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

Date: **26 June 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 Document

**Observations of the Legal Representatives of the Victims on the Defence Response
of 19 June 2009**

Source: The Legal Representatives of Victims a/0001/06 to a/0003/06, a/0047/06 to a/0052/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0227/06, a/0229/06 to a/0233/06, a/0236/06, a/0238/06 to a/0240/06, a/0244/06, a/0245/06, a/0248/06 to a/0250/06, a/0001/07 to a/0003/07, a/0005/07, a/0054/07 to a/0060/07, a/0063/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0173/07, a/0179/07, a/0181/07, a/0183/07, a/0184/07, a/0187/07, a/0188/07, a/0190/07, a/0191/07, a/0251/07, a/0253/07, a/0257/07, a/0270/07 to a/0277/07, a/0279/07, a/0280/07, a/0282/07, a/0283/07, a/0285/07, a/0007/08, a/0122/08 to a/0126/08, a/0130/08, a/0149/08, a/0404/08 to a/0407/08, a/0409/08, a/0612/08 and a/0613/08

Document 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 Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese
Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Sarah Pellet

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 29 January 2007, Pre-Trial Chamber I issued its *Decision on the confirmation of charges* (“the *Decision on the confirmation of charges*”), in which it found, *inter alia*, 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 15 years into the armed forces of the UPC/FPLC (“the UPC/FPLC”) and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi), 8(2)(e)(xii) and 25(3)(a) of the Rome Statute between early September 2002 and 13 August 2003.¹

2. On 23 December 2008, the Prosecution submitted the public version of the amended document containing the charges against Thomas Lubanga Dyilo² (“the Amended Document Containing the Charges”).

3. On 26 January 2009, in her opening statement, Ms Bapita referred to the widespread practice of acts of sexual violence perpetrated systematically against children – girls in particular – forcibly recruited into the UPC/FPLC.³

4. At the hearing of 8 April 2009, Mr Walley informed the Chamber that the Legal Representatives of the Victims intended to submit a joint application pertaining to the implementation of regulation 55 of the Regulations of the Court, given that the facts related to the recruitment of child soldiers are also linked to facts concerning sexual slavery.⁴

¹ See *Decision on the confirmation of charges* (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06-803-tEN (“the *Decision on the confirmation of charges*”), p. 156.

² See “Prosecution’s Provision of the Amended Document Containing the Charges”, 23 December 2008, ICC-01/04-01/06-1573 (“the Amended Document Containing the Charges”) and “Annex 1”, ICC-01/04-01/06-1573-Anx1.

³ See transcript of the hearing of 26 January 2009, ICC-01/04-01/06-T-107-ENG ET, p. 52, line 18, to p. 57, line 8.

⁴ See transcript of the hearing of 8 April 2009, ICC-01/04-01/06-T-167-ENG ET, p.26, line 24, to p.27, line 7.

5. On 22 May 2009, the Legal Representatives submitted their joint application for the implementation of the procedure under regulation 55 of the Regulations of the Court (“the Joint Application”).⁵

6. On 29 May 2009, the Prosecution filed its Response to the Joint Application.⁶ And on 12 June 2009, following an Oral Decision by the Trial Chamber,⁷ the Prosecution filed further observations on the subject.⁸

7. On 19 June 2009, the Defence filed its Response to the Joint Application and to the Prosecution’s Further Observations.⁹

8. Having been given leave to respond to the submissions of the Defence and the Prosecution,¹⁰ the Legal Representatives respectfully submit the following observations in response to the arguments put forward by the Defence.¹¹

II. THE APPLICABILITY OF REGULATION 55 OF THE REGULATIONS OF THE COURT TO THE PRESENT CASE

9. The Legal Representatives note that the Defence does not challenge the Chamber’s right to modify the legal characterisation of the facts,¹² or the right of the Legal Representatives to ask the Chamber to initiate the procedure for this purpose. However, the Defence does claim that the victims “are asking the Chamber to

⁵ See “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 (“the Joint Application”).

⁶ See “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”*”, 29 May 2009, ICC-01/04-01/06-1918.

⁷ See transcript of the hearing of 3 June 2009, ICC-01/04-01/06-T-185-CONF-ENG RT, pp.1-2 and 53-54.

⁸ See “Prosecution’s Further Observations Regarding the Legal Representatives’ Joint Request Made Pursuant to Regulation 55”, 12 June 2009, ICC-01/04-01/06-1966.

⁹ See “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 of 12 June 2009 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”*”, 19 June 2009, ICC-01/04-01/06-1975-tENG (“the Defence Response”).

¹⁰ See transcript of the hearing of 3 June 2009, footnote 7 above, p. 54, lines 16-25.

¹¹ See “the Defence Response”, footnote 9 above.

¹² *Idem*, especially paras. 10 and 11.

consider, in addition to the offences initially confirmed, other offences based on separate facts, and differently characterised, some of which are of a more serious nature".¹³

10. In this regard, the Legal Representatives would reiterate the observations set out in their Joint Application¹⁴ and, in particular, the submission that "the arguments set out [in the Joint Application] are not intended to replace the characterisations chosen by the Office of the Prosecutor in its Amended Document Containing the Charges and accepted by Pre-Trial Chamber I in its *Decision on the confirmation of charges*."¹⁵ Consequently, far from constituting "additional offences", as the Defence maintains,¹⁶ the Legal Representatives maintain their submission that "an additional legal characterisation may be applied to the same facts, since they may constitute a violation of several prohibitions set out in the Rome Statute",¹⁷ thereby falling within the scope of regulation 55 of the Regulations of the Court, and enabling the Chamber to rectify an error of characterisation.

11. Furthermore, the purpose of the provision in regulation 55 of the Regulations of the Court for modifying the legal characterisation of the facts is not to add new facts on account of which the Accused is to be charged, but to help to provide additional information regarding the charges as confirmed by Pre-Trial Chamber I. The Legal Representatives therefore reiterate their request for the implementation of the procedure under regulation 55 of the Regulations of the Court.

¹³ *Ibid.*, para. 17.

¹⁴ See the whole of the Joint Application, footnote 5 above.

¹⁵ *Idem*, para. 42 (footnotes omitted).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

II. THE INADMISSIBILITY AT THIS STAGE OF THE PROCEEDINGS OF THE ARGUMENTS PUT FORWARD BY THE DEFENCE

12. The Legal Representatives submit that the arguments put forward by the Defence on the facts,¹⁸ and on the problems arising out of the implementation of regulation 55 of the Regulations of the Court¹⁹ are not admissible at this stage of the proceedings.

13. In effect, the Joint Application has confined itself to requesting the Chamber to initiate the procedure for legal recharacterisation of the facts under regulation 55 of the Regulations of the Court, the Legal Representatives having restricted themselves to bringing to the Chamber's attention information that could serve as the basis for so acting.

14. Consequently, the Legal Representatives do not consider it necessary to address the arguments put forward in the last two sections of the Defence Response, but reiterate their request to the Chamber for leave to make oral or written observations on any issue pertaining to the legal recharacterisation of the facts under regulation 55 of the Regulations of the Court in the event that the Chamber were to implement that procedure.

¹⁸ See the Defence Response, footnote 9 above, paras. 26-49.

¹⁹ *Ibid*, paras. 50-71.

FOR THESE REASONS,

MAY IT PLEASE TRIAL CHAMBER I

To initiate the procedure for legal recharacterisation of the facts under regulation 55 of the Regulations of the Court; and

To grant the Legal Representatives of the Victims leave to make oral or written observations on any issue pertaining to the legal recharacterisation of the facts under regulation 55 of the Regulations of the Court.

[signed]

Mr H. Diakiese

[signed]

Ms P. Massidda

[signed]

Mr Joseph Keta

Dated this 26 June 2009

At The Hague, the Netherlands, and at Genoa, Italy