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No.: ICC-01/04-01/06  
Date: 23 October 2009

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyung Song, Presiding Judge  
Judge Erkki Kourula  
Judge Anita Ušacka  
Judge Daniel David Ntanda Nsereko  
Judge Christine Van den Wyngaert

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

**Public Document**

**Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009**

Source: The Legal Representatives of Victims a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0052/06, a/0051/06, a/0078/06, a/0232/06, a/0233/06, a/0246/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0610/08, a/0611/08 and a/0249/09.

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. BACKGROUND

1. On 22 May 2009, the Legal Representatives submitted a Joint Application for the Implementation of the Procedure pursuant to Regulation 55 of the *Regulations of the Court* ("Joint Application").<sup>1</sup>
2. On 14 July 2009, Trial Chamber I rendered its *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* ("Decision" or "Decision which is the subject of the Appeals").<sup>2</sup>
3. On 11 August 2009, the Defence submitted an application seeking leave to appeal the Decision.<sup>3</sup>
4. On 12 August 2009, the Prosecution also submitted an application seeking leave to appeal the Decision.<sup>4</sup>
5. On 27 August 2009, the majority of Trial Chamber I issued its *Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in*

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<sup>1</sup> See 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*", 22 May 2009, ICC-01/04-01/06-1891-tENG ("Joint Application").

<sup>2</sup> See 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* (Trial Chamber I), 14 July 2009, ICC-01/04-01/06-2049 ("Decision" or "Decision which is the subject of the Appeals").

<sup>3</sup> See 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*' rendered on 14 July 2009", 11 August 2009, ICC-01/04-01/06-2073-Conf-tENG.

<sup>4</sup> See the "Prosecution's Application for Leave to Appeal the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the *Regulations of the Court*'", 12 August 2009, ICC-01/04-01/06-2074.

accordance with Regulation 55(2) of the Regulations of the Court'<sup>5</sup> ("Clarification of the Decision").

6. On 31 August 2009, the Prosecution filed submissions in respect of the Clarification of the Decision.<sup>6</sup>

7. On 3 September 2009, Trial Chamber I rendered its *Decision on the prosecution and the defence applications 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'*<sup>7</sup> ("Decision granting leave to appeal").

8. On 10 September 2009, the Defence filed its "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'*"<sup>8</sup> ("Document filed by the Defence in support of its appeal").

9. On 14 September 2009, the Prosecution filed its "[...] Document in Support of Appeal against the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with

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<sup>5</sup> See the *Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'* (Trial Chamber I), 27 August 2009, ICC-01/04-01/06-2093 ("Clarification of the Decision").

<sup>6</sup> See the "Prosecution's Submissions to Trial Chamber I's *Clarification and further guidance to parties and participants in relation to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'*", 31 August 2009, ICC-01/04-01/06-2095.

<sup>7</sup> See the *Decision on the prosecution and the defence applications 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'* (Trial Chamber I), 3 September 2009, ICC-01/04-01/06-2107 (the "Decision granting leave to appeal").

<sup>8</sup> See the "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'*", 10 September 2009, ICC-01/04-01/06-2112-tENG OA15 OA16 ("Document filed by the Defence in support of its appeal").

Regulation 55(2) of the Regulations of the Court' and urgent request for suspensive effect"<sup>9</sup> ("Document filed by the Prosecution in support of its appeal").

10. On 15 and 22 September 2009, the Legal Representatives of Victims filed their applications to participate in the interlocutory appeals submitted by the Prosecution and the Defence against the Decision.<sup>10</sup>

11. On 22 September 2009, the Prosecution submitted its "[...] Response to the Defence Appeal against 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' and request for suspensive effect"<sup>11</sup> ("Prosecution Response to Defence Appeal").

12. On 24 September 2009, the Prosecution filed its response to the applications of the Legal Representatives to participate in the interlocutory appeals.<sup>12</sup>

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<sup>9</sup> See the "Document in Support of Appeal against 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' and urgent request for suspensive effect", 14 September 2009, ICC-01/04-01/06-2120 OA15 OA16 ("Document filed by the Prosecution in support of its appeal").

<sup>10</sup> See the "Application for participation by the Legal Representatives in the Appeals Proceedings relating to the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55 of the Regulations of the Court'", 15 September 2009, ICC-01/04-01/06-2121-tENG OA15 OA16; the "Application by the OPCV as the Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to Participate in the Interlocutory Appeals Lodged by the Prosecution and the Defence Against the Decision of 14 July 2009", 15 September 2009, ICC-01/04-01/06-2122-tENG OA15 OA16; and the "Application for Participation from the Legal Representatives of Victims a/0051/06, a/0078/06, a/0232/06 and a/0246/08 in the Defence and Prosecution Appeals against 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* rendered on 14 July 2009", 22 September 2009, ICC-01/04-01/06-2134-tENG OA15 OA16.

<sup>11</sup> See the "Prosecution's Response to the Defence Appeal against 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' and request for suspensive effect", 22 September 2009, ICC-01/04-01/06-2136 OA15 OA16 ("Prosecution Response to Defence Appeal").

<sup>12</sup> See the "Prosecution's response to victims' application for participation in the Prosecution and the Defence appeals against 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*", 24 September 2009, ICC-01/04-01/06-2140 OA15 OA16.

13. On 20 October 2009, the Appeals Chamber issued its *Decision on the participation of victims in the appeals*,<sup>13</sup> in which it granted the Legal Representatives of Victims a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0052/06, a/0051/06, a/0078/06, a/0232/06, a/0233/06, a/0246/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0610/08, a/0611/08 and a/0249/09 leave to participate in the appeals against the Decision and requested that they file their submissions in response to the documents filed by the Prosecution and the Defence in support of their appeals no later than 23 October 2009.<sup>14</sup>

14. Accordingly, the Legal Representatives submit the following observations on the interlocutory appeals by the Prosecution and the Defence against the Decision of 14 July 2009.

## II. SUSPENSIVE EFFECT

15. Both the Prosecution<sup>15</sup> and the Defence<sup>16</sup> joined an application to their appeal requesting that the Appeals Chamber grant suspensive effect to the Decision which is the subject of the appeals.

16. The Legal Representatives submit that the applications of the appellants for suspensive effect do not meet the criteria laid down by the Appeals Chamber in this regard. The Appeals Chamber, whilst emphasising that “[a]s *neither article 82(3) of the Statute nor rule 156 (5) of the Rules of Procedure and evidence stipulate in which circumstances suspensive effect should be ordered, this decision is left to the discretion of the*

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<sup>13</sup> See the *Decision on the participation of victims in the appeals* (Appeals Chamber), 20 October 2009, ICC-01/04-01/06-2168 OA 15 OA 16.

<sup>14</sup> *Idem*, p. 4.

<sup>15</sup> See Document filed by the Prosecution in support of its appeal, *supra*, footnote 9, paras. 19-21 and 50(a).

<sup>16</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 75-76.

*Appeals Chamber*”,<sup>17</sup> clearly ruled that an appeal could have a suspensive effect only if “[...] *the implementation of the Impugned Decision would create an irreversible situation that could not be corrected [...]*”.<sup>18</sup> However, in the present case neither the Prosecution nor the Defence have provided the Appeals Chamber with evidence to prove that not granting suspensive effect to the Decision would create an irreversible situation that could not be corrected under any circumstances.

17. Furthermore, these applications are now moot since the Trial Chamber has decided to adjourn the hearings on the guilt of the accused until such time as the Appeals Chamber issues a ruling here.<sup>19</sup>

18. Consequently, the Legal Representatives respectfully call upon the Appeals Chamber to dismiss the applications of the appellants for suspensive effect to be granted to the Decision which is the subject of the appeal.

### **III. PRELIMINARY OBJECTION TO THE DEFENCE ARGUMENTS ON THE LEGALITY OF REGULATION 55 OF THE *REGULATIONS OF THE COURT***

19. As far as the Defence challenge to the legality of regulation 55 of the *Regulations of the Court*<sup>20</sup> is concerned, the Legal Representatives submit first, as does the Prosecution,<sup>21</sup> that this is not one of the questions in respect of which the Trial Chamber granted leave to the Defence to appeal the Decision.<sup>22</sup> This being the case,

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<sup>17</sup> See the *Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008* (Appeals Chamber), 22 April 2008, ICC-01/04-01/06-1290 OA11, para. 7.

<sup>18</sup> *Idem*, para. 8.

<sup>19</sup> See the *Decision adjourning the evidence in the case and consideration of Regulation 55* (Trial Chamber I), ICC-01/04-01/06-2143, 2 October 2009.

<sup>20</sup> In particular the Defence submits that regulation 55 of the *Regulations of the Court* inherently contradicts the provisions of the *Rome Statute* and the *Rules of Procedure and Evidence* and specifically article 61(9) of the *Rome Statute*. Furthermore, it maintains that the Appeals Chamber has good cause to note its illegality and to dismiss its application. See the Defence’s document filed in support of its appeal, *supra*, footnote 8, paras. 5-6.

<sup>21</sup> See the Prosecution Response to the Defence Appeal, *supra*, footnote 11, para. 8. In addition, the Prosecution submits that the Defence has not challenged the legality of regulation 55 of the *Regulations of the Court*, either in its submissions in response to the Joint Application of the Legal Representatives or in its Application for leave to appeal the Decision.

<sup>22</sup> See the Decision granting leave to appeal, *supra*, footnote 7, para. 41.

the Defence arguments in this regard cannot be taken into account for the purposes of this procedure.

20. Furthermore, the Legal Representatives submit that the Defence has already raised arguments regarding the legality of regulation 55 of the *Regulations of the Court* before Trial Chamber I.<sup>23</sup> The Chamber examined the Defence's arguments in its decision of 13 December 2008<sup>24</sup> and dismissed them, thus confirming the legality of regulation 55 of the *Regulations of the Court* in light of the Court's core legal texts.<sup>25</sup> However, the Defence never sought leave to appeal this decision. Finally, the Defence's repetitive submission of the same arguments as those previously submitted amounts to an application for a review of the decision of the Trial Chamber even though the Appeals Chamber has already ruled that:

*the nature of this appeal is corrective and limited to the specific grounds of appeal raised. The Appeals Chamber considers that it is not a rehearing of the original request [...]. For that reason, in the context of [an appeal], it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber, or to introduce new evidence before the Appeals Chamber, without making any specific link as to how such material affects the Appeals Chamber's determination of the issues raised on appeal.*<sup>26</sup>

21. The Legal Representatives submit that the findings of the Appeals Chamber apply *mutatis mutandis* to the current procedure. Furthermore, Pre-Trial Chambers I and II have systematically rejected all applications, irrespective of the form thereof, which in essence sought to have past decisions reviewed on the ground that such applications had no legal basis in the Court's core legal texts. The Pre-Trial Chambers ruled on numerous occasions that "*in principle, the statutory framework set out by the Statute and the Rules does not provide for a motion for reconsideration as a procedural*

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<sup>23</sup> See the "*Conclusions de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: statut devant la Chambre de première instance des témoignages entendus par la Chambre préliminaire, statut des décisions de la Chambre préliminaire dans le cadre des procédures de première instance et modalités de présentation des éléments de preuve*", 16 November 2007, ICC-01/04-01/06-1033, paras. 35-38.

<sup>24</sup> See the *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* (Trial Chamber I), 13 December 2007, ICC-01/04-01/06-1084.

<sup>25</sup> *Idem*, paras. 47-48.

<sup>26</sup> See the *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'* (Appeals Chamber), 13 February 2008, ICC-01/04-01/06-824 OA7, para. 71.



*remedy against any decision taken by the Pre-Trial Chamber or the Single Judge”<sup>27</sup> and that “[r]eview of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules.”<sup>28</sup>*

22. Consequently, the Legal Representatives respectfully call upon the Appeals Chamber to dismiss *in limine* the Defence’s submissions on the legality of regulation 55 of the *Regulations of the Court* on the ground of inadmissibility.

#### IV. SPECIFIC OBSERVATIONS ON THE MERITS

23. Pre-Trial Chamber I granted leave to appeal in respect of the following two questions:

*Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterization 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 characterization 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 (the “First question which is the subject of the Appeals”); and*

*Whether the Majority of the Chamber erred in determining that the legal characterization of the facts may be subject to change, viz. to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute (the “Second question which is the subject of the Appeals”).<sup>29</sup>*

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<sup>27</sup> See the *Decision on the ‘Demande du BCPV d’accéder au document confidentiel déposé par le Conseil de direction du Fonds d’affectation spéciale au profit des victimes le 7 février 2008’* (Pre-Trial Chamber I), 18 February 2008, ICC-01/04-456, p. 4. See also the *Decision on the Prosecution Motion for reconsideration and, in the alternative, leave to appeal* (Pre-Trial Chamber I, Single Judge), 23 June 2006, ICC-01/04-01/06-166, para. 10. See also the *Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification* (Pre-Trial Chamber II), 28 October 2005, ICC-02/04-01/05-60, para. 18.

<sup>28</sup> See the *Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification* (Pre-Trial Chamber II), 28 October 2005, ICC-02/04-01/05-60, para. 18.

<sup>29</sup> See the *Decision granting leave to appeal*, *supra*, footnote 7, para. 41.

# 1. The first question which is the subject of the Appeals

24. The Defence<sup>30</sup> and the Prosecution<sup>31</sup> submit that regulation 55 of the *Regulations of the Court* establishes a single procedure for changing the characterisation of the facts and that it does not permit the Trial Chamber to go beyond the facts and circumstances described in the charges and in any changes thereto.<sup>32</sup>

25. The Legal Representatives concur with the argument of the appellants whereby regulation 55 of the *Regulations of the Court* provides for a single procedure subject to all the conditions and guarantees set out cumulatively in the three paragraphs thereof. Furthermore, this part of the reasoning in the Decision constitutes an *obiter dictum* and in no way affects the contents of the decision, which was issued during the proceedings rather than during the judges' deliberations.

26. The Legal Representatives, moreover, have never supported the argument that regulation 55 of the *Regulations of the Court* allows the Trial Chamber to go beyond the facts and circumstances described in the charges. Quite the contrary, in the context of their Joint Application, the Legal Representatives submitted to the Chamber that the facts to which they refer fall within the context of the facts, circumstances and mode of responsibility described in the charges confirmed against Thomas Lubanga Dyilo as well as in the Amended Document Containing the Charges.<sup>33</sup>

27. The Legal Representatives thus submit that the events referred to in their Joint Application constitute specific circumstances regarding the facts described in the charges against Thomas Lubanga Dyilo.

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<sup>30</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 8-35.

<sup>31</sup> See the Document filed by the Prosecution in support of its appeal, *supra*, footnote 9, paras. 25-49.

<sup>32</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 8-35 and the Document filed by the Prosecution in support of its appeal, *supra*, footnote 9, paras. 25-49.

<sup>33</sup> See the Joint Application, *supra*, footnote 1, paras. 35-41.

28. Pre-Trial Chamber I confirmed in its *Decision on the confirmation of charges*<sup>34</sup> the three counts involving the enlistment of children under the age of fifteen years, including using them to participate actively in hostilities.<sup>35</sup> Thus the Chamber accepted that the UPC/FPLC allegedly recruited children to use them to participate actively in hostilities. As a result, the UPC/FPLC clearly had to provide them with military training. It follows that the mistreatment suffered by a large number of children was an integral part of their military training<sup>36</sup> and constituted both a direct consequence of their recruitment into the UPC/FPLC armed militias and preparation for their participation in hostilities.<sup>37</sup> These events must clearly form part of the acts ascribed to the accused. The *Decision on the confirmation of charges* and the Amended Document Containing the Charges<sup>38</sup> both expressly and repeatedly mention the extremely strict discipline<sup>39</sup> and harsh punishment measures systematically imposed on the recruits within the UPC/FPLC military training camps, including the use of whips, blows, detention in prison and even summary executions.<sup>40</sup> In addition, the Amended Document Containing the Charges mentions cases where recruits were forced to smoke hemp by their trainers.<sup>41</sup> These acts may be characterised as inhuman and/or cruel treatment in light of the principles identified by international human rights case law.<sup>42</sup>

29. However, although certain instances of inhuman and/or cruel treatment may be considered a direct consequence of the recruitment of children under the age of

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<sup>34</sup> See the *Decision on the confirmation of charges* (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06-803-tEN (the “Decision on the confirmation of charges”).

<sup>35</sup> *Idem*, p. 133.

<sup>36</sup> See the Joint Application, *supra*, footnote 1, para. 33 and footnotes 58-77.

<sup>37</sup> The acts of inhuman and/or cruel treatment which have been recounted, whilst aiming to discipline the recruits, resulted in extremely harsh and cruel punishments being inflicted on them.

<sup>38</sup> See the “Prosecution’s Provision of the Amended Document Containing the Charges”, 23 December 2008, ICC-01/04-01/06-1573 and “Annexe 1” thereto, ICC-01/04-01/06-1573-Anx1 (the “Amended Document Containing the Charges”).

<sup>39</sup> See the *Decision on the confirmation of charges*, *supra*, footnote 34, para. 265. See also the Amended Document Containing the Charges, *supra*, footnote 38, paras. 35, 36 et 96.

<sup>40</sup> See the Amended Document Containing the Charges, *supra*, footnote 38, paras. 36, 73, 75 and 96.

<sup>41</sup> *Idem*, para. 90.

<sup>42</sup> A detailed analysis of the relevant principles in international human rights case law may be found in paragraph 19 of the Joint Application. See the Joint Application, *supra*, footnote 1, para. 19 and footnotes 21-28.

fifteen years into the UPC/FPLC, it may also be characterised as inhuman and/or cruel treatment in and of itself. In their Joint Application, the Legal Representatives demonstrated that this common-sense reasoning was behind the consensus that existed during the negotiations on the *Rome Statute* concerning the criminalisation of the acts in question<sup>43</sup> and was supported by various international NGOs working in the fields of human rights and rights of the child<sup>44</sup> as well as by several international treaties<sup>45</sup> and United Nations reports.<sup>46</sup>

30. The Legal Representatives demonstrated, moreover, that where young girls are forcibly recruited into armed forces, sexual slavery is one of the major consequences of their recruitment, if not the main reason therefor,<sup>47</sup> which is confirmed by statements of witnesses who have already testified in the trial.<sup>48</sup> Furthermore, the primary purpose for the recruitment of girls into armed militias is to use them as sex slaves,<sup>49</sup> whether or not these girls will be caused to participate actively in the hostilities.<sup>50</sup> The said practice of exploiting girls as sex slaves or “wives” is akin to the practice of serfdom, which is strictly prohibited under article 1(b) of the 1956 Convention on the Abolition of Slavery.<sup>51</sup>

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<sup>43</sup> *Idem*, para. 20 and footnote 29.

<sup>44</sup> *Ibid.*, paras. 20 and 21 and footnotes 30 and 31.

<sup>45</sup> *Ibid.*, para. 22 and footnote 32.

<sup>46</sup> *Ibid.*, para. 23, footnote 33.

<sup>47</sup> This argument is widely supported by various international legal texts. See *ibid.*, paras. 26 and 27 and footnotes 37-41.

<sup>48</sup> See *ibid.*, para. 34 and footnotes 78-88.

<sup>49</sup> This argument is also supported by various international texts and also by various international organisations, including the United Nations and the African Union. See *ibid.*, paras. 29-31 and footnotes 43-50.

<sup>50</sup> This is also the view of Pre-Trial Chamber I, which ruled that irrespective of whether the girl victims of sexual slavery practised by the UPC/FPLC commanders were made to participate actively in hostilities, the fact that they were recruited when they were under the age of 15 years is sufficient proof. See the *Annex to the Corrigendum to the Decision on the applications by victims to participate in the proceedings* (Trial Chamber I), 13 January 2009, ICC-01/04-01/06-1556-Corr-Anx1, para. 103.

<sup>51</sup> Under article 1(b) of that Convention, the definition of slavery includes, *inter alia*, the practice of “serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”. See Article 1(b) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, adopted

31. Consequently the Legal Representatives submit that, in view of the specificity, complexity and scope of the charges against Thomas Lubanga Dyilo, the circumstances involving inhuman and/or cruel treatment and sexual slavery, as described in the foregoing, constitute both the purpose and the consequences of the recruitment of children under the age of fifteen years into the UPC/FPLC armed forces.

32. Contrary to the position adopted by the Defence<sup>52</sup> and the Prosecution,<sup>53</sup> the Legal Representatives are not seeking to add fresh charges or to replace the characterisations selected by the Prosecution and confirmed by the Pre-Trial Chamber. However, they submit that the same facts, which include the circumstances involving inhuman and/or cruel treatment and sexual slavery, as described above, may take on an additional legal characterisation since they may constitute a breach of a number of prohibitions provided for in the *Rome Statute*.<sup>54</sup>

33. The argument that various constituent elements of a single act or operation may infringe several legal provisions is fully supported by international human rights case law, such as that of the Inter-American Court of Human Rights (the IACHR),<sup>55</sup> the European Commission of Human Rights (“ECommHR”)<sup>56</sup> and the

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on 7 September 1956 by a Conference of Plenipotentiaries convened by the Economic and Social Council resolution 608 (XXI) of 30 April 1956. This document is available at:

<http://www2.ohchr.org/english/law/slavetrade.htm>.

<sup>52</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 25-35.

<sup>53</sup> See the Document filed by the Prosecution in support of its appeal, *supra*, footnote 9, paras. 37-41.

<sup>54</sup> This argument has been consistently supported by the Legal Representatives since the start of the proceedings. See the Joint Application, *supra*, footnote 1, para. 42 and footnotes 112-113.

<sup>55</sup> The IACHR held on several occasions that “the forced disappearance of human beings is a multiple and continuous violation of many rights under the [American human rights] Convention that the States Parties are obligated to respect and guarantee”: See IACHR, *Velasquez Rodriguez v. Honduras*, Judgment, Series C No. 4, 29 July 1988, para. 155. The Court also observed that the kidnapping of a person violates Article 7 of the Convention, prolonged isolation and deprivation of communication violates Article 5 and the secret execution without trial, followed by concealment of the body violates Article 4: See IACHR, *Velasquez Rodriguez v. Honduras*, *idem.*, paras. 155-157 and 186 et seq. See also IACHR, *Godinez Cruz v. Honduras*, Judgment, Series 5, 20 January 1989, paras. 163-166 and *Fairen Garbi and Solis Corrales v. Honduras*, Judgment, Series C No. 6, 15 May 1989, paras. 147-150. Furthermore, in a case of illegal detention followed by the murder of two people by the Colombian armed forces, the Court held that the respondent State had violated Article 7, which guarantees the rights to personal liberty, and

European Court of Human Rights (“ECHR”).<sup>57</sup> Furthermore, this argument is supported by the case law on the accumulation of offences<sup>58</sup> as demonstrated by the International Criminal Tribunal for the former Yugoslavia (“the ICTY”) and the International Criminal Tribunal for Rwanda (“the ICTR”).<sup>59</sup> Finally, this argument is borne out by the concept of *concursum delictorum* which is widely applied in common-law legal systems<sup>60</sup> and chiefly through the legal opinion regarding “a single act

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Article 4, which guarantees the right to life: See IACHR, *Caballero Delgado and Santana v. Colombia*, Judgment, Series C No. 22, 8 December 1995, para. 72.

<sup>56</sup> In applying Article 3 of the European Convention on Human Rights, the ECommHR did not exclude the possibility of giving different characterisations to various similar acts. Thus in the *Greek case*, the ECommHR held that certain acts committed by the respondent State constituted torture whilst others were comparable to inhuman treatment: See ECommHR, *Greek Case*, Application Nos 3321/67, 3322/67, 3323/67 and 3344/67, 1969. See Council of Europe, European Convention on Human Rights, *Greek Case*, Vol. II, Part 1, 1970, pp. 421-423.

<sup>57</sup> Finally the ECHR accepted that a single act or operation can simultaneously violate a number of texts by ruling in particular on several occasions that “one and the same fact may fall foul of more than one provision of the Convention and Protocols”: See ECHR, *Erkner and Hofauer v. Austria*, Application No. 9616/81, 13 April 1987, para. 76; *Poiss v. Austria*, Application No. 9816/82, 23 April 1987, para. 66 and *Vendittelli v. Italy*, Application No. 14804/89, 18 July 1994, para. 53.

<sup>58</sup> The Legal Representatives submit that, unlike the case law of the ICTY and ICTR involving the accumulation of offences, in the present case it is not a question of choosing between crimes of a similar nature within the three groups of crimes set out in the *Rome Statute*, such as crimes against humanity, war crimes or the crime of genocide, but a case scenario in which the same facts result in the violation of several prohibitions which are inherently different.

<sup>59</sup> In all the cases involving the issue of accumulation of offences, the ICTY and ICTR examined the issue of determining whether or not the Prosecution was able to bring multiple charges against the accused which (i) involved the same facts or acts and (ii) involve crimes of a similar or even identical nature but which (iii) were characterised in accordance with a number of separate norms. In particular, it was always an issue of choosing between crimes of the same nature but which fell within the three groups of crimes set out in the respective Statutes: crimes against humanity, war crimes or the crime of genocide. See ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras. 463-470; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, paras. 627, 637-644 and 648-649; *The Prosecutor v. Georges Andersen Nderubumwe Rutanganda*, Case No. ICTR-96-3-T, Judgement and sentence, 6 December 1999, paras. 117-119 and *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and sentence, 27 January 2000, para. 296. See ICTY, *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-A, Judgement, paras. 400, 412-413, 416-423, 428-430; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 82 and *Prosecutor v. Radoslav Krstić*, Case No. IT-98-33, Judgement, 2 August 2001, paras. 661-686.

<sup>60</sup> In common-law legal systems, the concept of *concursum delictorum* involves the possibility of charging an individual with multiple offences, either cumulatively or alternatively, whilst granting the judge or jury discretionary powers regarding the offences supposed to serve as the basis for the guilty verdict: see in this regard BASSIOUNI, C, *Substantive Criminal Law*, Publisher: Charles C. Thomas Pub Ltd, January 1978, paras. 500-12. See also in this regard BOGDAN, A, *Cumulative charges, convictions and sentencing at the ad hoc International Tribunals for the former Yugoslavia and Rwanda*, *Melbourne Journal of International Law*, No. 1, 2002, p. 2. The text of the article is available on HeinOnline. This approach has been developed by the case law of common-law countries: See

fulfilling the conditions required to constitute various offences”, which is widely accepted in civil-law legal systems.<sup>61</sup>

34. The Legal Representatives submit that pursuant to regulation 55(1) of the *Regulations of the Court*, the ultimate purpose of a change of the legal characterisation of the facts is to make the facts and circumstances described in the charges confirmed against an accused match the crimes provided for under the *Rome Statute* and, contrary to what the Defence maintains,<sup>62</sup> is not limited to a mere rectification of errors of the legal characterisation of those facts. Furthermore, regulation 55 of the *Regulations of the Court* contains no restriction on the extent to which the characterisation of the facts may be changed nor does it establish any hierarchy in respect of such a recharacterisation.<sup>63</sup>

## 2. The second question which is the subject of the appeals

35. The Defence submits that the application by the Legal Representatives to change the legal characterisation of the facts is in fact an application to amend the charges and is therefore inadmissible.<sup>64</sup> It maintains, moreover, that the facts and circumstances described in the *Decision on the confirmation of charges* do not allow the constituent elements of the crimes alleged by the Legal Representatives to be characterised.<sup>65</sup> Finally, it submits that if the Chamber were to accept the new

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*Morey v. The Commonwealth* 108 Mass. 433 (1871), *Blockburger v. the USA* 284 U.S. 299 (1932), 52 S.Ct. 180 and *Ball v. United States*, 470 U.S. 856 (1985), p. 862.

<sup>61</sup> A “single act fulfilling the conditions required to constitute various offences” is deemed to exist when a single act committed by an individual gives rise to several offences with different characterisations and thus violates a number of social values or a number of interests which are protected in law. In the case of a single act fulfilling the conditions required to constitute various offences, the judge in a civil-law legal system is meant to accept all the characterisations in general, by considering that there are several offences, whilst at the same time handing down only one sentence for the most serious offence or a more severe sentence than that which is applicable to the most serious offence. See in this sense PRADEL, J., “*Droit pénal comparé*”, 2<sup>nd</sup> edition, 2002, Edition DALLOZ, pp. 748-749. See also CORNU, G. (Ed.), “*Vocabulaire juridique*”, 4<sup>th</sup> edition, Quadrige, 2003, p. 193.

<sup>62</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 18-19.

<sup>63</sup> *Idem*, paras. 20-22.

<sup>64</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 36-38.

<sup>65</sup> *Idem*, paras. 39-57.

characterisations as proposed by the Legal Representatives, this would seriously infringe the accused's fundamental rights.<sup>66</sup>

36. The Legal Representatives first note that questions of substance arising from the application of regulation 55 of the *Regulations of the Court* fall within the jurisdiction of the Trial Chamber alone, as the Appeals Chamber is not called upon to rule on the merits of the case but only on those questions which are the subject of the appeals. Furthermore, pursuant to regulation 55(2) of the *Regulations of the Court*, the Trial Chamber can rule on this issue only after having given the parties and the participants the opportunity to make oral or written submissions in this regard. Consequently, to burden the Appeals Chamber at this stage in the proceedings with the task of examining in detail all the evidence which could lead the Trial Chamber to recharacterise the facts in the present case would cause a wholly unjustified delay.

37. Firstly, the Legal Representatives reiterate their arguments set out above whereby (i) their reasoning is in no way an attempt to add fresh charges or to replace the characterisations selected by the Prosecutor and confirmed by the Pre-Trial Chamber with fresh characterisations; (ii) the factual elements regarding inhuman and/or cruel treatment and sexual slavery as described in their Joint Application constitute circumstances which are specific to the facts described in the charges against Thomas Lubanga Dyilo; (iii) acts of mistreatment suffered by a large number of children during their military training in the UPC/FPLC may be described as inhuman and/or cruel treatment in light of the principles identified by international human rights case law and (iv) the practice of exploiting girls as sex slaves or wives within the UPC/FPLC resembles the practice of serfdom, which is strictly prohibited under international law.<sup>67</sup>

38. Secondly, the Legal Representatives submit that the circumstances surrounding inhuman and/or cruel treatment and sexual slavery as described in their

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<sup>66</sup> *Ibid.*, paras. 58-74.

<sup>67</sup> See *supra*, paras. 27 to 4133.



Joint Application were recounted during the trial. They base their argument on the evidence of witnesses who have already testified before the Trial Chamber and who therefore form an integral part of the evidence in the present case.<sup>68</sup> The Defence has never raised objections to these circumstances being discussed during the trial and serving as the basis for a line of questioning by the Prosecution, the judges of the Chamber or the Legal Representatives of Victims. Moreover, the *Decision on the confirmation of charges* and the Amended Document Containing the Charges expressly and repeatedly mention systematic acts of mistreatment involving the recruits during their military training within the UPC/FPLC.<sup>69</sup>

39. The Legal Representatives further submit, as does the Prosecution,<sup>70</sup> that merely implementing the procedure pursuant to regulation 55 of the *Regulations of the Court* would not, *per se*, infringe the rights of the accused in any way, provided that the rights and guarantees provided for in paragraphs 2 and 3 of the regulation are applied. Until such time as the procedure under regulation 55 of the *Regulations of the Court* is initiated, it is premature at this stage to consider the question of determining whether, and to what extent, the arrangements for implementing this procedure, which must be decided by the Trial Chamber, are likely to affect the fundamental rights of the accused.<sup>71</sup> In light of the Defence argument involving the late implementation of regulation 55 of the *Regulations of the Court*,<sup>72</sup> the Legal Representatives submit that paragraph 2 of this regulation grants the Trial Chamber the power to change the legal characterisation of the facts at any time during the trial, not just at its commencement. The Legal Representatives did not refer the issue of the

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<sup>68</sup> See *supra*, para. 28, footnote 35 and para. 30, footnote 47.

<sup>69</sup> See the *Decision on the confirmation of charges*, *supra*, footnote 34, para. 265. See also the Amended Document Containing the Charges, *supra*, footnote 38, paras. 35, 36, 73, 75, 90 and 96.

<sup>70</sup> See the Prosecution Response to the Defence Appeal, *supra*, footnote 11, paras. 22-26.

<sup>71</sup> If the Trial Chamber decides to implement regulation 55 of the *Regulations of the Court* on the basis of the factual circumstances described by the Legal Representatives, it must grant the parties and participants all the rights and guarantees provided for in paragraphs 2 and 3 of this regulation and, *inter alia*, ensure that the parties and participants have adequate time for effective preparation and recall the witnesses who have already testified before the Chamber, if appropriate. See also the arguments of the Prosecution in this regard: see the Prosecution Response to the Defence Appeal, *supra*, footnote 11, paras. 22-26.

<sup>72</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 59-64.

implementation of the procedure under said regulation to the Chamber until they considered that the proceedings had yielded sufficient factual elements to support their application.

40. The Legal Representatives consider that although the implementation of the procedure under regulation 55 of the *Regulations of the Court* is likely to cause some delay, this is unlikely to affect either the efficiency of the proceedings or the rights of the accused.

41. In fact, changing the legal characterisation of the facts is an option open to a Trial Chamber pursuant to regulation 55 of the *Regulations of the Court*, a regulation held by Trial Chamber I to be legitimate and in line with the Court's core legal texts, and article 74(2) of the *Rome Statute* specifically.<sup>73</sup> This regulation allows a Trial Chamber to have the facts described in the charges match the crimes listed in the *Rome Statute* and, as a result, seeks to improve the legal nature of the proceedings. If the function of regulation 55 of the *Regulations of the Court* is combined with the obligations of the Trial Chamber to determine the truth,<sup>74</sup> to rule beyond reasonable doubt<sup>75</sup> and to base its decision on the entire proceedings,<sup>76</sup> the change of the legal characterisation of the facts pursuant to that regulation seeks to provide a better response to the needs of justice and the requirements of a fair and equitable trial.<sup>77</sup> In addition, changing the characterisation of the facts in this way is in the interest of international public order and the victims in having the truth determined<sup>78</sup> and

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<sup>73</sup> See the *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, supra*, footnote 24, para. 47.

<sup>74</sup> See article 69(3) of the *Rome Statute*.

<sup>75</sup> See article 66(3) of the *Rome Statute*.

<sup>76</sup> See article 74(2) of the *Rome Statute*.

<sup>77</sup> Pursuant to article 64(2) of the *Rome Statute*, the Trial Chamber shall ensure that a trial is fair and expeditious.

<sup>78</sup> The right of victims to the determination of the truth is clearly one of the fundamental principles of human rights as demonstrated by the ECHR and the IACHR. This right includes specifically: (i) the right to determine the facts of the case; (ii) the right to identify those responsible for the crimes and (iii) the right to define the degree of responsibility of the perpetrators of the crimes. See in this regard IACHR, *Bàmaca-Velasquez v. Guatemala*, Judgment, 25 November 2000, Series C, No. 70, para. 201; *Barrios Altos v. Peru*, Judgment, 14 March 2001, Series C, No. 75, para. 48; the *Mapiripán Massacre v.*

justice rendered.<sup>79</sup> Interpreted this way, any delay caused by a procedure to change the legal characterisation of the facts should not infringe the rights of the accused, including his or her right to be tried without delay.<sup>80</sup> Furthermore, whilst recommending an expeditious trial, the Defence has also called for suspensive effect to be granted in respect of the implementation of the procedure under regulation 55 of the *Regulations of the Court* and even the suspension of the hearings,<sup>81</sup> which carries the risk of significant delay to the trial itself

42. The Legal Representatives thus emphasise that for regulation 55 of the *Regulations of the Court* to be implemented, a single condition must be met: at some point during the course of the trial the Chamber must realise that the legal characterisation of facts *may* be changed. This observation can be established only by the Chamber with the necessary jurisdiction on the basis of the evidence before it and testimony it has heard. Merely implementing regulation 55(2) does not therefore prejudice the characterisation of the facts but enables the parties and participants to

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Colombia, Judgment, 15 September 2005, Series C, No. 134, para. 297; *Almonacid-Arellano et al v. Chile*, Judgment, 26 September 2006, Series C, No. 154, paras. 148 et seq. See also: ECHR, *Hugh Jordan v. United Kingdom*, Application No. 24746/94, 4 May 2001, para. 93. This definition of the right to determine the truth is fully supported by legal opinion. See in this regard: NAQVI, Y, "The Right to the Truth in International Law Fact or Fiction 9", in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ, J, "The Right to Truth", in JOYNER, C (ed.), "Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracuse Conference", 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 et seq and AMBOS, K., "El Marco Juridico de la Justicia de Transición", Tenus, Bogota, 2008, pp. 42-44.

<sup>79</sup> The right of victims for justice to be rendered goes beyond the right to the determination of the facts and the identification of the alleged perpetrator of the crimes. It also includes the right to see the perpetrator of a crime found guilty and punished. Thus defined, this right clearly falls within the scope of the fundamental principles of human rights. See in this regard: IACHR, *Velasquez-Rodriguez v. Honduras*, Judgment, 29 July 1988, Series C, No. 7, paras. 162-166 and 174; *Comunidad Monviana v. Suriname*, Judgment, 15 June 2005, Series C, No. 124, para. 204; *Almonacid-Arellano et al v. Chile*, Judgment, 26 September 2006, Series C, No. 154, para. 148; *Vargas-Areco v. Paraguay*, Judgment, 26 September 2006, Series C, No. 155, paras. 153 et seq. and *La Cantuta v. Peru*, Judgment, 29 November 2006, Series C, No. 162, para. 222. See also ECHR, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 98; *Aydm v. Turkey*, Application No. 21178/94, 25 September 1997, para. 103; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, para. 96; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, para. 140; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 79 and *Hugh Jordan v. United Kingdom*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160.

<sup>80</sup> See the Joint Application *supra*, footnote 1, paras. 12-13 and the relevant footnotes pertaining thereto.

<sup>81</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 75-76.

make submissions on this issue and provides for the possibility of suspending the hearings in order to ensure that they have adequate time and facilities to prepare.

43. As far as the Defence challenge to the relevance of the Cape Town Principles and Paris Principles is concerned,<sup>82</sup> the Legal Representatives submit that the argument that the primary purpose of recruiting girls into the armed forces was to use them as sex slaves is borne out not only by the said Principles but also by various international texts and international organisations, including the United Nations and the African Union referred to in the Joint Application – texts whose relevance the Defence is not contesting.<sup>83</sup>

44. Furthermore, pursuant to article 21(1)(b) of the *Rome Statute*, the Chamber may apply, *inter alia*, “principles and rules of international law”. The analysis of preparatory work on the adoption of article 21 of the *Rome Statute* reveals that the scope of the terms “principles and rules of international law” cannot be compared to that of the terms “general principles of law” in article 21(1)(c) of the *Rome Statute*. In addition, the Chamber is not restricted to international custom and may include, *inter alia*, principles identified as a result of cooperation between international organisations and even principles derived from international legal conscience and the nature of the international community.<sup>84</sup> Consequently, article 21(1)(b) of the *Rome Statute* permits the Trial Chamber to apply principles and rules of international law which fall within the scope of international cooperation without them having acquired any binding or customary value.

45. Finally, the Defence argument that the charge of inhuman and/or cruel treatment requires evidence of acute suffering being deliberately inflicted<sup>85</sup> greatly exceeds the scope of the appeal and involves the discussion on the merits of the case

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<sup>82</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, para. 47.

<sup>83</sup> See the Joint Application, *supra*, footnote 1, paras. 29-31 and footnotes 43-50.

<sup>84</sup> See in this regard MCAULIFFE DEGUZMAN, M., “Article 21”, in TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Verlag C.H.Beck, Hart Publishing and Nomos Verlagsgesellschaft, Munchen, 2008, pp. 706-708.

<sup>85</sup> See the Document filed by the Defence in support of its appeal, *supra*, footnote 8, paras. 52-53 and 56.

which may take place only before the Trial Chamber. The Legal Representatives recall, however, that unlike the crime of torture, which involves inflicting pain or suffering for specific purposes, the crimes of inhuman treatment or cruel treatment do not require any additional mental element and for this reason the intent to cause pain and suffering for specific ends need not be proved.<sup>86</sup> The argument that inhuman and/or cruel treatment does not necessarily imply the intent to inflict suffering is fully supported by international human rights case law as established by the ECHR, according to which detention conditions in penal establishments may also be equated with inhuman and/or degrading treatment.<sup>87</sup> In these cases, the fact that individuals were subjected to inhuman and degrading treatment is the result of non-compliance (objective and unintentional) of detention conditions in penal establishments with the prescribed rules. In addition, by recruiting children under the age of fifteen years into the UPC/FPLC armed forces to use them actively to participate in hostilities, the perpetrators of this crime could not fail to be aware that the act itself would cause acute pain and suffering, both physical and psychological.

**FOR THESE REASONS,**

**MAY IT PLEASE THE APPEALS CHAMBER**

- TO DISMISS the applications of the Prosecution and the Defence who are seeking the granting of suspensive effect in respect of the implementation of regulation 55 of the *Regulations of the Court* by the Trial Chamber;

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<sup>86</sup> The only proposal put forward by the delegations to include an element of intent in the elements of the crimes of inhuman treatment and cruel treatment was not supported by the majority of delegations. See the proposals from the delegations of Hungary and Switzerland of 10 February 1999, UN Doc. PCNICC/1999/DP.5, 10 February 1999, p. 2.

<sup>87</sup> This involves *inter alia* (i) detention without food and water and/or access to toilets: See ECHR, *Fedotov v. Russia*, No. 5140/02, 25 October 2005, paras. 67-68; or (ii) detention in overcrowded conditions and where heating, sanitation, sleeping arrangements and food are inadequate: see ECHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001, paras. 46-48 and *Kalashnikov v. Russia*, No. 47095/99, 15 July 2002, para. 97.

- TO DISMISS *in limine* the Defence arguments regarding the legality of regulation 55 of the *Regulations of the Court* to dismiss on the ground of inadmissibility;
- TO TAKE FORMAL NOTE of the position of the Legal Representatives on the first question which is the subject of the appeal; and
- TO TAKE FORMAL NOTE of the considerations on the merits included in these submissions and declare the appeals unfounded.

[signed]

Ms C. Bapita Buyangandu

[signed]

Ms P. Massidda

[signed]

Mr L. Walley

Legal Representatives of Victims a/0001/06, a/0002/06, a/0003/06, a/0047/06, a/0048/06, a/0049/06, a/0050/06, a/0052/06, a/0051/06, a/0078/06, a/0232/06, a/0233/06, a/0246/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0007/08, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0610/08, a/0611/08 and a/0249/09

Dated this 23 October 2009

At The Hague, The Netherlands; Brussels, Belgium; and Kinshasa, Democratic Republic of the Congo