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Date: **10 September 2009**

THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
 Judge Sang-Hyun Song
 Judge Akua Kuenyehia
 Judge Erkki Kourula
 Judge Anita Ušacka

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

Public Document and Annex

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*

Source: Mr Thomas Lubanga Dyilo's Defence Team

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
Mr Marc Desalliers
Ms Caroline Buteau

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 Tschibangu
Mr Hervé Diakiese
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

BACKGROUND

1. On 14 July 2009, Trial Chamber I rendered 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*.¹
2. On 11 and 12 August 2009, the Defence and the Prosecution submitted applications requesting leave to appeal the Decision (hereinafter referred to as “Applications”).²
3. On 17 August 2009, the Prosecutor responded to the Defence Application. That same day, the Legal Representatives of the Victims responded to the Defence and Prosecution Applications.³
4. On 3 September 2009, Trial Chamber I granted leave to the Prosecution and to the Defence to appeal the Decision on two grounds.⁴

SUBMISSIONS

5. As **principal submission**, the Defence contends that regulation 55 of the Regulations of the Court is inherently incompatible with the provisions of the Statute and of the Rules, and in particular with article 61(9), and maintains

¹ ICC-01/04-01/06-2049.

² ICC-01/04-01/06-2073 and ICC-01/04-01/06-2074.

³ ICC-01/04-01/06-2080 and ICC-01/04-01/06-2079.

⁴ ICC-01/04-01/06-2107:

- Question 1: Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.

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

that the Appeals Chamber is entitled to find it unlawful and to refuse to apply it.⁵

6. As the formal constraints with which this filing must comply do not allow this argument to be developed, the Defence refers in this regard to paragraphs 35 to 38 of its observations filed on 16 November 2007 before Trial Chamber I.⁶
7. **In the alternative**, the Defence submits the following:

1. QUESTION 1:

8. The Defence contends that, contrary to the position adopted by Trial Chamber I, regulation 55 establishes a unique re-characterisation process, which is subject to all of the conditions and guarantees provided for cumulatively in its three paragraphs.

1-1 In its final Judgment, Trial Chamber I cannot modify the characterisation of the "facts and circumstances described in the charges" without implementing the rights and guarantees set out in paragraphs 2 and 3 of regulation 55

9. On this point the Defence agrees with the arguments set out by Presiding Judge Fulford in paragraphs 22 to 28 of his Minority Opinion, whereby the Chamber's interpretation is incompatible with the fundamental principle that the accused must be informed "promptly and in detail of the nature, cause and content of the charge".⁷
10. The following points in particular are worthy of emphasis:
11. Firstly, it is well established that the legal characterisation of the facts which are the focus of the prosecution constitutes one of the essential components of

⁵ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, paras. 19 and 43.

⁶ ICC-01/04-01/06-1033.

⁷ Article 67(1)(a); Article 14(3)(a) of the *International Covenant on Civil and Political Rights*; Article 6(3)(a) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

the "charges",⁸ of which the accused must be informed "promptly and in detail".

12. Secondly, only a precise legal characterisation allows the accused to make his defence; in other words to mount an effective challenge, in terms of law, to the validity of the charges against him.
13. Thirdly, contrary to the Chamber's analysis,⁹ the decision by the accused fundamentally to challenge certain facts cited in the documents setting out the charges, and the manner in which this challenge is made, in particular through the submission of evidence, is directly dependent on the relevance of those facts in light of the legal characterisation accorded to them. It is therefore crucial that the accused be clearly informed of said characterisation, so that he can assess the relevance of the facts and prepare his defence accordingly.
14. It is only through implementation of the rights and guarantees set out in paragraphs 2 and 3 of regulation 55 that "consistency between sub-regulation 1 and the core rights of the accused" can be established.¹⁰
15. That is why regulation 55 must be understood as providing for an indivisible process which allows the accused, having been properly informed, to mount an effective defence to the charges; that is to say, not only as regards the truth of the facts alleged against him, but also as to the legal characterisation accorded thereto.

1-2 Paragraphs 2 and 3 of Regulation 55 do not allow Trial Chamber I to modify the characterisation of the acts for which the accused is being prosecuted, by reference to "facts and circumstances" other than those

⁸ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx 1, paras. 5 to 8 and para. 18.

⁹ ICC-01/04-01/06-2049, para. 30: "If the modification only concerns the substantive law applicable to the same factual basis that is contained in the relevant charging documents, a right to call new evidence is not necessary, and thus, is not expressly conferred on the defendant by Regulation 55(1)."

¹⁰ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx 1, para. 27.

specifically “described in the charges and any amendments to the charges”.

16. On this point the Defence fully agrees with the arguments set out by Presiding Judge Fulford in his Minority Opinion, and specifically those of paragraphs 28 to 33.

17. In addition, it submits the following observations:

- **The sole purpose of regulation 55 is to allow an error of characterisation to be rectified.**

18. Regulation 55 gives the Chamber power to “change the legal characterisation of the facts”, in other words, under certain circumstances, to replace the initial characterisation as determined by the Pre-Trial Chamber in the decision on the confirmation of charges with a different characterisation.

19. The sole purpose of this power is to ensure that the facts set out in the decision on the confirmation of charges “[...] accord with the crimes under articles 6, 7 or 8 [...]”;¹¹ in other words, to avoid the situation where a simple error of characterisation might have the effect of invalidating the prosecution.¹²

- **Regulation 55 does not allow the Chamber to consider additional offences, even when they are based on “facts and circumstances described in the charges”.**

20. The ICTY rightly emphasises that “[e]ven though the *iura novit curia* principle is normally applied in international judicial proceedings, it would be inappropriate for this principle to be followed in proceedings before

¹¹ Regulation 55(1).

¹² *Prosecutor v. Zoran Kupresic et al*, Case No IT-95-16-T, Judgement, 14 January 2000, paras. 731 *et seq.* (emphasis added).

international criminal courts, where the rights of an individual accused are at stake”.¹³

21. It follows that the accused must be informed, prior to the commencement of trial, of the precise legal characterisation of the offences with which he has been charged, and of the precise legal basis for the responsibility alleged,¹⁴ so that any re-characterisation of the charges at the close of the trial may only be in favour of a less serious offence included in the initial charging document.¹⁵

22. Thus any amendment to the charges involving the addition of new charges, or the replacement of the initial charges either by more serious charges¹⁶ or by charges which were not originally included, may only be carried out in accordance with the joint provisions of article 61(9) and rule 128, which give the Pre-Trial Chamber exclusive jurisdiction in the matter and require that the

¹³ *Prosecutor v. Zoran Kupresic et al*, Case No IT-95-16-T, Judgement, 14 January 2000, paragraph 740. There is a distinction between the present case and those where several characterisations are established as soon as the document containing the charges is issued for similar facts, thus raising the issue of converging characterisations; this is not the case here.

¹⁴ *Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08-388, *Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute*, 3 March 2009, paras. 21-28; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003, para. 138: “With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)).”; *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36-T, *Decision on objections by Momir Talic to the form of the amended indictment*, 20 February 2001, paras. 48-52; *The Prosecutor v. Simic et al*, Case No. IT-95-9-T, Judgement, 17 October 2003, paras. 114 to 120, and, for example, para. 116; *Prosecutor v. Zoran Kupreski et al*, Case No. IT-95-16-T, Judgement, 14 January 2000, paras. 728 *et seq.* See also: *Gouget v. France*, ECHR, Application No. 61059/00, 24 January 2006, para. 28.

¹⁵ *Prosecutor v. Zoran Kupreskic et al*, Case No. IT-95-16-T, Judgement, 14 January 2000, Decision of 14 January 2000, paras. 728 *et seq.*. See also the case of *Pélissier and Sassi v. France*, ECHR, Application No. 25444/94, Judgment, 25 March 1999, paras. 57 to 63. The document containing the charges must be amended in accordance with a specific procedure, or if this is not done in good time, it must be dismissed. See: *Prosecutor v. Krnojelac*, *idem*, para. 145; *Prosecutor v. Zoran Kupreskic et al.*, *idem*, para. 748; “Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge”, para. 740; *Prosecutor v. Simic et al*, *idem*, para. 120; *Prosecutor v. Brdanin and Talic*, *idem*, para. 51.

¹⁶ See article 61(9), and also rule 128(3), which also draws a distinction between “new charges” and “more serious charges”, both of which require the Pre-Trial Chamber to implement confirmation proceedings; see in this regard the *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 13.

accused be informed of the new charges prior to the commencement of the trial.

- **The power to re-characterise provided for in regulation 55 is limited to the facts and circumstances described in the charges, and cannot be extended to related facts established during the trial.**

23. The procedural regime governing the charges is based on three fundamental mechanisms: final definition of the charges prior to the commencement of the trial (article 61(9)); the strict separation of the judges responsible for defining the charges from those tasked with determining their truth; a prohibition on the latter from taking into account, in reaching their verdict, facts other than those set out in the decision on the confirmation of charges (article 74(2)).

24. In holding that, whilst the trial is in progress, regulation 55 allows facts other than those cited by the Pre-Trial Chamber to be relied on against the accused so as to form the basis of new charges, Trial Chamber I has taken a position incompatible with these basic principles. This approach would have the effect of rendering meaningless the role of the Pre-Trial Chamber in defining the charges.

Violation of article 61(9)

25. A procedure involving adding to the charges new facts under new legal characterisations clearly constitutes an amendment of the charges within the meaning of article 61(9).

26. However, such amendment is lawful only prior to the commencement of the trial and falls within the sole prerogative of the Pre-Trial Chamber.¹⁷

27. The circumstance that the new facts are related to those set out in the charges cannot in any event justify such amendment, inasmuch as they involve

¹⁷ Article 61(9); see in this regard the *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 16.

distinct acts, constituting distinct offences. Moreover, the vagueness of the concept of “relatedness” or “procedural unity”¹⁸ is incompatible with the mandatory requirement of precision in relation to the statement of the charges.

28. Nor, by the same token, can the circumstance that these new facts came to light as a result of testimony given at the trial justify such an extension of the charges.¹⁹ To the contrary, their discovery at this stage of the proceedings makes it impossible for the accused to mount an effective defence against them.

Violation of article 74(2)

29. Article 74(2) prohibits the judges of Trial Chamber I from taking into consideration, in their final decision, facts other than those set out in the charges as confirmed by the Pre-Trial Chamber.

30. This principle is based on obvious reasons of fairness, recalled in article 67(1)(a) and (b). It also enshrines the notion that the facts of which Trial Chamber I is legally seized are confined to those set out in the decision on the confirmation of charges. The extent of Trial Chamber I’s seisin *ratione materiae* is thus exclusively defined by the terms of the decision on the confirmation of charges rather than by revelations involving all manner of events by witnesses during the trial.²⁰

¹⁸ Wording used in the *Decision on the prosecution and the defence 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”*, ICC-01/04-01/06-2107, para. 41.

¹⁹ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, paras. 28-29.

²⁰ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 28 *in fine*. See also: *The Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08-424, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, para. 207.

31. Under no circumstances does regulation 55 give Trial Chamber I the authority to consider and rely on against the accused matters of which it has not been legally seized.²¹

Violation of article 67(1)(a) and (b)

32. The position under challenge here allows the charges to be expanded at any time to include counts which were not notified to the accused in good time, and against which he cannot mount an effective defence.

33. It is thus a stance incompatible with the provisions of article 67(1)(a) and (b).²²

34. The rights and guarantees provided for in paragraphs 2 and 3 of regulation 55, which were designed to allow the accused to adjust his defence in the event of a re-characterisation of the facts, are manifestly inadequate where there is a modification of the factual basis of the charges, requiring fresh investigations.

35. It follows that the position taken by the Trial Chamber is clearly incompatible with the aforementioned provisions of the Statute, to which regulation 55 is subject.²³

QUESTION TWO

2-1 The applications for re-characterisation submitted by the Legal Representatives are in reality applications to amend the charges and are thus clearly inadmissible.

36. In their Joint Application, the Legal Representatives allege that the victims whom they are assisting, described as “former child soldiers forcibly recruited into the UPC/FPLC”, were subjected during their military training to inhuman and/or cruel treatment; and, as far as the young girls are concerned, were

²¹ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, paras 29 and 45.

²² *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 28. See *infra*, footnote 19.

²³ Regulation 1(1) of the *Regulations of the Court*: “These Regulations have been adopted pursuant to article 52 and shall be read subject to the Statute and the Rules.”

“sexually enslaved”;²⁴ they ask that these facts be given “appropriate characterisation”.

37. In reality, as pointed out by Presiding Judge Fulford in his Minority Opinion,²⁵ this Application is not for a re-characterisation of the facts, but for a substantial amendment of the charges through the addition of five further offences, some of them more serious,²⁶ as set out in articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i).

38. The above submissions have shown that such an application to amend the charges is inadmissible at this stage in the proceedings.²⁷

2-2 The facts presented by the Legal Representatives as capable of receiving characterisations coming within the terms of articles 8(2)(a)(ii), 8(2)(c)(i), 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) exceed the scope of the “facts and circumstances described in the charges”.

39. It will be apparent to the Appeals Chamber that the “facts and circumstances” set out in the *Decision on the confirmation of charges*²⁸ cannot be characterised so as to disclose the constituent elements of the offences alleged by the Legal Representatives.

Crimes against humanity under article 7(1)(g) (sexual violence)

40. This provision provides for the offences of: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of

²⁴ ICC-01/04-01/06-1891, para. 11

²⁵ “A modification to the legal characterisation of the facts must not constitute an amendment to the charges”: See *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, paras. 17, 34, 42, 43 and 44.

²⁶ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 44: “One of the characterisations envisaged falls within the category of crimes against humanity, which may reasonably be considered as being more serious than that of war crimes, even though the sentences incurred are identical, given that they assume a contextual element which is inherently criminal.”

²⁷ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 45.

²⁸ Only the *Decision on the confirmation of charges* defines the charges and fixes the extent of seisin *ratione materiae* of the Trial Chamber. Thus the references by the Legal Representatives to the “Amended Document Containing the Charges” drawn up by the Prosecutor are irrelevant to this discussion.

sexual violence of comparable gravity”, committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

41. The Appeals Chamber will note that:

- the *Decision on the confirmation of charges* does not cite “facts or circumstances” characterising a widespread or systematic attack directed against a civilian population. In particular, at no time does it state that an attack of this nature was carried out by armed forces under the control of the accused against the community from which the children under the age of fifteen were allegedly enlisted.

- neither the *Decision on the confirmation of charges*, nor any other document describing the charges, cites “facts and circumstances” characterising sexual violence, irrespective of the form or seriousness thereof.²⁹

42. The “facts and circumstances” described in the *Decision on the confirmation of charges* can thus in no way be characterised as crimes against humanity as described in article 7(1)(g).

War crimes provided for under articles 8(2)(b)(xxii) and 8(2)(e)(vi) (sexual violence)

43. These provisions cover the offences of “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”, committed as part of an international armed conflict (8(2)(b)(xxii)) or an armed conflict not of an international character (8(2)(e)(vi)).

²⁹ *Minority Opinion of Presiding Judge Fulford*, ICC-01/04-01/06-2069-Anx1, para. 49

44. The Appeals Chamber will note, as previously pointed out, that no fact of this nature is mentioned in the *Decision on the confirmation of charges*.
45. The “facts and circumstances” described in the *Decision on the confirmation of charges* can thus in no way be characterised as war crimes under articles 8(2)(b)(xxii) and 8(2)(e)(vi).
46. Moreover, it cannot seriously be argued that the charges concerning the enlistment and conscription of young girls under the age of fifteen would implicitly include charges of sexual violence committed against them, and, in particular, the offence of sexual slavery.³⁰
47. This argument, which the Legal Representatives seem to be putting forward in, albeit in a confused manner, does not stand up to scrutiny:
- Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), and the Elements of Crimes, which amplify them, do not include any reference to sexual abuse; similarly, articles 8(2)(b)(xxii) and 8(2)(e)(vi) do not establish any link between the commission of sexual violence and the child soldier status of any victims of such violence within an armed group. In law, the two categories of offence are wholly independent and, apart from the context of armed conflict, have no constituent element in common.
 - International criminal courts dealing with cases involving the crime of the enlistment of children under fifteen years of age have never considered the fact of being used for sexual purposes as capable of characterising child soldier status.³¹ Such acts of violence, even committed against young recruits by soldiers within an armed group, clearly have no link with hostilities, are in no way connected to military duties illegally imposed on

³⁰ *Idem.*, para. 44.

³¹ See in this regard all the decisions rendered by the SCSL. In particular, none of the decisions of the SCSL establishes sexual slavery as one of the forms of the status of a child soldier.

young children, and do not come within the framework of activities required in order for the force or the armed group to operate. These are distinct acts of violence, to be examined separately from the crime of enlistment.

- No international convention, nor any principle or rule of international law, has expressly or implicitly made sexual slavery one of the constituents of the crimes of enlistment, conscription or participation in hostilities of children under the age of fifteen years. The same applies to national legislation.
- The “Cape Town Principles” and the “Paris Principles”, invoked by the applicant victims, have no normative value whatever, and cannot be taken into consideration for purposes of assessing the content and scope of an international crime.³²

48. There is therefore nothing to suggest that the definition in international law of the crimes of enlistment and conscription of children under the age of fifteen years implicitly but necessarily includes the crime of sexual slavery or any other form of sexual violence.

49. The extension of the scope of these offences to include sexual violence, which is moreover characterised as a separate offence, would obviously run counter

³² None of these texts can be considered part of international law to be applied by the Chamber. They cannot be considered to constitute international custom, given that they are not generalised practice accepted by the States as law (the *Cape Town Principles* were adopted by NGOs and the *Paris Principles* by only 58 States); nor can they be considered a general principle of law, as they have been neither cited nor relied on by a court. Furthermore, the *Paris Principles* were adopted in February 2007, in other words five or six years after the acts with which the accused has been charged. They could not therefore be applied by the Chamber without infringing the *nullum crimen sine lege* principle in respect of crimes and penalties, as provided for in article 22 of the Statute. Finally, in a decision of 31 May 2004 (SCSL-04-14-AR72(E)-131-7383, -7398, -7413 and -7430), the Appeals Chamber of the SCSL did not include the *Cape Town Principles* among the elements establishing the customary basis of the crime of enlisting child soldiers. The ICRC also states that these instruments have no binding force.

to the principle of the strict interpretation of criminal law and to the rule that any doubts must be resolved in favour of the accused.³³

50. Finally, the fact that young girls recruited into armed groups have been subjected to sexual violence provides information about the reality of individual situations, but is of no relevance to the definition in international law of the crimes of enlistment and conscription of children under the age of fifteen years. Such sexual violence constitutes a separately characterisable offence and must be prosecuted under a separate head.

War crime under article 8(2)(a)(ii) (inhuman treatment)

51. This provision makes “torture or inhuman treatment, including biological experiments,” an offence when carried out, in the context of an international armed conflict, against persons protected by one or more of the 1949 Geneva Conventions.

52. Contrary to the argument of the Legal Representatives,³⁴ who appear to confuse criminal intent (“mental element”³⁵) and special intent, the crime of “inhuman treatment” requires that the criminal intent of the perpetrator be demonstrated in accordance with article 30. The Elements of Crimes make it clear that this offence is based on the premise that “the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons”.³⁶

53. The Appeals Chamber will note:

- that the “facts and circumstances” described in the *Decision on the confirmation of charges* do not include any allegation of torture or abuse having caused “mental pain or suffering upon one or more persons”. Being

³³ *Case of Kokkinakis v. Greece*, ECHR, Application No 14307/88, “Judgment”, 25 May 1993, paras. 51-52.

³⁴ ICC-01/04-01/06-1891-tENG, para. 18.

³⁵ Article 30.

³⁶ *Elements of Crimes*, article 8(2)(a)(ii)-2, Inhuman treatment, Element 1.

forced to undergo tough military training and being subjected to “rigorous and strict discipline”³⁷ cannot be considered to reach the severity threshold of “inhuman treatment”.

- that the enlistment, conscription or participation in hostilities of children under the age of fifteen years cannot be considered inhuman treatment *per se*.³⁸ “Inhuman treatment” as an offence pre-supposes evidence of severe suffering inflicted with intent and effectively suffered, in other words an act distinct from the enrolment, conscription or participation in hostilities of children under the age of fifteen years.
- that, in the present case, the *Decision on the confirmation of charges* does not describe any situation where such suffering was inflicted with intent by members of the UPC upon enlisted children in the context of their military activities. However, the circumstances and nature of particularly severe suffering of this kind must be expressly described in order for it to be taken into consideration for purposes of examination of the charges.

War crime under article 8(2)(c)(i) (cruel treatment)

54. The offence defined by this provision is “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”, committed within the context of an armed conflict not of an international character against persons taking no active part in the hostilities.

³⁷ *Decision on the confirmation of charges*, ICC-01/04-01/06-803-tEN, para. 265.

³⁸ The position taken by the ICRC in its commentary on Article 77 of Additional Protocol I is only valid as an opinion and has no normative effect. The same commentary explicitly acknowledges that the position of the ICRC, whereby the use of child soldiers during hostilities constitutes “*inhumane practice*”, is not representative of the practice of States or of customary international law (Sandoz, Swinarski, Zimmerman, *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, 1987, p. 900, para. 3184).

55. The Legal Representatives are seeking the implementation of regulation 55 on account of acts constituting “cruel treatment” of children under the age of fifteen years enlisted in the FPLC.

56. This calls for the same comments as those made above with regard to the war crime under article 8(2)(a)(ii) (inhuman treatment).

57. In conclusion, it is clear that that the additional charges envisaged by the Legal Representatives have no basis in the “facts and circumstances” set out in the *Decision on the confirmation of charges*. The argument 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”³⁹ is irrelevant, given that the scope of the matters of which the Chamber is seized is exclusively defined by the “facts and circumstances” set out in the *Decision on the confirmation of charges*, and not by the facts of various kinds alleged by witnesses in the course of the trial.⁴⁰

2-3 If the Chamber were to allow the new charges discussed above, this would seriously undermine the fundamental rights accorded to the accused by article 67(1)(a), (b) and (c), as well as the fairness of the trial.

58. At the current stage of the proceedings, the addition of new offences would clearly infringe the core rights of the accused and would seriously jeopardise the fairness of the trial.

- These new charges were not notified to the accused in a timely manner.

59. It is clear from what has been said above that the *Decision on the confirmation of charges* did not inform the accused “in detail” of the offences which the applicant victims now wish to see added to the charges against him.

³⁹ ICC-01/04-01/06-1891-tENG, para. 15.

⁴⁰ See for example: *The Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08-424, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, para. 207.

60. If a Party or the Chamber considered that the “facts and circumstances” set out in the *Decision on the confirmation of charges* were capable of being differently characterised, then it was bound to take the necessary action without delay, so as to ensure that the accused was informed “promptly” of the charges against him.

61. It was in these circumstances that the Chamber held that it was necessary, prior to the commencement of the trial, to implement the procedure set out in regulation 55 in relation to the issue of the nature of the armed conflict referred to in the charges.

62. It should be noted that, in the event:

- Trial Chamber I did not envisage any modification of the legal characterisation of the facts other than that relating to the nature of the armed conflict;
- the Legal Representatives waited until late on in the proceedings before submitting the present Application to the Chamber, and provided no explanation for their delay in doing so;
- the Prosecutor publicly confirmed on several occasions that he would not seek to add new charges in the present case.⁴¹

63. Thus, not only was the accused not informed in good time prior to the commencement of the trial that he would have to defend himself against additional charges, but the position adopted by Trial Chamber I, the passivity of the participating victims and the public statements of the Prosecutor strengthened his conviction that he would not need to do so.

⁴¹ See for example: ICC-01/04-01/06-1067, para. 26 and ICC-01/04-01/06-T-69-ENG, p. 37, lines 4 *et seq.*

64. It follows that to charge new offences at this stage of the trial would be clearly contrary to article 67(1)(a).

- **The accused was only able to prepare and conduct his defence on the basis of the charges accepted and set out in the *Decision on the confirmation of charges*.**

65. The purpose of the right of the accused to be “informed promptly and in detail of the nature, cause and content of the charges” is to enable him to prepare and conduct his defence effectively, in other words to conduct investigations into the facts alleged against him, to implement his rights under article 67(2) and rule 77 and to conduct an effective cross-examination of Prosecution witnesses. A clear and detailed statement of the charges thus determines the defence strategies deployed.

66. As a result, to date the Defence has essentially focused its investigations and interventions on matters relating specifically to the constituent elements of the crimes of enlistment, conscription or participation in hostilities of children under the age of fifteen years.⁴²

67. Since the charges of sexual slavery, inhuman treatment and cruel treatment were not accepted in relation to the accused, the Defence did not consider it necessary to conduct investigations in this respect, to submit applications for disclosure pursuant to article 67(2) or rule 77, or to challenge the testimony of witnesses on these matters.

68. At the current stage of the trial, to widen the scope of the prosecution to include these new offences would cause unacceptable prejudice to the accused:

⁴² The age of the recruits in particular has been one of the major concerns as far as the Defence was concerned. Yet this issue becomes entirely irrelevant in light of the new charges.

- First, he would have insufficient time and facilities to prepare his defence in light of these new charges;
- Secondly, and more importantly, the fact that these fresh charges were not notified in a timely manner will have deprived him of the possibility of adapting his defence strategy in light of the evidence already submitted by the Prosecutor in the course of the trial.

69. It follows that the addition of these fresh charges would cause the accused serious and irreparable harm, compromising one of his most fundamental rights.

- **To amend the charges at the current stage of the trial would infringe the right of the accused to be tried without undue delay.**

70. In the unlikely event that the Appeals Chamber were to accept any of the charges proposed by the Legal Representatives, it would then be incumbent on Trial Chamber I to seek to limit the harm caused by applying the provisions of paragraphs 2 and 3 of regulation 55.

71. In the present case, implementation of those provisions could lead Trial Chamber I to order all the witnesses who have already testified to appear before the Court again, so as to enable the Defence to examine and test their testimony in light of the new charges.⁴³

72. Similarly, the Chamber might need to suspend the proceedings so as to allow the Defence “adequate time and facilities” to conduct additional investigations and prepare its case.⁴⁴

73. Such a situation would unduly delay the outcome of a trial which has already suffered multiple delays.

⁴³ Regulation 55(3)(b).

⁴⁴ Regulation 55(3)(a).

74. It follows that the addition of new charges at this stage of the trial would be manifestly incompatible with the right of the accused to be tried without undue delay.⁴⁵

SUSPENSIVE EFFECT

75. The implementation of the Decision has a direct impact on the future course of the trial, in particular because:

- it requires the accused to vary his defence strategy in light of the statements provided by the witnesses who are due to appear when the trial resumes;
- it may result in the submission of evidence which has not so far been envisaged, as well as in the recall of certain Prosecution witnesses before the Defence presents its case;
- finally, implementation of the rights and guarantees provided for in paragraphs 2 and 3 of regulation 55 will cause the resumption of the trial to be delayed.

76. Implementation of the Decision under appeal should therefore be suspended in order to avoid irreparable prejudice being caused to the accused.

⁴⁵ *Prosecutor v. Milutinovic et al*, IT-05-87-T, “Order Regarding Prosecution’s Submission With Respect to Rule 73 Bis (D)”, 7 April 2009, para. 8.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER:

TO ORDER the immediate suspension of the Decision under appeal;

TO SET ASIDE the Decision rendered on 14 July 2009 by Trial Chamber I.

[signed]

Catherine Mabilie, Lead Counsel

Dated this 10th of September 2009, at The Hague.