

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/04-01/06 OA 15 OA 16

Date: 8 December 2009

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun 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
THE PROSECUTOR v. THOMAS LUBANGA DYILO**

Public document

Judgment

on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I 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"

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Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley
Ms Carine Bapita Buyangandu

The Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Lubanga Dyilo and the Prosecutor 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” of Trial Chamber I, dated 14 July 2009 (ICC-01/04-01/06-2049),

After deliberation,

Unanimously,

Renders the following

DECISION

Mr Lubanga Dyilo’s application for an extension of the page limit for his document in support of the appeal is granted,

And unanimously,

Delivers the following

JUDGMENT

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” of Trial Chamber I of 14 July 2009 is reversed.

REASONS

I. KEY FINDING

1. Regulation 55 (2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto.

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II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chambers

2. On 28 August 2006, the Prosecutor filed the “Document Containing the Charges, Article 61(3)(a)”¹ (hereinafter: “Document Containing the Charges”) in respect of Mr Lubanga Dyilo. On 29 January 2007, Pre-Trial Chamber I rendered the “Decision on the confirmation of charges”² (hereinafter: “Confirmation Decision”). In the operative part of the decision, the Pre-Trial Chamber, *inter alia*:

CONFIRM[ED], 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;

CONFIRM[ED], 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 to 13 August 2003 [...].³

3. On 22 December 2008, the Prosecutor filed confidentially the “Amended Document Containing the Charges, Article 61(3)(a)”⁴ having been ordered by the Trial Chamber to do so.⁵

4. On 22 May 2009, 27 victims participating in the trial requested the Trial Chamber to trigger the procedure for a modification of the legal characterisation of

¹ ICC-01/04-01/06-356-Conf-Anx1; a public redacted version of this document was filed under the number ICC-01/04-01/06-356-Anx2. In the present judgment, references are to the public redacted version.

² ICC-01-04/01/06-796-Conf-tENG; a public redacted version of the decision was filed under the number ICC-01/04-01/06-803-tEN. In the present judgment, references are to the public redacted version.

³ Confirmation Decision, pp. 156-157.

⁴ ICC-01/04-01/06-1571-Conf-Anx; public redacted version of this document was filed on 23 December 2008 under the number ICC-01/04-01/06-1573-Anx1. In the present judgment, references are to the public redacted version.

⁵ “Order for the prosecution to file an amended document containing the charges”, ICC-01/04-01/06-1548, 9 December 2008.

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the facts under regulation 55 of the Regulations of the Court⁶ (hereinafter: “Joint Application”), in order to include the crimes of sexual slavery and inhuman or cruel treatment.⁷ The Prosecutor filed a response to the Joint Application on 29 May 2009,⁸ and further observations on 12 June 2009.⁹ Mr Lubanga Dyilo filed his response to the Joint Application on 19 June 2009.¹⁰ The victims filed observations to the submissions of Mr Lubanga Dyilo on 26 June 2009.¹¹

5. On 14 July 2009, Trial Chamber I issued 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 (hereinafter: “Impugned Decision”), the purpose of which was “to comply with the Chamber’s responsibility established in Regulation 55(2), to give notice to the parties and participants that it appear[ed] to the majority of the Chamber that the legal characterisation of facts may be subject to change”.¹³ Judge Fulford filed a dissenting opinion to the Impugned Decision¹⁴ (hereinafter: “Minority Opinion”).

6. Mr Lubanga Dyilo¹⁵ and the Prosecutor¹⁶ sought leave to appeal the Impugned Decision, on 11 and 12 August 2009, respectively.

⁶ “Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court”, ICC-01/04-01/06-1891-tENG.

⁷ Joint Application, para. 17.

⁸ “Prosecution’s Response to the Legal Representatives’ ‘Demand [*sic*] conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour””, ICC-01/04-01/06-1918.

⁹ “Prosecution’s Further Observations Regarding the Legal Representatives’ Joint Request Made Pursuant to Regulation 55”, ICC-01/04-01/06-1966.

¹⁰ “Defence Response to the ‘Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court’ of 22 May 2009 and to the ‘Prosecution’s Response to the Legal Representatives’ “Demande conjointe des représentants légaux des victimes aux fins de mise en oeuvre de la procédure en vertu de la norme 55 du Règlement de la Cour”” of 12 June 2009 ”.

¹¹ “Observations of the Legal Representatives of the Victims on the Defence Response of 19 June 2009”, ICC-01/04-01/06-1998-tENG.

¹² ICC-01/04-01/06-2049.

¹³ Impugned Decision, para. 35.

¹⁴ “Second Corrigendum to ‘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””, ICC-01/04-01/06-2069-Anx1, 31 July 2009.

¹⁵ “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”, ICC-01/04-01/06-2073-tENG, filed confidentially on 11 August 2009; the document was reclassified as public pursuant to an order of Trial Chamber I of 14 August 2009.

¹⁶ “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’”, ICC-01/04-01/06-2074.

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7. On 27 August 2009, Trial Chamber I issued 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’”¹⁷ (hereinafter: “Clarification”). It included a direction that participants could file “[f]urther submissions [...] resulting from this clarification regarding the requests for leave to appeal [...]”.¹⁸

8. On 3 September 2009, the Trial Chamber granted leave to appeal¹⁹ (hereinafter: “Decision Granting Leave to Appeal”) in respect of the following two questions:

Question 1

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

Question 2

Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, viz. to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi) [*sic*], 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.²⁰

B. Proceedings on appeal

9. On 10 September 2009, Mr Lubanga Dyilo filed his document in support of the appeal²¹ (hereinafter: “Mr Lubanga Dyilo’s Document in Support of the Appeal”). On the same day, he filed the “Defence Application for an Extension of the Page Limit

¹⁷ ICC-01/04-01/06-2093.

¹⁸ ICC-01/04-01/06-2093, para. 11.

¹⁹ “Decision on the prosecution and the defence applications for leave to appeal the ‘Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, ICC-01/04-01/06-2107.

²⁰ Decision Granting Leave to Appeal, para. 41.

²¹ “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*”, ICC-01/04-01/06-2112-tENG.

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for its Appeal Brief Filed on 10 September 2009”²² (hereinafter: “Request for Extension of the Page Limit”).

10. On 14 September 2009, the Prosecutor filed his document in support of the appeal²³ (hereinafter: “Prosecutor’s Document in Support of the Appeal”).

11. On 14 September 2009, victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07, a/0162/07, a/0610/08, a/0611/08 and a/0249/09 filed an application for participation in relation to both appeals²⁴ (hereinafter: “First Victims’ Filing”). Similar applications were filed by victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06²⁵ and by victims a/0051/06, a/0078/06, a/0232/06, a/0233/06 and a/0246/06,²⁶ on 15 and 18 September 2009 (hereinafter: “Second Victims’ Filing” and “Third Victims’ Filing”, respectively).

12. On 22 September 2009, the Prosecutor filed his response to Mr Lubanga Dyilo’s Document in Support of the Appeal²⁷ (hereinafter: “Prosecutor’s Response to Mr Lubanga Dyilo’s Document in Support of the Appeal”). Mr Lubanga Dyilo did not respond to the Prosecutor’s Document in Support of the Appeal.

²² ICC-01/04-01/06-2113-tENG.

²³ “Prosecution’s 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”, ICC-01/04-01/06-2120.

²⁴ “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(2) of the Regulations of the Court”, ICC-01/04-01/06-2121-tENG; the document was registered on 15 September 2009.

²⁵ “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”, ICC-01/04-01/06-2122-tENG.

²⁶ “Application for Participation from the Legal Representative of Victims a/0051/06, a/0078/06, a/0232/06 et 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”, ICC-01/04-01/06-2134-tENG; the document was registered on 22 September 2009.

²⁷ “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”, ICC-01/04-01/06-2136.

13. On 24 September 2009, the Prosecutor responded to the First, Second and Third Victims' Filings²⁸ (hereinafter: "Prosecutor's Response to Victims' Filings"). Mr Lubanga Dyilo responded on 13 October 2009²⁹ (hereinafter: "Mr Lubanga Dyilo's Response to Victims' Filings").

14. On 14 October 2009, the Appeals Chamber ordered the legal representative who filed the Third Victims' Filing to clarify on what basis she was representing victim a/0246/08, having noted that "there appear[ed] to be no indication in the record that she represent[ed] this victim".³⁰ The clarification was filed on 16 October 2009 and stated that the legal representative, in fact, represented victim a/0246/06.³¹

15. On 20 October 2009, the Appeals Chamber rendered the "Decision on the participation of victims in the appeals"³² (hereinafter: "Decision on Participation of Victims"), permitting the 27 victims to participate in the appeals and stating that the reasons for its decision would follow.³³

16. On 23 October 2009, the 27 victims filed consolidated observations on the appeals³⁴ (hereinafter: "Victims' Observations"). On 28 October 2009, the Prosecutor³⁵ and Mr Lubanga Dyilo³⁶ filed their responses to the Victims'

²⁸ "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'", ICC-01/04-01/06-2140.

²⁹ "Réponse de la Défense relative à la « Demande de participation des représentants légaux à la procédure d'appel de la « Décision informant les parties et les participants que la qualification juridique des faits peut être modifiée conformément à la norme 55-2 du Règlement de la Cour » déposée le 15 Septembre 2009", ICC-01/04-01/06-2156.

³⁰ "Order on the filing of a clarification in relation to the 'Demande de participation du représentant légal des victimes a/0051/06, a/0078/06, a/0232/06 et a/0246/08 à la procédure d'appel interjetés par la Défense et l'Accusation à l'encontre de la "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" rendue le 14 juillet 2009"', ICC-01/04-01/06-2159, p. 3.

³¹ "Soumission de clarification en relation avec l'ordre de la chambre d'appel du 14 octobre 2009 concernant la [Demande de participation du représentant légal des victimes a/0051/06, a/0078/06, a/0253/06, a/0233/06 et a/0246/08 à la procédure d'appel interjetés par la Défense et l'Accusation à l'encontre de la 'Décision giving notice to the parties that the legal characterisation of the facts may be subject to change in accordance with regulation 55 (2) of the Regulation of the Court' rendue le 14 juillet 2009]", ICC-01/04-01/06-2167.

³² ICC-01/04-01/06-2168.

³³ See below, at paragraphs 28 et seq.

³⁴ "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", ICC-01/04-01/06-2173-tENG.

³⁵ "Prosecution's Response to the Observations of Victims on the Appeals by the Prosecution and the defence against the 'Decision giving notice to the parties and participants that the legal characterisation

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Observations (hereinafter: “Prosecutor’s Response to the Victims’ Observations” and “Mr Lubanga Dyilo’s Response to the Victims’ Observations”, respectively).

III. PRELIMINARY ISSUES

A. Extension of the page limit

17. In the Request for Extension of the Page Limit, Mr Lubanga Dyilo seeks an extension of the page limit for his document in support of the appeal pursuant to regulation 37 (2) of the Regulations of the Court.³⁷ He submits that “[e]xceptionally, and in view of the importance of the issues discussed and the complexity thereof, the Defence seeks leave [...] to include in its appeal brief paragraphs 35 to 38 of its submissions filed on 16 November 2007”.³⁸ In these submissions³⁹ (hereinafter: “Additional Submissions”), Mr Lubanga Dyilo contests the legality of regulation 55 of the Regulations of the Court (hereinafter: “Regulation 55”). The Additional Submissions amount to approximately three pages.

18. The Prosecutor and the victims oppose the Request for Extension of the Page Limit on the ground that Mr Lubanga Dyilo did not raise the question of the validity of Regulation 55 in the course of the proceedings leading to the Impugned Decision, nor was leave to appeal granted in this respect.⁴⁰ The victims further submit that the Trial Chamber confirmed, for the purposes of this case, that Regulation 55 is legal in its decision of 13 December 2007⁴¹ and that Mr Lubanga Dyilo’s request is repetitive, relying on the jurisprudence of both the Appeals Chamber and the Pre-Trial Chamber that, in their view, precluded repetitive submissions.⁴² Both the Prosecutor and the

of the facts may be subject to change in accordance with Regulation 55(2) of the regulations of the Court”, ICC-01/04-01/06-2178.

³⁶ “Defence Response to the ‘Observations des Représentants légaux des victimes en réponse aux documents déposés par l’Accusation et la Défense à l’appui de leurs appels à l’encontre de la décision de la Chambre de première instance I du 14 juillet 2009’ dated 23 October 2009”, ICC-01/04-01/06-2180-tENG.

³⁷ Request for Extension of the Page Limit, para. 5; see also Mr Lubanga Dyilo’s Document in Support of the Appeal, paras 5-6.

³⁸ Request for Extension of the Page Limit, para. 5.

³⁹ Request for Extension of the Page Limit, Annex I, ICC-01/04-01/06-2113-Anx1-tENG, paras 35-38.

⁴⁰ Prosecutor’s Response to Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 8; Victims’ Observations, paras 19-22.

⁴¹ See “Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted”, ICC-01/04-01/06-1084.

⁴² Victims’ Observations, paras 20-21.

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victims contend that the Appeals Chamber should reject the Request for Extension of the Page Limit.⁴³

19. Under regulation 37 (2) of the Regulations of the Court, a Chamber may extend a page limit in “exceptional circumstances”. In the present case, Mr Lubanga Dyilo seeks a three-page extension to include submissions that relate to the question of whether or not Regulation 55 is consistent with the Statute.

20. While it is true that leave to appeal was neither sought nor granted in respect of this specific question, it is the Appeals Chamber’s view that this question is nevertheless fundamental to the appeals, as it is directly related to the issues for which leave to appeal was granted. If Regulation 55 were incompatible with the Statute and therefore should not be applied, any interpretation by the Trial Chamber that would lead to an application of the provision would be erroneous. The question raised by Mr Lubanga Dyilo is thus implicitly contained in the first issue on appeal.

21. As to the extension of the page limit, the Appeals Chamber finds that in the present case, exceptional circumstances in terms of regulation 37 (2) of the Regulations of the Court have been established because of the complexity of the case and the novelty of the issue; the Appeals Chamber is also persuaded that Mr Lubanga Dyilo could not present all of his arguments within the page limit prescribed by regulation 37 (1) of the Regulations of the Court. Noting also the modest extension sought, the Appeals Chamber has decided to grant the extension of the page limit. In addition, and for the same reasons, it has accepted Mr Lubanga Dyilo’s Document in Support of the Appeal, which already slightly exceeded the page limit.

22. The Appeals Chamber notes that Mr Lubanga Dyilo has annexed to the Request for Extension of the Page Limit the additional submissions he wishes to make. The Appeals Chamber recalls that it previously stated that a participant should not file an extended document until leave to do so was granted.⁴⁴ In the present case, the Appeals Chamber has nevertheless decided, in the particular circumstances of this case, to

⁴³ Prosecutor’s Document in Support of the Appeal, para. 8; Victims’ Observations, para. 22.

⁴⁴ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006, para. 4; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the re-filing of the document in support of the appeal”, ICC-01/04-01/06-1445, 22 July 2008, para. 8.

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accept the Additional Submissions. This is because Mr Lubanga Dyilo merely re-filed a document that had already been filed in the case and is, therefore, part of the record of the proceedings, to which the Appeals Chamber has access pursuant to rule 156 (1) of the Rules of Procedure and Evidence.

B. Requests for suspensive effect

23. In their documents in support of the appeals, both Mr Lubanga Dyilo⁴⁵ and the Prosecutor⁴⁶ requested the Appeals Chamber to grant suspensive effect to their appeals.

24. On 2 October 2009, Trial Chamber I rendered the “Decision adjourning the evidence in the case and consideration of Regulation 55”⁴⁷ (hereinafter: “Decision to Adjourn”), deciding that “[t]he recommencement date of 6 October 2009 is postponed, and the evidence in this case is adjourned to await the Decision of the Appeals Chamber [on the present appeals]”.⁴⁸

25. The victims oppose the requests for suspensive effect of the appeals on the ground that neither Mr Lubanga Dyilo nor the Prosecutor has established that “the implementation of the Impugned Decision would create an irreversible situation that could not be corrected”, as required by the Appeals Chamber.⁴⁹ Furthermore, the victims submit that the requests are moot, following the Decision to Adjourn.⁵⁰

26. In the Prosecutor’s Response to the Victims’ Observations, the Prosecutor acknowledged that suspensive effect was no longer required, following the Decision to Adjourn.⁵¹ In Mr Lubanga Dyilo’s Response to the Victims’ Observations, Mr Lubanga Dyilo did not address the victims’ submissions regarding the requests for suspensive effect.

⁴⁵ Mr Lubanga Dyilo’s Document in Support of the Appeal, paras 75-76.

⁴⁶ Prosecutor’s Document in Support of the Appeal, paras 19-21.

⁴⁷ ICC-01/04-01/06-2143.

⁴⁸ Decision to Adjourn, para. 23.

⁴⁹ Victims’ Observations, para. 16; the victims refer to the decision *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the request of Mr. Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008”, ICC-01/04-01/06-1290, 22 April 2008, para. 7.

⁵⁰ Victims’ Observations, para. 17.

⁵¹ Prosecutor’s Response to the Victims’ Observations, para. 7.

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27. The Appeals Chamber notes that the primary purpose of the requests for suspensive effect was to suspend the implementation of the Impugned Decision. As the Trial Chamber adjourned the hearing of all evidence in relation to the case against Mr Lubanga Dyilo, the Appeals Chamber considered that the requests for suspensive effect had been overtaken by these events. The Appeals Chamber therefore saw no need to rule on the requests for suspensive effect.

C. Reasons for decision on participation of victims

28. As stated above,⁵² in the Decision on Participation of Victims the Appeals Chamber granted 27 victims the right to participate in the appeals. It stated that they could make written submissions for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on both appeals. The reasons for this decision are summarised below. Judge Song and Judge Van den Wyngaert append to this judgment a separate opinion in relation to the Decision on Participation of Victims.

1. Submissions on the participation of victims

29. The victims submitting the First Victims' Filing contended that they had an "obvious interest" in participating in these appeals, as the Impugned Decision was issued following the victims' Joint Application.⁵³ They submitted furthermore that these appeals concerned a question that directly affected their interests, as they claimed to have been children enlisted in a militia in circumstances that could be characterised "as inhuman and degrading treatment or as sexual slavery".⁵⁴

30. As in the First Victims' Filing, the victims submitting the Second Victims' Filing contended that their personal interests were affected by the appeals because it was the victims who raised the matter of the implementation of Regulation 55 before the Trial Chamber.⁵⁵ Moreover, they submitted that they were former child soldiers who were sent to military camps, where they suffered inhuman or cruel treatment and that victim a/0050/06 also suffered various acts of sexual violence.⁵⁶ They recalled

⁵² See paragraph 15.

⁵³ First Victims' Filing, para. 12.

⁵⁴ First Victims' Filing, para. 13.

⁵⁵ Second Victims' Filing, para. 25.

⁵⁶ Second Victims' Filing, para. 25.

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that all of them were also witnesses for the Prosecutor.⁵⁷ They argued that their participation was appropriate because all of the requirements under article 68 (3) of the Statute were met.⁵⁸

31. The victims submitting the Third Victims' Filing contended that they were all recruited at a young age as child soldiers and subjected to inhuman treatment.⁵⁹ Accordingly, in their view, they had a direct and personal interest in the proceedings before the Appeals Chamber. Moreover, they argued that the issue of the interpretation of Regulation 55 (2), which allowed the legal characterisation of facts to be modified, was of the utmost interest to them.⁶⁰ They contended that the requested participation was appropriate insofar as the victims instigated the proceedings which resulted in the Impugned Decision, underlining that article 68 (3) of the Statute gave victims the right to present their views and concerns at all stages of the proceedings.⁶¹ The victims further submitted that the Appeals Chamber should defer its decision on the requests for suspensive effect until it decided on the participation of the victims, as this question could affect their interests.⁶²

32. The Prosecutor submitted that the victims should be permitted to present their views and concerns regarding the appeals because in his view, the victims fulfil the criteria established by the Appeals Chamber for participation in appeals under article 82 (1) (d) of the Statute.⁶³ Furthermore, he submitted that the "Appeals Chamber [should] consider directing the Legal Representatives to file a consolidated document containing the views and concerns of all three groups of victims on both the Prosecution appeal and the Defence appeal against the [Impugned] Decision".⁶⁴

33. Mr Lubanga Dyilo opposed the participation of victims in the appeals, arguing that there was no provision in the Statute that allowed victims to participate in the modification of the charges.⁶⁵ He submitted that only the Prosecutor could apply for

⁵⁷ Second Victims' Filing, para. 26.

⁵⁸ Second Victims' Filing, paras 28-38.

⁵⁹ Third Victims' Filing, paras 14-15.

⁶⁰ Third Victims' Filing, paras 16-17.

⁶¹ Third Victims' Filing, paras 17-23.

⁶² Third Victims' Filing, para. 13.

⁶³ Prosecutor's Response to Victims' Filings, para. 4.

⁶⁴ Prosecutor's Response to Victims' Filings, para. 5.

⁶⁵ Mr Lubanga Dyilo's Response to Victims' Filings, para. 8.

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an amendment of the charges pursuant to article 61 (9) of the Statute.⁶⁶ In Mr Lubanga Dyilo's opinion, the applications for participation were therefore inadmissible.⁶⁷

2. Determination of the applications for participation

34. In its "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'"⁶⁸ of 16 May 2008 (hereinafter: "Decision of 16 May 2008"), the Appeals Chamber explained that in respect of victims' participation in appeals brought under article 82 (1) (d) of the Statute, four cumulative criteria must be fulfilled: (i) the individuals seeking participation must be victims in the case, (ii) their personal interests must be affected by the issues on appeal, (iii) their participation must be appropriate, and (iv) the manner of participation should neither cause any prejudice to, nor be inconsistent with the rights of the accused and a fair and impartial trial.⁶⁹ In the same decision, the Appeals Chamber stated furthermore that:

[I]n ordering the manner of participation of victims to comply with the rights of the Defence to a fair and impartial trial, the Appeals Chamber will limit the victims to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal. Observations to be received by the victims must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.⁷⁰

35. In another decision, it stated that "any determination of [...] whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis".⁷¹ In line with its consistent previous jurisprudence, the Appeals Chamber recently confirmed this approach to victims' participation in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*.⁷²

⁶⁶ Mr Lubanga Dyilo's Response to Victims' Filings, para. 8.

⁶⁷ Mr Lubanga Dyilo's Response to Victims' Filings, paras 6-10.

⁶⁸ ICC-01/04-01/06-1335.

⁶⁹ Decision of 16 May 2008, para. 36.

⁷⁰ Decision of 16 May 2008, para. 50.

⁷¹ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber on the joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007", ICC-01/04-01/06-925, 13 June 2007, para. 28.

⁷² *Prosecutor v. Jean-Pierre Bemba Gombo*, "Reasons for the 'Decision on the Participation in the Appeal against the 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal

36. In the present case, the 27 applicants fulfilled all of the criteria for participation in the appeals. The Appeals Chamber first noted that all applicants had been recognised as victims in the case.⁷³ In addition, the Appeals Chamber considered that the victims' personal interests were affected insofar as they claim that they were children enlisted in a militia and that they had suffered sexual slavery, inhuman treatment and/or cruel treatment. Thus, the present appeals, which relate to the question of whether the legal characterisation of the facts may be modified so as to include these crimes, affected their personal interests. The Appeals Chamber also considered that the requested victims' participation was appropriate. Finally, turning to the manner of participation, in line with its previous jurisprudence, the Appeals Chamber allowed the victims to voice their views and concerns respecting their personal interests in the issues raised on appeal.

IV. MERITS OF THE APPEALS

A. First issue on appeal

37. The Trial Chamber formulated the first issue on appeal as follows:

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.⁷⁴

38. On the face of it, the first issue appears to comprise two questions: whether Regulation 55 contains two distinct procedures; and whether Regulation 55 (2) and (3) permits the "change of the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at

Republic of Germany, the Italian Republic, and the Republic of South Africa", ICC-01/05-01/08-566, 20 October 2009.

⁷³ See "Decision on the applications by victims to participate in the proceedings", ICC-01/04-01/06-1556, 16 December 2008; "Decision on the applications by 3 victims to participate in the proceedings", ICC-01/04-01/06-1562, 18 December 2008; "Corrigendum to 'Decision on the applications by victims to participate in the proceedings'", ICC-01/04-01/06-1556-Corr, 13 January 2009; "Decision on the applications by 7 victims to participate in the proceedings", ICC-01/04-01/06-2035, 10 July 2009.

⁷⁴ Decision Granting Leave to Appeal, para. 41.

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trial.” The Appeals Chamber, however, considers that the former question is an integral part of the latter question. The Appeals Chamber will therefore consider the two questions raised under the first issue on appeal together.

1. Relevant part of the Impugned Decision and the Clarification

39. In the Impugned Decision, the Trial Chamber explained that in its view:

Regulation 55 sets out the powers of the Chamber in relation to two distinct stages. One stage is defined in Regulation 55(1) by referring expressly to Article 74 of the Statute which sets out the “Requirements for the decision”, that is, the requirements for the Trial Chamber’s *final* judgment. Pursuant to Article 74(2) of the Statute, that decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. In harmony with Article 74, Regulation 55(1) confers on the Chamber, in that final stage, the power to change the legal characterisation of facts with one express limitation: “without exceeding the facts and circumstances described in the charges and any amendments to the charges”.⁷⁵

40. The Chamber continued:

On the other hand, Regulation 55(2) defines a distinct stage in which this sub-regulation operates. In contrast to Regulation 55(1), the former applies “at any time during the trial”. The power to change the legal characterisation of facts at this stage also has limitations, namely those specified in Regulation 55(2) and (3). However, the latter sub-regulations *do not require that the modification is done* “without exceeding the facts and circumstances described in the charges and any amendments to the charges”.⁷⁶ [Emphasis added.]

41. In the view of the Trial Chamber, the “safeguards”⁷⁷ for the rights of the accused person stipulated in Regulation 55 (2) and (3) do not apply to the modification of the legal characterisation of facts under Regulation 55 (1) because at the end of the trial, the modification is limited to the “facts and circumstances described in the charges and any amendments to the charges”.⁷⁸ To further support its view that Regulation 55 establishes two separate procedures, the Trial Chamber noted:

A right to call new evidence or to examine previous witnesses is only relevant to challenge evidence that is provided to substantiate a different factual basis. However, if the modification only concerns the substantive law applicable to the same factual basis that is contained in the relevant charging documents a right to

⁷⁵ Impugned Decision, para. 27.

⁷⁶ Impugned Decision, para. 28.

⁷⁷ Impugned Decision, para. 29.

⁷⁸ Impugned Decision, para. 27.

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call new evidence is not necessary, and thus, is not expressly conferred on the defendant by Regulation 55(1).⁷⁹ [Footnote omitted.]

42. The Trial Chamber concluded its analysis of Regulation 55 by stating that “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)”.⁸⁰

43. Turning to the case before it, the Trial Chamber noted that “[t]he submissions of the legal representatives of the victims and the evidence heard so far during the course of the trial persuade the majority of the Chamber that such a possibility [that the legal characterisation of facts may be subject to change] exists”.⁸¹ The Trial Chamber stated furthermore that it would, at an appropriate stage of the proceedings, give the parties and participants an opportunity to make submissions, in accordance with Regulation 55 (2),⁸² and that the purpose of the Impugned Decision was “to give notice to the parties and participants that it appears to the majority of the Chamber that the legal characterisation of facts may be subject to change.”⁸³

44. In the Clarification, the Trial Chamber “underline[d] that the parties and participants shall be guided by the understanding that the specific new facts and circumstances that the Chamber may consider are those listed in the [J]oint [A]pplication of the legal representatives”.⁸⁴ Furthermore, the Trial Chamber stated that:

As explained in the [Impugned Decision], Regulation 55(2) allows for the incorporation of additional facts and circumstances provided that notice to the participants is granted and an opportunity to make oral or written submissions concerning the proposed changes is afforded. Those “additional facts” must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.⁸⁵ [Footnote omitted.]

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⁷⁹ Impugned Decision, para. 30.

⁸⁰ Impugned Decision, para. 32.

⁸¹ Impugned Decision, para. 33.

⁸² Impugned Decision, para. 34.

⁸³ Impugned Decision, para. 35.

⁸⁴ Clarification, para. 7.

⁸⁵ Clarification, para. 8.

2. *The Minority Opinion*

45. In his Minority Opinion, Judge Fulford emphasised that in his view, Regulation 55 “created an indivisible or singular process”.⁸⁶ Recalling regulation 52 of the Regulations of the Court, he explained that he was of the opinion that charges are, “in essence, a combination of a ‘statement of facts’ and the ‘legal characterisation’ of those facts”.⁸⁷ He stated furthermore that Regulation 55 is restricted by both articles 74 (2) and 61 (9) of the Statute.⁸⁸ In his opinion, the former limits the power to modify the legal characterisation of facts to the “facts and circumstances” described in the charges or any amendment thereto, while the latter limits the Trial Chamber’s powers to amend charges.⁸⁹ In Judge Fulford’s view, “once the trial has begun, the charges cannot be amended, nor can additions or substitution to the charges be introduced”,⁹⁰ and “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)”.⁹¹

46. Turning to the distinction between an amendment of the charges and a modification of the legal characterisation of facts, Judge Fulford questioned whether any modification of the legal characterisation would not automatically lead to an “amendment” of the charges.⁹² Without exploring this question further, he stated that “[u]nless in due course Regulation 55 is found to be incompatible with Article 61(9), [the determination of whether a modification of the legal characterisation amounts to an amendment] will (at the very least) constitute a question of fact and degree, to be assessed on a case-by-case basis”.⁹³ He stated 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

⁸⁶ Minority Opinion, para. 4.

⁸⁷ Minority Opinion, para. 8.

⁸⁸ Minority Opinion, paras 9-10.

⁸⁹ Minority Opinion, paras 9-11.

⁹⁰ Minority Opinion, para. 15; *see also* paras 16-17.

⁹¹ Minority Opinion, para. 17.

⁹² Minority Opinion, para. 18.

⁹³ Minority Opinion, para. 19.

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example, applying a lesser ‘included offence’ [...] to that contained in the Document Containing the Charges, and reclassifying the mode of liability”.⁹⁴

47. Furthermore, Judge Fulford explained that in his view, the first sub-regulation of the provision cannot be severed from the second and third sub-regulations because this would mean that the Trial Chamber, in its decision under article 74 of the Statute at the end of the trial, could modify the legal characterisation of the facts without any of the safeguards for the rights of the accused which are provided in the second and third sub-regulations of Regulation 55.⁹⁵

48. Judge Fulford stated furthermore that in his view, the victims were not seeking a modification of the legal characterisation of the facts, but were rather proposing to add five additional charges.⁹⁶

3. *Submissions of Mr Lubanga Dyilo*

49. Mr Lubanga Dyilo’s principal submission is that Regulation 55 is “inherently incompatible” with the Statute and the Rules of Procedure and Evidence.⁹⁷ He submits that in adopting Regulation 55, the plenary of the judges went beyond its powers under article 52 (1) of the Statute to adopt Regulations of the Court necessary for its “routine functioning”.⁹⁸ He argues that the provision is in conflict with articles 61 (4) and 61 (9) of the Statute, read with rules 121 (4) and 128 of the Rules of Procedure and Evidence, which regulate the modification of the charges.⁹⁹ He argues that there is no general principle of international law that would give a Trial Chamber at the Court the right to modify the legal characterisation of the facts.¹⁰⁰ In his submission, Regulation 55 “conflicts with the principles laid down by the case law of the *ad hoc* tribunals [...] which can be transposed, *mutatis mutandis*, to the procedures in force before the International Criminal Court”.¹⁰¹

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⁹⁴ Minority Opinion, para. 20.

⁹⁵ Minority Opinion, paras 26-27.

⁹⁶ Minority Opinion, para. 34.

⁹⁷ Mr Lubanga Dyilo’s Document in Support of the Appeal, paras 5-6.

⁹⁸ Additional Submissions, para. 37.

⁹⁹ Additional Submissions, para. 37.

¹⁰⁰ Additional Submissions, para. 37.

¹⁰¹ Additional Submissions, para. 37.

50. In the alternative, Mr Lubanga Dyilo submits that Regulation 55 establishes a single re-characterisation process, which is subject to all of the conditions and guarantees provided for cumulatively in its three sub-regulations.¹⁰² Therefore, even if the Trial Chamber decides to modify the legal characterisation of the facts and circumstances described in the charges at the stage of its decision under article 74 of the Statute, it must implement the rights and guarantees set out in sub-regulations (2) and (3) of Regulation 55, as this is the only interpretation that respects the accused's fundamental rights.¹⁰³ Mr Lubanga Dyilo contends that as the legal characterisation of the facts constitutes an essential component of the charges, he must be informed promptly and in detail of any modification, in order to allow him to challenge effectively the validity of those charges against him,¹⁰⁴ because the knowledge of the legal characterisation is crucial to the assessment of the relevance of facts.¹⁰⁵

51. Expressing his agreement with Judge Fulford's Minority Opinion, Mr Lubanga Dyilo submits that Regulation 55 (2) and (3) allows the Trial Chamber to modify the legal characterisation only based on the facts and circumstances specifically described in the charges and any potential amendment thereto prior to the commencement of the trial.¹⁰⁶ In his view, the sole purpose of Regulation 55 is to rectify an error of legal characterisation by replacing one characterisation with another.¹⁰⁷ Mr Lubanga Dyilo argues that no additional offences or more serious charges can be added under Regulation 55 after the start of trial because this would conflict with article 61 (9) of the Statute and rule 128 of the Rules of Procedure and Evidence.¹⁰⁸ Referring to the judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") of 14 January 2000 in the case of *Prosecutor v. Kupreškić et al.*¹⁰⁹ (hereinafter: "*Kupreškić* Trial Judgment"), he submits that "any re-characterisation of the charges at the close of the trial may only be in favour of a less serious offence included in the initial charging document".¹¹⁰ He submits that pursuant to article 61 (9) of the Statute, the charges must be definitively defined prior

¹⁰² Mr Lubanga Dyilo's Document in Support of the Appeal, para. 8.

¹⁰³ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 9 and 14-15.

¹⁰⁴ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 9-12.

¹⁰⁵ Mr Lubanga Dyilo's Document in Support of the Appeal, para. 13.

¹⁰⁶ Mr Lubanga Dyilo's Document in Support of the Appeal, para. 16.

¹⁰⁷ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 18-19.

¹⁰⁸ Mr Lubanga Dyilo's Document in Support of the Appeal, para. 22.

¹⁰⁹ "Judgment", IT-95-16-T.

¹¹⁰ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 20-22.

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to the commencement of the trial.¹¹¹ He contends that Regulation 55 does not give authority to the Trial Chamber to consider and rely on matters of which it has not been legally seized.¹¹² Furthermore, he argues that article 74 (2) of the Statute does not allow the Trial Chamber to take into consideration, in their final decision, “facts other than those set out in the charges as confirmed by the Pre-Trial Chamber”.¹¹³ He then contends that article 67 (1) (a) of the Statute enshrines the fairness principle and the confinement of “the facts of which Trial Chamber I is legally seized [...] to those set out in the decision on the confirmation of charges”.¹¹⁴

52. Mr Lubanga Dyilo argues finally that a legal re-characterisation based on a modification of the factual basis of the charges would not allow him to adjust his defence and would thus violate article 67 (1) (a) and (b) of the Statute.¹¹⁵

4. *Submissions of the Prosecutor*

53. In the view of the Prosecutor, the language of Regulation 55 read as a whole clearly establishes that the facts must remain fixed and only their legal characterisation can be subject to change.¹¹⁶ Referring to the *travaux préparatoires* of the Statute, the Prosecutor contends that any decision of the Trial Chamber rendered under article 74 of the Statute that would exceed the facts and circumstances described in the charges and any amendments thereto would violate article 74 (2) of the Statute.¹¹⁷ The Prosecutor adds that the interpretation of Regulation 55 cannot contradict the statutory framework or the Rules of Procedure and Evidence.¹¹⁸ The Prosecutor also takes issue with the Trial Chamber’s reading of the case law of the European Court of Human Rights (hereinafter: “ECtHR”) and emphasises that in the cases referred to by the Trial Chamber, the factual scope of the charges had always remained intact.¹¹⁹

¹¹¹ Mr Lubanga Dyilo’s Document in Support of the Appeal, paras 23-28.

¹¹² Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 31.

¹¹³ Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 29.

¹¹⁴ Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 30.

¹¹⁵ Mr Lubanga Dyilo’s Document in Support of the Appeal, paras 32-35.

¹¹⁶ Prosecutor’s Document in Support of the Appeal, para. 29.

¹¹⁷ Prosecutor’s Document in Support of the Appeal, paras 28, 31, 33-34 and 44.

¹¹⁸ Prosecutor’s Document in Support of the Appeal, paras 42-43.

¹¹⁹ Prosecutor’s Document in Support of the Appeal, para. 46.

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54. The Prosecutor further argues that by dividing Regulation 55 into two different procedures, the Trial Chamber circumvented the safeguards established by the provision and he submits that “it would be unfair to the Prosecution and to the accused if they were denied any right to make submissions, to call new evidence, or to re-examine previous witnesses in order to fully explore the new issues and to address the new legal elements”.¹²⁰

55. As to amending the charges under article 61 (9) of the Statute, the Prosecutor asserts that he is vested with exclusive powers to amend the charges, but acknowledges that after the confirmation of the charges and before the commencement of the trial such powers are limited.¹²¹ Thereafter, he can only withdraw the charges or initiate subsequent prosecutions.¹²²

56. With regard to the relationship between article 61 (9) of the Statute and Regulation 55, the Prosecutor refutes Mr Lubanga Dyilo’s argument that a change in the legal characterisation necessarily constitutes an amendment to the charges.¹²³ Furthermore, the Prosecutor avers that Regulation 55 is not limited to permitting re-characterisation of a charge to a ‘lesser included offence’ because the only requirement that Regulation 55 sets out is the consistency with the facts and circumstances described in the charges and any amendments thereto.¹²⁴

5. Observations of the victims and responses thereto

57. The victims agree with the Prosecutor and Mr Lubanga Dyilo that Regulation 55 creates an indivisible process.¹²⁵ They emphasise that they did not request the Trial Chamber to exceed the facts and circumstances described in the confirmed charges, and that the proposed modifications of the legal qualification are “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

¹²⁰ Prosecutor’s Document in Support of the Appeal, para. 48; Response to Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 10.

¹²¹ Prosecutor’s Document in Support of the Appeal, paras 39-40.

¹²² Prosecutor’s Document in Support of the Appeal, paras 36 and 39.

¹²³ Prosecutor’s Document in Support of the Appeal, paras 39-41.

¹²⁴ Prosecutor’s Document in Support of the Appeal, para. 49; Response to Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 13.

¹²⁵ Victims’ Observations, paras 24-25.

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Containing the Charges.”¹²⁶ In their view, these factual elements are related to the facts described in the charges, as the said offences were allegedly committed during the military trainings.¹²⁷

58. Regarding the proposed re-characterisation of the facts as inhuman and/or cruel treatment, the victims first contend that both the Confirmation Decision and the Amended Document Containing the Charges expressly refer to strict discipline and sanctions imposed on the child soldiers, as well as to the fact that some of the children had been forced to smoke hemp.¹²⁸ Relying on the jurisprudence of international human rights courts, they argue that the abovementioned acts could amount to inhuman and/or cruel treatment.¹²⁹ They add that contrary to Mr Lubanga Dyilo’s submission, inhuman and/or cruel treatment does not require any specific intent, and can apply to detention conditions.¹³⁰ They submit furthermore that the recruitment of children under the age of fifteen years constitutes *per se* inhuman and/or cruel treatment.¹³¹

59. The victims submit that sexual slavery is one of the major consequences of the recruitment of girls, if not its first goal, as several witnesses have testified in Court.¹³² To support their submission, they refer the Appeals Chamber to other international instruments.¹³³

60. The victims contend that the circumstances of inhuman or cruel treatment and of sexual slavery constitute the goal and the consequences of the recruitment of child soldiers.¹³⁴ They submit that they neither propose new charges, nor a substitution of the legal qualifications selected by the Prosecutor, as confirmed by the Pre-Trial Chamber; rather, they claim that those circumstances justify supplementary legal qualifications, as the accused’s acts concurrently violate several provisions of the Statute.¹³⁵ The victims emphasise that, while Regulation 55 neither limits nor sets any

¹²⁶ Victims’ Observations, para. 26.

¹²⁷ Victims’ Observations, paras 27-28.

¹²⁸ Victims’ Observations, para. 28.

¹²⁹ Victims’ Observations, para. 28; Joint Application, para. 19.

¹³⁰ Victims’ Observations, para. 45.

¹³¹ Victims’ Observations, para. 29.

¹³² Victims’ Observations, para. 30.

¹³³ Victims’ Observations, paras 30 and 43-44.

¹³⁴ Victims’ Observations, para. 31.

¹³⁵ Victims’ Observations, para. 32.

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sort of hierarchy defining the allowed modification of the characterisation, both the cumulative charges and the *concursum delictorum* theories are in compliance with human right standards and are applied, *inter alia*, by the *ad hoc* tribunals.¹³⁶ The purpose of their joint request is thus only to allow the facts and circumstances contained in the confirmed charges to accord with the crimes provided for in the Statute.¹³⁷

61. The Prosecutor and Mr Lubanga Dyilo concur with the victims on the fact that Regulation 55 contains a single procedure, contrary to the interpretation given by the Trial Chamber.¹³⁸

62. The Prosecutor notes that “[t]he sole issue on which the Prosecution and the Legal Representatives differ is on the impact of this error”¹³⁹ of interpretation of Regulation 55 by Trial Chamber I:

Contrary to the Legal Representatives’ submissions, the notification given by the Majority was fundamentally flawed as it was based, at least in part, on consideration of new facts and circumstances beyond those set out in the charges. The Appeals Chamber should therefore remand the matter to the Trial Chamber to decide whether, based on the facts set out in the Document Containing the Charges, it still “appears to the Chamber that the legal characterisation of facts may be subject to change.” [Footnote omitted.]¹⁴⁰

63. Mr Lubanga Dyilo refutes the victims’ argument that the facts and circumstances alleged by the victims are described in the charges, as those facts and circumstances are not expressly mentioned in the Confirmation Decision, and their inclusion would thus be in breach of article 67 (1) of the Statute.¹⁴¹

6. Determination by the Appeals Chamber

64. Regulation 55 (“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

¹³⁶ Victims’ Observations, para. 33.

¹³⁷ Victims’ Observations, para. 34.

¹³⁸ Prosecutor’s Response to the Victims’ Observations, paras 8-11; Mr Lubanga Dyilo’s Response to the Victims’ Observations, para. 13.

¹³⁹ Prosecutor’s Response to the Victims’ Observations, para. 3.

¹⁴⁰ Prosecutor’s Response to the Victims’ Observations, para. 3, *see also* paras 12-15.

¹⁴¹ Mr Lubanga Dyilo’s Response to the Victims’ Observations, paras 15-26.

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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).

65. The Appeals Chamber notes that the arguments of Mr Lubanga Dyilo under the first issue are twofold: first, he submits that Regulation 55 is – irrespective of the Trial Chamber’s interpretation – incompatible with the Court’s legal instruments and therefore may not be applied. Second, and in the alternative, Mr Lubanga Dyilo argues that the Trial Chamber’s interpretation of Regulation 55 is incompatible with the Statute and with the rights of the accused person. The Prosecutor’s arguments in support of his appeal supplement or repeat submissions of Mr Lubanga Dyilo under the second strand of his contentions. Accordingly, the Appeals Chamber will initially address the first set of arguments raised by Mr Lubanga Dyilo and then turn to the following one, including those of the Prosecutor.

(a) Is Regulation 55 inherently incompatible with articles 52 and 61 (9) of the Statute, general principles of international law and with the rights of the accused?

66. Mr Lubanga Dyilo submits that Regulation 55 is inherently incompatible with articles 52 and 61 (9) of the Statute, general principles of international law and with the rights of the accused. For the reasons set forth below, the Appeals Chamber is not persuaded by these arguments.

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(i) *Article 52 of the Statute*

67. Mr Lubanga Dyilo submits that Regulation 55 is illegal because it affects directly the substance of the trial and the rights of the accused and therefore goes beyond the “routine functioning” of the Court.¹⁴² In essence, Mr Lubanga Dyilo submits that the judges acted *ultra vires* when adopting Regulation 55.

68. Article 52 (1) of the Statute provides as follows:

The judges shall, in accordance with the Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

69. The Appeals Chamber notes that the term “routine functioning” is not defined any further in the Statute or the Rules of Procedure and Evidence. However, the term has been described as a “broad concept”¹⁴³ and it has been observed that “routine functioning” also concerns matters of “practice and procedure”.¹⁴⁴ The Appeals Chamber notes furthermore that the Regulations of the Court contain several important provisions that affect the rights of the accused person, *inter alia*, on detention and on the scope of legal assistance paid by the Court.¹⁴⁵ Thus, while the Appeals Chamber acknowledges that the question of modification of the legal characterisation of facts is an important question that directly impacts on the trial, it is not persuaded that for that reason alone, it cannot be part of the routine functioning of the Court.

70. The Appeals Chamber observes in this context that after the Statute was adopted, there was a discussion as to whether the Rules of Procedure and Evidence should contain a provision on powers of the Trial Chambers to modify the legal characterisation of facts. In light of differences of views between common law countries and countries following the Romano-Germanic tradition, the matter was left for determination by the judges of the Court.¹⁴⁶ Two approaches would have been

¹⁴² Additional Submissions, para. 37.

¹⁴³ H.-J. Behrens, C. Staker, ‘Article 52 – Regulations of the Court’, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition, 2008), pp. 1053 et seq., at margin number 11.

¹⁴⁴ *Ibid.*, at margin number 13.

¹⁴⁵ See also C. Kreß, ‘The Procedural Texts of the International Criminal Court’, 5 *Journal of International Criminal Justice* (2007), pp. 537-543, at p. 540.

¹⁴⁶ See G. Bitti, ‘Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursum Delictorum’, in: H. Fischer, C. Kreß, S. R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (2004), pp. 279-288, at p.

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possible: the matter could have been determined through case law or through adoption of a provision on the issue in the Regulations of the Court. The latter approach has significant benefits, as it prevented, from the beginning, uncertainty as to the possibility of the modification of a legal characterisation. The adoption of a provision on the subject in the Regulations of the Court also prevented potentially inconsistent jurisprudence on the issue, which would have a considerable impact on the day-to-day conduct of the trials and the efficient use of judicial resources. Thus, the adoption of a provision on the modification of the legal characterisation was necessary for the Court's routine functioning.

71. Moreover, after their adoption by the judges on 26 May 2004, the Regulations of the Court were circulated to the States Parties for comments, pursuant to article 52 (3) of the Statute.¹⁴⁷ None of the States Parties raised any objection to Regulation 55, or questioned the judges' power to adopt such a provision under article 52 (1) of the Statute.

72. In sum, the Appeals Chamber is therefore not persuaded that the adoption of Regulation 55 was in breach of article 52 (1) of the Statute.

(ii) Article 61 (9) of the Statute

73. Mr Lubanga Dyilo also avers that Regulation 55 is inherently incompatible with article 61 (9) of the Statute and is therefore illegal.¹⁴⁸

74. Article 61 (9) of the Statute reads as follows:

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.

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286; H. Friman, 'The Rules of Procedure and Evidence in the Investigative Stage', in: H. Fischer, C. Kreß, S. R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law* (2004), pp. 191-217, at pp. 208-210.

¹⁴⁷ Article 52 (3) of the Statute reads as follows: "The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force".

¹⁴⁸ Additional Submissions, para. 37.

75. In Mr Lubanga Dyilo's submission, any modification of the legal characterisation of facts amounts to an amendment of the charges and therefore must conform to the procedure set out in article 61 (9) of the Statute and rules 121 (4) and 128 of the Rules of Procedure and Evidence.¹⁴⁹

76. The Appeals Chamber notes that if one adopted Mr Lubanga Dyilo's interpretation of article 61 (9) of the Statute, the only change to the charges after the commencement of the trial that would still be possible would be the withdrawal of a charge by the Prosecutor with the permission of the Trial Chamber (third sentence of article 61 (9) of the Statute). The Trial Chamber could not re-visit the legal characterisation that was confirmed by the Pre-Trial Chamber at the end of the confirmation procedure; the Trial Chamber could enter a conviction only on the basis of the legal characterisation expressly confirmed. Regulation 55 would be inherently incompatible with article 61 (9) of the Statute and therefore could never be applied.

77. The Appeals Chamber is not persuaded by the interpretation of article 61 (9) of the Statute put forward by Mr Lubanga Dyilo. First, the Appeals Chamber recalls that article 61 (9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced. Regulation 55 fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to "support each charge with sufficient evidence to establish substantial grounds to believe",¹⁵⁰ whereas during trial, the onus is on the Prosecutor to prove "guilt beyond reasonable doubt".¹⁵¹ Thus, in the Appeals Chamber's view, article 61 (9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible. Second, the Appeals Chamber notes that Mr Lubanga Dyilo's interpretation of article 61 (9) of the Statute bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the Statute to "put

¹⁴⁹ Additional Submissions, para. 37.

¹⁵⁰ Article 61 (5) of the Statute.

¹⁵¹ Article 66 (2) and (3) of the Statute.

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an end to impunity” (fifth paragraph of the Preamble). The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps,¹⁵² a purpose that is fully consistent with the Statute. Third, contrary to Mr Lubanga Dyilo’s claim, applicable human rights standards do not prohibit the modification of the legal characterisation in the course of a trial, as long as the rights of the accused person are safeguarded. This question will be addressed in more detail below.

78. The Appeals Chamber therefore finds that Regulation 55 is not inherently incompatible with article 61 (9) of the Statute. Whether the Trial Chamber’s interpretation of Regulation 55 is compatible with article 61 (9) of the Statute will be discussed below.¹⁵³

(iii) General principles of international law

79. Mr Lubanga Dyilo submits that Regulation 55 does not find support in any general principle of international law and that it is incompatible with the principles established in the case law of the ICTY. In his submission, the *Kupreškić* Trial Judgment indicates that a change in the legal characterisation of facts to a different or more serious crimes requires an amendment to the charges at the initiative of the prosecution, in order to put the defence on notice, and this principle should apply, *mutatis mutandis*, at the Court as well.

80. In the view of the Appeals Chamber, Mr Lubanga Dyilo’s arguments are misconceived. First, the Appeals Chamber notes that on the face of the Court’s legal texts, there is no general requirement that the provisions of the Regulations of the Court must be limited to the codification of general principles of international law. The Appeals Chamber notes that Mr Lubanga Dyilo then focuses on the *Kupreškić* Trial Judgment. As a starting point, the Appeals Chamber does not consider that the Regulations of the Court must necessarily reflect the approach adopted by the ICTY. In addition, it is noteworthy that the legal instruments of the ICTY do not contain a provision similar to Regulation 55. For that reason, in the *Kupreškić* Trial Judgment, the judges considered whether this gap in the legal framework of the ICTY could be

¹⁵² On the purpose of Regulation 55 *see also* H.P. Kaul, ‘Developments at the International Criminal Court/Construction Site for More Justice: The International Criminal Court after Two Years’, 99 *American Journal of International Law* (2005), pp. 370-384, at pp. 375-378; C. Stahn, ‘Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55’, 16 *Criminal Law Forum* (2005), pp. 1-31.

¹⁵³ *See paras 94 et seq.*

closed by reference to a general principle of law and concluded that there exists “no general principle of criminal law common to all major legal systems of the world”¹⁵⁴ regarding a change in the legal characterisation of facts. At this Court, the situation is different. The judges of the Court adopted Regulation 55 as part of the Regulations of the Court. Thus, there is no need to rely on general principles of law to determine whether or not legal re-characterisation is permissible.

81. The Appeals Chamber is therefore not persuaded by Mr Lubanga Dyilo’s argument that Regulation 55 should not be applied because of a purported inconsistency with general principles of international law.

(iv) Consistency with the rights of the accused person

82. Mr Lubanga Dyilo submits that Regulation 55 is inconsistent with the rights of the accused person.

83. The Appeals Chamber notes that pursuant to article 67 (1) (a) of the Statute, an accused person has the right to “be informed promptly and in detail of the nature, cause and content of the charge”. In addition, pursuant to article 67 (1) (b) of the Statute, the accused person has the right to “have adequate time and facilities for the preparation of the defence”. Finally, under article 67 (1) (c) of the Statute, the accused person has the right to “be tried without undue delay”. These rights of the accused person reflect internationally recognised human rights.¹⁵⁵ Pursuant to article 21 (3) of the Statute, “the application and interpretation of law pursuant to [article 21] must be consistent with internationally recognized human rights”. Now, is Regulation 55 inconsistent with these rights, as Mr Lubanga Dyilo asserts?

84. In the view of the Appeals Chamber, article 67 (1) (a) of the Statute does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of the trial, and without a formal amendment to the charges. This is

¹⁵⁴ *Kupreškić* Trial Judgment, para. 738.

¹⁵⁵ See article 14 (3) (a) of the International Covenant on Civil and Political Rights, signed 16 December 1966, entered into force 23 March 1976, 999 United Nations Treaty Series 14668; article 7 (1) of the African (Banjul) Charter on Human and Peoples’ Rights, signed 27 June 1981, entered into force 21 October 1986, 1520 United Nations Treaty Series 26363; article 8 (2) (b) of the American Convention on Human Rights ‘Pact of San Jose, Costa Rica’, signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955; article 6 (3) (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), signed 4 November 1950, as amended by Protocol 11, entered into force 3 September 1953, 213 United Nations Treaty Series 2889.

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supported by the jurisprudence of the ECtHR¹⁵⁶ on article 6 (3) (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁵⁷ and of the Inter-American Court of Human Rights¹⁵⁸ on article 8 (2) (b) of the American Convention on Human Rights.¹⁵⁹

85. Nevertheless, human rights law demands that the modification of the legal characterisation of facts in the course of the trial must not render that trial unfair.¹⁶⁰ The Appeals Chamber notes in this context that article 67 (1) (b) of the Statute provides for the right of the accused person to “have adequate time and facilities for the preparation of the defence”. It is to avoid violations of this right that Regulation 55 (2) and (3) set out several stringent safeguards for the protection of the rights of the accused. How these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented has not been fully considered in the context of the present appeals and will depend on the circumstances of the case.

86. As to the right to a trial without undue delay (article 67 (1) (c) of the Statute), the Appeals Chamber does not consider that a change of the legal characterisation of the facts pursuant to Regulation 55 as such will automatically lead to undue delay of the trial. Whether a re-characterisation leads to undue delay will depend on the specific circumstances of the case.

¹⁵⁶ See *Pélissier and Sassi v. France*, “Judgment”, 25 March 1999, Application no. 25444/94; *Dallos v. Hungary*, “Judgment”, 1 March 2001, Application no. 29082/95; *Sadak and others v. Turkey*, “Judgment”, 17 July 2001, Application nos 29900/96, 29901/96, 29902/96 and 29903/96; *I. H. and others v. Austria*, “Judgment”, 20 April 2006, Application no. 42780/98; *Miriaux v. France*, “Arrêt”, 26 September 2006, Application no. 73529/01; *Mattei v. France*, “Arrêt”, 19 December 2006, Application no. 34043/02; *Abramyan v. Russia*, “Judgment”, 9 October 2008, Application no. 10709/02.

¹⁵⁷ Article 6 (3) (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms reads: “Everyone charged with a criminal offence has the following minimum rights: [...] to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.

¹⁵⁸ See *Fermín Ramírez v. Guatemala*, “Judgment”, 20 June 2005.

¹⁵⁹ Article 8 (2) of the American Convention on Human Rights reads, in relevant part, as follows: “2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: [...] b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense”.

¹⁶⁰ For instance, the ECtHR found in *Pélissier and Sassi v. France* that a breach of article 6 of the European Convention on Human Rights occurred in circumstances where the accused were not properly informed that the legal characterisation of the facts against them could be modified from co-perpetration to aiding and abetting bankruptcy, paras 55-63. See also *Sadak and others v. Turkey*, “Judgment”, 17 July 2001, Application nos. 29900/96, 29901/96, 29902/96, and 29903/96, para. 57; *Miriaux v. France*, “Arrêt”, 26 September 2006, Application no. 73529/01, para. 32; *Mattei v. France*, “Arrêt”, 19 December 2006, Application no. 34043/02, para. 34.

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87. In sum, therefore, the Appeals Chamber does not consider that Regulation 55 is inherently in breach of Mr Lubanga Dyilo's right to a fair trial.

(b) The Trial Chamber's interpretation of Regulation 55

88. Having thus determined that Regulation 55 is not inherently incompatible with the aforementioned provisions of the Statute, but rather complements and completes them, the Appeals Chamber will now turn to the arguments of Mr Lubanga Dyilo and of the Prosecutor regarding the Trial Chamber's interpretation of Regulation 55 in the Impugned Decision. Based on the consideration that Regulation 55 contains two distinct procedures that are applicable at different stages of the procedure,¹⁶¹ the Trial Chamber was of the view that the provision would allow it to change the legal characterisation "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."¹⁶² For the reasons stated below, the Appeals Chamber finds that this interpretation of the provision was erroneous because Regulation 55 (2) and (3) may not be used to exceed the facts and circumstances described in the charges or any amendment thereto

(i) Article 74 (2) of the Statute

89. In the Appeals Chamber's view, the most obvious obstacle to the Trial Chamber's interpretation of Regulation 55 is article 74 (2) of the Statute. The second sentence of that provision reads as follows:

The decision [of the Trial Chamber at the end of the trial] shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

90. According to the Trial Chamber's interpretation of Regulation 55, the Chamber could adjudicate, at the end of the trial, not only the facts described in the charges or any amendment thereto,¹⁶³ but also *additional* facts that were introduced into the trial

¹⁶¹ Impugned Decision, para. 27.

¹⁶² Decision Granting Leave to Appeal, para. 41.

¹⁶³ In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute.

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through a “change” of their legal characterisation under Regulation 55. The Appeals Chamber considers that this interpretation would result in a conflict with article 74 (2) of the Statute because these additional facts would not have been described in the charges or any amendment thereto. Regulation 1 (1) of the Regulations of the Court provides that the Regulations of the Court must be “read subject to the Statute and the Rules”. Thus, any interpretation of Regulation 55 that cannot be reconciled with article 74 (2) of the Statute must be rejected as incorrect.

91. The drafting history of article 74 (2) of the Statute also confirms that Regulation 55 must be limited to the facts and circumstances described in the charges or any amendment thereto. As the Prosecutor notes, what would become the second sentence of article 74 (2) of the Statute was first contained in an Argentinean proposal of 13 August 1996 for the Rules of Procedure and Evidence.¹⁶⁴ The commentary to the proposal explained that “the court may not hand down a judgement on acts which have not been included in the indictment or an amendment thereto”.¹⁶⁵ Thus, the purpose of the provision was to bind the Chamber to the factual allegations in the charges. The Trial Chamber’s interpretation of Regulation 55 would be inconsistent with that purpose.

92. The Appeals Chamber agrees with the submission of the Prosecutor that the fact that the Trial Chamber, in its Clarification, limited the additional facts to those that “have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges”¹⁶⁶ does not cure the breach of article 74 (2) of the Statute.¹⁶⁷ This is because as long as the Trial Chamber, in its decision at the end of the trial, goes beyond the “facts and circumstances described in the charges and any amendments to the charges”, there would be a conflict with that provision. The Trial Chamber’s interpretation of Regulation 55 must therefore be rejected as incorrect, irrespective of the more limiting interpretation given by the Trial Chamber in the Clarification. In this context, the Appeals Chamber notes that the Clarification substantially modified the Impugned Decision. The Appeals Chamber

¹⁶⁴ Working paper submitted by Argentina to the Preparatory Committee on the Establishment of an International Criminal Court (12-30 August 1996), A/AC.249/L.6.

¹⁶⁵ Working paper submitted by Argentina to the Preparatory Committee on the Establishment of an International Criminal Court (12-30 August 1996), A/AC.249/L.6, p. 12.

¹⁶⁶ Clarification, para. 8.

¹⁶⁷ Prosecutor’s Document in Support of the Appeal, para. 35.

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disapproves of the use of such clarifications to alter, or to add to, the substance of a decision. Clarifications of this kind are of questionable legality and are undesirable, because they affect the finality of judicial decisions.

93. Thus, the Appeals Chamber is of the view that article 74 (2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto. If applied with such limitation, Regulation 55 is consistent with article 74 (2) of the Statute. This latter provision binds the Trial Chamber only to the facts and circumstances described in the charges or any amendment thereto, but does not make reference to the legal characterisation of these facts and circumstances. It follows *a contrario* that article 74 (2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances.

(ii) Article 61 (9) of the Statute

94. The interpretation by the Trial Chamber of Regulation 55 is also in conflict with article 61 (9) of the Statute. The Appeals Chamber is persuaded by the arguments of Mr Lubanga Dyilo and the Prosecutor that new facts and circumstances not described in the charges may only be added under the procedure of article 61 (9) of the Statute. The Trial Chamber's interpretation of Regulation 55 would circumvent article 61 (9) of the Statute and would blur the distinction between the two provisions. As the Prosecutor notes, the incorporation of new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial. The Appeals Chamber observes that it is the Prosecutor who, pursuant to article 54 (1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61 (1) and (3) of the Statute, proffers charges against suspects. To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.

95. The Appeals Chamber therefore finds that the Trial Chamber's interpretation of Regulation 55 is incompatible with article 61 (9) of the Statute.

(iii) Regulation 52 of the Regulations of the Court

96. The Appeals Chamber also sees merit in the argument of the Prosecutor that the Trial Chamber's interpretation is inconsistent with regulation 52 of the Regulations of

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the Court, which describes the elements of a document containing the charges as follows:

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.

97. Regulation 52 of the Regulations of the Court thus stipulates that the document containing the charges shall contain three distinct elements: information identifying the accused person, a statement of the facts, and the legal characterisation of these facts. The distinction between facts and their legal characterisation should be respected for the interpretation of Regulation 55 as well. The text of Regulation 55 only refers to a change in the legal characterisation of the facts, but not to a change in the statement of the facts. This indicates that only the legal characterisation (regulation 52 (c) of the Regulations of the Court) could be subject to change, but not the statement of the facts (regulation 52 (b) of the Regulations of the Court). The Appeals Chamber finds that the Trial Chamber's interpretation of Regulation 55 does not follow this distinction, which indicates that it is incorrect.

(iv) Article 21 (3) of the Statute

98. As stated above,¹⁶⁸ the Appeals Chamber is of the view that Regulation 55, if properly interpreted and applied, is consistent with internationally recognised human rights. However, as Judge Fulford noted in his Minority Opinion and as all parties and participants to the present appeals submit, if one were to sever sub-regulation (1) from the procedural safeguards in sub-regulations (2) and (3), the compliance of sub-regulation (1) with human rights would not be ensured. The Appeals Chamber agrees with the Prosecutor that this is another clear indication that the Trial Chamber's

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¹⁶⁸ See paragraphs 83 et seq.

interpretation of Regulation 55, which would separate the provision into two procedures, is flawed and cannot be maintained.

(v) *Addition of new offences or replacement with more serious offences*

99. Mr Lubanga Dyilo submits that Regulation 55 only allows the re-characterisation of facts to ‘lesser included offences’,¹⁶⁹ but does not allow for the addition of new offences to those listed in the charges, even if they are based on the facts and circumstances described in the charges; nor does Regulation 55 allow that the legal characterisation be modified to a more serious offence.¹⁷⁰ In his view, the addition of an offence or the replacement of a lesser offence with a more serious offence would require an amendment of the charges, which is in the exclusive jurisdiction of the Pre-Trial Chamber.¹⁷¹ He refers to the *Kupreskić* Trial Judgment,¹⁷² and to the accused person’s right to be informed “prior to the commencement of the trial, of the precise legal characterisation of the facts”.¹⁷³

100. The Appeals Chamber notes that the question raised by Mr Lubanga Dyilo goes beyond the scope of the first issue on appeal, which is limited to the question of whether Regulation 55 may be used to include additional facts and circumstances not described in the charges or any amendment thereto. The Chamber notes, however, that the text of Regulation 55 does not stipulate, beyond what is contained in sub-regulation 1, what changes in the legal characterisation may be permissible. The Appeals Chamber will not consider the issue any further, but notes, in any event, that the particular circumstances of the case will have to be taken into account. In addition, as stated above, the modification of the legal characterisation is limited by the facts and circumstances described in the charges or any amendment thereto. Furthermore, Regulation 55 (2) and (3) must be respected in order to safeguard the rights of the accused, and the change in the re-characterisation must not lead to an unfair trial.

B. Second issue on appeal

101. The second issue for which leave to appeal was granted is:

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¹⁶⁹ Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 21.

¹⁷⁰ Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 22.

¹⁷¹ Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 22.

¹⁷² Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 20.

¹⁷³ Mr Lubanga Dyilo’s Document in Support of the Appeal, para. 21.

Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, *viz.* to include crimes under Articles 7(1)(g), 8(2)(b)(xxvi) [*sic*], 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.¹⁷⁴

1. Relevant part of the Impugned Decision and the Clarification

102. In the Impugned Decision, the Trial Chamber did not rule as to how the legal characterisation of the facts could be changed. The Trial Chamber merely stated:

A condition for triggering the mechanism of Regulation 55(2) is the Chamber's finding that the legal characterisation of facts may be subject to change. The submissions of the legal representatives of the victims and the evidence heard so far during the course of the trial persuade the majority of the Chamber that such a possibility exists. Accordingly, the parties and participants have a right to receive early notice.¹⁷⁵

103. In the Clarification, the Trial Chamber stated that the “‘additional facts’ must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.”¹⁷⁶ The Trial Chamber also stated that:

The parties and participants, when preparing for the hearing referred to in paragraph 9, shall be guided by the understanding that the specific additional legal characterisations indicated by the legal representatives of the victims were the basis for the Chamber triggering the proceedings prescribed in Regulation 55(2) and (3). Thus, the additional legal characterisations that the chamber may consider are the following

- a Article 7(1)(g) (“sexual slavery” as a crime against humanity),
- b Article 8(2)(b)(xxii) (“sexual slavery” as a war crime),
- c. 8(2)(e)(vi) (“sexual slavery” as a war crime),
- d 8(2)(a)(ii) (“inhuman treatment” as a war crime), and
- e 8(2)(c)(i) (“cruel treatment” as a war crime)¹⁷⁷

2. Submissions of Mr Lubanga Dyilo

104. The arguments raised by Mr Lubanga Dyilo under the second issue are in two parts: first, he makes detailed submissions in support of the argument that the facts

¹⁷⁴ Decision Granting Leave to Appeal, para. 41.

¹⁷⁵ Impugned Decision, para. 33.

¹⁷⁶ Clarification, para. 8.

¹⁷⁷ Clarification, para. 11 b).

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and circumstances described in the charges do not establish the elements of the crimes defined in article 7 (1) (g), article 8 (2) (b) (xxii), article 8 (2) (e) (vi), article 8 (2) (a) (ii) and article 8 (2) (c) (i) of the Statute,¹⁷⁸ and that therefore the modification of the legal characterisation of facts contemplated by the Trial Chamber would amount to an (impermissible) amendment of the charges.¹⁷⁹ Second, he avers that the addition of charges at this stage of the proceedings would violate his fundamental rights.¹⁸⁰

3. Submissions of the Prosecutor

105. As to Mr Lubanga Dyilo's first set of arguments, the Prosecutor submits that it would be premature for the Appeals Chamber to consider the arguments raised under the second issue because the Trial Chamber gave notice that the legal characterisation of the facts may change based on an incorrect interpretation of Regulation 55.¹⁸¹ In the Prosecutor's view, "neither the Appealed Decision nor the Clarification distinguish which facts the Trial Chamber considered may support which legal characterisations, nor do they distinguish which of the facts were set out in the charges and which were not."¹⁸² For these reasons, the Prosecutor suggests that "the Appeals Chamber should remand the matter to the Trial Chamber for it to consider whether based on the correct facts it still 'appears to the Chamber that the legal characterisation of the facts may be subject to change' under Regulation 55(2)".¹⁸³ As to Mr Lubanga Dyilo's second set of arguments, the Prosecutor submits that the mere fact of triggering Regulation 55 does not in and of itself violate the rights of the accused.¹⁸⁴

4. Observations of the victims and responses thereto

106. In respect of the first set of arguments of Mr Lubanga Dyilo under the second issue on appeal, the victims submit that the Appeals Chamber should not analyse the entire set of evidence that could potentially lead to a modification of the legal characterisation of facts by the Trial Chamber, as this would cause an unjustified

¹⁷⁸ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 38-57.

¹⁷⁹ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 36-38.

¹⁸⁰ Mr Lubanga Dyilo's Document in Support of the Appeal, paras 58-74.

¹⁸¹ Prosecutor's Response to Mr Lubanga Dyilo's Document in Support of the Appeal, paras 19-21.

¹⁸² Response to Mr Lubanga Dyilo's Document in Support of the Appeal, footnote 38.

¹⁸³ Response to Mr Lubanga Dyilo's Document in Support of the Appeal, para. 21.

¹⁸⁴ Response to Mr Lubanga Dyilo's Document in Support of the Appeal, paras 17 and 22-26.

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delay.¹⁸⁵ They reiterate that they are not requesting the Court to bring new charges against Mr Lubanga Dyilo, but rather to consider circumstances related to the facts described in the charges.¹⁸⁶ In respect of the second set of arguments of Mr Lubanga Dyilo, the victims agree with the Prosecutor that Mr Lubanga Dyilo's rights will not be violated as long as the safeguards provided for in Regulation 55 (2) and (3) are implemented and that in any event, a finding that the implementation of the procedure under Regulation 55 in the present case would result in the violations of Mr Lubanga Dyilo's rights would be premature.¹⁸⁷

107. The Prosecutor agrees with the victims that the question of whether the facts and circumstances set out in the charges support the proposed legal characterisations is one which must be decided by the Trial Chamber, having heard submissions from the parties, and not by the Appeals Chamber at this stage.¹⁸⁸ The Prosecutor thus requests the Appeals Chamber not to determine "at this stage whether the facts and circumstances support the alternative legal characterisations under consideration by the Trial Chamber".¹⁸⁹

108. Mr Lubanga Dyilo refutes the victims' argument that it would be premature for the Appeals Chamber to rule on the second issue in respect of which leave to appeal was granted, drawing the Appeals Chamber's attention to the formulation of the question and the fact that the Trial Chamber considered the addition of offences.¹⁹⁰ He also contests the victims' submissions as to why the crimes of sexual slavery, inhuman treatment or cruel treatment may be made part of the trial against him.¹⁹¹

5. Determination by the Appeals Chamber

109. The Appeals Chamber agrees with the submission of the Prosecutor that the Trial Chamber based its finding that the legal characterisation of the facts may be subject to change on an interpretation of Regulation 55 that was flawed. Moreover, the Appeals Chamber notes that the Trial Chamber itself has not yet considered the

¹⁸⁵ Victims' Observations, para. 36.

¹⁸⁶ Victims' Observations, paras 37-38.

¹⁸⁷ Victims' Observations, para. 39.

¹⁸⁸ Victims' Observations, paras 35, 39 and 42; Prosecutor's Response to the Victims' Observations, para. 14.

¹⁸⁹ Prosecutor's Response to the Victims' Observations, paras 14-15.

¹⁹⁰ Mr Lubanga Dyilo's Response to the Victims' Observations, paras 28-31.

¹⁹¹ Mr Lubanga Dyilo's Response to the Victims' Observations, paras 32-40.

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questions arising under the second issue in any detail. The Trial Chamber's explanations in the Impugned Decision and the Clarification regarding the facts and circumstances that it would take into account for the change in the legal characterisation are extremely thin. The Trial Chamber neither provided any details as to the elements of the offences the inclusion of which it contemplated, nor did it consider how these elements were covered by the facts and circumstances described in the charges. Thus, if it considered the second issue, the Appeals Chamber would, for the first time, make an assessment of these questions in its judgment on the appeals, even though the Trial Chamber currently is in the best position to assess the charges and the evidence that has been presented. Furthermore, the Appeals Chamber notes that it would potentially deprive the accused of one level of review if it were to rule on the second issue. The Appeals Chamber thus finds that it would be premature to address the arguments raised by Mr Lubanga Dyilo under the second issue.

110. Similarly, as far as Mr Lubanga Dyilo's arguments regarding the purported violation of his fundamental rights are concerned, any discussion by the Appeals Chamber of the issues raised would be abstract and hypothetical.

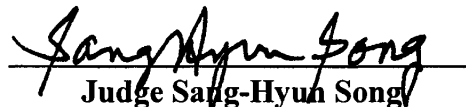
111. Therefore, the Appeals Chamber sees no need to address the merits of Mr Lubanga Dyilo's submissions under the second issue on appeal.

V. APPROPRIATE RELIEF

112. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, for the reasons given above, the Appeals Chamber is of the view that the Trial Chamber erred in law when finding that Regulation 55 contained two separate procedures and that it was permissible under Regulation 55 (2) and (3) to include additional facts and circumstances that are not described in the charges. This error materially affected the Impugned Decision. The Appeals Chamber therefore considers it appropriate to reverse the Impugned Decision.

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


Judge Sang-Hyun Song
Presiding Judge

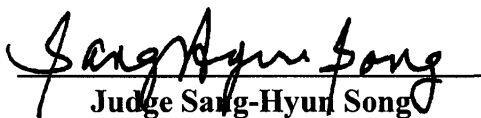
Dated this 8th day of December 2009

At The Hague, The Netherlands

Separate opinion of Judge Sang-Hyun Song and Judge Christine Van den Wyngaert with respect to the “Decision on the participation of victims in the appeals” issued on 20 October 2009

We agree with the majority of the Appeals Chamber that the 27 victims who seek to participate in the present appeals should be allowed to make submissions. However, as first explained in Judge Song’s dissenting opinion of 13 February 2007,¹⁹² we are of the view that the victims have a right to make their submissions under regulation 65 (5) of the Regulations of the Court because they participated in the proceedings that gave rise to the present appeals. Therefore, there is no need for the victims to apply for participation, nor for the Appeals Chamber to rule on the applications.

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


Judge Sang-Hyun Song

Dated this 8th day of December 2009

At The Hague, The Netherlands

¹⁹² ICC-01/04-01/06-824, pp. 54-57. That dissenting opinion related to an appeal brought under article 82 (1) (b) of the Statute; however, the same considerations apply to appeals brought under article 82 (1) (d) of the Statute; *see* Judge Song’s separate and partly dissenting opinion of 16 May 2008, ICC-01/04-01/06-1335, pp. 18-22, para. 3.