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International Criminal Court

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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

Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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I. THE ISSUE

1. The majority have advanced, as it seems to me, two central conclusions in their Decision:

   i) "Regulation 55 sets out the powers of the Chamber in relation to two distinct stages" (paragraph 27), with the result that on the present application "the limitations provided in Regulation 55(1) to the 'facts and circumstances described in the charges' are not applicable to the present procedural situation, which is governed by Regulation 55(2) and (3)'" (paragraph 32), and

   ii) The "condition for triggering the mechanism of Regulation 55(2)", namely "the Chamber's finding that the legal characterisation of facts may be subject to change" is met on the basis of "the submissions of the legal representatives of victims and the evidence heard so far during the course of the trial" in that the majority are persuaded that "such a possibility exists", and notice is to be given to the parties and participants (paragraph 33).

2. I regret that I am unable to accept these conclusions or the analysis that underpins them.

II. THE REGULATION

3. Regulation 55 of the Regulations of the Court, which is entitled **Authority of the Chamber to modify the legal characterisation of facts**, provides as follows:

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

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

III. THE AMBIT OF REGULATION 55

A. General Conclusions

4. Regulation 55, endowing the Chamber with authority "to modify the legal characterisation of facts" created, in my opinion, an indivisible or singular process, for the reasons set out hereafter.

B. The context of Regulation 55

5. First, it is necessary to consider Regulation 55 in its overall context.

6. Regulation 1(1) prescribes that the Regulations "shall be read subject to the Statute and the Rules" and that Article 52(1) of the Statute enjoins the Judges to adopt such Regulations as are "necessary for the routine functioning of the Court."

7. The expression, "legal characterisation of the facts", in Regulation 55 comes from Regulation 52, the provision in the Rome Statute framework that describes the "Document containing the charges". Its terms are:

> The document containing the charges referred to in article 61 shall include:
>
> (a) The full name of the person and any other relevant identifying information;
>
> (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
>
> (c) A **legal characterisation of the facts** to accord both with the crimes under Articles 6, 7 or 8 and the precise form of participation under articles 25 and 28 (emphasis added).

8. Therefore, a charge for an identified accused is, in essence, a combination of a "statement of facts" and the "legal characterisation" of those facts.

9. There are significant and various restrictions to the ambit of Regulation 55. Sub-regulation (1) creates the opportunity for the Chamber to effect a modification in its final Decision on the charges, provided that the "the facts and circumstances described in the charges and any amendments to charges" are not exceeded. The origins of latter restriction are to be found in the unequivocal language of Article 74(2): "The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not **exceed the facts and circumstances described in the charges** and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial (emphasis added)."

10. Since a charge must be confirmed by the Pre-Trial Chamber pursuant to Article 61 of the Statute before a Trial Chamber is constituted, the inevitable consequence is that the Trial Chamber is entitled to modify only those facts and circumstances that were set out in the Document Containing the Charges, as confirmed by the Pre-Trial Chamber (amended or otherwise).[1] In this case there is an Amended Document Containing the Charges.[2]

11. Therefore, Regulation 52 describes what constitutes a criminal charge for the purpose of trials before the ICC, and Article 74(2) generally restricts a conviction in the final Decision to the facts and circumstances described in the charge, as set out in the Document Containing the Charges under Regulation 52.

[1] ICC-01/04-01/06-356.
[2] ICC-01/04-01/06-1571-Conf-Anx; ICC-01/04-01/06-1573-Anx.

12. However, Regulation 55 is further circumscribed. The governing provision as regards amendments to the charges, additional charges, substitute charges or the withdrawal of charges is Article 61(9):

> After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

13. Therefore, the power to frame and alter the charges is exclusively a function of the Pre-Trial Chamber. By Article 61(9), after the charges have been confirmed, control over them remains with the Pre-Trial Chamber until the commencement of the trial, since post-confirmation and "before the trial has begun", the Prosecutor may, with the permission of the Pre-Trial Chamber and on notice to the accused, amend the charges. For additional charges, or to substitute more serious charges, there must be a further confirmation hearing.

14. Once the trial has commenced, the two limited powers given to the Trial Chamber under the Rome Statute framework in relation to the charges are, first, to grant or reject an application by the prosecution to withdraw the charges and, second, to modify the legal characterisation of the facts under Regulation 55.

15. The structure of Article 61(9) leads to the necessary conclusion that once the trial has begun, the charges cannot be amended, nor can additions or substitution to the charges be introduced. The Article is divided into two phases: "After the charges are confirmed and before the trial has begun

[...]" when amendments, additions and substitutions are possible and "After the commencement of the trial [...]" when the only available measure is that the Prosecutor, with leave, may withdraw the charges. I should add that in my view Articles 61(11) and 64(6), which enable the Trial Chamber to exercise any functions of the Pre-Trial Chamber, are of no effect here because they operate expressly **subject to** Article 61(9): "Once the charges have been confirmed [...] a Trial Chamber which, **subject to paragraph 9** and to Article 64, shall be responsible for the conduct of the subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings" (Article 61(11), emphasis added).[3]

16. To recapitulate, the Statute, in explicit terms, left control over framing and effecting any changes to the charges (under Article 61(9) of the Statute) exclusively to the Pre-Trial Chamber. The scheme was clearly designed to ensure that once the trial has begun the charges are not subject to any further amendment, addition or substitution. No opportunity is created for the Trial Chamber to send the case back to the Pre-Trial Chamber for a further hearing to amend or alter the charges, because "[a]fter the commencement of the trial" the only available step is, following an application and with leave, to withdraw the charges. Critically, the statutory scheme has provided an accused with a high degree of certainty as to charges that he or she will face once the trial has commenced.

17. Inevitably, it follows that a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the

[3] See also: 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, paragraph 40.

charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by Article 61(9).

C. *The distinction between modifying the legal characterisation of the facts and amending, adding or substituting a charge*

18. Under the scheme created in Article 61, the "charges" (Article 61(1)) must be set out in "the document containing the charges" (Article 61(3)(a)), and it is this latter document that is described and defined in Regulation 52, as analysed above. To repeat, the "charge" is, therefore, in two parts: first, the statement of facts (Regulation 52(b)) and, second, the legal characterisation of the facts (Regulation 52(c)). The critical question that arises is whether it is possible to "modify" the latter – the characterisation of the facts – without *ipso facto* amending the charge. Put otherwise, can a charge remain "unamended" if one of the necessary ingredients, the legal characterisation, has changed?

19. This highly important issue has not been adequately addressed in the submissions of counsel, and although in those circumstances I am not prepared to express a general conclusion on this question, it nonetheless provides the context for resolving the merits of the present application: is the proposed modification of the legal characterisation of the facts, in reality, an amendment or addition to, or substitution for, the charge? Unless in due course Regulation 55 is found to be incompatible with Article 61(9), this will (at the very least) constitute a question of fact and degree, to be assessed on a case-by-case basis. It is this latter approach that I have adopted in the analysis set out later in this Opinion.

20. Finally on this issue, I merely add that, in due course, the debate is likely – in my view – to be focussed on whether the Trial Chamber is restricted by way of modifications under Regulation 55 to such relatively limited steps as, by way of example, applying a lesser "included offence" (*viz.* one of the crimes under Articles 6, 7 or 8) to that contained in the Document Containing the Charges, and reclassifying the mode of liability (*viz.* the form of participation of the accused under Article 25 and 28).[4] Regulation 52(c) expressly differentiates between a legal characterisation of the facts as regards the crimes, on the one hand, and a legal characterisation of the facts as regards the precise form of participation, on the other.

D. Is Regulation 55 a singular or indivisible provision, or is it in two distinct parts?

21. Sub-regulation 1 provides for changes to the legal characterisation of the facts, as follows:

i) it concerns modifications implemented in the (final) Decision;

ii) the Chamber may effect a change of this kind so that the legal characterisation of the facts accord with the crimes under Articles 6, 7 or 8 or so that they accord with the form of participation under Articles 25 and 28; and

iii) the modifications must not exceed the facts and circumstances described in the charges.

22. It follows that if sub-regulation 1 is separated from sub-regulations 2 and 3, the only material protection afforded to an accused is that the

[4] See ICTY, *Prosecutor v. Zoran Kupreskic et al., Case No. IT-95-16-T,* Trial Chamber Judgment, 14 January 2000, paragraphs 745 and 746.

modification cannot exceed the facts and circumstances described in the charges. In my judgment, unless the Chamber automatically incorporates significant additional measures to protect the rights of the accused, changes to the legal characterisation of the facts made at the very end of the case (*viz.* in the final Decision) will inevitably infringe certain central safeguards provided for the accused in the Rome Statute (as reflected in other international provisions), and it will run counter to the approach taken in key human rights jurisprudence. Article 21(3) places an obligation on the Chamber to apply the law in accordance with internationally recognised human rights. The accused has a fundamental right under the Rome Statute "to be informed promptly and in detail of the nature, cause and content of the charge [...]" and this right is reflected in other key international instruments.[5]

23. Within the context of the European Convention, the European Court of Human Rights ("ECtHR") has expressly addressed, in a number of cases, the present issue of the rights of an accused when facts contained in the charges are re-characterized. In the *Case of Pelissier and Sassi v. France,*[6] the Court, whilst recognising that the right of the trial court to re-characterize the facts submitted by the prosecution does not *ipso facto* violate the right of the accused to be informed promptly of the nature and causes of the charge, stressed that the defendant has the right "to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and in which the accusation is based, but also the legal characterization of facts."[7] The Court underlined that "in criminal matters the provision of full, detailed information concerning the charges against a

[5] See also Article 14(3) of the International Covenant of Civil and Political Rights and Article 6(3)(a) of the European Convention on Human Rights and Fundamental Freedoms.
[6] Application No.25444/94, Judgment 25 March 1999, paragraph 62.
[7] *Ibid.*, paragraph 51.

defendant, and consequently the legal characterization that the Court might adopt in the matter is an essential prerequisite for ensuring that the proceedings are fair."[8] Further, it was found to be essential that defendants are given the "possibility of exercising their defence rights [...] in a practical and effective manner and, in particular, in good time."[9] Within the context of the facts of that case, the Court held that there should have been an adjournment (before the Aix-en-Provence Court of Appeal), to enable the accused to submit arguments or written observations, and the ECtHR concluded there had been violations of paragraph 3(a) and (b) of Article 6 of the Convention, on the basis that the applicants were given no opportunity to prepare their defence to the "new charge" (the changes being no more than a re-characterization of the facts). The Court observed that if the accused first learns of the re-characterization of the facts in the court's judgment, this "plainly [...] was too late."[10]

24. In the *Case of Abramyan v. Russia,*[11] in dealing with the reclassification of offences by the trial court, the ECtHR observed that "[p]articulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. [...] In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair."[12] The Court went on to criticise the fact that the accused only learned of the new classification introduced by the trial court when the latter "pronounced its judgment at the end of the

[8] *Ibid.*, paragraph 52.
[9] *Ibid.*, paragraph 62.
[10] *Ibid.*
[11] Application No.10709/02, Judgment 9 January 2009.
[12] *Ibid.*, paragraph 34.

hearing",[13] having given no earlier indication that the accused risked conviction under particular articles of the relevant Criminal Code. In the circumstances, the Court concluded the applicant's right to a fair trial, and, in particular, the rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were infringed.[14]

25. Similarly, in the *Case of Mattoccia v. Italy,*[15] a case in which "[...] the information contained in the accusation was characterised by vagueness as to essential details concerning time and place, was repeatedly contradicted and amended in the course of the trial [...]" the Court observed "[a]s concerns the changes in the accusation, including the changes in its "cause", the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation."[16]

26. It follows, in my view, that if sub-regulation 1 is separated from sub-regulations 2 and 3, the Court will need to incorporate each element of the safeguards afforded by sub-regulations 2 and 3, in order to ensure that the accused is "informed promptly and in detail of the nature, cause and content of the charge [...]". In order to comply with fair-trial rights these perforce will include:

i) notice of the possibility that the legal characterisation may be subject to change (sub-regulation 2);

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[13] *Ibid.*, paragraph 36.
[14] *Ibid.*, paragraph 39.
[15] Application No.23969/94, Judgment 25 July 2000.
[16] *Ibid.*, paragraphs 71 and 61. See also: Case of I.H. and Others v. Austria, Application No. 42780/98, Judgment 20 July 2006; Case of Sadak and Others v. Turkey, Applications Nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment 17 July 2001; Case of Dallo v. Hungary, Application No. 29082/95, Judgment 1 March 2001.

ii) an opportunity to make oral and written submissions (sub-regulation 2);

iii) if necessary, suspending the hearing to provide adequate time and facilities for effective preparation, and holding a hearing to consider all matters relevant to the proposed change (sub-regulation 2);

iv) ensuring there is adequate time and facilities for the effective preparation of the accused's defence (sub-regulation 3); and

v) if necessary, recalling witnesses or calling new witnesses (sub-regulation 3).

27. That the safeguards adumbrated in sub-regulations 2 and 3 are the *sine qua non* for establishing consistency between sub-regulation 1 and the core rights of the accused is an important factor in determining that Regulation 55, in its entirety, is a singular and indivisible provision.

28. Furthermore, in their Decision, the majority suggest that if Regulation 55(2) is treated as a separate provision, enabling the Chamber to change the characterisation of the facts at any time during the trial, it follows that the restriction in Regulation 55(1) – that the modification shall not exceed the facts and circumstances described in the charges and any amendments thereto – does not apply. In my respectful view, this result would markedly undermine the rights of the accused under Article 67(1)(a) "[t]o be informed promptly and in detail of the nature, cause and content of the charge [...]", set against the general restrictions on changes to the charges as reflected in governing provision, Article 61(9). The facts of a criminal case frequently – in reality, invariably – change and develop as the trial unfolds, and under the approach preferred by the majority, the accused could be confronted, at any stage, with a re-characterization based on the

new facts and circumstances that have emerged during the trial. Even allowing for the safeguards under sub-regulations 2 and 3, this would be inimical to the statutory provisions just set out, which strongly tend towards finality and certainty as regards the charges, rather than to flexibility, particularly if this leads to a significant change.

29. Equally fundamentally, a legal re-characterisation of the facts reached during the trial (based on new facts and circumstances that have emerged during the trial) would in due course become incorporated into the Decision at the end of the case. A conviction of the accused on this basis, would lead – without more – to a fundamental breach of the prohibition contained in Article 74(2), that "[...] [t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges [...]". Put otherwise, a Decision convicting the accused on the basis of a charge which includes a legal re-characterisation of facts, whenever the modification is made, would be unlawful, if it exceeds the facts and circumstances described in the charges.

30. It follows that I am unable to accept the proposition that sub-regulations 55(1) and 55(2) establish two separate processes. By way of a postscript under this heading, I note that this conclusion is consistent with the Trial Chamber's earlier consideration of this issue. In our Decision of the 13 December 2007,[17] the Chamber held as follows:

> The scheme of Regulation 55 indicates that a decision to modify the legal characterisation of facts will only occur at a late rather than an early stage in the trial, because it is provided that notice shall be given to the parties of this possibility once

[17] 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, paragraph 47.

> it emerges, and the Court shall hear submissions "after having heard the evidence". This will be a fact-dependent decision, [...] What is clear is that this is likely to emerge as an issue at the conclusion of the evidence in the case, and the parties and participants are, accordingly, on notice (pursuant to Regulation 55(2)) that there is a possibility that the Chamber may modify the characterisation of the facts so as to delete the international armed conflict ingredient of the first group of three charges, thereby re-characterising it as internal.

31. I note also that in that Decision[18] the Chamber addressed the relationship between Regulation 55 and Article 74(2), as follows:

> Turning finally to Regulation 55, this regulation was recommended by the judges in plenary and thereafter adopted by the Assembly of States Parties, which underlines its legitimacy. The Bench recognises, however, that if use of Regulation 55 conflicted with any statutory provision or one contained in the Rules of Procedure and Evidence, then the latter take precedence. However, the terms of Regulation 55 do not involve any conflict with the main relevant provision, Article 74(2), 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. Therefore, so long as the facts and the circumstances as described in the charges are not exceeded, pursuant to Regulation 55 it is possible to give those facts and circumstances a different legal characterisation, so long as no unfairness results.

32. I stress, however, in that Decision the Chamber was not called on, additionally, to analyse the relationship between Article 61(9) and Regulation 55, because the Chamber was considering two specific alternative submissions: first, an application to strike down part of the Pre-Trial Chamber's Decision on the Confirmation of Charges (which the Trial Chamber rejected), and, second, by way of an alternative, an application to modify the legal characterisation of the facts in relation to the nature of the armed conflict (which the Chamber considered was premature).

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[18] ICC-01/04-01-06-1084, paragraph 31.

33. It follows that Regulation 55 was envisaged by the Chamber in the Decision of 13 December 2007 as an indivisible process, in which the opportunity to re-characterize at the end of the trial was qualified by the safeguards set out in sub-regulations 2 and 3.

IV. DOES IT APPEAR THAT THE LEGAL CHARACTERISATION OF THE FACTS MAY CHANGE?

A. General Conclusions

34. In my view, the proposals advanced by the victims do not raise the possibility that the legal characterisation of the facts may change. Instead, the victims seek to add five additional charges. Further, the proposals of the victims apart, no other possible changes to the legal characterization of the facts have been identified, and accordingly the preconditions have not been met to "give notice" under Regulation 55(2): there needs to be notification of the "**proposed change**" (as set out at the end of Regulation 55(2)), which should be identified and disseminated, so that the participants can make oral or written submissions, and which may be the subject of a separate hearing.

B. The Charges

35. It is instructive to set the charges, in their various forms, alongside the proposals advanced by the victims.

36. On 29 January 2007 the Pre-Trial Chamber confirmed six charges against the accused on which he was committed for trial, in the following way:

- CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, 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 fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003;

- CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, 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 fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003;

37. I describe these as six charges, because the Pre-Trial Chamber in each instance referred to the separate charges of:

- enlisting
- conscripting, and
- using

children under the age of fifteen.

38. This conclusion is reflected in the final section of the Amended Document Containing the Charges,[19] where the prosecution framed the charges, as follows:

[19] ICC-01/04-01/06-1571-Conf-Anx; ICC-01/04-01/06-1573-Anx.

- **Count 1:** CONSCRIPTING CHILDREN INTO ARMED GROUPS, a **WAR CRIME**, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

- **Count 2:** ENLISTING CHILDREN INTO ARMED GROUPS, a **WAR CRIME**, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

- **Count 3:** USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a **WAR CRIME**, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

- **Count 4:** CONSCRIPTING CHILDREN INTO NATIONAL ARMED FORCES, a **WAR CRIME**, punishable under Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.

- **Count 5:** ENLISTING CHILDREN INTO NATIONAL ARMED FORCES, a **WAR CRIME**, punishable under Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.

- **Count 6:** USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a **WAR CRIME**, punishable under Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.

39. The difference between the first three and the latter three charges is whether the conflict was of an international or internal nature.

C. *The Five Proposals*

40. On analysis, the true effect of the application in this case, is to advance the following five "proposals":

A. Sexual Slavery

- On the evidence, Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charge of **sexual slavery** as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack within the meaning of Articles 7(1)(g) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003; (*A **crime against humanity.***)

B. Sexual Slavery

- On the evidence, Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charge of **sexual slavery** as part of a plan or policy or part of a large-scale commission of this crime within the meaning of Articles 8(2)(b)(xxii) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003; (*A **war crime**, committed in violation of the laws and customs applicable in international armed conflict*);

C. Sexual Slavery

- On the evidence, Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charge of **sexual slavery** as part of a plan or policy or part of a large-scale commission of this crime within the meaning of Articles 8(2)(e)(vi) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003; (*A **war crime**, which although committed during an armed conflict not of an international character, was nonetheless a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949, namely an act of violence to life and person committed against persons taking no active part in the hostilities.*)

D. Inhuman treatment

- On the evidence, Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charge of **inhuman treatment** as part of a plan or policy or part of a large-scale commission of this crime within the meaning of Articles 8(2)(a)(ii) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003; (*A **war crime**, which involved a grave breach or grave breaches of the Geneva Conventions of 12 August 1949, namely inhuman treatment against someone protected under the provisions of a relevant Geneva Convention.*)

E. Cruel treatment

- On the evidence, Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charge of **cruel treatment** as part of a plan or policy or part of a large-scale commission of this crime within the meaning of Articles 8(2)(c)(i) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003; (*A **war crime**, which although committed during an armed conflict not of an international character, was nonetheless a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949,*

namely an act of violence to life and person committed against persons taking no active part in the hostilities.)

41. Significantly, the legal representatives have stressed that the proposed legal re-characterizations are not intended to replace "the qualifications" chosen by the Office of the Prosecutor in the Amended Document Containing the Charges. Instead, the legal representatives submit that the same facts are able to take on an additional legal qualification, and may constitute a violation of several of the prohibitions in the Rome Statute.[20] As I understand the argument, it is suggested that the purported modification of the legal classification can be applied separately to the same facts, as these constitute a violation of several crimes set out in the Statute.

42. At present the charges are brought as war crimes only, but proposal A. is put as a crime against humanity. However, far more notably, the present charges relate to the conscription, enlistment or use of child soldiers, whilst these new proposals add the significant elements of sexual slavery and inhuman treatment (requiring, it is to be noted, the probable reliance on additional facts and circumstances, as discussed in paragraphs 46, *et seq.* below), in the context of:

- separate and additional grave breaches of the Geneva Conventions, or

- separate and additional serious violations of the laws and customs applicable in international armed conflict, or

[20] Demande conjointe des représentants légaux des victimes aux fins de mise en oeuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, 22 May 2009, ICC-01/04-01/06-1891, paragraph 42.

- separate and additional serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely an act, or acts, of violence to life and person committed against persons taking no active part in the hostilities.

43. Although, as discussed above (paragraphs 18, *et seq.*), in due course the jurisprudence of the Court will need to define the relationship between Article 61(9) and Regulation 55, and in particular the dividing line between amending charges, adding additional charges or substituting more serious charges, on the one hand, and modifying the legal characterisation of the facts, on the other, focussing on this application, the five "proposals" involve changes to the Document containing the charges of such a wide-ranging and fundamental nature that they constitute additional charges. On the formulation advanced by the victims, the accused would be at risk of conviction on 11 (rather than 6) charges, because the Chamber may only convict on charges: under Article 74(2) "[…] [t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges […]." In these circumstances, in my view, each of these five "proposals" amounts to an application to add an additional charge, which is unlawful.

44. Of equal importance, conscripting, enlisting or using children under the age of 15 do not, *ipso facto*, involve sexual slavery or inhuman treatment (as defined in the Statute). Each of the five proposals is founded on a new form of criminal responsibility. These proposals – if endorsed – would involve additional, and arguably more serious, offences being levied against the accused, in breach of Article 61(9).

45. Only the Prosecutor is entitled to apply to amend, add or substitute charges and in each instance the Pre-Trial Chamber alone has jurisdiction to allow or refuse the application, and then only before the commencement of the trial. This application is made by the representatives of the victims, who do not have *locus standi* under Article 61(9), and it is addressed to the Chamber, which would be acting *ultra vires*.

V. OTHER MATTERS

A. The facts and circumstances described in the charges

46. It follows that I am unable to accept that Regulation 55 and the procedure thereunder are engaged by this application. This renders it unnecessary to reach a conclusion on whether the facts relied on by the legal representatives exceed the "facts and circumstances described in the charges" (Article 74(2) and Regulation 55(1)). Nonetheless, it is to be observed that the position on this issue would need careful scrutiny. It is clear that the prosecution at the confirmation stage made reference to the severe sanctions faced by the children, for example, in paragraph 36 of its Document Containing the Charges [21] and the Amended Document Containing the Charges:[22]

> The children in the FPLC training camps were subjected to strict military discipline. A detailed system of severe sanctions for misconduct was imposed on them, including beatings, detention and execution.

[21] ICC-01/04-01/06-356.
[22] ICC-01/04-01/06-1571-Conf-Anx; ICC-01/04-01/06-1573-Anx.

47. Further, the Pre-Trial Chamber confirmed that "they were subjected to rigorous and strict discipline, including lengthy and exhausting physical exercises which lasted all day, [...]"[23]

48. That said, the Court would need to investigate whether facts and circumstances exceeding those described in the Amended Document Containing the Charges are to be relied on in order to establish the crimes proposed by the legal representatives, and specifically as regards the facts relating to the alleged personal criminal responsibility of Thomas Lubanga, in terms of both the *actus reus* and the necessary *mens rea*.

49. The Amended Document Containing the Charges seemingly makes no reference to acts of sexual violence or sexual slavery (proposals A, B and C). Further, the Amended Document Containing the Charges apparently does not suggest that Thomas Lubanga had specific knowledge of, and was responsible for, the severe sanctions in the camp (proposals D and E); the suggestion in the document containing the charges may be no greater than that set out in paragraph 17, namely "[...] Thomas Lubanga Dyilo was in a position to exercise command and control over subordinate units on a permanent basis, and to stay informed about the general situation in Ituri, in particular about FPLC military operations **and the situation in the FPLC military training camps** (emphasis added)." Generally, it would be necessary to prove his participation in a plan or policy, or his involvement in a large-scale commission, of the charge of inhuman treatment, in the context of the charges.

50. These matters, *inter alia,* would require careful scrutiny to establish whether the victim's application is properly brought under Regulation 55,

[23] Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, paragraph 265.

and whether proof of the facts relied on by the legal representatives, following any re-characterization, exceed the "facts and circumstances described in the charges".

B. Fairness

51. There is similarly no need to reach conclusions on the particular issues relevant to fairness, as contained in Regulation 55 (2) and (3). I merely observe that if this application was properly brought within Regulation 55, very serious consideration would then have had to be given to the extent to which witnesses should be recalled, along with the additional time that would have been necessary for defence preparation, within the context of the attendant consequences for the accused's entitlement under Article 67 (c) to be tried without undue delay.

VI. CONCLUSIONS

52. It has been unnecessary to reach any conclusions under the two latter headings (*i.e.* "the facts and circumstances described in the charges" and "fairness") because, for other reasons as set out above, I would refuse this application.

53. In my judgment:

i. Regulation 55, endowing the Chamber with authority "to modify the legal characterisation of facts" created an indivisible or singular process;

ii. A modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by Article 61(9);

iii. Whether a proposed modification of the legal characterisation of facts is, in reality, an amendment or addition to, or substitution for, the charge is (at the very least) a question of fact and degree, to be assessed on a case-by-case basis;

iv. The procedure set out in Regulation 55 of giving notice of a proposed change to the legal characterisation of the facts has not been engaged by this application because the victims seek to add 5 additional charges, and no other relevant proposed changes have been formulated and disseminated;

v. In all the circumstances, the application should be dismissed and notification under Regulation 55 should not be given to the participants.

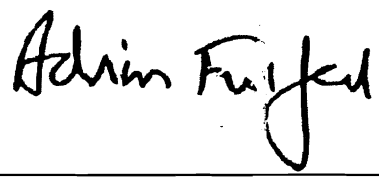
VII. POSTSCRIPT

54. In order to preserve the timeliness of the current trial, my view is that if leave for appeal is filed against the majority Decision (and if leave is granted under Article 82(1)(d)), it would be appropriate for the Appeals Chamber to consider an application for suspensive effect of the majority Decision to enable the trial to proceed on the basis of the current charges, as presently formulated, until any appeal is determined (see Article 82(3) and Rule 156(5) of the Rules of Procedure and Evidence). Otherwise, save

for one court witness who is unaffected by this issue, the Trial Chamber will not be able to hear further evidence until the appeal is resolved, and instead the next step necessarily will be to commence the Regulation 55 procedure.

55. It will be for any party filing an appeal (if that step is taken) to decide whether or not to request that the appeal has suspensive effect (Rule 156(5) of the Rules of Procedure and Evidence).

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford

Dated this 17 July 2009

At The Hague, The Netherlands