Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **19 June 2009**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document
+ Public Annex
Defence Response to the 'Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court' of 22 May 2009 and to the 'Prosecution's Response to the Legal Representatives' "*Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour*"' of 12 June 2009

Source: **Mr Thomas Lubanga'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 Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of the Victims
Mr Luc Walleyn
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 (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

BACKGROUND

1. On 8 April 2009, the Legal Representatives of the Victims (hereafter "the Legal Representatives") informed the Trial Chamber (hereafter "the Chamber") of their intention to file an application under Regulation 55.[1]

2. On 22 May 2009, the Legal Representatives jointly filed an application entitled "Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the *Regulations of the Court*" (hereafter "Joint Application").[2]

3. On 29 May and 12 June 2009, the Prosecutor filed his observations.[3]

4. The purpose of the present observations by the Defence is to oppose the above Application, which seeks to introduce new charges against the accused.

OBSERVATIONS

5. In their Joint Application, the Legal Representatives allege that the victims whom they are assisting, presented as "*former child soldiers who were forcibly recruited into the UPC/FPLC*", had all suffered inhuman and/or cruel treatment during their military training, and, in the case of the young girls, had "*been sexually enslaved*".[4]

6. They request the "*implementation of the procedure provided for by regulation 55 of the Regulations of the Court*", with a view to having an "*appropriate legal characterisation*" attached to these acts of sexual violence and inhuman and cruel treatment.

7. Although it makes frequent use of the concept of "re-characterisation", the Joint Application seeks in reality to enable the accused to be convicted not only of the

[1] ICC-01/04/06-T-167-ENG, p. 26, lines 24 *et seq*.
[2] ICC-01/04-01/06-1891-tENG.
[3] ICC-01/04-01/06-1918 and ICC-01/04-01/06-1966.
[4] ICC-01/04-01/06-1891-tENG, para. 11.

offences specified by the Pre-Trial Chamber in its *Decision on the confirmation of charges*, but also of "sexual slavery", "inhuman treatment" and "cruel treatment", which are crimes provided for by articles 8(2)(b)(xxii), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i).

8. The Legal Representatives claim that regulation 55 authorises the addition of these new charges against Mr Lubanga.

9. The following observations demonstrate that this Application is inadmissible and without merit.

1. Regulation 55 does not authorise the extension of the prosecution to include additional offences not referred to in the *Decision on the confirmation of charges*.

1.1. The sole purpose of regulation 55 is to enable the correction of an error of characterisation.

10. Regulation 55 authorises the Chamber to "*change the legal characterisation of facts*", that is to say, under certain conditions, to substitute another characterisation for that initially accepted by the Pre-Trial Chamber in the decision on the confirmation of charges.

11. The sole purpose of this power is to ensure that the facts referred to in the decision on confirmation of the charges "[…] *accord with the crimes under articles 6, 7 or 8* […]",[5] that is to say, to prevent a simple error of characterisation from invalidating the prosecution.

12. As noted by the ICTY concerning the judges' power to re-characterise, "*any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution* […]".[6]

[5] Regulation 55(1).
[6] *Prosecutor v. Zoran Kupresic et al*, Case No IT-95-16-T, Judgment, 14 January 2000, paras. 731 *et seq*. (emphasis added).

13. In response to the question "*with what powers is a Trial Chamber vested when faced with a charge that has been wrongly formulated by the Prosecutor?*",[7] case-law of the ad hoc Tribunals has stated clearly that the power of judges to re-characterise is limited to replacing the offence initially charged with a lesser offence already included in the original.[8] Any other form of re-characterisation would require an amendment to the indictment itself.[9]

14. Regulation 55, which follows on from this case-law, in no circumstances gives the Chamber the authority to charge the accused with additional offences not set out in the *Decision on the confirmation of charges*, even if they are a product of the "*facts and circumstances described in the charges*".

15. In allowing the Chamber to re-characterise correctly the facts before it, regulation 55 confines itself to authorising rectification of an erroneous characterisation, but does not empower the Chamber to include additional offences alleged to have been omitted or rejected when the charges were being confirmed.

16. However, in the present case the Legal Representatives are not claiming that the characterisations accepted by the *Decision on the confirmation of charges* are inappropriate and should be replaced by other characterisations better suited to the acts being prosecuted.[10] It cannot indeed be disputed that the "*facts and circumstances*" set out in the *Decision on the confirmation of charges* "*accord with the crimes*" accepted by the Pre-Trial Chamber.

17. In reality, far from setting out to rectify an error, they are asking the Chamber to consider, in addition to the offences initially confirmed, other offences based on

[7] *Ibid.*, para. 670 (emphasis added).
[8] *Ibid.*, paras. 744 to 746; See also *Pélissier and Sassi v. France*, ECHR, Judgment, 25 March 1999, paras. 57 to 61.
[9] *Ibid.*, paras. 747 and 748; under the terms of the texts governing the ICC, this type of amendment falls within the sole jurisdiction of the Pre-Trial Chamber.
[10] ICC-0l/04-01/06-1891-tENG, para. 42.

separate facts, and differently characterised, some of which are of a more serious nature.[11]

18. Regulation 55 does not allow such an extension of the charges.

1.2. Regulation 55 does not allow the Chamber to consider additional offences, even when they are claimed to be based on the "facts and circumstances described in the charges"

19. The ICTY correctly emphasises that "[e]*ven though the* iura novit curia *principle is normally applied in international judicial proceedings, under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an individual accused are at stake*".[12]

20. Under the procedural regime operating at the ICC, the power of the Chamber to re-characterise is all the more limited in that, in contrast to the ad hoc Tribunals, it does not have any authority, subject to the exception provided for in regulation 55, to determine or amend the charges, as these matters are the sole prerogative of the Pre-Trial Chamber.

21. The notion of "charges" refers not only to the material acts attributed to the accused, which must be described with sufficient precision, but also to the legal characterisations under which these acts are being prosecuted. Case-law of the ad hoc Tribunals emphasises that the accused must be informed, prior to the commencement of trial, of the precise legal characterisation of the offences with

[11] 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.

[12] *Prosecutor v. Zoran Kupresic et al*, Case No IT-95-16-T, Judgment, 14 January 2000, para. 731; There is a distinction between the present case and those where several characterisations are established in respect of similar facts in the original indictment, thus raising the issue of converging characterisations; this is not the case here.

which he has been charged, and of the precise legal basis for the responsibility alleged.[13]

22. Any amendment to the charges liable to worsen the accused's situation or, in general, to prejudice the preparation of his defence, must take the form of an amendment to the indictment prior to commencement of the trial.

23. Any amendment to the charges that involves adding new legal characterisations or replacing initial characterisations with more serious characterisations,[14] can only be made in accordance with the combined provisions of articles 61(4) and 61(9) and rules 121(4) and 128, which give the Pre-Trial Chamber sole jurisdiction and require that the accused be informed of the new charges before the start of the trial.

24. This approach is supported, *mutatis mutandis*, by the case-law of the ICTs, and particularly by that of the ICTY, which considers that the re-characterisation of charges at the close of the trial is only possible in favour "*of a lesser included offence, not charged in the Indictment*".[15]

25. The extension of the prosecution and the aggravation of the charges, as sought by the Legal Representatives, can thus in no circumstances be envisaged by the Chamber within the framework of regulation 55 of the Regulations of the Court.

---

[13] *The 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. 26-28; *Idem* para. 738; *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 71 and/or 73*)."; *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; *Prosecutor v. Simic et al*, Case No. IT-95-9-T, Judgement, 17 October 2003, paras. 114 to 120, and, for example, para. 116.

[14] Article 61(9).

[15] *Prosecutor v. Zoran Kupreski et al*, Case No. IT-95-16-T, Judgement, 14 January 2000, paras. 728 *et seq*.

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".

26. The facts and circumstances that may be considered by the Chamber under regulation 55 must have been "*described in the charges and any amendments made to them*".

27. This requirement is based on the principle enshrined in article 74(2), whereby the Chamber's decision at the close of the trial "*shall not exceed the facts and circumstances described in the charges and any amendments to the charges"*.

28. In the instant case, as no amendment has been made since the *Decision on the confirmation of charges*, the Chamber cannot consider any "facts and circumstances" other than those set out in that Decision.[16]

29. It will be apparent to the Chamber that the "facts and circumstances" set out in the *Decision on the confirmation of charges* cannot be characterised so as to disclose the constituent elements of the crimes alleged by the Legal Representatives.

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

30. This provision provides for the offences of "*rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"*, committed *"as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*".

31. The Appeals Chamber will note that:

— the *Decision on the confirmation of charges* does not cite "facts and circumstances" characterising a widespread or systematic attack directed against a civilian population. In particular, at no time does it state that an

[16] 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.

attack of this nature was carried out by armed forces under the control of the accused against the community to which the children under the age of fifteen who were allegedly enlisted belong;

- the *Decision on the confirmation of charges* does not cite "facts and circumstances" characterising sexual violence, irrespective of its form or gravity. The same applies to the "document containing the charges" of 28 August 2006, filed by the Prosecutor with the Pre-Trial Chamber, and to the "amended document containing the charges", filed by the Prosecutor with the Chamber on 22 December 2008.

32. 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).

33. The circumstance that "[t]*he events described by a certain number of witnesses who have thus far testified before the Chamber*"[17] can be characterised as sexual violence is irrelevant, since these matters did not feature, even cursorily, in the *Decision on the confirmation of charges*. It goes without saying that the scope of the Chamber's seisin *ratione materiae* is exclusively defined by the terms of the *Decision on the confirmation of charges* and not by the variety of facts alleged by the witnesses during the trial.[18]

2.2. War crimes under article 8(2)(b)(xxii) and 8(2)(e)(vi) (sexual violence)

34. 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)).

[17] ICC-0l/04-01/06-1891-tENG, para. 17.

[18] 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.

35. The Appeals Chamber will note, as previously pointed out, that no act of this nature is mentioned in the *Decision on the confirmation of charges*.

36. 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).

37. 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.

38. This argument, which the Legal Representatives seem to be putting forward in confused fashion, does not stand up to scrutiny:

– Article 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.[19] 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 young children, and do not come within the framework of activities required in order for the force or the armed group to

[19] 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.

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 legislations.

– 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.[20]

39. 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.

40. The extension of the scope of these offences to include sexual violence, which is moreover characterised as a separate offence, would clearly run counter to the principle that criminal law provisions must be interpreted strictly, and to the rule that any doubts must be resolved in favour of the accused.[21]

[20] 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 (only 58 States have signed these principles). 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, almost nine years after the signing of the Rome Treaty and five to six years after the acts with which the accused has been charged. Therefore, although these Principles may be considered to be a source of law, they could not 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. In a decision of 31 May 2004 (SCSL-2004-14-AR72(E), 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. Lastly, the ICRC states that these instruments have no binding force.
(http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/children-soldier-press-article-00508?opendocument).
[21] *Kokkinakis v. Greece*, ECHR, Application No. 14307/88, *Judgment*, 25 May 1993.

41. Finally, the finding that young girls were recruited into armed groups for the purposes of sexual exploitation and reduced to the rank of sex slaves 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.

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

42. 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.

43. Contrary to the argument of the Legal Representatives,[22] who appear to confuse criminal intent ("mental element"[23]) 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*".

44. The 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 forced to undergo exhausting military training and being subjected to "*rigorous and strict*" discipline[24] cannot be considered to reach the severity threshold of "inhuman treatment".

[22] ICC-0l/04-01/06-1891-tENG, para. 18.
[23] Article 30.
[24] ICC-01/04-01/06-803-tEN, para. 265.

– the enlistment, conscription or participation in hostilities of children under the age of fifteen years cannot be considered inhuman treatment *per se*.[25] "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 enlistment, conscription or participation in hostilities of children under the age of fifteen years – offences which do not require that harm be proved.

– 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.

– furthermore, as regards the acts committed against them by soldiers from their own army, children under the age of fifteen enlisted in that army cannot be considered to be protected persons within the meaning of article 8(2)(a)(ii). The protection guaranteed by the law of armed conflicts is only for the benefit of civilians and persons associated with the enemy and does not extend to acts committed by soldiers against members of their own forces.[26]

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

45. 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.

[25] 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).
[26] *Prosecutor v. Sesay*, SCSL-04-15-T, *Judgement*, 2 March 2009, paras. 1451 to 1453.

46. 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.

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

48. 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*"[27] 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.[28]

49. Nor, contrary to what the Prosecutor suggests, can the acts alleged in support of these charges be accepted as aggravating circumstances, since the Chamber cannot in its final verdict "*exceed the facts and circumstances described in the charges […]*".[29]

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.

50. The foregoing observations show that regulation 55 of the Regulations of the Court does not permit the Chamber to contemplate the addition of new charges against the accused. In any event, at the current stage of the proceedings, such an addition to the charges would clearly infringe the core rights of the accused and would seriously jeopardise the fairness of the trial.

[27] ICC-0l/04-01/06-1891-tENG, para. 15.
[28] *Supra*, footnote 18.
[29] Article 74(2).

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

51. Article 67(1)(a) provides that the accused must be "*informed promptly and in detail of the nature, cause and content of the charge […]*".

52. The jurisprudence of the ad hoc Tribunals insists on the need for the accused to be notified in the indictment, not only of the nature of the acts of which he is accused, but also of the precise legal characterisation of the offences with which he has been charged and of the legal basis for the responsibility alleged.[30] Failing this, the indictment must be amended according to a specific procedure, or, if not amended in good time, dismissed.[31]

53. As the ICTY emphasises, "*[w]ere 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*".[32]

54. 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.

55. If a party, a participant 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

[30] *Prosecutor v. Zoran Kupreskic et al*, Case No. IT-95-16-T, *Judgement*, 14 January 2000, para. 738; *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 et 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 to 52; *Prosecutor v. Simic et al*, Case No. IT-95-9-T, *Judgement*, 17 October 2003, paras. 114 to 120, and, for example, para. 116. See also: *Gouget v. France*, ECHR, Application No. 61059, 24 April 2006, para. 28.

[31] *Prosecutor v. Krnojelac*, idem, para. 145; *Prosecutor v. Zoran Kupreskic et al*, idem, para. 748; *Prosecutor v. Simic et al*, idem, para. 120; *Prosecutor v. Brdanin and Talic*, idem, para. 51.

[32] *Prosecutor v. Zoran Kupreskic et al*, idem, para. 740.

without delay, so as to ensure that the accused was informed "promptly" of the charges against him.

56. 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.

57. In the present case, it must be noted that:

– the Chamber 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.[33]

58. 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.

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

[33] See, for example: ICC-01/04-01/06-1067, para. 26 and ICC-01/04-01/06-T-69-FRA, p. 30, lines 21 *et seq*.

3.2. The accused has only been 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*.

60. 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.

61. 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.[34]

62. Since no charges of sexual slavery, inhuman treatment and cruel treatment had been confirmed against 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.

63. 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:

– firstly, 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.

[34] 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.

64. This situation would thus result in allowing the judges to examine charges in reliance on testimonies which it will not have been possible to challenge fully and fairly during the trial, in conditions consistent with article 67.[35]

65. It follows that the addition of these new offences would cause serious and irreparable prejudice to the accused, infringing one of his most fundamental rights.

3.3. Amending the charges at the current stage of the trial would violate the accused's right to be tried without undue delay.

66. The foregoing observations show that the introduction of new charges at the current stage of the trial would cause serious and irreparable harm to the fundamental rights of the accused.

67. However, in the unlikely event that the Chamber were to accept any of the charges proposed by the Legal Representatives, it would then be incumbent upon it to seek to limit the harm caused by applying the provisions of paragraphs 2 and 3 of regulation 55.

68. In the present case, implementation of those provisions would compel the Chamber 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.[36]

69. Similarly, the Chamber would have to suspend the proceedings so as to allow the Defence "adequate time and facilities" to conduct additional investigations and prepare its case.[37]

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

[35] ICC-01/04-01/06-1891-tENG, paras. 32 to 34.
[36] Regulation 55(3)(b).
[37] Regulation 55(3)(a).

71. 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.[38]

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO DISMISS the Joint Application by the Legal Representatives.

[signed]

Ms Catherine Mabille, *Avocate à la Cour*

Dated this 19 June 2009

At The Hague, The Netherlands

[38] *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.