Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **8 January 2010**

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 Document

Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 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:

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Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, issues the following Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court.[1]

I. Relevant History

1. On 28 August 2006, the Office of the Prosecutor ("prosecution") filed the "Document Containing the Charges, Article 61(3)(a)".[2] On 29 January 2007, Pre-Trial Chamber I rendered its "Decision on the confirmation of charges",[3] in which it confirmed the charges against the accused (on which he was committed for trial) as follows:

> CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003;
>
> CONFIRMS, on the evidence admitted for the purpose of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August2003 [...].[4]

2. The prosecution submitted an "Amended Document Containing the Charges, Article 61(3)(a)",[5] in response to an order from Trial Chamber I.[6]

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[1] Observations conjointes des Représentants Légaux des Victimes quant aux conséquences de l'arrêt de la Chambre d'appel du 8 décembre 2009, 15 December 2009, ICC-01/04-01/06-2211.
[2] Document Containing the Charges, Article 61(3)(a), 28 August 2006, ICC-01/04-01/06-356-Conf-Anx1; public redacted version, ICC-01/04-01/06-356-Anx2.
[3] Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-796-Conf-tEN; public redacted version, ICC-01/04-01/06-803-tEN ("Decision on the Confirmation of Charges").
[4] ICC-01/04-01/06-796-Conf-tEN, pages 156 – 157; ICC-01/04-01/06-803-tEN, pages 156 – 157.
[5] Amended Document Containing the Charges, Article 61(3)(a), 22 December 2008, ICC-01/04-01/06-1571-Conf-Anx; public redacted version, 23 December 2008, ICC-01/04-01/06-1573-Anx1.
[6] Order for the prosecution to file an amended document containing the charges, 9 December 2008, ICC-01/04-01/06-1548.

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3. On 22 May 2009, 27 participating victims filed their "Joint Application of the Legal Representatives of Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court" in which they requested the Chamber to trigger the procedure for a modification of the legal characterisation of the facts in order to include the crimes of sexual slavery and inhuman or cruel treatment.[7]

4. On 14 July 2009, a Majority of Trial Chamber I issued a "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".[8] Judge Fulford dissented.[9]

5. On 11 August 2009 the accused,[10] and on 12 August 2009 the Prosecutor,[11] sought leave to appeal.

6. On 27 August 2009, Trial Chamber I (the Majority) issued a "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'".[12]

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[7] Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, 22 May 2009, ICC-01/04-01/06-1891-tENG.
[8] 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, 14 July 2009, ICC-01/04-01/06-2049.
[9] 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' of 17 July 2009", 31 July 2009, ICC-01/04-01/06-2069-Anx1.
[10] Defence Application for Leave to Appeal the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court rendered on 14 July 2009, 11 August 2009, ICC-01/04-01/06-2073-tENG.
[11] Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 12 August 2009, ICC-01/04-01/06-2074.
[12] Clarification and further guidance to parties and participants in relation to 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", 27 August 2009, ICC-01/04-01/06-2093.

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7. On 3 September 2009, the Trial Chamber granted leave to appeal,[13] on the following 2 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.
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> 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(l)(g), 8(2)(b)(xxii),[14] 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute.

8. On 8 December 2009 the Appeals Chamber delivered its "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'".[15]

9. For the purposes of this Decision, the Appeals Chamber reached a number of relevant conclusions. The judges found that Regulation 55 of the Regulations of the Court is not inherently incompatible with Articles 52 and 61(9) of the Rome Statute ("Statute"),[16] the general principles of international law[17] or the rights of the accused.[18]

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[13] Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 3 September 2009, ICC-01/04-01/06-2107.
[14] Corrected from (xxvi).
[15] 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", 8 December 2009, ICC-01/04-01/06-2205.
[16] ICC-01/04-01/06-2205, paragraphs 72 and 78.
[17] ICC-01/04-01/06-2205, paragraph 81.
[18] ICC-01/04-01/06-2205, paragraph 87.

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10. The Appeals Chamber expressly highlighted the importance of avoiding the risk of unmeritorious acquittals, obtained simply because "[...] legal qualifications confirmed in the pre-trial phase [...] turn out to be incorrect, in particular based on the evidence presented at the trial."[19] The Appeals Chamber emphasised that this result "[...] would be contrary to the aim of the Statute to 'put an end to impunity' (fifth paragraph of the Preamble)", and expressed the view that "[...] a principal purpose of Regulation 55 is to close accountability gaps [...]". The Appeals Chamber expressly endorsed this purpose as being fully consistent with the Statute.[20]

11. The Appeals Chamber accepted that under Article 67(1)(a) of the Statute, changes can be made to the legal characterisation of facts in the course of the trial that do not involve a formal amendment to the charges.[21] In this context, the judges emphasised the requirement that any modification must be consistent with the rights of the accused.[22]

12. The Appeals Chamber, without finally resolving whether Regulation 55 of the Regulations of the Court limits the re-characterisation of facts to "[...] lesser included offences", noted 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."[23] The Appeals Chamber, did not go beyond that observation, save to note "[...] in any event, [...] the particular circumstances of the case will have to be taken into account. In addition, [...] the modification of the legal characterisation is limited by the facts and circumstances described in the charges and any amendment thereto. Furthermore, Regulation 55(2) and (3) must be respected in order to safeguard

[19] ICC-01/04-01/06-2205, paragraph 77.
[20] ICC-01/04-01/06-2205, paragraph 77.
[21] ICC-01/04-01/06-2205, paragraph 84.
[22] ICC-01/04-01/06-2205, paragraphs 77 and 85.
[23] ICC-01/04-01/06-2205, paragraphs 99 and 100.

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the rights of the accused, and the change in the re-characterisation must not lead to an unfair trial."[24]

13. Finally, the Appeals Chamber concluded that the Trial Chamber has not yet sufficiently addressed, first, the facts and circumstances that it would take into account for a change in the legal characterisation; second, the details of the elements of the offences the inclusion of which it contemplated; and, third, how these elements were covered by the facts and circumstances described in the charges.[25] In those circumstances, the judges declined to address the merits of the representatives' application for the implementation of the procedure under Regulation 55 of the Regulations of the Court.

14. During a status conference on 9 December 2009, one legal representative raised the issue of the consequences of the Appeals Chamber Decision. The Chamber set a time-table for written submissions on the matter if it was still considered to be a live issue.[26] The legal representatives filed joint observations on 15 December 2009.[27] The defence filed its submissions on 18 December 2009,[28] and the prosecution on 22 December 2009.[29]

II. The Submissions

The Legal Representatives of Victims

15. In their joint submissions, the legal representatives suggest that the "facts of the case", as they describe them, are the conscription and enlistment of

[24] ICC-01/04-01/06-2205, paragraph 100.
[25] ICC-01/04-01/06-2205, paragraph 109.
[26] Transcript of hearing on 9 December 2009, ICC-01/04-01/06-T-222-ENG-ET, page 3, line 1 to page 4, line 2.
[27] ICC-01/04-01/06-2211.
[28] Réponse de la Défense aux "Observations conjointes des Représentants Légaux des Victimes quant aux conséquences de l'arrêt de la Chambre d'appel du 8 décembre 2009", datées du 15 décembre 2009, 18 December 2009, ICC-01/04-01/06-2214.
[29] Prosecution's Observations on the consequences of the Appeal Judgment of 8 December 2009, 22 December 2009, ICC-01/04-01/06-2215.

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children under the age of fifteen into the FPLC, and the "circumstances of those facts" are the "circumstances of manner, time and location of those acts" (*e.g.* in Ituri between early September 2002 and 13 August 2003).[30] Regulation 55 of the Regulations of the Court ("Authority of the Chamber to modify the legal characterisation of facts") in sub-regulation 1 provides as follows:

> 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 (emphasis added).

The legal representatives, against this regulatory background, submit that the term "circumstances described in the charges" should be interpreted as covering all the "circumstances of the crime" under Rule 145(1)(b) and (c) of the Rules of Procedure and Evidence ("Rules"), and it is suggested that this latter Rule refers to "the circumstances of manner, time and location".[31]

16. Within the context of this framework, the legal representatives submit that factors concerning the alleged inhuman and cruel treatment, together with the suggested sexual slavery, can be considered as "circumstances of manner", that is to say the way the crime of enlisting and conscripting children under the age of 15 was committed. It is argued that in view of the gravity of these circumstances, they may also be considered as aggravating factors.[32]

17. It is contended that in committing these alleged crimes, methods were used that affronted human dignity and almost equated to the systematic sexual slavery of girls under the age of 15 who were enrolled into the armed forces. In consequence, the legal representatives suggest these factors should be

[30] ICC-01/04-01/06-2211, paragraph 20. The original French text reads: "*Les faits* de la cause sont le recrutement d'un certain nombre d'enfants de moins de 15 ans dans la milice de l'UPC/FPLC, tandis que les *circonstances des ces faits* sont les circonstances de lieu, de temps et de contexte dans lesquelles ces faits ont eu lieu, à savoir : en Ituri, entre début septembre 2002 et le 13 août 2003, dans le cadre d'un conflit armé international ou non-international, mais aussi les circonstances de manière dont les faits ont été commis."
[31] ICC-01/04-01/06-2211, paragraph 21.
[32] ICC-01/04-01/06-2211, paragraph 21.

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viewed as both a "circumstance of manner" under Rule 145(1)(c) of the Rules and as aggravating circumstances in the sense of Rule 145(2)(b) of the Rules.[33]

18. An element of the argument advanced is that the inhuman and cruel treatment experienced by several victims in their recruitment or training (the latter is said to be part of the crime of enlisting or conscripting) amounts to aggravating circumstances as well as demonstrating the manner in which the crime was committed. Put otherwise, it is suggested that the inhuman and cruel treatment is part of the material manner in which the crimes alleged were committed.[34]

19. The representatives draw the attention of the Chamber to the document notifying the charges, in that it is suggested that this expressly refers to the extremely strict discipline, as well as the measures of severe punishment, systematically practised against the recruits in the military camps of the UPC/FPLC, including the use of whips, blows, detention in prison and execution.[35] Chapter IV of the Decision on the Confirmation of Charges is quoted:[36]

> [...] new recruits were trained in a systematic and organised fashion in that they were subjected to rigorous and strict discipline, including lengthy and exhausting physical exercises which lasted all day, such as saluting, marching, taking up positions and running, as well as compelling them to sing aggressive military songs [...].

20. As regards sexual abuse, the representatives rely on the evidence of witnesses (as revealed in their statements and evidence before the Trial Chamber) that in their enlistment into the militia, girls under the age of 15 were often in a situation of sexual slavery, as well as being involved in training and participating in hostilities.[37]

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[33] ICC-01/04-01/06-2211, paragraph 22.
[34] ICC-01/04-01/06-2211, paragraph 23.
[35] ICC-01/04-01/06-2211, paragraph 24.
[36] ICC-01/04-01/06-796-Conf-tEN, paragraph 265; ICC-01/04-01/06-803-tEN, paragraph 265.
[37] ICC-01/04-01/06-2211, paragraph 25.

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21. The legal representatives suggest that certain factors that the prosecution have treated as aggravating circumstances of the crimes alleged against the accused, constitute separate and concurrent crimes. In these circumstances, it is argued that a modification of the legal characterisation of the facts is necessary, to add to the offences the accused faces.[38]

22. On the issue of fairness, the legal representatives argue that the defence has had sufficient notice of the matters for which it seeks a modification, and it is suggested that these issues have been canvassed during the evidence given thus far in the trial, not least because they are potentially relevant to sentence under Rule 145 if the accused is convicted. Furthermore, at least since the original application by the legal representatives on 22 May 2009 and the Decision of the Majority of the judges on 14 July 2009 this possibility has been clearly before the Chamber.[39]

The Prosecution

23. The prosecution argues that it is unnecessary to utilise Regulation 55 of the Regulations of the Court, particularly since it submits that the alleged inhuman and cruel treatment and sexual slavery are already "[...] an essential component of this case".[40] It is said that "[...] recognising the sexual and gender violence as part of the harm suffered by children enlisted and used in conflict effectively presents the dimensions of the victims' suffering and the full criminal responsibility of the Accused at trial, and will itself justify an appropriately severe sentence."[41]

[38] ICC-01/04-01/06-2211, paragraph 26.
[39] ICC-01/04-01/06-2211, paragraphs 33 – 35.
[40] ICC-01/04-01/06-2215, paragraphs 5 and 19.
[41] ICC-01/04-01/06-2215, paragraphs 5 and 19.

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24. The prosecution suggests that the aggravating factors and the circumstances of the crime that are relevant under Rule 145(1) of the Rules for sentencing are different from the circumstances described in the charges in Regulation 55(1) of the Regulations of the Court, not least because there will be factors or circumstances relevant for sentencing that will not have been described in the charges.[42]

25. Therefore, although the prosecution argues that the Chamber should consider all the information in the case relevant to the extent of victimisation, it does not accept that it is necessary to rely on Regulation 55 of the Regulations of the Court for this purpose.[43]

The Defence

26. The defence suggests that the request by the legal representatives is inadmissible, the issue having already been the subject of first instance and appellate decisions.[44] The defence observes that the application, if granted, will involve the addition of five more serious offences, at a late stage in the proceedings.[45] The defence stresses that the facts and circumstances on which any modification is based must be contained in the Decision on the Confirmation of Charges, and not, for instance, taken from the Amended Document Containing the Charges or the evidence given during the trial.[46] The defence rejects the suggestion that the Decision on the Confirmation of Charges provides appropriate and sufficient evidence to justify a modification of the legal characterisation of the facts so as to include the crimes of sexual slavery and inhuman or cruel treatment as crimes against humanity or war

[42] ICC-01/04-01/06-2215, paragraph 20.
[43] ICC-01/04-01/06-2215, paragraph 21.
[44] ICC-01/04-01/06-2214, paragraphs 10 – 16.
[45] ICC-01/04-01/06-2214, paragraphs 19 – 24.
[46] ICC-01/04-01/06-2214, paragraphs 26 – 33.

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crimes.[47] Finally, the defence argues that any modification to the charges at this stage will undermine the accused's right to a fair trial.[48]

III. Analysis and Conclusions

27. The Chamber does not accept the defence argument that this application is inadmissible. As set out above, in its Decision the Appeals Chamber expressly indicated that a number of issues had not been resolved by the Trial Chamber, and those that are relevant have now been addressed substantively by the Chamber.

28. As a result of the Decision by the Appeals Chamber on this issue, depending on the particular facts, the Trial Chamber clearly has a discretion at this stage in the proceedings to give 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. Before following this course, however, it is necessary for the Chamber, *inter alia,* to ensure that the proposed modification of the legal characterisation of the facts does not exceed the particular facts and circumstances which support each of the legal elements of the crimes charged (see Article 74(2) of the Statute and Regulation 55(1) of the Regulations of the Court).

29. In footnote 163, the Appeals Chamber addressed this issue, when analysing the second sentence of Article 74(2) (*viz.* "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"). The Appeals Chamber observed as follows:

> In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations

[47] ICC-01/04-01/06-2214, paragraphs 34 – 51.
[48] ICC-01/04-01/06-2214, paragraphs 52 – 69.

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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.

30. As the Appeals Chamber has emphasised, therefore, these specific factual allegations are to be distinguished from the general evidence in the case, as well as background or other information, whether advanced by the Prosecutor or otherwise referred to in the proceedings, and including in the Decision on the Confirmation of Charges, unless the Pre-Trial Chamber has identified with sufficient clarity and detail in the Decision on the Confirmation of Charges that they are facts which support the legal elements of the crimes charged. Therefore, it is necessary to focus on the factual allegations in that Decision and on whether the requested modification of the legal characterisation of facts arises (i) from factual allegations included in the Decision on the Confirmation of Charges, which (ii) support each of the legal elements of the crimes with which the accused is charged.

31. The legal representatives have not undertaken this critical task, but instead they have advanced as their central argument the suggested "circumstance of manner", linking this concept to Rule 145(1)(c) of the Rules and to possible aggravating circumstances in the sense envisaged in Rule 145(2)(b) of the Rules. It is convenient to set out the relevant parts of Rule 145 of the Rules (which comes within Chapter 7: "Penalties") in full:

Rule 145
Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

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(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia,* to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

32. The Chamber does not find this analysis of particular assistance in this context: the provisions relating to sentence are essentially irrelevant to a decision under Regulation 55 of the Regulations of the Court. Assessing aggravating circumstances for the purposes of sentence is an entirely different task to that of modifying the legal characterisation of the facts as regards the

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charges the accused faces, and different provisions and considerations apply for each of these separate undertakings.

33. Although the legal representatives have not carried out the analysis referred to in paragraph 30 above, on investigation the closest the Pre-Trial Chamber came to setting out any facts that may be considered relevant to the suggested crimes involving inhuman or cruel treatment is to be found in paragraph 265 in the Decision on the Confirmation of Charges when (as set out above), in the context of reviewing the evidence that supported the allegation that children participated actively in hostilities, the judges addressed the training of the recruits, which they found to be systematic and organised, and in which the recruits were subjected to rigorous and strict discipline, including lengthy and exhausting physical exercises which could last all day, such as saluting, marching "taking up positions", running and singing aggressive military songs.

34. These facts alone could not support the suggested crimes involving inhuman or cruel treatment, each of which requires significant additional factual elements. Moreover, these factual allegations do not support the legal "elements of the crimes" with which the accused is charged.

35. Factual allegations potentially supporting sexual slavery are simply not referred to at any stage in the Decision on the Confirmation of Charges.

36. The references to the arduous training to which the alleged conscripted or enlisted children were subjected, including lengthy and exhausting physical exercises and other "circumstances of manner", although they may become relevant for the purposes of Rule 145 of the Rules, do not support any "element of the crimes" constituting the charges confirmed against the accused.

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37. It follows that these modifications to the legal characterisation of facts could only be proved by reference to evidence (i) not referred to by the Pre-Trial Chamber in the Decision on the Confirmation of Charges and (ii) not referred to by the Pre-Trial Chamber in that Decision as supporting the legal elements of the crimes charged. In the result, the proposed modifications would infringe the Appeals Chamber's interpretation of Regulation 55 of the Regulations of the Court.

38. For these reasons, and in accordance with the criteria set out by the Appeals Chamber, it does not appear to the Chamber that the legal characterisation of facts may be subject to the changes described by the legal representatives of victims.

39. The application is refused.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito **Judge René Blattmann**

Dated this 8 January 2010

At The Hague, The Netherlands

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