Public Annex B2: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant to the Appeals Chamber's order ICC-01/05-01/08-3579

Ambos, K., *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, OUP 2016, pp. 424-430

On the other hand, the TC (not the PTC!) has, pursuant to Regulation 55 RegC,[858] the competence of amending the *legal* nature of the charges—in one singular procedure[859]—as long as this does not unduly restrict defence rights.[860] The TC is the master of the Regulation 55 proceedings.[861] The parties may bring a possible modification to the attention of the Chamber,[862] but it is the Chamber that takes the respective decision. It also decides when it initates the procedure by giving notice to the participants and allows them, afterwards, to make submissions.[863] While Regulation 55, as explained above, surely must not be applied at the pre-trial stage,[864] it is unclear whether it could be invoked by the AC.[865] If at all, this could only be done by way of an analogy ('Chamber' in Regulation 55 means the TC) and under the same strict conditions to be discussed in the following, in particular without exceeding 'the facts and circumstances described in the charges'.[866]

adversarial reading of the ICC procedure (e.g. at 994: 'adversarial nature' and referring to the—US dominated—Nuremberg proceedings as 'accepted part of international criminal practice').

[858] For a radical critique, see Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), pp. 981–1006, concluding that it 'represents the most indefensible form of judicial law-making', but his view is predicated on a too unilateral, adversarial reading of the ICC Statute (note 857 in this chapter) and blurs the distinction between the factual and legal component of the charges (we will return to his position more specifically in the following text); crit. also, Jacobs, 'Shifting Scale of Power', in Schabas et al., *Research Companion ICL* (2013), pp. 215–18, 221 ('difficult' to 'be reconciled with the Statute', additional amendment procedure cannot be read into the Statute, judicial lawmaking; but also defending a too adversarial reading of the Statute [p. 219]); Boas et al., *International Criminal Procedure* (2011), pp. 190–1 (regarding the Lubanga case). For my previous views, see Ambos, 'The Structure of International Criminal Procedure', in Bohlander, *International Criminal Justice* (2007), pp. 462–3 and Ambos and Miller, *ICLR,* 7 (2007), 358–60.

[859] *Lubanga*, No. ICC-01/04-01/06-2205, paras. 88 ff., convincingly reversing the TC's 'split' interpretation of Regulation 55 where the TC distinguished between para. 1 and paras. 2, 3 providing for two distinct procedures the latter of which allows for a change of the legal characterization of charges which have not been in the original DCC as long as there is a procedural unity; cf. *Prosecutor v Lubanga*, No. ICC-01/04-01/06-2049, TC 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, paras. 27–8 (14 July 2009); *Prosecutor v Lubanga* No. ICC-01/04-01/06-2093, Clarification and Further Guidance to Parties and Participants in Relation to the 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', para. 8 (27 August 2009); in favour of 'an indivisible or singular process' created by Reg. 55 also *Lubanga*, No. ICC-01/04-01/06-2054, paras. 4, 21–33, 53.

[860] On the different theoretical options ('freezing theory', 'amendment theory', compromise of Reg. 55), see Stahn, *CLF,* 16 (2005), 13–16.

[861] cf. Stahn, *CLF,* 16 (2005), 26–7. The respective power of the TC may also be inferred from its general competence under Art. 64 (6)(f) ICCS and its implied powers; cf. Stahn, *CLF,* 16 (2005), 17–18.

[862] e.g. in a status conference pursuant to Rule 132 (2) RPE ICC.

[863] Reg. 55(2) RegC; see also *Prosecutor v Bemba et al*, No. ICC-01/05-01/13-1250, TC VII Decision on Prosecution Application to Provide Notice pursuant to Regulation 55, para. 8 (distinguishing these stages and considering the actual recharacterization decision as a third stage) (15 September 2015).

[864] In the same vein, Friman, Brady, Costi, Guariglia, and Stuckenberg, 'Charges', in Sluiter et al., *International Criminal Procedure* (2013), pp. 486–7, 487–8; Stegmiller, 'Confirmation of Charges', in Stahn, *Law and Practice of the ICC* (2015), p. 905; on the case law regarding Reg. 55, see Friman, 'Trial Procedures', in Stahn, *Law and Practice of the ICC* (2015), pp. 916 ff.—I hereby deviate from my earlier position in Ambos, 'The Structure of International Criminal Procedure', in Bohlander, *International Criminal Justice* (2007), pp. 462–3 and Ambos and Miller, *ICLR,* 7 (2007), 360.

[865] See Staker and Eckelmans, 'Article 83', in Triffterer/Ambos, *ICC Commentary* (2016), mn. 7.

[866] Art. 74 (2) cl. 2 ICCS.

While Regulation 55 is compatible with the statutory framework in general, in particular with the judges' mandate under Article 52 (1) ICCS,[867] it has to be interpreted in strict conformity with Articles 61 (9) and 74 (2) ICCS. As to Article 52, we have just explained above that it refers to the pre-trial stage and basically regulates the relationship between Prosecutor and PTC at this stage, while Regulation 55 addresses the trial stage and the TC. Accordingly, the *Lubanga* AC correctly held that these 'two provisions are not inherently incompatible.'[868]

Article 74 (2) provides that the TC's decision 'shall not exceed the *facts and circumstances* described in the charges and any amendments to the charges'.[869] As a consequence, *e contrario*, it is not prohibited, as stated by Regulation 55, to 'modify the legal characterization of facts'.[870] From this perspective Regulation 55 crystallizes and refines Article 74 (2).[871] In other words, this provision contains, as correctly held by the *Lubanga* AC, a double message: On the one hand, it 'confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto'; on the other, it 'does not make reference to the legal characterisation of these facts and circumstances'.[872] As a result, '[i]t follows *a contrario* [sic][873] that article 74 (2) of the Statute does not rule out' such a legal modification.[874] It further follows that Regulation 55, in principle, is not limited as to possible legal modifications,[875] in particular not to lesser included offences (in the sense of the above mentioned common law approach) or to modes of liability.[876] Indeed, on the face of it, Regulation 55 even applies to changes of (objective or subjective) elements within

[867] *Lubanga*, No. ICC-01/04-01/06-2205, paras. 66 ff., basically arguing, at paras. 68–72, as to the 'routine functioning' as the limiting element of the judges' competence in Art. 52 (1) ICCS, that the fact that the drafters did not reach an agreement on the issue meant that it had to be solved by the judges who did so by introducing Regulation 55; in the same vein, Stahn, *CLF,* 16 (2005), 12, arguing that 'Article 52 is broad enough to allow for the adoption of regulations which clarify elements of the trial procedure or provide the capacity to function effectively as a Court'; contra Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), pp. 982–4; crit. also, Jacobs, 'Shifting Scale of Power', in Schabas et al., *Research Companion ICL* (2013), p. 217; Staker and Jacobs, 'Article 52', in Triffterer/Ambos, *ICC Commentary* (2016), mn. 8, 14, 15.

[868] *Lubanga*, No. ICC-01/04-01/06-2205, para. 77.

[869] Emphasis added.

[870] *Bemba*, No. ICC-01/05-01/08-424, para. 203 ('under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation'); in the same vein, Stahn, *CLF,* 16 (2005), 16–17.

[871] Stahn, *CLF,* 16 (2005), 31.

[872] *Lubanga*, No. ICC-01/04-01/06-2205, para. 93.

[873] The correct latin term is 'e contrario' (Kramer, *Methodenlehre* (2013), p. 212 with fn. 658; Hager, *Rechtsmethoden* (2009), pp. 52–3; Linderfalk, *Interpretation of Treaties* (2007), pp. 279, 299–303) but 'a contrario' is indeed used often in common law sources, see e.g. Garner, *Law Dictionary* (2014), p. 128.

[874] *Lubanga*, No. ICC-01/04-01/06-2205, para. 93.

[875] *Lubanga*, No. ICC-01/04-01/06-2205, para. 100, arguing that Reg. 55 'does not stipulate . . . what changes in the legal characterisation may be permissible'; in the same vein, Stahn, *CLF,* 16 (2005), 24–5 (wide scope of application); Schabas, Chaitidou, and El Zeidy, 'Article 61', in Triffterer/Ambos, *ICC Commentary* (2016), mn. 7 ('unrestricted powers').

[876] This limitation has been suggested by Judge Fulford in his Minority Opinion, *Lubanga*, No. ICC-01/04-01/06-2054, para. 20; for a restrictive interpretation, see also *Prosecutor v Katanga*, No. ICC-01/04-01/07-3363, AC Judgment on the Appeal of Mr Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Dissenting Opinion of Judge Cuno Tarfusser, paras. 5 ff. (27 March 2013).

one offence or form of responsibility.[877] If it were otherwise, Regulation 55 could not fulfil one of its major purposes, namely, to prevent the risk of acquittals by allowing the TC to correct an incorrect legal characterization of an alleged conduct.[878] If the TC were to be bound by the original legal characterization of the Prosecutor and/or the PTC, it would have to acquit the accused in such a situation, since it could not convict her on the basis of a legal characterization it considers to be incorrect.[879] The only way to avoid this result would be to allow for broad alternative charging, which, however, is not necessarily a better approach in terms of the defence rights of the accused. Of course, the possibility of a legal modification of the charges should not produce the same result, that is, an overbroad factual charging to enable the TC to pick and choose the appropriate crime and mode of responsibility.[880]

Last but not least, Regulation 55 is not limited, per se, in temporal terms; on the contrary, a legal modification may occur 'at any time during the trial',[881] that is, until its closure pursuant to a decision under Article 74 ICCS.[882] Of course, this does not mean that the Chamber can exhaust this period, if the possibility of a legal change 'appears'[883]

[877] See in this vein *Prosecutor v Bemba*, No. ICC-01/05-01/08-2324, TC III 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 Regulation of the Court, (21 September 2012), regarding a possible change of the mental element of Art. 28 (a)(i) ICCS from 'knowledge' to 'should have known'; see also *Bemba*, No. ICC-01/05-01/08-3343, paras. 51–7, 62 (21 March 2016).

[878] See also *Lubanga*, No. ICC-01/04-01/06-2205, para. 77 (pointing to the risk of acquittals and considering as 'a principal purpose' of Reg. 55 'to close accountability gaps'); conc. *Katanga*, No. ICC-01/04-01/07-3363, para. 22; also *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, para. 7 and *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, para. 10 (note however the caveat that this should not infringe upon the rights of the accused, para. 50); Stahn, *CLF*, 16 (2005), 25; Friman, Brady, Costi, Guariglia, and Stuckenberg, 'Charges', in Sluiter et al., *International Criminal Procedure* (2013), p. 451; Stegmiller, 'Confirmation of Charges', in Stahn, *Law and Practice of the ICC* (2015), pp. 904–5 ('important new procedural tool'); contra Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), pp. 1003–5; critical, see also Jacobs, 'Shifting Scale of Power', in Schabas et al., *Research Companion ICL* (2013), p. 217; Staker and Jacobs, 'Article 52', in Triffterer/Ambos, *ICC Commentary* (2016), mn. 8.

[879] Stahn, *CLF,* 16 (2005), 3; in a similar vein, critical of a binding effect of the confirmation decision on the TC, Friman, 'Trial Procedures', in Stahn, *Law and Practice of the ICC* (2015), pp. 918–21. This issue is not addressed by the dissenting Judges. Especially Judge Tarfusser does not discuss the consequences of his quite radical view (*Katanga*, No. ICC-01/04-01/07-3363, Dissenting Opinion of Judge Cuno Tarfusser, paras. 5 ff.): Would the inapplicability of Reg. 55 bind the TC to the original charges, thereby provoking an acquittal, or could it modify the charges without further ado? The latter approach would make things worse for the accused and therefore does not seem to be compatible with Judge Tarfusser's view.

[880] Cautioning in this regard, see Jacobs, 'Shifting Scale of Power', in Schabas et al., *Research Companion ICL* (2013), p. 218; Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), p. 1002.

[881] Reg. 55 (2) RegCourt.

[882] cf. *Katanga*, No. ICC-01/04-01/07-3363, paras. 14–24; conc. insofar *Katanga,* No. ICC-01/04-01/07-3363, Dissenting Opinion Judge Tarfusser, para. 2. *In casu*, the notice was given at the deliberation stage more than one year after the close of the evidentiary phase, i.e. after the hearing within the meaning of Reg. 55 (2) cl. 2 alternative 1; but the Chamber (para. 23) correctly points to the possibility to order a separate hearing in this situation pursuant to Reg. 55 (2) cl. 2 alternative 2 ('or, if necessary'). Contra, Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), p. 993, arguing that the deliberations phase must be distinguished from the actual trial phase but this misreads the Statute; Part. 6 clearly refers to the trial phase including the deliberations (Art. 74 (4) ICCS) and its closure with the delivery of the verdict in open court (Art. 74 (5) ICCS); similarly in favour of a temporal limit, WCRO, *Regulation 55* (2013), pp. 2, 52 (until presentation of defence case before TC).

[883] Reg. 55 (2) RegC.

to it; rather, it must give notice to the accused as soon as it becomes aware of this possibility,[884] i.e. even prior to the hearing of opening statements.[885] Also, it is clear that the later the notice is given, the stricter become the fair trial requirements to be observed by the Chamber. We will discuss these requirements in a moment but can already anticipate here that the late notice given in the *Katanga* proceedings has become the gist of the fair trial issue in this case.[886]

(d) The gist of the issue: Distinguishing law and facts and ensuring a fair trial

While the wording of Regulation 55 (1) is clear enough in distinguishing between law ('legal characterisation') and 'facts', it begs the question whether this fine line can always be convincingly drawn in each case before a TC. Judge Fulford questioned, albeit without elaborating further, whether it is possible at all to modify the legal characterization of the facts 'without *ipso facto* amending' the respective charges.[887] In other words, 'can a charge remain "unamended" if one of the necessary ingredients, the legal characterisation, has changed?'[888] Ultimately, this is, in his view, 'a question of fact and degree, to be assessed on a case-by-case basis'.[889] In a similar vein, Judge van den Wyngaert argued in *Katanga*, albeit acknowledging the 'merit' of Regulation 55 'as a tool . . . to adjust the legal characterisation to better accord with the facts and circumstances described in the charges',[890] that a change in the mode of liability—from co-perpetration to contribution in a collective crime[891]—cannot be done without affecting the factual basis of the charges and therefore exceeding the facts and circumstances as described in the charges.[892] Van den Wyngaert agrees with Judge Fulford

[884] In this vein, also *Katanga*, No. ICC-01/04-01/07-3363, para. 24 (notice 'should always be given as early as possible'); more flexible, *Prosecutor v Bemba et al*, No. ICC-01/05-01/13-1250, paras. 9–12 (early prosecution request rejected for lack of 'exceptional circumstances').

[885] *Prosecutor v Gbagbo and Blé Goudé*, No. ICC-02/11-01/15-369, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court', paras. 47–55 (18 December 2015).

[886] cf. *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, paras. 25 ff., stressing several times the (too) late notice to the accused and 'the particular circumstances of this case' (para. 50) and concluding that 'in the current stage of the proceedings . . . the 25 (3)(d) Notice Decision cannot be implemented fairly'. (para. 53).

[887] *Prosecutor v Lubanga*, No. ICC-01/04-01/06-2054, TC I (Judge Fulford) 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', para. 18 (17 July 2009).

[888] *Lubanga*, No. ICC-01/04-01/06-2054, (Judge Fulford) para. 18.

[889] Ibid., para. 53, iii.

[890] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, para. 5.

[891] Art. 25 (3)(a) vs. 25 (3)(d) ICCS. *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, paras. 42–4, is right if she rejects the lesser included offence argument of the majority since these two modes of responsibility have different objects of reference ('plan' *versus* 'crime'); also *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, para. 38.

[892] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, paras. 12–23; *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 9 ff (regarding TJ).

that the question of a violation of Article 74 is one 'of fact and degree'.[893] However, she interprets the *Lubanga* AC's prohibition of a change 'in the statement of the facts'[894] as a prohibition to 'change the narrative of the facts . . . s o fundamentally that it exceeds the facts and circumstances described in the charges'.[895] She sees such a fundamental and thus inadmissible change in the majority's 'factual acrobatics' to find factual support for the change regarding Katanga's mode of responsibility in the confirmation decision.[896] In her view, the ensuing transformation of the mode of responsibility entails a 'drastic change' in the factual narrative of the case, which is no longer covered by Article 74 (2) ICCS and Regulation 55 (1).[897] In general terms, whether such a drastic change exists, can be evaluated, in her view, by questioning 'whether a reasonably diligent accused would have conducted substantially the same line of defence against both the old and new charge'.[898] Van den Wyngaert further argues that there is a distinction between 'material' and 'subsidiary facts' and only the former ones—actually underlying the charges—are open to a recharacterization, while the latter ones cannot be relied upon to that effect.[899]

While the latter argument—which can be traced back to the distinction by the *Lubanga* Appeaks Chamber and the ensuing PTC case law[900]—finds no basis in either Article 74 (2) ICCS or Regulation 55[901] and, more importantly, the proposed distinction would lead to unsurmountable problems of delimitation,[902] van den Wyngaert's first argument deserves serious consideration. Judge Tarfusser's Dissent in the *Katanga* AC Judgment, albeit advocating a restrictive interpretation of Regulation 55, does not directly address the difficult issue of the impact of a legal recharacterization on the facts underlying the charges.[903]

[893] *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, para. 29.

[894] *Lubanga*, No. ICC-01/04-01/06-2205, para. 97.

[895] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, para. 13; *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 17, 29.

[896] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, paras. 20–1; *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 19–26, arguing that the majority introduced new facts to justify the conviction.

[897] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, para. 22; also *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 12, 27–49, 129 ('textbook example' of 'drastic change', para. 49); replying *Prosecutor v Katanga*, No. ICC-01/04-01/07-3436-AnxII-tENG, TC II Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judges Diarra and Cotte, para. 2, stressing the identical 'factual allegations' of the TJ; basically conc. with Judge van den Wyngaert, WCRO, *Regulation 55* (2013), pp. 2, 50–2.

[898] *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, para. 35.

[899] *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, paras. 14–5.

[900] Notes 126, 127, and main text in this chapter.

[901] cf. *Katanga*, No. ICC-01/04-01/07-3363, para. 50 (against the Katanga defence which adopted van den Wyngaert's position, but admitting that 'facts and circumstances' may be 'narrowly or broadly understood'). Interestingly, van den Wyngaert in *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, no longer pursues this distinction.

[902] Crit. regarding the clarity of the distinction, also Schabas, Chaitidou, and El Zeidy, 'Article 61', in Triffterer/Ambos, *ICC Commentary* (2016), mn. 32 with fn. 59 and mn. 129.

[903] *Katanga,* No. ICC-01/04-01/07-3363, Dissenting Opinion Judge Tarfusser, paras. 5–20, arguing that Reg. 55 should only encompass 'those modifications which, being significant, are suitable to have a meaningful impact on the "nature, cause and content" of the charges' (para. 8) and, as to the forms of

The starting point to addressing this complex issue is, again, the factual-legal concept of charges as already defined above.[904] Such a dualist concept, explicitly adopted by Regulation 52 with regard to the DCC,[905] presupposes that the distinction between the factual and legal contents of the charges is possible and that, in principle, charges may be amended as to their legal component (i.e. kind of crime and mode of responsibility) without thereby changing their factual component (the statement of facts).[906] Of course, such a legal modification affects the charges[907] but this is beside the point, since Regulation 55 explicitly allows it as long as the facts remain the same.[908] In this regard the dispute between the *Katanga* majority and Judge van den Wyngaert touches upon the *gist of the issue*: did the TC only stress the relevant facts or did it make them 'salient' ('mise en relief'),[909] or did it actually alter the facts as alleged by van den Wyngaert.[910] This, of course, cannot be decided without having been actively involved in the proceedings but it clearly shows that the fine distinction between an admissible, purely legal re-characterization of the facts and their inadmissible modification as a result of the re-characterization depends on the concrete circumstances of each case. It is, as rightly said by Judge Fulford, Judge van den Wyngaert concurring, 'a question of fact and degree, to be assessed on a case-by-case basis'.[911] At any rate, one lesson learnt from the *Katanga* proceedings is that the precise 'facts and circumstances' should be made clearer at the outset, that is, in the confirmation decision, making an updated DCC[912] or any other subsequent clarification unnecessary.[913]

This brings us—notwithstanding the different approaches of common and civil law jurisdictions to the problem of a legal recharacterization in the course of the proceedings—to the key prerequisite of any recharacterization of the facts, that is, the safeguarding of the *fair trial rights* of the accused,[914]

responsibility, limiting its application to changes from Art. 25 to Art. 28 and *vice versa* but not within Art. 25, these being of minor significance (paras. 10–20).

[904] Section A.(3)(a) in this chapter.

[905] cf. Reg. 52 (b) and (c) RegC; in this vein also *Lubanga*, No. ICC-01/04-01/06-2205, paras. 96–7 ('distinction between facts and their legal characterisation should be respected for the interpretation of Regulation 55 as well').

[906] In the same vein, Stahn, CLF, 16 (2005), 17, correctly distinguishing between the factual and legal component of the charges.

[907] Correct in this regard, see Jacobs, 'Shifting Scale of Power', in Schabas et al., *Research Companion ICL* (2013), p. 215 and Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), pp. 987–9, but understating the dualist nature of charges.

[908] For this reason, the analogy, proposed by WCRO (WCRO, *Regulation 55* (2013), pp. 2, 44 ff.), to the ad hoc tribunals' practice of 'curing' defective indictments (note 156 and main text in this chapter) is problematique since it is structurally different from Reg. 55 in that it entails the addition of new facts (as correctly acknowledged WCRO, *Regulation 55* (2013), pp. 46, 50; distinguishing between the ad hoc tribunals and the ICC in this regard, also Friman, Brady, Costi, Guariglia, and Stuckenberg, 'Charges', in Sluiter et al., *International Criminal Procedure* (2013), pp. 421–2, 423, and 450).

[909] *Prosecutor v Katanga*, No. ICC-01/04-01/07-3436-tENG, TC II Judgment pursuant to Article 74 of the Statute, paras. 1476, 1479 (7 March 2014) ('certain aspects of the case are made salient' [French original: 'mise en relief de certain aspects du dossier']).

[910] Note 892 and main text in this chapter.

[911] Note 899 and main text in this chapter.

[912] See Section A.(2)(a) in this chapter.

[913] In the same vein, Stahn, *JICJ,* 12 (2014), 833.

[914] For Judge van den Wyngaert (*Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion, para. 10) this is the 'second step' of a two-step-test analysis embodied in Reg. 55 RegC (the first step being the re-characterization without exceeding the facts and circumstances); similarly, without

especially[915] his right to 'be informed promptly and in details of the nature, cause and content of the charge',[916] to 'have adequate time and facilities for the preparation of the defence'[917] and to 'be tried without undue delay'.[918] The first of these rights protects the accused from being taken by surprise and therefore demands that he is *as soon as possible*—that is, by the investigation stage—*informed* about the charges.[919] Yet, this right does not prohibit a subsequent change in the legal characterization of the facts at the trial stage,[920] especially since the TC is under an obligation to 'give notice' of such a change.[921] Also, a correction or adjustment of the legal characterization that better fits to the facts corresponds to the principle of 'fair labelling'[922] and thus is plainly in the interests of the accused.[923] Of course, the Chamber may need to indicate the 'specific facts' upon which it intends to rely.[924] In

explicitly mentioning the two-step test, *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 16 ff. and 50 ff. (sub-sect. A and B. of sect. II of the Opinion).

[915] The alleged violation of the *right to an impartial trial* (see thereon, Chapter I, D.(2)(a) in this volume), brought forward by the *Katanga* defence, is too far fetched. Given that the Chamber is explicitly authorized to act on the basis of Regulation 55, it does not perform 'a prosecutorial function', but 'a neutral judicial act' which does not impinge upon its impartiality (*Katanga*, No. ICC-01/04-01/07-3363, para. 104); *Katanga*, No. ICC-01/04-01/07-3436-AnxII-tENG, Concurring Opinion of Judges Diarra and Cotte, para. 2, stressing that they have 'no intention of encroaching' on the Prosecution's authority; following the defence position, however, see Jacobs, 'Shifting Scale of Power', in Schabas et al., *Research Companion ICL* (2013), pp. 220–1; Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), p. 1005, arguing that judges act 'as advocates, not as neutral umpires'. It is also unconvincing to invoke the *right to remain silent* (*Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, para. 45; *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 51–9, 130; conc., Heller, 'Legal Recharacterization of Facts', in Stahn, *Law and Practice of the ICC* (2015), pp. 1000–1) if the accused has voluntarily waived this right and testified to the facts underlying the charges; it is then a question of the concrete case if the facts have been changed to the accused's detriment. For further general fair trial violations in *Katanga,* see *Katanga*, No. ICC-01/04-01/07-3436-AnxI, Minority Opinion Judge van den Wyngaert, paras. 109–17, alleging 'that the Majority has systematically turned a blind eye towards the Defence's repeated requests to terminate the regulation 55 proceedings'. Crit. also, WCRO, *Regulation 55* (2013), pp. 1–2, 44, 50–2; Stahn, *JICJ,* 12 (2014), 830, 833 ('critical dilemmas of late notice and self-incrimination', 'findings compromise the idea of protection of defence interests . . . inherent in the regulation', 'in contrast to . . . fairness'); Schabas and McDermott, 'Article 67', in Triffterer/Ambos, *ICC Commentary* (2016), mn. 20. Van den Wyngaert's outspoken opinion has provoked a reaction by the majority expressing 'astonishment' and stressing that it took an 'approach' 'informed' by 'the principle of legality as well as that of fair and impartial proceedings'; see *Katanga*, No. ICC-01/04-01/07-3436-AnxII-tENG, Concurring Opinion of Judges Diarra and Cotte, para. 3.

[916] cf. Art. 67 (1)(a) ICCS. [917] cf. Art. 67 (1)(b) ICCS.

[918] cf. Art. 67 (1)(c) ICCS. [919] See in detail Chapter I, D.(3)(c) in this volume.

[920] For the same result, *Lubanga*, No. ICC-01/04-01/06-2205, para. 84; *Katanga*, No. ICC-01/04-01/07-3363, para. 93 (both with references to human rights case law which allows for a change to the legal characterization of the facts 'at late stages of the proceedings'); see also the discussion by Friman, Brady, Costi, Guariglia, and Stuckenberg, 'Charges', in Sluiter et al., *International Criminal Procedure* (2013), pp. 458–60.

[921] Reg. 55 (2) RegC. For such a decision, see *Bemba*, No. ICC-01/05-01/08-2324.

[922] On this principle, see generally Ashworth and Horder, *Principles of Criminal Law* (2013), pp. 77–9; Zawati, *Fair Labelling* (2014), pp. 25 ff.; regarding the codification and prosecution of gender based crimes at the international criminal tribunals, Zawati, ibid., pp. 87 ff.

[923] See also *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319, Dissenting Opinion Judge van den Wyngaert, para. 5, acknowledging 'that there is merit' in this principle; following her (para. 32) one may also identify fair labelling concerns in the Majority decision stating that it is the Chambers' task to find 'the most suitable [normative] response to the charges'; cf. *Katanga and Ngudjolo Chui*, No. ICC-01/04-01/07-3319-tENG/FRA, para. 8.

[924] *Katanga*, No. ICC-01/04-01/07-3363, para. 101.