

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06

Date: 14 July 2009

**TRIAL CHAMBER I**

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

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

**Public - Urgent**

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

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

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju Duval

**Legal Representatives of the Victims**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu  
Mr Joseph Keta Orwinyo  
Mr Jean Louis Gilissen  
Mr Jean Chrysostome Mulamba  
Nsokoloni  
Mr Paul Kabongo Tshibangu  
Mr Hervé Diakiese

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## Background and submissions

1. On 22 May 2009, the legal representatives of the victims filed a joint request pursuant to Regulation 55 of the Regulations of the Court ("Regulations"), requesting the Chamber to consider a legal re-characterisation of the facts as, respectively, sexual slavery pursuant to Articles 7(1)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi) of the Rome Statute ("Statute"), and inhuman and / or cruel treatment pursuant to Articles 8(2)(a)(ii) or 8(2)(c)(i) of the Statute. In addition, the legal representatives requested that the Chamber accept oral or written observations on any issue related to this aforementioned legal re-characterisation.<sup>1</sup>
  
2. In the course of the filing, the legal representatives submitted: (i) that Regulation 55(1) provides the Chamber with the power to change the legal classification of the facts so that they are consistent with both the crimes listed under Articles 6, 7 or 8 of the Statute, and with the form of participation of the accused in those crimes as specified in Articles 25 and 28 of the Statute; (ii) that notwithstanding, any re-characterisation must not exceed the scope of the facts and circumstances described in the charges or in any amendments to them; and (iii) that under the provisions of Regulation 55(2) the Chamber is empowered to make a decision under the Regulation 55(1) at any time during the trial.<sup>2</sup>
  
3. The legal representatives further submitted that Regulation 55(2) grants to those who participate in the proceedings: (i) the right to be informed of the intention of the Chamber to modify the legal characterisation of the facts; (ii) the right to effective preparation in relation to all matters concerning the proposed modification; and (iii) the right to give oral or written observations

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<sup>1</sup> Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, 22 May 2009, ICC-01/04-01/06-1891.

<sup>2</sup> *Ibid*, paragraphs 6-7.

on the proposed amendment. It was noted that while Regulation 55 neither specifies how the procedure under this Regulation should be implemented, nor whether parties or participants may also initiate it, the Trial Chamber has explicitly recognised that the term “participants” in Regulation 55(2) is not to be limited to the “parties” to the procedure, but also the other participants including the victims’ legal representatives.<sup>3</sup> In the alternative, the legal representatives submitted that the personal interests of the victims are affected by the application of Regulation 55 within the meaning of Article 68(3) of the Statute.<sup>4</sup>

4. Furthermore, the legal representatives submitted: (i) that Trial Chamber I has itself recognised Regulation 55 as lawful, to the extent that its adoption was recommended by the Judges in plenary and was subsequently endorsed by the Assembly of States Parties;<sup>5</sup> (ii) that the terms of this Regulation do not conflict with Article 74(2) of the Statute, allowing as they do for a modification in the legal classification of the facts and not an alteration or modification of the facts and circumstances as described in the charges; and (iii) that provided it remains within the boundaries delineated by the facts and circumstances described in the charges, the Regulation allows for another legal classification to be conferred to these facts and circumstances, provided that no unfairness arises.<sup>6</sup>
5. The legal representatives also submitted that the following elements weighed in favour of allowing the Chamber to apply Regulation 55 in this case. The facts are consistent with the relevant charges set out in the Statute, specifically the facts stated by a number of the witnesses who testified before the Chamber to date relate to the elements of crimes that fall into Articles 7(1)(g)

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<sup>3</sup> Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04/01-06-1084, paragraph 48.

<sup>4</sup> ICC-01/04-01/06-1891, paragraph 11.

<sup>5</sup> ICC-01/04/01-06-1084, paragraph 47.

<sup>6</sup> ICC-01/04-01/06-1891, paragraph 14.

or 8(2)(b)(xxii) or 8(2)(e)(vi) (“sexual slavery”), 8(2)(a)(ii) (“inhuman treatment”) or 8(2)(c)(i) (“cruel treatment”). The facts given in evidence fall within the particular facts, circumstances and form of criminal responsibility described in the charges with regard to Thomas Lubanga Dyilo, as confirmed by the *Decision on the confirmation of the charges*<sup>7</sup> and as amended in accordance with the Amended Document Containing the Charges.<sup>8</sup> The alleged acts of sexual slavery and inhuman and / or cruel treatment engage, with regard to the accused, the same form of criminal responsibility as that contained in the *Decision on the confirmation of the charges*.<sup>9</sup>

6. The legal representatives stressed that the proposed legal re-characterisations were not intended to replace the legal classifications initially chosen by the Office of the Prosecutor (“prosecution”) in its Amended Document Containing the Charges, which reflects the charges confirmed by Pre-Trial Chamber I in its *Decision on the confirmation of the charges*. The legal representatives submitted, rather, that the purported modification of the legal classification can be applied to the same facts as these facts may constitute a violation of several crimes set out in the Statute.<sup>10</sup>
  
7. Therefore, the legal representatives requested that the Chamber commence the procedure for the legal re-characterisation of the facts provided for in Regulation 55, and grants to the victims’ legal representatives the opportunity to make oral or written submissions on any matter relating to this legal qualification of the facts under Regulation 55.<sup>11</sup>

<sup>7</sup> Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803.

<sup>8</sup> Prosecution’s provision of the amended document containing the charges, Article 61(3)(a), 22 December 2008, ICC-01/04-01/06-1571-Conf, and public redacted version, ICC-01/04-01/06-1573.

<sup>9</sup> Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, 22 May 2009, ICC-01/04-01/06-1891, paragraph 37.

<sup>10</sup> *Ibid*, paragraph 42.

<sup>11</sup> *Ibid*, page 23.

8. On 29 May 2009, the prosecution submitted its response,<sup>12</sup> in which it noted that, pursuant to Regulation 55(2) of the Regulations and in line with the joint request of the legal representatives, the Chamber has the authority to consider the possibility of modifying the legal characterisation of the facts. The prosecution further submitted that in the event that the Chamber subsequently considered it appropriate to do so, it would, on notice, provide the Chamber with its factual and legal response.<sup>13</sup>
9. On 12 June 2009, in response to a request from the Chamber for a more detailed response to the joint request of the legal representatives,<sup>14</sup> the prosecution submitted its further observations.<sup>15</sup> The prosecution addressed, in general terms, the requirements of Regulation 55 as well as the factors the Chamber might consider when deciding if re-characterisation is a possibility in this case.<sup>16</sup>
10. More specifically, the prosecution made reference to the procedural approach enunciated by the Chamber in its response to a previously raised potential Regulation 55 modification,<sup>17</sup> and suggested that this should be followed in the instant case if a modification is deemed appropriate. The prosecution noted that, although the Chamber will be aware of the law and is thus not solely dependant on the arguments of the parties and participants with respect to the applicable provisions, the Chamber should not apply a legal re-characterisation that exceeds the facts and circumstances described in the charges and any amendments thereto. It was further submitted that to trigger the procedure contained in Regulation 55, the Chamber must be satisfied that

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<sup>12</sup> Prosecution's Response to the Legal Representatives' "Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour", 29 May 2009, ICC-01/04-01/06-1918.

<sup>13</sup> *Ibid*, paragraph 3.

<sup>14</sup> ICC-01/04-01/06-T185-CONF-ENG, page 54.

<sup>15</sup> Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55, 12 June 2009, ICC-01/04-01/06-1966.

<sup>16</sup> *Ibid*, paragraphs 7-8, 9-15.

<sup>17</sup> ICC-01/04/01-06-1084, paragraphs 47-50

the congruence of time, place and the facts alleged in the legal representatives' joint request are present in the charging documents and that they are sufficient to constitute factual allegations within the scope of the proposed legal re-characterisation. In the submission of the prosecution, Regulation 55(2) requires the Chamber to find, at a minimum, a *viable* legal theory under which the facts pleaded may constitute the new crimes proposed. The prosecution noted that the legal representatives propose that the Chamber supplements the charges by adding to them, rather than replacing them. In this regard, the prosecution does not completely discount the possibility of adding supplementary legal characterisations, provided the Chamber does not exceed the facts and circumstances contained in the charges. If the Chamber does not add additional charges through a legal re-characterisation, it should nevertheless consider the evidence adduced supporting the crimes relevant to the proposed re-characterisation for the purposes of determining an appropriate sentence if it convicts the accused on the existing charges.<sup>18</sup>

11. The prosecution reserved its position on the merits of the proposed alternative legal characterisations until such time as the Regulation 55 procedure is triggered, if at all, by the Trial Chamber.<sup>19</sup>
12. On 19 June 2009, the defence submitted its response to the joint request of the victims' legal representatives and the responses of the prosecution.<sup>20</sup> The defence noted that the legal representatives sought the implementation of the procedure under Regulation 55 with the object that an "appropriate legal qualification" be attached to the facts of sexual violence and inhuman and / or

<sup>18</sup> ICC-01/04-01/06-1966, paragraph 19.

<sup>19</sup> *Ibid*, paragraph 6.

<sup>20</sup> Réponse de la Défense à la « 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 » datée du 22 mai 2009 et à la « 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 » datée du 12 juin 2009, 19 June 2009, ICC-01/04-01/06-1975.

cruel treatment. From the outset of their submission, the defence stated that while the concept of “re-qualification” has repeatedly been used, in practice, the aim of the joint request is to create the possibility of the conviction of the accused not only for the crimes identified by the Pre-Trial Chamber in its *Decision on the confirmation of the charges*, but also for the crimes of “sexual slavery”, “inhuman” and / or “cruel treatment”, as contained in Articles 8(2)(b)(xxii), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.<sup>21</sup>

13. The defence submitted that the joint request of the victims’ legal representatives is both inadmissible and unfounded. It argued that Regulation 55 does not authorise the inclusion of additional offences to those contained in the *Decision on the confirmation of charges*. Specifically it was submitted that: (i) Regulation 55 has the sole purpose of facilitating a correction to a legal qualification that could otherwise invalidate the investigations; (ii) the power of Judges to re-qualify is limited to substituting the offence charged with a lesser offence already included in the original and thus any other form of re-qualification would require an amendment to the indictment; (iii) Regulation 55 did not, in any event, confer on the Chamber the ability to bring against the accused qualifications not envisaged in the *Decision on the confirmation of charges*, even if they are a product of the “facts and circumstances described in the charges”; and (iv) any modification of the charges to add new legal qualifications or to substitute the initial qualifications with those of a higher gravity cannot be implemented in accordance with Articles 61(4) and 61(9) and Rules 121(4) and 128 of the Rules of Procedure and Evidence, which reserve exclusive competence to the Pre-Trial Chamber in this regard by requiring that the accused is informed of any new charges before the beginning of the trial.<sup>22</sup>

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<sup>21</sup> *Ibid*, paragraph 20.

<sup>22</sup> *Ibid*, paragraphs 10-18.

14. The defence submitted that the facts relied on by the victims' legal representatives in support of the legal re-characterisations under Articles 8(2)(a)(ii), 8(2)(c)(i), 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the Statute exceed the framework of the "facts and circumstances described in the charges". In particular, it was submitted that the facts and circumstances that may be considered by the Chamber under Regulation 55 should have been described in the charges and any amendments made to them. Given that no modifications to the charges have occurred since the confirmation stage, the Chamber could not consider any "facts and circumstances" other than those outlined in the *Decision on the confirmation of charges*. The "facts and circumstances" described in that Decision do not allow for the characterisation of the elements of crimes alleged by the legal representatives.<sup>23</sup>

15. In particular, the defence submitted that for the purposes of crimes against humanity as provided for under Article 7(1)(g) ("sexual violence") the *Decision on the confirmation of charges* made no mention of "facts and circumstances" indicating a widespread and systemic attack against a civilian population. Furthermore, no reference was made to "facts and circumstances" indicating sexual violence of any form or gravity. Therefore, the facts and circumstances described in that Decision cannot be qualified as crimes against humanity pursuant to the relevant Articles. In this regard, the argument that certain witnesses, who have given evidence before the Chamber to date, have been able to describe facts regarding sexual violence is irrelevant, since these facts did not feature, even cursorily, in the *Decision on the confirmation of charges*.<sup>24</sup>

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<sup>23</sup> *Ibid*, paragraphs 26-29.

<sup>24</sup> *Ibid*, paragraphs 30-33.

16. Similarly, the defence submitted that for the purpose of war crimes pursuant to Articles 8(2)(b)(xxii) and 8(2)(e)(vi) (“sexual violence”) no facts of this nature are mentioned in the *Decision on the confirmation of charges*. Therefore, the facts and circumstances described in that Decision cannot be qualified as war crimes pursuant to the relevant Articles. Further, it cannot be validly argued that the charges of enlistment and conscription of female children under the age of 15 years implicitly include the charge of sexual violence, particularly the crime of sexual slavery.<sup>25</sup>

17. In addition, the defence submitted that for the purpose of war crimes pursuant to Article 8(2)(a)(ii) (“inhuman treatment”) the “facts and circumstances” described in the *Decision on the confirmation of the charges* did not include any allegation of torture or abuse causing “one or more persons acute pain or suffering”. The defence submitted that the mere fact of the enlistment, conscription or participation in the hostilities of children under the age of 15 years cannot be automatically characterised as “inhuman treatment”. In this regard, the *Decision on the confirmation of the charges* does not describe the intentional infliction of such suffering by members of the UPC on enrolled children in the course of their military activities and in respect of acts committed against them by soldiers in their own army. In any event, enlisted children under the age of 15 years are not eligible to be regarded as “protected persons” within the meaning of Article 8(2)(a)(ii).<sup>26</sup>

18. Furthermore, the defence submitted that for the purpose of war crimes pursuant to Article 8(2)(c)(i) (“cruel treatment”) the request of the victims’ legal representatives results in the same observations as those formulated above on the subject of war crimes pursuant to Article 8(2)(a)(ii) (“inhuman treatment”).<sup>27</sup>

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<sup>25</sup> *Ibid*, paragraphs 34-41.

<sup>26</sup> *Ibid*, paragraphs 42-44.

<sup>27</sup> *Ibid*, paragraphs 45-49.

19. It was submitted that the possibility of the Chamber ordering new qualifications as those just described would seriously affect both the fundamental rights of the accused as recognised by Article 67(1)(a), (b) and (c) of the Statute as well as the fairness of the trial. In this regard, the defence submitted that the new qualifications were not notified in time to the accused and the accused had not been able, in any event, to prepare and conduct his defence for the charges in the *Decision on the confirmation of the charges*. On this basis, any amendment of the charges at this stage of the trial would prejudice the right of the accused to be tried without undue delay.<sup>28</sup>
20. The defence in its final submission requested the Chamber to reject the joint request of the victims' legal representatives.<sup>29</sup>
21. On 26 June 2009, the victims' legal representatives submitted "Observations on the Response of the Defence",<sup>30</sup> noting that the defence had not addressed either the ability of the Chamber to modify the legal qualification of the facts or the standing of the legal representatives to initiate this procedure.<sup>31</sup>
22. On the issue of the applicability of Regulation 55 to the present case, the legal representatives reiterated the observations made in their previous joint request. The legal representatives restated that the arguments introduced in the prior joint request are not intended to replace the legal qualifications chosen by the prosecution in its Amended Document Containing the Charges, which reflects the charges upheld by Pre-Trial Chamber I in its *Decision on the confirmation of the charges*. Instead of constituting additional charges, the same facts may identify additional legal qualifications as they may constitute a

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<sup>28</sup> *Ibid*, paragraphs 50-71.

<sup>29</sup> *Ibid*, page 20.

<sup>30</sup> Observations des représentants des victimes sur la Réponse de la Défense datée du 19 juin 2009, 26 June 2009, ICC-01/04-01/06-1998.

<sup>31</sup> *Ibid*, paragraph 9.

violation of multiple prohibitions under the Statute, thus rendering it permissible under Regulation 55 for the Chamber to rectify the suggested error of qualification. In addition, the legal representatives submitted that a modification of the legal qualification of the facts, as provided in Regulation 55, does not encompass the addition of new facts to be brought against the accused but instead it helps to provide additional clarification with regard to the charges as confirmed by Pre-Trial Chamber I.<sup>32</sup>

23. The legal representatives contended that the submissions of the defence on the facts as well as the problems arising from the implementation of Regulation 55 are not admissible at this stage of the procedure. The joint request simply requested the Chamber to start the procedure for the purpose of a legal re-qualification of the facts pursuant to Regulation 55 and merely informed the Chamber of the elements that may serve to trigger the process. Accordingly, the legal representatives reiterate their request to the Chamber to allow them the opportunity to make oral or written observations on all matters relating to the legal re-qualification of the facts under Regulation 55 in the event that the Chamber initiates that procedure.<sup>33</sup>

24. Finally, the legal representatives requested that the Chamber: (i) commence the procedure for the legal re-characterisation of the facts pursuant Regulation 55; and (ii) grant leave to the legal representatives to advance oral or written observations on all matters relating to this legal re-characterisation of the facts.<sup>34</sup>

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<sup>32</sup> *Ibid*, paragraphs 10-11.

<sup>33</sup> *Ibid*, paragraphs 12-14.

<sup>34</sup> *Ibid*, page 7.

## Analysis and conclusions

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

- CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003 (emphasis added);
- CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June 2006 to 13 August 2003 (emphasis added);

26. Regulation 55, which is entitled “Authority of the Chamber to modify the legal characterisation of facts”, provides as follows:

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

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

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

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

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

27. In the view of the majority of the Trial Chamber, 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".

28. 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".

29. Notably, a potential change in the legal characterisation of facts at this stage is subject to a number of different and specific safeguards clearly set out in Regulation 55(2) and (3). Those safeguards ensure that the modification is implemented in accordance with the right of the accused to a fair trial.

The powers conferred on the Chamber pursuant Regulation 55(1) are distinct from the powers conferred by Regulation 55(2). This explains why the

provision of adequate time and facilities for the effective preparation of the defence as well as an opportunity to examine witnesses or present evidence is mandatory only under Regulation 55(2).

30. It is self-evident why the safeguards expressly established in Regulation 55(2) and (3) are distinct from the limitations applicable to a modification at the decision stage (Regulation 55(1)). 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.<sup>35</sup> 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 call new evidence is not necessary, and thus, is not expressly conferred on the defendant by Regulation 55(1).

31. Regulation 55(2), applicable at any stage during trial proceedings, contains no limitation to the “facts and circumstances described in the charges”. Therefore, a right to examine again previous witnesses, to call new witnesses and to present new evidence is expressly provided for in order to allow the defence the opportunity to challenge whether the evidentiary threshold required by procedural law has been met, and accordingly, a new factual basis has been established.

32. It follows that the limitations provided in Regulation 55(1) to the “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).

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<sup>35</sup> The framework contained in Regulation 55 reflects a legal structure with three components. First, evidence is brought by the parties to substantiate facts and circumstances. Second, this factual basis is established to the requisite standard set out in the procedural law. This means any of the evidentiary thresholds mentioned in the Statute: (a) “reasonable grounds to believe” pursuant to Article 58(1)(a); (b) “substantial grounds to believe” contained in Article 61(7); and (c) “beyond reasonable doubt” under Article 66(3). Third, that factual basis is subsumed under the applicable substantive law. The result is a legal characterisation of the facts as established by the evidence.

33. 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.
34. At an appropriate stage of proceedings the defence, the prosecution and the victims' legal representatives shall be given the opportunity to make oral or written submissions according to Regulation 55(2). In due course, the Trial Chamber will articulate the procedural steps for a hearing to take place to consider all matters relevant to the possible modification.
35. The purpose of this decision is to comply with the Chamber's responsibility, established in Regulation 55(2), 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.

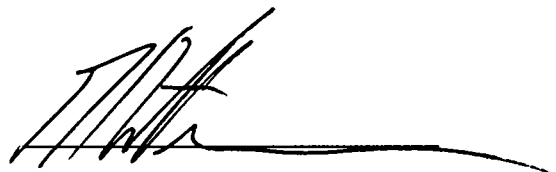
The dissenting Opinion of Judge Adrian Fulford will follow in due course.

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



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**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 14 July 2009

At The Hague, The Netherlands