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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

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

Public

**Prosecution's Further Observations Regarding the Legal Representatives' Joint
Request Made Pursuant to Regulation 55**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Ms Paolina Massidda

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. On 22 May 2009, the Legal Representatives filed a Joint Application for re-characterization of the charges, pursuant to Regulation 55.¹ On 29 May the Prosecution filed a Response.² On 3 June 2009, the Chamber asked the Prosecution to file a more detailed response to the L.R. Request.³
2. Regulation 55 imposes on the Chamber the burden of making a threshold determination that the facts may be subject to a changed legal characterisation.⁴ After the Chamber reaches that interim conclusion, it shall give notice of the possibility of re-characterisation to the participants. Then, “having heard the evidence, [the Chamber] shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions.”
3. This procedural sequence is neither inadvertent nor optional. The Regulation consciously (1) requires the Chamber to trigger the submission by announcing the possibility and (2) defers the parties’ submissions on the merits until the evidence has been presented.⁵
4. If the Chamber determines that modification to the charges may be appropriate, it should identify specifically what modifications it is considering. On the basis of this notice, the parties can adjust their presentation of evidence to accommodate the potential changes, including perhaps allowing the defence to recall previous witnesses or list new witnesses.⁶ After hearing all the evidence, if the Chamber concludes that re-characterization is possible and appropriate under the circumstances, it shall give the parties the opportunity to make submissions.

¹ ICC-01/04-01/06-1891 (hereafter “L.R. Request”)

² ICC-01/04-01/06-1918

³ ICC-01/04-01/06-T.185-CONF-ENG ET, page 54.

⁴ The language in Regulation 55(2) is quite clear: “If, at any time during the trial *it appears to the Chamber* that the legal characterisation of facts may be subject to change [...]” (emphasis added).

⁵ While the Regulation 55 inquiry is initiated by the Chamber that does not mean that the idea must originate with the Chamber. For example, the Prosecution raised the nature of the conflict – international versus a conflict not of an international character – prior to the start of this trial. See para 5, *infra*. Thus, the Prosecution does not contest the ability of the Legal Representatives to propose re-characterisation.

⁶ See, Regulation 55(3)(b).

5. This position is consistent with the Chamber's response to another previously-raised potential Regulation 55 modification. The Chamber provided initial notice and enunciated this procedural sequence in its "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".⁷ The Chamber acknowledged that the legal characterisation of the conflict as an international armed conflict could be changed to a conflict not of an international character. It accordingly announced that "[t]he parties and the participants are on notice that this is an issue that may arise and they should prepare their cases on [that] basis [...]".⁸ And it explained that whether to make that change under Regulation 55 "will be a fact-dependent decision" ripe for resolution "at the conclusion of the evidence in the case".⁹
6. The instant submission thus addresses, in general terms, the requirements of Regulation 55 and the factors that the Chamber might consider in deciding if re-characterisation is a reasonable possibility. The Prosecution reserves its position on the merits of the proposed alternative legal characterisations until such time as the Regulation 55 process is triggered, if at all, by Trial Chamber.

The Legal Representatives' proposals

(a) The nature and scope of Regulation 55

7. Regulation 55 encloses the principle *iura novit curia*, "the court knows the law".¹⁰ It means that "for the purpose of deciding whether the claim is well

⁷ ICC-01/04-01/06-1034, 13 December 2007, paras. 47-50.

⁸ *Id.* at para. 49.

⁹ *Id.* at para. 48.

¹⁰ See Cryer R., Friman H., Robinson D., Wilmschurst E., "An Introduction to International Criminal Law and Procedure" (Cambridge University Press, 2007), p. 377. This is an unfamiliar principle in common law jurisdictions, which generally take the approach that courts can only consider the specific charges set out in the complaint or indictment without the flexibility to permit conviction where the charged facts are proven but their legal characterization contains elements different than those of the charged crime. As a result, common law criminal charges may include multiple counts pleading alternative crimes when the facts alleged violate more than one statute. The ICTY followed this model (see ICTY, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Trial Chamber Judgment, 14 January 2000, paras. 728-748). See Stahn C.,

founded in law [...] the Court is not solely dependent on the argument of the parties before it with respect to the applicable law".¹¹ Under this principle, the prosecution's legal characterization constitutes its theory from which the judges may deviate in appropriate instances.¹²

8. Regulation 55 thus allows the Chamber to modify the legal characterisation chosen by the Prosecution if it concludes that the facts and circumstances pleaded in the Document Containing the Charges (DCC) support a different crime or a different form of participation than that contained in the charging document.¹³ It mandates, however, that the re-categorisation shall not exceed "the facts and circumstances described in the charges and any amendments to the charges".¹⁴ That means that the Chamber may not depart from the facts and circumstances set out in the charging documents. If facts proven at trial are different than those contained within the charging document, the Chamber cannot rely on *iura novit curiae* to convict the Accused of that different crime.¹⁵ Rather the charges shall be amended.

(b) The legal elements of the proposed charges

9. With specific regard to the Legal Representatives' proposal, the Chamber must initially assess whether the new charges of sexual slavery, cruel treatment,

"Modification of the legal characterization of facts in the ICC system", Criminal Law Forum, vol. 16, 2005, pp. 4-6 (which refers to several domestic codes of criminal procedure which reproduce such principle); Cryer R., Friman H., Robinson D., Wilmschurst E., *supra.*, at, pp. 376-377.

¹¹ See ICJ, "Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)", Judgment 27 June 1986, ICJ Reports 1986, para. 29, referring, *inter alia*, to the "Lotus" Case, Judgment of 7 September 1927, P.C.I.J., Series A, No. 10, p. 31. Also cited in Request, footnotes 9-10.

¹² Carsten Stahn, "Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55", 16 Criminal Law Forum (2005) (hereafter "Stahn"), pp. 4-6 (which refers to several domestic codes of criminal procedure that reproduce such principle); Cryer R., Friman H., Robinson D., Wilmschurst E., "An Introduction to International Criminal Law and Procedure" (Cambridge University Press, 2007), pp. 376-377.

¹³ Cryer R., Friman H., Robinson D., Wilmschurst E., "An Introduction to International Criminal Law and Procedure" (Cambridge University Press, 2007), p. 377

¹⁴ See Article 74(2) and Regulation 55(1). The Trial Chamber recognised this key limitation when it ruled that "so long as the facts and the circumstances as described in the charges are not exceeded, pursuant to Regulation 55 it is possible to give those facts and circumstances a different legal characterisation, so long as no unfairness results". ICC-01/04-01/06-1084, 13 December 2007, para. 47.

¹⁵ See, *inter alia*, J. Maier, *Derecho Procesal Penal. Tomo I. Fundamentos* (Editores del Puerto, 1996), pp. 568 et seq.; C. Roxin, *Strafverfahrensrecht* (C.H. Beck, 1998), pp. 390-392.

and/or inhuman treatment fall within the facts and circumstances presented in the DCC.

10. The Legal Representatives urge that the additional crimes fall within the time period and at the locations identified in the amended DCC and the Confirmation Decision.¹⁶ They also urge that forcibly recruiting children and making them undergo military training and participate actively in hostilities – acts alleged in the DCC -- constitutes cruel or inhuman treatment.¹⁷ Additionally, they note that the Confirmation Decision refers to the extremely strict discipline and punishment to which the recruits were subjected, as well as the fact that they were forced to smoke hemp.¹⁸ As to the sexual slavery, they assert that the practice “may be inferred” from the allegations in the DCC that girls were recruited, and that it “seems logical” that “in all likelihood” the recruitment was done for the additional purpose of providing domestic and/or sexual services.¹⁹

11. The Prosecution submits that in order to trigger the procedure enshrined in Regulation 55 the Chamber must be satisfied that the congruence of time and place, the recited facts regarding the strict discipline, the punishment, the forced use of hemp, and the act of recruiting children, among other facts alleged in the L.R. Request, are present in the charging document and sufficient to constitute factual allegations of cruel or inhuman treatment. If they are, the Chamber can then consider whether the conduct appears to conform to the legal definitions of the crimes. Similarly, if the Chamber is satisfied that the congruence of time and place and the recited facts concerning the recruitment of young girls are present in the charging document and sufficient to establish

¹⁶ L.R. Request, para. 36.

¹⁷ L.R. Request, para. 32.

¹⁸ L.R. Request, para. 39.

¹⁹ L.R. Request, para. 40.

a factual allegation of sexual slavery, it can consider whether the conduct appears to conform to the legal definition of that crime.²⁰

12. Regulation 55(2) requires that it must “appear [...] to the Chamber” that a new legal characterisation *may* apply to those facts. That requires that there must be, at a minimum, a *viable* legal theory under which the facts pleaded constitute the new crimes proposed.
13. As the Legal Representatives implicitly acknowledge, to constitute a crime against humanity the acts of sexual slavery would have to be committed as part of a widespread or systematic attack against a civilian population.²¹
14. As to the proposed war crimes, the relevant acts must have been committed in the context of and associated with an armed conflict.
15. In addition, most war crimes must be committed against a specified and protected class of persons or objects. The charges of inhuman and cruel treatment proposed by the Legal Representatives require that the victims are: “persons [...] protected under the provisions of the relevant Geneva Conventions” for inhuman treatment under Article 8(2)(a)(ii);²² or “persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”, for cruel treatment under Article 8(2)(c)(i).²³

(c) “Modification” of the charges under Regulation 55

²⁰ *Stahn*, p. 26: “The Chamber is, however, entitled to reject a request by the parties. In addition, the Chamber alone has the authority to decide whether an envisaged change in legal qualification comes within the limits imposed by Article 74(2). The Trial Chamber determines whether a proposed change in legal qualification exceeds the limits of the facts and circumstances described in the charges.”

²¹ L.R.Request, para. 34.

²² Chapeau to Article 8(2)(a), as this paragraph covers “Grave breaches of the Geneva Conventions”.

²³ Chapeau to Article 8(2)(c), as this paragraph covers “serious violations of article 3 common to the four Geneva Conventions”. The ICRC commentaries confirm that common article 3 covers “persons who do not take part in the hostilities as well as members of the armed forces who have laid down their arms or have been placed ‘*hors de combat*’” (emphasis added), and that “[t]he important thing is that the man in question will be taking no further part in the fighting” - ICRC Commentary on the Third Geneva Convention, pp. 39-40. See also APV Rogers, *Law on the Battlefield, 2nd edition*, (Juris Publishing: 2004), p. 237; La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008), p. 41.

16. The Prosecution also notes that the Legal Representatives propose that the Chamber not “replace” the existing charges, but instead that it supplement the charges by adding to them.²⁴ They ask the Trial Chamber to consider entering a conviction for the charges included in the document containing the charges, as well as for additional charges of sexual slavery, pursuant to Articles 7(1)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi), and inhuman or cruel treatment, pursuant to Articles 8(2)(a)(ii) or 8(2)(c)(i).
17. Regulation 55 consistently refers to “change” but the Prosecution does not completely discount adding supplementary legal characterizations to those chosen by the Prosecution, provided the Chamber does not exceed the facts and circumstances contained in the charges. To the extent that the principle of *iura novit curia* enclosed in Regulation 55 constitutes a “device to counter accountability gaps”,²⁵ it may be an overly restrictive interpretation to exclude the possibility, in all circumstances, of an additional legal characterization being appropriate. For instance, faced with a cluster of facts grouped in the charges under a given *nomen iuris*, a Chamber could conclude that a portion of those facts are properly encompassed by that legal characterisation, but that the other facts are more properly characterized under a different legal provision.
18. In this sense, the Prosecution notes that some domestic legal systems that incorporate the principle of *iura novit curia* appear not to foreclose the possibility that, under specific conditions, a person may be convicted of another crime *in addition* to the one that is included in the charging document.²⁶

²⁴ L.R. Request, para. 42.

²⁵ *Stahn*, , pp. 3 and 25.

²⁶ See, for instance, paragraph 265(1) of the German Code of Criminal Procedure, which allows the possibility that an accused may be convicted on the basis of an additional penal norm, in addition to the one(s) referred to in the charges that were confirmed by the Court (see *Lutz Meyer-Goßner*, *Strafprozessordnung*, 48. Auflage, Verlag C.H.Beck (2005), p. 983, margin note 8a). The German Federal High Court expressly considered paragraph 265 of the Code on Criminal Procedure (“StPO”) as supplementing the charges (BGH 13, 320, 324). See also ruling of the Swiss Supreme Court: „*Es sei durchaus denkbar, dass der Richter durch den in der Anklageschrift umschriebenen Sachverhalt neben dem vom Ankläger eingeklagten Straftatbestand noch weitere Straftatbestände als erfüllt erachte, und es sei in diesem Fall mit dem Anklagegrundsatz vereinbar, den Angeklagten auch wegen dieser weiteren Straftatbestände zu verurteilen.*“ (Bundesgericht, T 0/2, 6B_225/2008/sst, 7. Oktober 2008). See further Article 312 of the Japanese Code of Criminal Procedure,

19. Finally, the Prosecution notes that even if the Chamber does not add criminal charges of sexual slavery, cruel treatment, or inhuman treatment, if it convicts the Accused on the existing charges it can and should consider the evidence adduced regarding those acts when determining the appropriate sentence. The Prosecution during its opening statement highlighted that the recruitment included aspects of cruel treatment and sexual slavery and that at the end of the case it would request a very severe punishment.²⁷ The circumstances under which a crime is committed and the gravity of additional harm that the crime has caused to its victims, which the Prosecution expressly included in its DCC,²⁸ thus will be essential factors to be weighed in assessing a just punishment.



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of June 2009

At The Hague, The Netherlands

which provides that “The court, may, when it deems proper in view of the development of proceedings, order to add or change the count or penalty” (cited in *Stahn*, p. 21).

²⁷ ICC-01/04-01/06-T-107 ENG ET WT, 26 January 2009.

²⁸ DCC, paras. 99-101.