provisions.*¹⁴

14. Furthermore, Trial Chamber I itself recognised that (i) regulation 55 of the *Regulations of the Court* was legitimate since its adoption was recommended by the judges in plenary and it was thereafter adopted by the Assembly of States Parties; (ii) the terms of the regulation did not involve any conflict with article 74(2) of the *Rome Statute*, because they allow for a modification of the legal characterisation of the facts rather than an alteration or amendment to the facts and circumstances described in the charges; and (iii) so long as the facts and the circumstances as described in the charges are not exceeded, it is possible under that regulation to give those facts and circumstances a different legal characterisation, so long as no unfairness results.¹⁵

III. APPLICATION OF REGULATION 55 OF THE REGULATIONS OF THE COURT TO THE INSTANT CASE

15. Over and above the fact that the personal interests of the victims whom they represent are affected by the application of the said regulation,¹⁶ the Legal Representatives note that a large number of witnesses who have already testified before the Chamber referred, *inter alia*, to numerous cases of inhuman and cruel treatment and sexual violence witnessed and/or suffered by them after being forcibly recruited into the UPC/FPLC. The evidence provided by these witnesses clearly shows that those were not isolated cases, but rather a widespread and systematic practice. To say the least, those testimonies are of such seriousness, persistence and specificity that one must seriously ask oneself whether a number of serious crimes provided for by the *Rome Statute* were not committed during the period in question – crimes which are closely linked to the charges confirmed against Thomas Lubanga

¹⁴ See Inter-Am. C.H.R., *Michael Gayle v. Jamaica*, Case 12.418, Report No. 92/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005), para. 70. See also, *inter alia*, IACHR, *Velasquez Rodriguez*, 29 July 1988, Series C, No. 4, p. 151, para. 163.

¹⁵ See *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, *supra*, footnote 5, para. 47.

¹⁶ See *supra*, para. 11.

Dyilo, but which might also be characterised in a different manner from that chosen by the Prosecution.

16. The Legal Representatives submit that the following factors would allow the Chamber to apply regulation 55 of the *Regulations of the Court*.

1) *The events described are in accord with the charges provided for by the Rome Statute*

17. The events described by a certain number of witnesses who have thus far testified before the Chamber pertain to the elements of crimes which may fall within the categories set out at articles 8(2)(a)(ii) (“inhuman treatment”) or 8(2)(c)(i) (“cruel treatment”) of the *Rome Statute* and 7(1)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi) (“sexual slavery”).¹⁷ This is also consistent with existing academic commentary and jurisprudence on the subject.

a) Inhuman or cruel treatment

18. The *actus reus* of the crime of inhuman treatment set forth at article 8(2)(a)(ii) of the *Rome Statute* is identical to that of the crime of cruel treatment set forth at article 8(2)(c)(i) of the *Rome Statute* and to that of the crime of torture set forth at articles 8(2)(a)(ii) and 8(2)(c)(i) of the *Rome Statute*.¹⁸ All of those crimes involve the infliction by the perpetrator of severe pain or suffering, whether physical or mental, upon one or more persons. However, unlike the crime of torture, which involves inflicting pain or suffering for specific purposes, the crimes of inhuman treatment or cruel treatment do not require that there be intent to cause such pain and suffering or that it be done for specific purposes.¹⁹ As for the difference between the crime of

¹⁷ This list does not claim to be exhaustive, since it is likely to be extended and/or completed on the basis of additional evidence which may be provided when upcoming witnesses are heard.

¹⁸ See paragraph 1 of articles 8(2)(a)(ii)(2), 8(2)(c)(i)(3), 8(2)(c)(ii)(1) and 8(2)(c)(i)(4) of the *Elements of Crimes of the International Criminal Court*, adopted by the Assembly of States Parties at its first session, 3-10 September 2002, Official Journal, ICC-ASP/1/3(part II-B), 9 September 2002.

¹⁹ The only proposal put forward by the delegations to include an element of intent in the elements of those crimes was not supported by the majority of delegations. See the proposals from the delegations of Hungary and Switzerland of 10 February 1999, UN Doc. PCNICC/1999/DP.5, 10 February 1999, p. 2.

inhuman treatment and the crime of cruel treatment, it was decided, from the start of the work of the Preparatory Committee on the Establishment of an International Criminal Court, that there would be no difference between the two crimes.²⁰

19. The ECHR has developed extensive case law on the subject of inhuman and degrading treatment. Firstly, according to the ECHR, “*ill-treatment must attain a minimum level of severity [...]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.*”.²¹ The ECHR distinguished between, on the one hand, the crime of torture and, on the other, the crime of inhuman and degrading treatment, stressing that – unlike inhuman and degrading treatment – torture involves “*a special stigma [being attached] to deliberate inhuman treatment causing very serious and cruel suffering*” and that “[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”.²² The ECHR also drew a distinction between inhuman treatment, on the one hand, and, on the other, degrading treatment, considering in particular that inhuman treatment covers any treatment which “*cause[s], if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto [and/or] acute psychiatric disturbances*”,²³ whereas degrading treatment involves treatment or punishment “*such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance*”.²⁴ The ECHR has, on several occasions, found that assault by security forces occasioning actual bodily harm on detained persons constitutes inhuman treatment.²⁵ In its view, conditions of detention may also amount to inhuman and/or

²⁰ See in this respect DÖRMANN, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2003, p. 398.

²¹ See ECHR, *Ireland v. The United Kingdom*, No. 5310/71, 18 January 1978, para. 162. See also *Kalashnikov v. Russia*, No. 47095/99, 15 July 2002, para. 95; and *Labita v. Italy*, No. 26772/95, 6 April 2000, para. 120.

²² See ECHR, *Ireland v. The United Kingdom*, No. 5310/71, 18 January 1978, para. 167.

²³ *Idem*. See also ECHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, para. 96.

²⁴ *Ibid.*

²⁵ *Ibid.* See also ECHR, *Tomasi v. France*, No. 12850/87, 27 August 1992, para. 115 and *Ribitsch v. Austria*, No. 18896/91, 4 December 1995, paras. 34 to 39.

degrading treatment, and, *inter alia*, (i) detention without food or drink and/or access to a toilet,²⁶ and (ii) detention in overcrowded conditions and inadequate facilities for heating, sanitation, sleeping arrangements and food.²⁷ Lastly, the ECHR has articulated the principle that corporal punishment that has attained a minimum level of severity used to discipline a child may constitute inhuman and/or degrading treatment.²⁸ These principles are applicable, *mutatis mutandi*, to the facts of this case.

20. Furthermore, it seems, in this regard, that this commonsense reasoning was behind the consensus that existed during the negotiations on the *Rome Statute* concerning the criminalisation of the acts in question, even though the provisions relating to the crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities.²⁹ That is also the reason why the Coalition to Stop the Use of Child Soldiers stated, in a letter to the members of the United Nations Security Council, that “*arbitrary detention, torture and other forms of ill-treatment of child soldiers are addressed as among the violations that occur as a direct consequence of their illegal recruitment and use*”.³⁰

21. Similarly, the active participation of child soldiers in hostilities was characterised as an “*inhumane practice*” by the International Committee of the Red

²⁶ See ECHR, *Fedotov v. Russia*, No. 5140/02, 25 October 2005, paras. 67 to 68.

²⁷ See ECHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001, paras. 46 to 48 and *Kalashnikov v. Russia*, No. 47095/99, 15 July 2002, para. 97.

²⁸ See ECHR, *A. v. The United Kingdom*, No. 25599/94, 23 September 1998, paras. 20 to 24.

²⁹ See Von HEBEL, H. and ROBINSON, D., “Crimes within the Jurisdiction of the Court”, in LEE, R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, London, Boston, Kluwer Law International, 1999, pp. 103 to 122. See also DÖRMANN, K., *op. cit. supra*, footnote 20, pp. 375 to 381 and pp. 470 to 471. See also UDOMBANA, N.J., “War is not Child’s Play! International Law and the Prohibition of Children’s Involvement in Armed Conflicts”, *Temple International and Comparative Law Journal*, vol. 20, 2006, p. 58, in which the author states that: “[m]ilitary service can jeopardize the health and safety of children; some aspects of recruits’ training, particularly live-ammunition exercises and physical endurance programs, may lead to death, injury and trauma. Power relationships in the military often leave young recruits vulnerable to bullying, harassment, abuse, and sometimes rape”.

³⁰ See the letter of the Coalition to Stop the Use of Child Soldiers dated 29 April 2009, available at: http://www.child-soldiers.org/Child_Soldier_Coalition_letter_to_Security_Council_members_for_debate_on_children_and_armed_conflict.April09.pdf.

Cross in its commentary on article 77(2) of *Additional Protocol I to the Geneva Conventions*.³¹

22. However, although inhuman treatment may be considered to be a direct consequence of the recruitment of children under the age of 15 years into the UPC/FPLC, it may also be characterised as inhuman treatment in and of itself. In fact, under article 3(a) of the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*:

*For the purposes of this Convention, the term the worst forms of child labour comprises all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.*³²

23. Lastly, the inhuman conditions prevailing during the children's military training following their recruitment are clearly detailed in the report of the Secretary-General on the events in Ituri, which states that:

*By all accounts, training conditions were generally physically gruelling and extremely hard, in terms of food rations and punishment regimes.*³³

b. Sexual slavery

24. Similarly, the *actus reus* and *mens rea* of the crime of sexual slavery are identical for all three crimes set forth at articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the *Rome Statute* and provide, on the one hand, for the perpetrator exercising any or all of the powers attaching to the right of ownership over one or more persons, such

³¹ See SANDOZ, Y., SWINARSKI, C. and ZIMMERMANN, B. (eds.), *Commentaire des protocoles additionnels du 8 juin 1977 aux conventions de Genève du 12 août 1949* [Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949], ICRC/Martinus Nijhoff Publishers, Geneva, 1986, para. 3183, p. 924.

³² See the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, Convention C 182 of the International Labour Organization, 17 June 1999 (emphasis added). The convention is available at:

<http://www.ilo.org/ilolex/cgi-lex/single.pl?query=011999182@ref&chspec=01>.

³³ See *Special report on the events in Ituri, January 2002 – December 2003*, UN Doc. S/2004/573, 16 July 2004, para. 147.

as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty, and, on the other hand, the person reduced to a servile status engaging in one or more acts of a sexual nature.³⁴ The *Elements of Crimes* state that “[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956”.³⁵

25. Under article 1(b) of that Convention, the definition of slavery includes, *inter alia*, the practice of “[s]erfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”.³⁶

26. Girls recruited into armed militias have multiple roles in such groups: combatant, bodyguard, sex slave, domestic help and cook.³⁷ This multiplicity of roles is widely recognised through various documents. For example, the *Cape Town Principles* provide that:

‘Child soldier’ [...] is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.³⁸

³⁴ See paragraphs 1 and 2 of articles 7(1)(g)(2), 8(2)(b)(xxii)(2) and 8(2)(e)(vi)(2) of the *Elements of Crimes of the International Criminal Court*, adopted by the Assembly of States Parties at its first session, 3-10 September 2002, Official Journal ICC-ASP/1/3 (part II-B), 9 September 2002.

³⁵ *Idem*.

³⁶ See article 1(b) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted on 7 September 1956 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956. The document is available at: http://www.aidh.org/Biblio/Trait_internat/Esclav_03.htm. [English version available at <http://www2.ohchr.org/english/law/slavetrade.htm>.]

³⁷ In this respect, see *idem*, para. 22.

³⁸ See *Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, adopted on 30 April 1997 at a symposium organised by the NGO Working Group on the Convention on the Rights of the Child and UNICEF, p. 8 (emphasis added). These principles are available at:

Those principles were reiterated and clarified in the *Paris Principles and Guidelines*, according to which:

*“A child associated with an armed force or armed group” refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.*³⁹

27. Moreover, in its disarmament, demobilization and reintegration (DDR) policy, the United Nations established that: “[n]o distinction should be made between combatants and non-combatants when eligibility criteria [for DDR programmes] are determined, as these roles are blurred in armed forces and groups, where children, and girls in particular, perform numerous combat support and non-combat roles that are essential to the functioning of the armed force or group”.⁴⁰ Thus, the United Nations *de facto* recognises the multiple roles which may be assigned to girls in armed militias, including in the UPC/FPLC.⁴¹

28. Accordingly, irrespective of whether or not the girl victims of sexual slavery practised by the UPC/FPLC commanders were caused to participate actively in hostilities, the fact that they were recruited when they were under the age of 15 years is sufficient proof. Moreover, this opinion is shared by Trial Chamber I which, in its *Decision on the applications to participate in the proceedings*, held that “[i]t is not necessary [...] for the Chamber to engage in the critical question that otherwise arises in this application as to whether the ‘use’ of children for sexual purposes alone, and including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and

http://www.unicef.org/emerg/files/Cape_Town_Principles.pdf.

³⁹ See *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, p. 7, point 2.1 (emphasis added). These principles are available at:

http://www.diplomatie.gouv.fr/fr/IMG/pdf/Paris_Conference_Principes_Francais_31_Janvier.pdf.

[English version available at:

http://www.un.org/children/conflict/documents/parisprinciples/ParisPrinciples_EN.pdf.]

⁴⁰ See *Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards*, para. 5.30, available in English at the following URL:

http://www.unddr.org/iddrs/iddrs_guide.php. The French translation was obtained from the “Observations écrites présentées en application de la règle 103 du Règlement de procédure et de preuve par la Représentante spéciale du Secrétaire général des Nations Unies pour les enfants et les conflits armés”, No. ICC-01/04-01/06-1229-AnxA-tFRA, 18 March 2008, para. 18.

⁴¹ See also *Special report on the events in Ituri*, *supra*, footnote 33, para. 152

*Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, prima facie, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC.”*⁴²

29. Nevertheless, it should be pointed out that the view that the recruitment of girls into the armed forces is primarily aimed at using them as sex slaves was fully endorsed by the United Nations Special Representative of the Secretary-General for Children and Armed Conflict (“the Special Representative”) in her observations to Trial Chamber I.⁴³ In her criticism of the Pre-Trial Chamber I’s approach which confined the “participate actively” standard to hostilities and excluded any activity manifestly unrelated to the hostilities,⁴⁴ the Special Representative specifically stated that “[t]he Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the “using” [children in hostilities] crime [and] that during war, the use of girl children in particular includes sexual violence.”⁴⁵ She further maintained that “[girls] are recruited [into armed groups] as child soldiers and sex slaves”.⁴⁶

30. This approach is also wholly consistent with the definition of the term “child soldier” set out in the *Cape Town Principles*, which includes girls recruited for sexual purposes and for forced marriage.⁴⁷ The recent *Paris Principles*, which were adopted in 2007, reiterate the fact that all children used for sexual purposes should be considered child soldiers.⁴⁸

31. Moreover, the African Union formally recognises the widespread practice of recruiting child soldiers and abusing girl children as wives and sex slaves and

⁴² See *Annex to the Corrigendum to the Decision on the applications by victims to participate in the proceedings* (Trial Chamber I), No. ICC-01/04-01/06-1556-Corr-Anx1, 13 January 2009, para. 103.

⁴³ See “Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence”, *supra*, footnote 40.

⁴⁴ *Idem*, para. 19.

⁴⁵ *Idem*, para. 21.

⁴⁶ *Idem*, para. 26.

⁴⁷ See *supra*, footnote 38.

⁴⁸ See *supra*, footnote 39.

strongly condemns this practice in its *Solemn Declaration on Gender Equality in Africa*.⁴⁹ Lastly, the United Nations explicitly recognises that girls are primarily recruited into armed groups for sexual purposes.⁵⁰

- c. The facts of the case show that crimes of inhuman and/or cruel treatment and sexual slavery were committed in the context of the charges confirmed

32. Firstly, the Legal Representatives submit that the very act of forcibly recruiting child soldiers under the age of 15 years into the UPC/FPLC to make them undergo military training and/or using them to participate actively in hostilities constitutes *per se* inhuman and/or cruel treatment under articles 8(2)(a)(ii) and 8(2)(c)(i) of the *Rome Statute*. In fact, the statements of witnesses who have already testified before the Chamber, particularly those of Witnesses OTP 0299 [in relation to Witness OTP 0298],⁵¹ OTP 0298,⁵² OTP 0008,⁵³ OTP 0011,⁵⁴ OTP 0010⁵⁵ and OTP 0007,⁵⁶ show that after they were forcibly recruited into the UPC/FPLC, followed by military training in training camps and active participation in hostilities, they all

⁴⁹ *Solemn Declaration on Gender Equality in Africa* (adopted by African Union Member States, Addis Ababa, 6-8 July 2004), available at <http://www.chr.up.ac.za/about/2007/AfricaSolemnDec04.pdf>.

⁵⁰ See Report of the United Nations High Commission for Refugees: *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*, May 2003, p. 79. This report is available at <http://www.unhcr.org/refworld/pdfid/3edcd0661.pdf>. See also *Report of the Secretary-General on Children and Armed Conflict*, 19 July 2000, A/52/163-S/2000/712, para. 34.

⁵¹ Witness OTP 0298 suffered psychological damage. See transcript of the hearing of 4 February 2009, No. ICC-01/04-01/06-T-117-CONF-ENG ET, p. 40, lines 4 to 18.

⁵² Witness OTP 0298 suffers from hearing and sight problems, has bodily scars and suffers from headaches. See transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 11, lines 11 to 13; p. 29, line 7 to p. 30, line 7; and p. 31, lines 7 to 19.

⁵³ Witness OTP 0008 suffers from a foot injury and psychological distress. See transcript of the hearing of 25 February 2009, No. ICC-01/04-01/06-T-135-CONF-ENG ET, p. 55, lines 3 to 25 and p. 56, line 1.

⁵⁴ Witness OTP 0011 was very frightened of taking part in hostilities and killing someone and still suffers psychologically. See transcript of the hearing of 3 March 2009, No. ICC-01/04-01/06-T-139-CONF-ENG ET, p. 34, line 4 to p. 35, line 5.

⁵⁵ Witness OTP 0010 was very frightened of taking part in hostilities and killing someone, still suffers from a foot injury, stomach pain as a result of being raped, headaches as result of taking drugs, suffers from psychological distress and has suicidal thoughts. See transcript of the hearing of 5 March 2009, No. ICC-01/04-01/06-T-144-CONF-ENG ET, p. 52, lines 15 to 22; p. 57, lines 10 to 14. See also transcript of the hearing of 6 March 2009, No. ICC-01/04-01/06-T-145-CONF-ENG ET, p. 28, line 18 to p. 29, line 25; and p. 80, lines 9 to 14.

⁵⁶ Witness OTP 0007 was very frightened of taking part in hostilities, suffered greatly during military training and continues to suffer from a foot injury and has psychological disorders. See transcript of the hearing of 17 March 2009, No. ICC-01/04-01/06-T-149-CONF-ENG ET, p. 38, line 24 to p. 41, line 18.

experienced physical and/or psychological suffering of varying levels of severity which undoubtedly attains the minimum level required to fall within the category of the crime of inhuman and/or cruel treatment. A number of witnesses also testified that children under the age of 15 years were, in any case, too young to undergo military training.⁵⁷

33. Secondly, numerous cases of inhuman and/or cruel treatment systematically inflicted on child soldiers under the age of 15 years and forcibly recruited into the UPC/FPLC were described by former child soldiers who were either directly subjected to such treatment or witnesses of such treatment inflicted on other child soldiers. The existence of the widespread and/or systematic practice of whipping recruits, often cruelly beating and sometimes killing them during their military training for disobeying orders, lack of diligence during training and particularly for attempting to flee the camp or for losing weapons was confirmed by a former UPC/FPLC soldier, Witness OTP 0299,⁵⁸ as well as by former child soldiers who were forcibly recruited by the UPC/FPLC: Witnesses OTP 0038,⁵⁹ OTP 0298,⁶⁰ OTP 0213,⁶¹ OTP 0008,⁶² OTP 0011,⁶³ OTP 0010,⁶⁴ OTP 0007⁶⁵ and OTP 0294.⁶⁶ The inhuman and

⁵⁷ For example, Witness OTP-0299 considered that his son (Witness OTP-0298) was too young to undergo military training. See transcript of the hearing of 6 February 2009, No. ICC-01/04-01/06-T-120-CONF-ENG ET, p. 22, lines 3 to 19; and p. 29, lines 19 to 22. Similarly, Witness OTP-0011 stated that he was frightened during military training because he was too young for this work. See transcript of the hearing of 3 March 2009, No. ICC-01/04-01/06-T-139-CONF-ENG ET, p. 4, lines 22 to 25 to p. 5, lines 1 to 10.

⁵⁸ See transcript of the hearing of 4 February 2009, No. ICC-01/04-01/06-T-117-CONF-ENG ET, p. 38, lines 17 to 25. See also transcript of the hearing of 9 February 2009, No. ICC-01/04-01/06-T-122-CONF-ENG ET, p. 9, line 8 to p. 10, line 4.

⁵⁹ See transcript of the hearing of 30 January 2009, No. ICC-01/04-01/06-T-113-CONF-ENG ET, p. 69, line 3 to p. 70, line 11. See also transcript of the hearing of 3 February 2009, No. ICC-01/04-01/06-T-114-CONF-ENG ET, p. 4, line 6 to p. 5 line 9; and p. 82, line 19 to p. 83, line 3.

⁶⁰ See transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 5, lines 24 to 25 to p. 7, line 10; p. 7, line 25 to p. 8, line 12; p. 9, lines 4 to 17; p. 14, lines 4 to 19; p. 19, lines 11 to 18; and p. 32, lines 10 to 19.

⁶¹ See transcript of the hearing of 20 February 2009, No. ICC-01/04-01/06-T-132-CONF-ENG CT, p. 12, lines 3 to 6. See also transcript of the hearing of 23 February 2009, No. ICC-01/04-01/06-T-133-CONF-ENG ET, p. 3, lines 6 to 10.

⁶² See transcript of the hearing of 25 February 2009, No. ICC-01/04-01/06-T-135-CONF-ENG ET, p. 16, line 8 to p. 18, line 1; p. 18, lines 19 to 21; p. 19, line 4 to p. 20, line 3 [in closed session]; p. 20, line 10 to p. 22, line 10.

degrading training and living conditions of recruits, including children under the age of 15 years, in the various UPC/FPLC military training camps were described by Witnesses OTP 0298,⁶⁷ OTP 0010⁶⁸ and OTP 0007.⁶⁹ The practice of forcing UPC/FPLC recruits, including children under the age of 15 years, to drink alcohol and smoke hemp was confirmed by Witnesses OTP 0298,⁷⁰ OTP 0293,⁷¹ OTP 0017⁷² and OTP 0294.⁷³ The inhuman detention conditions of recruits, including children under the age of 15 years, in the various camp prisons were described by Witnesses OTP 0298,⁷⁴ OTP 0213⁷⁵ and OTP 0011.⁷⁶ Lastly, the events pertaining to the inhuman and/or cruel treatment of girls who had become pregnant as a result of being raped, including girls under the age of 15 years, were described by Witness OTP 0007.⁷⁷ The Legal Representatives submit that all these cases undoubtedly attain the minimum

⁶³ See transcript of the hearing of 3 March 2009, No. ICC-01/04-01/06-T-139-CONF-ENG ET, p. 5, lines 19 to 25 and p. 6, lines 1 to 8; p. 28, line 6 to p. 31, line 1.

⁶⁴ See transcript of the hearing of 5 March 2009, No. ICC-01/04-01/06-T-144-CONF-ENG ET, p. 28, line 14 to p. 30, line 25; and p. 33, lines 9 to 16.

⁶⁵ See transcript of the hearing of 13 March 2009, No. ICC-01/04-01/06-T-148-CONF-ENG CT, p. 44, line 9 to p. 48, line 11; p. 48, line 22 to p. 49, line 10. See also transcript of the hearing of 19 March 2009, No. ICC-01/04-01/06-T-151-CONF-ENG ET, p. 11, line 4 to p. 12, line 14.

⁶⁶ See transcript of the hearing of 18 March 2009, No. ICC-01/04-01/06-T-150-CONF-FRA CT, p. 75, line 15 to p. 76, line 17.

⁶⁷ See transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 6, lines 6 to 16; p. 8, line 7 to p. 12, line 1.

⁶⁸ See transcript of the hearing of 5 March 2009, No. ICC-01/04-01/06-T-144-CONF-ENG ET, p. 21, lines 22 to 23; p. 23, lines 3 to 18; p. 31, line 23 to p. 33, line 8.

⁶⁹ See transcript of the hearing of 17 March 2009, No. ICC-01/04-01/06-T-149-CONF-ENG ET, p. 40, line 6 to p. 41, line 6.

⁷⁰ See transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 14, line 18 to p. 15, line 20.

⁷¹ See transcript of the hearing of 24 March 2009, No. ICC-01/04-01/06-T-153-CONF-ENG ET, p. 48, line 24 to p. 49, line 1.

⁷² See transcript of the hearing of 31 March 2009, No. ICC-01/04-01/06-T-158-CONF-ENG ET, p. 31, line 24 to p. 32, line 1.

⁷³ See transcript of the hearing of 18 March 2009, No. ICC-01/04-01/06-T-150-CONF-ENG ET, p. 77, line 17 to p. 78, line 24.

⁷⁴ See transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 19, line 20 to 25 and p. 20, line 1 to 3.

⁷⁵ See transcript of the hearing of 20 February 2009, No. ICC-01/04-01/06-T-132-CONF-ENG ET, p. 40, line 6 to p. 42, line 12.

⁷⁶ See transcript of the hearing of 3 March 2009, No. ICC-01/04-01/06-T-139-CONF-ENG ET, p. 29, line 5 to p. 30, line 24.

⁷⁷ See transcript of the hearing of 18 March 2009, No. ICC-01/04-01/06-T-150-CONF-ENG ET, p. 35, line 16 to p. 36, line 14.

level of severity required to fall within the category of the crime of inhuman and/or cruel treatment.

34. The existence within the UPC/FPLC of a systematic and/or widespread practice of using girls, including those under the age of 15 years, against their will as wives or sex slaves to UPC/FPLC commanders was confirmed by former soldiers from the said militia, Witnesses OTP 0299⁷⁸ and OTP 0017,⁷⁹ as well as by former child soldiers forcibly recruited by the UPC/FPLC: Witnesses OTP 0038,⁸⁰ OTP 0298,⁸¹ OTP 0010,⁸² OTP 0011,⁸³ OTP 0007⁸⁴ and OTP 0294.⁸⁵ The existence of a widespread and/or systematic practice of UPC/FPLC soldiers, including children under the age of 15 years, being required to go out and look for girls, including girls under the age of 15 years, for their commanders' sexual needs as well as for their own sexual needs was confirmed by former child soldiers forcibly recruited by the UPC/FPLC, Witnesses OTP 0213,⁸⁶ OTP 0008⁸⁷ and OTP 0294.⁸⁸ The Legal Representatives submit

⁷⁸ See transcript of the hearing of 9 February 2009, No. ICC-01/04-01/06-T-122-CONF-ENG ET, p. 26, line 22 to p. 27, line 21.

⁷⁹ See transcript of the hearing of 25 March 2009, No. ICC-01/04-01/06-T-154-CONF-ENG ET, p. 29, lines 12 to 23. See also transcript of the hearing of 1^{er} April 2009, No. ICC-01/04-01/06-T-160-CONF-ENG ET, p. 59, lines 14 to 21.

⁸⁰ See transcript of the hearing of 3 February 2009, No. ICC-01/04-01/06-T-114-CONF-ENG ET, p. 22, line 12 to p. 24, line 14; and p. 25, line 16 to p. 26, line 8.

⁸¹ See transcript of the hearing of 10 February 2009, No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 32, line 25 to p. 33, line 1

⁸² See transcript of the hearing of 5 March 2009, No. ICC-01/04-01/06-T-144-CONF-ENG ET, p. 36, line 6 to p. 37, line 18; and p. 37, line 12 to p. 38, line 18. [in closed session] See also transcript of the hearing of 6 March 2009, No. ICC-01/04-01/06-T-145-CONF-ENG ET, p. 6, line 17 to p. 8, line 23 [in closed session]; p. 78, line 23 to p. 79, line 8 [in closed session]; and p. 79, line 13 to p. 80, line 4.

⁸³ See transcript of the hearing of 27 February 2009, No. ICC-01/04-01/06-T-138-CONF-ENG ET, p. 65, line 25 to p. 66, line 2.

⁸⁴ See transcript of the hearing of 13 March 2009, No. ICC-01/04-01/06-T-148-CONF-ENG ET, p. 49, line 11 to p. 49, line 22. See also transcript of the hearing of 17 March 2009, No. ICC-01/04-01/06-T-149-CONF-ENG ET, p. 26, line 19 to p. 27, line 18. Lastly, see transcript of the hearing of 18 March 2009, No. ICC-01/04-01/06-T-150-CONF-ENG ET, p. 35, line 1 to p. 36, line 14.

⁸⁵ See transcript of the hearing of 19 March 2009, No. ICC-01/04-01/06-T-151-CONF-ENG ET, p. 5, line 14 to p. 6, line 3.

⁸⁶ See transcript of the hearing of 20 February 2009, No. ICC-01/04-01/06-T-132-CONF-ENG CT, p. 13, lines 7 to 9. See also transcript of the hearing of 23 February 2009, No. ICC-01/04-01/06-T-133-CONF-ENG ET, p. 4, lines 2 to 23. Lastly, See transcript of the hearing of 24 February 2009, No. ICC-01/04-01/06-T-134-CONF-ENG CT, p. 70, lines 7 to 19.

⁸⁷ See transcript of the hearing of 25 February 2009, No. ICC-01/04-01/06-T-135-CONF-ENG ET, p. 13, line 12 to p. 14, line 15; p. 37, line 24 to p. 38, line 18; and p. 39, line 19 to p. 40, line 23.

that the said practice of exploiting girls as sex slaves or wives is akin to the practice of serfdom which is strongly prohibited by article 1(b) of the 1956 Convention on the Abolition of Slavery.⁸⁹

2) *The events described fall within the context of the facts, circumstances and mode of responsibility described in the charges confirmed against Thomas Lubanga Dyilo*

35. The events pertaining to the elements of the crimes which may fall within the categories of inhuman and/or cruel treatment or crimes of sexual slavery, as described above, fall within the context of the facts and circumstances described in the charges against Thomas Lubanga Dyilo, as confirmed by the *Decision on the confirmation of charges*⁹⁰ and which were amended in accordance with the Amended Document Containing the Charges.⁹¹

36. Firstly, the events described by Witnesses OTP 0038,⁹² OTP 0299,⁹³ OTP 0298,⁹⁴ OTP 0213,⁹⁵ OTP 0008,⁹⁶ OTP 0010,⁹⁷ OTP 0011,⁹⁸ OTP 0007,⁹⁹ OTP 0294¹⁰⁰ and

⁸⁸ See transcript of the hearing of 19 March 2009, No. ICC-01/04-01/06-T-151-CONF-ENG ET, p. 9, line 25 to p. 11, line 10.

⁸⁹ See *supra*, footnote 36.

⁹⁰ See *Decision on the confirmation of charges, supra*, footnote 1.

⁹¹ See Amended Document Containing the Charges, *supra*, footnote 2.

⁹² The events described by Witness OTP 0038 occurred: (i) from November 2002 onwards in Mongbwalu, Bunia and other locations which Commander Abelanga travelled to with his bodyguards (commanders' sexual relations with their bodyguards (girls)): No. ICC-01/04-01/06-T-114-CONF-ENG ET, p. 23, line 17 to p. 24, line 13; (ii) in 2002 at the Mandro camp (inhuman and/or cruel treatment of recruits): No. ICC-01/04-01/06-T-113-CONF-ENG ET, p. 65, lines 15 to 17; and transcript of the interview, DRC-OTP-0149-0056 page 2, lines 254 to 293.

⁹³ The events described by Witness OTP 0299 occurred in July-August 2002 at the Mandro camp (commanders' sexual relations with their bodyguards (girls)): No. ICC-01/04-01/06-T-117-CONF-ENG ET, p. 14, lines 8 to 10 and No. ICC-01/04-01/06-T-122-CONF-ENG ET, p. 26, line 3 to p. 27, line 21.

⁹⁴ The events described by Witness OTP 0298 occurred: (i) in December 2002 at the Bule camp (sexual violence against female recruits), No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 32, lines 5 to 25 and p. 33, line 1; and witness statement, DRC-OTP-0184-0011, paras. 14-16; (ii) in December 2002 at the Bule camp (inhuman and/or cruel treatment of recruits and the practice of forcing recruits to smoke hemp), No. ICC-01/04-01/06-T-123-CONF-ENG ET, p. 5, line 1 and witness statement, DRC-OTP-0184-0011, paras. 14-16.

⁹⁵ The events described by Witness OTP 0213 occurred: (i) when the witness was in the third year of primary school [born in 1991] in the camp in Lopa (the practice of going to look for girls for commanders): No. ICC-01/04-01/06-T-132-CONF-ENG ET, p. 11, line 14 to p. 13, line 9; (ii) when the witness was in the third year of primary school [born in 1991] in the camp in Lopa (inhuman and/or cruel treatment of recruits), No. ICC-01/04-01/06-T-132-CONF-ENG ET, p. 11, lines 18 to 20.

OTP 0017¹⁰¹ all occurred between early September 2002 and 13 August 2003. They therefore fall within the period covered by the charges confirmed against Thomas Lubanga Dyilo.¹⁰² These events also occurred in the locations which are directly referred to in the *Decision on the confirmation of charges*¹⁰³ and in the Amended Document Containing the Charges.¹⁰⁴

⁹⁶ The events described by Witness OTP 0008 occurred: (i) in early 2003 at the Irumu camp; and after the fighting in Lipri and Barriere, in Lipri and Barriere (practice of ordering recruits to go to look for girls for their commanders and their own sexual needs), No. ICC-01/04-01/06-T-135-CONF-ENG ET, p. 12, lines 15 to 17 and p. 24, line 4 to p. 38, p. 10; (ii) in early 2003 at the Irumu camp (inhuman and/or cruel treatment of recruits), No. ICC-01/04-01/06-T-135-CONF-ENG ET, p. 12, lines 15 to 17.

⁹⁷ The events described by Witness OTP 0010 occurred: (i) between January and December 2003 in the camp in Mandro (sexual violence against female recruits), No. ICC-01/04-01/06-T-144-CONF-ENG ET, p. 35, lines 21 to 23 and the Application for participation as a victim, MFI-D-00071; (ii) between January and December 2003 at the Rwampara camp (inhuman and/or cruel treatment of recruits), No. ICC-01/04-01/06-T-144-CONF-ENG ET, p. 18, line 8 and p. 21, lines 14 to 15 and the Application for as a victim, MFI-D-00071, p. 9.

⁹⁸ The events described by Witness OTP 0011 occurred: (i) in January 2003 at the Bule camp (use of female recruits as wives), No. ICC-01/04-01/06-T-138-CONF-ENG ET, p. 58, lines 15 to 16 and p. 62, line 12, and the Application for participation as a victim, MFI-D-00057, p. 9. (ii) in January 2003 at the Bule camp (inhuman and/or cruel treatment of recruits), No. ICC-01/04-01/06-T-138-CONF-ENG ET, p. 58, lines 15 to 16 and No. ICC-01/04-01/06-T-139-CONF-ENG ET, p. 5, line 12, and the application for participation as a victim MFI-D-00057, p. 9.

⁹⁹ The events described by Witness OTP 0007 occurred: (i) in early 2003 at the Irumu camp (sexual violence against female recruits), No. ICC-01/04-01/06-T-148-CONF-ENG ET, p. 21, lines 8 to 12 and p. 49, lines 11 to 13; (ii) in early 2003 at the Irumu and Mandro camps (inhuman and/or cruel treatment of recruits), No. ICC-01/04-01/06-T-148-CONF-ENG ET, p. 21, lines 8 to 12, p. 42, line 10 and p. 48, line 1.

¹⁰⁰ The events described by Witness OTP 0294 occurred: (i) after Bunia was recaptured by the FPLC, the Epo camp (a commander's sexual relations with his bodyguards and the practice of going to look for girls for the commanders), No. ICC-01/04-01/06-T-151-CONF-ENG ET, p. 2, line 24 to p. 4, line 4; (ii) at the Mandro camp (inhuman and/or cruel treatment of recruits and the practice of forcing recruits to smoke hemp), No. ICC-01/04-01/06-T-150-CONF-ENG ET, p. 77, line 17 to p. 78, line 6.

¹⁰¹ The events described by Witness OTP 0017 occurred: (i) between early 2002 and August 2003 at the Mandro camp (sexual violence by Commander Abelanga against female recruits), No. ICC-01/04-01/06-T-154-CONF-ENG ET, p. 17, lines 13 to 15; and p. 28, line 14 to p. 29, line 23.

¹⁰² See *Decision on the confirmation of charges*, *supra*, footnote 1, p. 133.

¹⁰³ The *Decision on the confirmation of charges* refers to the following places: (i) places where the FPLC military training camps were located: Centrale, Rwampara, Mandro, Irumu, Bule, Bogoro and Sota; and (ii) places where the hostilities took place: Libi, Mbau, Largu, Lipri, Bogoro, Bunia, Djugu and Mongbwalu: see *Decision on the confirmation of charges*, *supra*, footnote 1, paras. 265, 266, 379-iv and 379-viii.

¹⁰⁴ The Amended Document Containing the Charges refers to the following places: (i) places where the FPLC military training camps were located: Sota, Centrale, Mandro, Rwampara, Irumu and Bule; and (ii) places where the hostilities took place: Lipri, Bogoro, Libi, Mbau, Djugu, Mongbwalu, Lenga, Fataki, Bule, Bunia, Katoto, Mandro, Lonio, Lopa, Marabu, Chai, Songolo, Zumbe, Kasenyi and Opasi: see Amended Document Containing the Charges, *supra*, footnote 2, paras. 26, 34, 41-98.

37. Moreover, the said events which may be characterised as inhuman and/or cruel treatment and sexual slavery are allegedly attributable to UPC/FPLC soldiers and commanders and were allegedly committed against recruits in the UPC/FPLC training camps, who included children under the age of 15 years. Accordingly, Thomas Lubanga Dyilo could incur direct responsibility as President of the UPC and Commander-in-Chief of the FPLC. These acts could therefore entail Thomas Lubanga Dyilo's criminal responsibility as a co-perpetrator within the meaning of article 25(3)(a) of the *Rome Statute* for the crimes referred to in articles 7(1)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi), 8(2)(a)(ii) or 8(2)(c)(i) of the *Rome Statute*. Furthermore, these acts could also entail the criminal responsibility of other UPC/FPLC commanders who are expressly referred to in the *Decision on the confirmation of charges*¹⁰⁵ and in the Amended Document Containing the Charges¹⁰⁶ as co-perpetrators, particularly Chief Kahwa Panga Mandro, Rafiki Saba, Floribert Kisembo, Bosco Ntaganda and other senior UPC/FPLC commanders, such as Tchalingonza.

38. Finally, the alleged acts of sexual slavery and inhuman and/or cruel treatment were inflicted on the recruits as part of their military training, are directly related to their status as recruits and are therefore a direct consequence of their forcible recruitment into the UPC/FPLC.

39. Although intended to discipline the recruits, the acts of inhuman and/or cruel treatment described involved subjecting them to extremely severe and cruel punishment. The *Decision on the confirmation of charges* expressly refers on numerous occasions to the extremely strict discipline¹⁰⁷ and severe punishment to which recruits were systematically subjected in UPC/FPLC military training camps, including whippings, beatings, detention in prison and even executions.¹⁰⁸ Moreover,

¹⁰⁵ See *Decision on the confirmation of charges*, *supra*, footnote 1, para. 408.

¹⁰⁶ See Amended Document Containing the Charges, *supra*, footnote 2, para. 23.

¹⁰⁷ See *Decision on the confirmation of charges*, *supra*, footnote 1, para. 265. See also the Amended Document Containing the Charges, *supra*, footnote 2, paras. 35, 36 and 96.

¹⁰⁸ See Amended Document Containing the Charges, *supra*, footnote 2, paras. 36, 73, 75 and 96.

the *Decision on the confirmation of charges* refers to cases of recruits being forced to smoke hemp by their trainers.¹⁰⁹

40. With respect to the practice of sexual slavery in the UPC/FPLC, the existence of this practice may be readily inferred from the very fact that girls were forcibly recruited into the UPC/FPLC. It seems logical that the recruitment of girls, in contrast to the recruitment of boys, could have a purpose over and above their military training for active participation in hostilities at some future stage.¹¹⁰ In all likelihood, the girls' main role could involve performing duties not directly related to hostilities, namely domestic tasks and/or sexual services. This, however, does not *per se* deprive the girls of their status as soldiers¹¹¹ or recruits.

41. Accordingly, the Legal Representatives submit that the following factors constitute a sufficient basis for the Chamber to apply regulation 55 of the *Regulations of the Court*: (i) the events described to date by the witnesses before the Chamber pertain to elements of crimes which may fall within the categories of crimes under 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") of the *Rome Statute*; (ii) these events fall within the context of the facts and circumstances described in the charges against Thomas Lubanga Dyilo, as confirmed by the *Decision on the confirmation of charges* and amended in accordance with the Amended Document Containing the Charges; and (iii) the alleged acts of sexual slavery and inhuman and/or cruel treatment entail the

¹⁰⁹ *Idem*, para. 90.

¹¹⁰ In this regard, see the annex to the letter dated 23 January 2001 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the Secretary-General, *The Machel Review 1996-2000: A Critical Analysis of Progress Made and Obstacles Encountered in Increasing Protection for War-Affected Children*, UN doc. A/55/749, 26 January 2001, p. 11 *in fine*. This document is available at the following URL:

[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/ac21680072b3245fc1256b09004d9a57/\\$FILE/N0123465.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/ac21680072b3245fc1256b09004d9a57/$FILE/N0123465.pdf). See also COALITION TO STOP THE USE OF CHILD SOLDIERS, *Child Soldiers: Global Report* 2008, pp. 28 to 29. This document is available at the following URL:

http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf.

¹¹¹ See transcript of the hearing of 7 April 2009, No. ICC-01/04-01/06-T-166-CONF-ENG ET, p. 95, line 25 to p. 96, line 18.

same form of criminal responsibility for Thomas Lubanga Dyilo as that with which he is charged in the *Decision on the confirmation of charges*.

42. Lastly, the Legal Representatives emphasise that the arguments herein set out are not intended to replace the characterisations chosen by the Office of the Prosecutor in its Amended Document Containing the Charges¹¹² and accepted by Pre-Trial Chamber I in its *Decision on the confirmation of charges*.¹¹³ The Legal Representatives submit that an additional legal characterisation may be applied to the same facts since they may constitute a violation of several prohibitions set out in the *Rome Statute*. In the instant case, the crimes of inhuman and/or cruel treatment and sexual slavery occurred in the context of the charges confirmed against Thomas Lubanga Dyilo.

FOR THESE REASONS,

MAY IT PLEASE TRIAL CHAMBER I

To trigger the procedure for legal recharacterisation of the facts under regulation 55 of the *Regulations of the Court*; and

To grant the Legal Representatives of the Victims the opportunity to make oral or written observations on any issue pertaining to the legal recharacterisation of the facts under regulation 55 of the *Regulations of the Court*.

¹¹² See Amended Document Containing the Charges, *supra*, footnote 2.

¹¹³ The *Decision on the confirmation of charges* refers to the following places: (i) places where FPLC military training camps were located: Centrale, Rwampara, Mandro, Irumu, Bule, Bogoro and Sota; and (ii) places where hostilities occurred: Libi, Mbau, Largu, Lipri, Bogoro, Bunia, Djugu and Mongbwalu: see *Decision on the confirmation of charges*, *supra*, footnote 1, paras. 265, 266, 379-iv and 379-viii.

Ms C. Bapita Buyangandu

Ms P. Massidda

Mr J.C. Mulamba Nsokoloni

[signed]

[signed]

[signed]

Dated this 22 May 2009

At The Hague, The Netherlands