Public Annex B10: 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

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'A STICK TO HIT THE ACCUSED WITH'[1]: THE LEGAL RECHARACTERIZATION OF FACTS UNDER REGULATION 55

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INTRODUCTION

Regulation 55 was one of 126 regulations adopted by the judges of the International Criminal Court on 26 May 2004.[3] Entitled 'Authority of the Chamber to Modify the Legal Characterisation of Facts', it 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.
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> 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.

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[1] *Prosecutor v Katanga*, ICC-01/04-01/07, 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 Van den Wyngaert (21 Nov 2012) para 8.

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[3] *Prosecutor v Lubanga*, ICC-01/04-01/06 OA 15 OA 16, 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 Dec 2009) para 71.

> 3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
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> (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
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> (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).

Regulation 55 has already had a significant effect on a number of ICC cases. In *Lubanga*, the Pre-Trial Chamber used the Regulation to recharacterize the conflict in the DRC from non-international to international, while the Trial Chamber considered (but ultimately rejected) adding five additional charges involving sexual violence and inhuman treatment. In *Bemba*, the Pre-Trial Chamber relied on the Regulation to decline to confirm charges brought by the Office of the Prosecutor (OTP) that it considered unnecessarily cumulative, while the Trial Chamber recharacterized the mental element of command responsibility adopted by the Pre-Trial Chamber from knowledge to negligence. And most dramatically, in *Katanga*, the Trial Chamber invoked the Regulation more than six months after the end of trial to recharacterize the applicable mode of participation from indirect co-perpetration to common-purpose liability and then convicted the accused on the basis of the recharacterized mode.

The impact of Regulation 55 is, moreover, only likely to increase. The OTP has asked the Trial Chamber to give notice in both *Ruto* and *Kenyatta* that the charged mode of participation is subject to recharacterization. Ruto and Kenyatta are alleged to be responsible for a variety of crimes against humanity as indirect co-perpetrators. In both cases, the OTP wants the Trial Chamber to also consider convicting them on the basis of any of the forms of complicity listed in Art. 25(b)-(d) of the Rome Statute – from ordering to aiding and abetting. The Trial Chamber has already granted the OTP's request in *Ruto*.

This Chapter provides a comprehensive critique of Regulation 55. Section I argues that the judges' adoption of Regulation 55 was *ultra vires*, because the Regulation does not involve a 'routine function' of the Court and is inconsistent with the Rome Statute's procedures for

amending charges. Section II explains why, contrary to the practice of the Pre-Trial Chamber and Trial Chamber, Regulation 55 cannot be applied either prior to trial or after trial has ended. Finally, Section III demonstrates that Pre-Trial Chamber and Trial Chamber have consistently applied Regulation 55 in ways that undermine both prosecutorial independence and the accused's right to a fair trial.

I. IS REGULATION 55 ULTRA VIRES?

Regulation 55 is *ultra vires* in two respects. First, it does not involve a 'routine function' of the Court. Second, it conflicts with the Rome Statute's provisions for amending the charges against the accused.

A. Routine Function

Art. 52(1) of the Rome Statute provides that '[t]he judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning'.[4] In *Lubanga*, the accused challenged Regulation 55 as *ultra vires*, arguing that 'it affects directly the substance of the trial and the rights of the accused and therefore goes beyond the "routine functioning" of the Court'.[5] The Appeals Chamber, however, disagreed:

> The Appeals Chamber notes that the term 'routine functioning' is not defined any further in the Statute or the Rules of Procedure and Evidence. However, the term has been described as a 'broad concept' and it has been observed that 'routine functioning' also concerns matters of 'practice and procedure'. The Appeals Chamber notes furthermore that the Regulations of the Court contain several important provisions that affect the rights of the accused person, *inter alia*, on detention and on the scope of legal assistance paid by the Court. Thus, while the Appeals Chamber acknowledges that the question of modification of the legal characterisation of facts is an important question that directly impacts on the trial, it is not persuaded that for that reason alone, it cannot be part of the routine functioning of the Court.[6]

[4] Rome Statute, art 52(1).
[5] *Lubanga* Appeals Judgment (n 3) para 67.
[6] ibid para 69; see also Carsten Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 Crim L Forum 1,

The Appeals Chamber's defense of Regulation 55 is unconvincing. As noted above, the various Chambers have relied on Regulation 55 to refuse to confirm evidentiarily-adequate charges brought by the OTP, to consider adding multiple new and more serious charges against an accused in the middle of a trial, and to recast the applicable mode of participation in a case long after the trial was over. It is difficult to see how such changes, which fundamentally alter the relationship between the Chambers, the OTP, and the defence, can be considered 'routine'[7] – particularly in comparison to other regulations adopted by the judges. Indeed, it's revealing that the scholar the Appeals Chamber cites in support of the supposed ordinariness of the Regulation, Claus Kress, notes dryly in the same article that '[t]his rather important provision is found in a spot within the house of international criminal procedure where not everybody would have bothered to search'.[8] Even Carsten Stahn, the most prominent academic supporter of Regulation 55, acknowledges that the provision serves 'primarily as a substitute, rather than a complement, of the concept of the amendment of the charges within the context of the ICC system'.[9] At least as interpreted by the various Chambers, therefore, Regulation 55 clearly violates Art. 52(1).

That said, it is not surprising that the Appeals Chamber considers Regulation 55 to be routine, despite how aggressively it has been used by the Pre-Trial Chamber and Trial Chamber. After all, the judges themselves wrote and adopted the Regulation. That conflict of interest is both obvious and problematic, counseling in favor of a very restrictive understanding of the concept of 'routine'. As Dov Jacobs notes, 'the legitimacy of the international criminal law system rests on a clear separation of roles between those who create the rules and those who apply them'.[10] Unfortunately, when given the choice between judicial modesty and expanding the scope of their own power, the Appeals Chamber chose the latter.

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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, including a norm on the treatment of the legal characterization of facts').

[7] See Susana SáCouto and Katherine Cleary, 'Defining the Case Against an Accused Before the International Criminal Court: Whose Responsibility Is It?' (War Crimes Research Office, Nov 2009) 50.

[8] Claus Kress, 'The Procedural Texts of the International Criminal Court' (2007) 5 J Intl Crim Just 537, 540.

[9] Stahn (n 6) 29.

[10] Dov Jacobs, 'A Shifting Scale of Power: Who Is in Charge of the Charges at the International Criminal Court?' in William A Schabas et al (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 222.

B. Amending Charges

In addition to limiting the Regulations to 'routine functions' of the Court, Art. 52(1) also provides that all regulations must be 'in accordance' with the Rome Statute. That limitation is echoed by Regulation 1, which provides that the Regulations 'shall be read subject to the Statute'.[11] Regulation 55, however, directly conflicts with the Rome Statute's provisions for amending the charges against an accused.[12] In particular, because it permits the Trial Chamber to alter the charges confirmed by the Pre-Trial Chamber – with regard to both crimes and modes of participation – Regulation 55 is inconsistent with paragraphs 9 and 11 of Art. 61, which provide as follows:

> **Article 61**
> **Confirmation of the charges before trial**
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> 9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
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> 11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Art. 61(9) makes clear that only the OTP has the authority to amend the charges against the accused post-confirmation. And Art. 61(11) explicitly binds the Trial Chamber to the charges as confirmed by the Pre-Trial Chamber. As Stahn notes, the reference to paragraph 9 in

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[11] Regulations of the Court, ICC-BD/01-01-04 (26 May 2004) reg 1.

[12] Jacobs (n 10) 215 ('In light of the absence of any provision relating to an amendment of the charge after the commencement of trial, it is difficult to imagine how Regulation 55 can in fact be reconciled with the Statute as it stands'); see also SáCouto and Cleary (n 7) 48.

Art. 61(11) 'can only be reasonably interpreted as an exclusion of amendments of the charges at the trial stage. Otherwise the third sentence of Art. 61(9) would be pointless'.[13]

Two solutions have been offered to the conflict between Regulation 55 and Art. 61. First, the Appeals Chamber has simply held that Art. 61 does not prohibit the Trial Chamber from amending the charges during trial. Second, Stahn and Sienna Merope argue that recharacterizing a charged crime and/or mode of participation does not, in fact, qualify as an 'amendment' to the charges. Neither solution, however, is tenable.

1. Does Article 61(9) Permits Amendments?

In *Lubanga*, the Appeals Chamber rejected the accused's claim that adding multiple new and more serious charges during trial would violate Art. 61. In its view, nothing in Art. 61(9) prohibits a Trial Chamber from using Regulation 55 to amend the confirmed charges during trial:

> First, the Appeals Chamber recalls that article 61(9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced. Regulation 55 fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to 'support each charge with sufficient evidence to establish substantial grounds to believe', whereas during trial, the onus is on the Prosecutor to prove 'guilt beyond reasonable doubt'. Thus, in the Appeals Chamber's view, article 61(9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.[14]

There are a number of problems with the Appeals Chamber's reliance on Art. 61(9)'s alleged silence concerning the use of

[13] Stahn (n 6) 15.
[14] *Lubanga* Appeals Judgment (n 3) para 77.

recharacterization to amend the charges. To begin with, it sits uneasily with Art. 61(7), which contemplates recharacterizing the charges during confirmation, but specifically prohibits the Pre-Trial Chamber from doing so itself. According to Art. 61(7)(c)(ii), if the Pre-Trial Chamber believes that the 'evidence submitted appears to establish a different crime within the jurisdiction of the Court', the proper response is to '[a]djourn the hearing and request the Prosecutor to consider… [a]mending a charge'. As Jacobs notes, the Pre-Trial Chamber's limited power reflects the fact that, under the Rome Statute, the OTP is 'the primary organ responsible for determining the content of the charges and their amendment'.[15]

To be sure, Art. 61(7) does not explicitly prohibit the *Trial Chamber* from amending the charges confirmed by the Pre-Trial Chamber. But Art. 61(11) does, which is another significant problem with the Appeals Chamber's position. As noted above, Art. 61(11) entitles the Trial Chamber to exercise 'any function of the Pre-Trial Chamber that is relevant and capable of application in [subsequent] proceedings', with one notable exception: the power to amend the charges against the accused. Only the OTP has the authority to alter the charges once trial has begun, as the third sentence of Art. 61(9) makes clear.[16]

Remarkably, the Appeals Chamber did not even *mention* Art. 61(11) in the *Lubanga* judgment. Even worse, it completely undermined its own position when it concluded that although Art. 61(9) permits the Trial Chamber to legally recharacterize the 'facts and circumstances' in the charges, it prohibits the Trial Chamber from modifying those facts and circumstances itself:

> [N]ew facts and circumstances not described in the charges may only be added under the procedure of article 61(9) of the Statute. The Trial Chamber's interpretation of Regulation 55 would circumvent article 61(9) of the Statute and would blur the distinction between the two provisions. As the Prosecutor notes, the incorporation of new facts and circumstances into the subject matter of the trial would alter the

[15] Jacobs (n 10) 208.

[16] See *Prosecutor v Lubanga*, ICC-01/04-01/06, Minority Opinion on the 'Decision Giving Notice to the Parties that the Legal Characterisation of Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of Court' (17 July 2009) para 16 ('To recapitulate, the Statute, in explicit terms, left control over framing and effecting any changes to the charges… exclusively to the Pre-Trial Chamber. The scheme was clearly designed to ensure that once the trial has begun the charges are not subject to any further amendment, addition or substitution.').

> fundamental scope of the trial. The Appeals Chamber observes that it is the Prosecutor who, pursuant to article 54(1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61(1) and (3) of the Statute, proffers charges against suspects. To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.[17]

Every consideration cited by the Appeals Chamber applies equally to the legal characterization of facts. Introducing new crimes and different modes of participation *in media res* 'alter[s] the fundamental scope of the trial' no less than introducing new facts and circumstances; as discussed in detail below, both prosecutorial and defence strategy are influenced as much (if not more so) by the legal characterization of facts than by the facts themselves. Moreover, and relatedly, Art. 54(1) does not distinguish between the Prosecutor's investigation of facts and her determination of charges. On the contrary, subparagraph b specifically instructs the Prosecutor to '[t]ake appropriate measures to ensure the effective investigation and prosecution of *crimes* within the jurisdiction of the Court'.[18]

The Appeals Chamber's reference to the Prosecutor's authority under Art. 61 to proffer charges is the most baffling of all. Although the Rome Statute does not define 'charge', Regulation 51 – adopted by the judges at the same time as Regulation 55 – specifically provides that '[t]he document containing the charges referred to in article 61 shall include' not only '[a] statement of facts', but also '[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28'. By the judges' own reckoning, therefore, the Prosecutor's right to 'proffer charges against suspects' necessarily includes the right to specify *both* the relevant facts and the relevant legal characterization of those facts.[19] So what justifies distinguishing between facts and legal characterization for purposes of Art. 61(9)? On that critical question, the Appeals Chamber's judgment is revealingly silent.

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[17] *Lubanga* Appeals Judgment (n 3) para 94.

[18] Rome Statute, art 54(1)(b) (emphasis added).

[19] See *Lubanga* Regulation 55 Dissent (n 16) para 11 ('Regulation 52 describes what constitutes a criminal charge for the purpose of trials before the ICC.'); Jacobs (n 10) 217.

2. Is Recharacterisation an Amendment?

As Judge Fulford noted in his *Lubanga* dissent, '[i]Inevitably, it follows that a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by Article 61(9)'.[20] Even Stahn accepts that conclusion.[21] In his view, though, a Trial Chamber does not actually amend the charges against an accused when it relies on Regulation 55 to legally recharacterize facts:

> It is possible to change the legal characterization of a crime without changing the charges. The charges are composed of two elements: a factual element, the 'statement of the facts, including the time and place of the alleged crime', and a legal element, the 'legal characterization of facts'. If a Chamber modifies only the second component, the legal characterization of facts, while basing its assumptions on the facts set out in the charges, it does not automatically amend the charges.[22]

Stahn's belief that a charge is amended only if the facts and circumstances are modified is irreconcilable with Art. 61, which repeatedly privileges the legal characterization of facts over the facts themselves with regard to the nature of a 'charge'. Paragraph 5 provides that '[a]t the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged' – a formulation that not only distinguishes between the 'charge' and the supporting facts, but also equates the charge with the specific crime the accused is alleged to have committed. Paragraph 6 similarly distinguishes between charges and facts, providing that, at the confirmation hearing, the accused may either '(a) Object to the charges' *or* '(b) Challenge the evidence presented by the Prosecutor'. Paragraph 8, in turn, provides that '[w]here the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence' – making clear that declination reflects the OTP's failure to establish the accused's (potential) responsibility for a particular crime, not its failure to establish its

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[20] *Lubanga* Regulation 55 Dissent (n 16) para 17.
[21] Stahn (n 6) 25 n 79 (noting that 'an amendment of the charge after the beginning of the trial… [is] prohibited by Article 61(9)').
[22] ibid 17.

factual allegations (hence the paragraph's focus on 'additional evidence'). Even more revealingly, paragraph 9 provides that, post-confirmation, '[i]f the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held'. If the legal characterization of facts is not an essential element of a charge, paragraph 9's reference to 'more serious charges' makes no sense: in the context of a criminal trial, the seriousness of a charge is signaled by the nature of the alleged crime, not by the kind of facts the prosecution uses to prove that crime.[23]

This laundry list of provisions obviously skips paragraph 7 of Art. 61, and for good reason: that paragraph alone suffices to call into question Stahn's argument. To begin with, like the other paragraphs, paragraph 7 equates 'the charges' with the 'crimes charged' – '[t]he Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'. More importantly, though, Subparagraph (c) specifically provides that it is necessary to amend a charge when 'the evidence submitted appears to establish *a different crime* within the jurisdiction of the Court'. If legally recharacterizing facts at the confirmation stage requires a formal amendment to the charges, it is impossible to plausibly maintain that legally recharacterizing facts during trial does not.

This interpretation of the nature of a charge, it is important to note, is supported by the ICC's (admittedly limited) jurisprudence.[24] In *Bemba*, the Pre-Trial Chamber held that Art. 61(7)(c)(ii) requires the OTP to formally amend the charges whenever the evidence establishes either a different crime under Arts. 6, 7, and 8 or a different mode of participation under Arts. 25 and 28.[25] Similarly, in *Katanga*, the Trial Chamber not only specifically distinguished between 'the charges' confirmed by the Pre-Trial Chamber and the

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[23] See eg Allison Marsten Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 Virginia L Rev 415, 463-64.

[24] It is also worth noting that the OTP took the position in *Lubanga* that recharacterizing facts to add new charges constituted an amendment. See *Prosecutor v Lubanga*, ICC-01/04-01/06, 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 Aug 2009) para 24.

[25] *Prosecutor v Bemba*, ICC-01/05-01/08, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute (3 Mar 2009) para 26.

'alleged facts underpinning the charges',[26] it described the 'constituent elements' of a 'confirmed charge' as the 'contextual circumstances as well as the material and mental elements' of the crime in question.[27] Indeed, the Trial Chamber viewed the legal characterization of facts as so central to the concept of a charge that it required the OTP – over its strenuous objection – to prepare an 'analytical table' specifying the precise items of evidence the prosecution intended to use at trial to prove the elements of both the charged crime and the applicable mode of participation.[28]

Finally, the idea that recharacterizing facts to establish an unconfirmed crime does not amend the charges is simply 'at odds with any common sense idea of what "change" means'.[29] The 'recharacterization of facts' requested by the victims in *Lubanga*, for example, would have resulted in the accused facing conviction not only for the war crimes of enlisting, conscripting, and using child soldiers, but also for the crimes against humanity of sexual slavery, inhuman treatment and cruel treatment – a difference that would have resulted in a far longer sentence than the one the accused actually received.[30] Given that possibility, it is difficult to disagree with Judge Fulford's conclusion that 'the proposals advanced by the victims [did] not raise the possibility that the legal characterisation of the facts may change. Instead, the victims [sought] to add five additional charges'.[31]

II. HAS THE JUDICIARY CORRECTLY INTERPRETED REGULATION 55?

The fundamental problem with Regulation 55, in short, is that it is *ultra vires*. Even if we accept the general legitimacy of the Regulation, though, it is clear that the judges have wrongly applied it both prior to trial and after trial has ended.

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[26] *Prosecutor v Katanga*, ICC-01/04-01/07-956, Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol (13 Mar 2009) para 5.
[27] ibid para 13.
[28] ibid para 11.
[29] Jacobs (n 10) 215.
[30] See eg Barbara Hola et al, 'Consistency of International Sentencing: ICTY and ICTR Case Study' (2012) 9 Eur J of Criminology 539, 547.
[31] *Lubanga* Regulation 55 Dissent (n 16) para 34.

A. *Lubanga*

In *Lubanga*, the Pre-Trial Chamber invoked Regulation 55 to recharacterize the qualification of the conflict in the DRC.[32] In its Document Containing the Charges, the OTP alleged that the accused was responsible for the war crime of conscripting, enlisting, and using children to participate actively in non-international armed conflict, a violation of Art. 8(2)(e)(vii) of the Rome Statute.[33] After the confirmation hearing, however, the Pre-Trial Chamber held that the accused should be tried for the war crime of conscripting, enlisting, and using children to participate actively in *international* armed conflict instead, a violation of Art. 8(2)(b)(xxvi).[34] The Pre-Trial Chamber recognized that Art. 61(7)(c)(ii) required it to adjourn the hearing and ask the Prosecutor to amend the charges if 'the evidence before it appear[ed] to establish that a crime other than those detailed in the Document Containing the Charges has been committed'.[35] But it nevertheless insisted that it did not have to comply with the provision, because its purpose was 'to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges'[36] and Arts. 8(2)(e)(vii) and 8(2)(b)(xxvi) criminalized the same conduct.[37] The OTP immediately sought leave to appeal the Pre-Trial Chamber's recharacterization of the conflict,[38] but the Pre-Trial Chamber refused, pointing out that if it had, in fact, exceeded its authority under Art. 61(7), the Trial Chamber could simply re-recharacterize the facts back to non-international armed conflict.[39] Indeed, that is precisely what the Trial Chamber did at the end of trial.[40]

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[32] The case also involved a dispute between the OTP, defence, and Trial Chamber concerning the use of Regulation 55 to add additional charges against the accused. That dispute is discussed in Section III.

[33] *Prosecutor v Lubanga*, ICC-01/04-01/06-356, Submission of the Document Containing the Charges Pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3) (28 Aug 2006) para 12.

[34] *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges (29 Jan 2007) 156.

[35] ibid para 202.

[36] ibid para 203.

[37] ibid para 204.

[38] *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges (24 May 2007) para 41.

[39] ibid para 48.

[40] See *Prosecutor v Lubanga*, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (14 Mar 2012) para 566.

The Pre-Trial Chamber's casual disregard of Art. 61(7)(c)(ii) is troubling. To begin with, the Pre-Trial Chamber made no attempt to defend its assertion that the purpose of the provision 'is to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges'. Some sort of defence was clearly necessary, given that the subparagraph requires adjournment whenever the evidence appears to establish 'a different crime'– not 'a materially different crime'. In fact, not only are Arts. 8(2)(e)(vii) and 8(2)(b)(xxvi) different crimes,[41] they are *materially* different crimes, because the Trial Chamber specifically held in *Lubanga* that the nature of the armed conflict in question is a material element of every war crime that the prosecution is required to prove.[42]

The Pre-Trial Chamber's position is also inconsistent with the drafting history of Art. 61(7). France proposed a version of the article during PrepCom that would have permitted the Pre-Trial Chamber to amend the indictment *sua sponte* 'by giving some facts another characterization',[43] but that proposal was opposed by a number of common-law states, 'who feared the excessive judicial interference at the stage of investigation and prosecution would undermine the independence of the Prosecutor'.[44] Similarly, states ultimately rejected a more limited proposal in the Zutphen Draft of the Rome Statute that would have permitted the Pre-Trial Chamber to 'confirm only part of the indictment [and amend it], giving a different qualification to the facts'.[45]

B. *Bemba*

The Pre-Trial Chamber applied Regulation 55 even more aggressively in *Bemba*. In the Document Containing the Charges, the OTP alleged that the accused was responsible for the crimes against humanity of murder, rape, and torture, and the war crimes of murder, rape, torture, outrages upon personal dignity, and

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[41] Jacobs (n 10) 210.

[42] *Lubanga* Trial Judgment (n 40) para 504.

[43] Draft Statute for the International Criminal Court: Working Paper Submitted by France to the Preparatory Committee on the Establishment of an ICC, A/AC.249/L.3 (6 Aug 1996) art 48(5).

[44] Fabricio Guariglia, 'Article 56' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, OUP 2008) 736, 737.

[45] Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13 (4 Feb 1998) 96.

pillaging.[46] Following the confirmation hearing, the Pre-Trial Chamber concluded that the OTP had presented sufficient evidence in support of the crimes against humanity charges and all of the war crimes charges other than torture.[47] But it nevertheless refused to confirm the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime, because it concluded that those charges were 'cumulative' with the crime against humanity of rape and the war crime of rape, respectively.[48] In its view, because permitting the OTP to engage in cumulative charging 'places an undue burden on the Defence', as 'a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges'.[49]

The OTP sought leave to appeal, arguing that the Pre-Trial Chamber did not have the authority under Art. 61(7) to decline to confirm charges for any reason other than evidentiary insufficiency.[50] The Pre-Trial Chamber rejected the request, justifying its rejection of cumulative charging on the following grounds:

> [T]he Pre-Trial Chamber must carefully filter the cases to be sent to trial and detect deficiencies which would otherwise flaw the entire proceedings. Hence, the Chamber's role cannot be that of merely accepting whatever charge is presented to it. To restrict the competences of the Pre-Trial Chamber to a literal understanding of article 61(7) of the Statute, to merely confirm or decline to confirm the charges, does not correspond to the inherent powers of any judicial body vested with the task to conduct fair and expeditious proceedings while at the same time paying due regard to the rights of the Defence.[51]

This interpretation of Art. 61(7) is indefensible. The Pre-Trial Chamber is not entitled to ignore an interpretation of the Rome

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[46] *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) para 71.
[47] SáCouto and Cleary (n 7) 20-22.
[48] *Bemba* Decision on Charges (n 46) para 202.
[49] ibid.
[50] *Prosecutor v Bemba*, ICC-01/05-01/08, Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (18 Sept 2009) para 5.
[51] ibid para 52.

Statute it admits is 'literal' simply because it prefers a different interpretation. Art. 21 specifically requires the Court to apply '[i]n the first place, this Statute', and the sources of 'applicable law' specified in Art. 21 do not include the Court's 'inherent powers'. At most, therefore, the judges are entitled to invoke their inherent powers only when all of the sources of applicable law are silent – which the Pre-Trial Chamber openly admitted was not the case here.

The Pre-Trial Chamber's claim to be protecting the right of the defence also rings hollow, because it acknowledged – in response to complaints by the Office of Public Counsel for the Victims (OPCV) – that its rejection of cumulative charging would not prevent the Trial Chamber from using Regulation 55 to legally recharacterize the facts at trial if it concluded that a different characterization was more appropriate.[52] In other words, as Susana SáCouto and Katherine Cleary note, the Pre-Trial Chamber 'rejected the victims' claims, in part, by using an argument that is contrary to efficiency and the rights of the Defense, since if the Trial Chamber can later re-characterize the charges, neither party can be absolutely certain what the relevant charges will be, even after the case moves to trial'.[53]

Finally, it is worth noting that the Pre-Trial Chamber's rejection of cumulative charging was inconsistent with its earlier approach to the recharacterization of the accused's mode of participation. The original Document Containing the Charges alleged that the accused was responsible for the charged crimes against humanity and war crimes as an indirect co-perpetrator. According to the Pre-Trial Chamber, however, the evidence presented at the confirmation hearing indicated that the accused could also be responsible for the charged crimes as a superior. It thus adjourned the hearing and requested the OTP to amend the charges to include superior responsibility.[54] (Which it did.[55]) At no point during the litigation over cumulative charging did the Pre-Trial Chamber acknowledge its earlier practice – much less explain why it felt obligated to comply with Art. 61(7)(c)(ii) in one situation but not the other.

C. *Katanga*

Unlike *Lubanga* and *Bemba*, *Katanga* involved recharacterization by the Trial Chamber. The OTP charged the accused with a variety of

[52] *Bemba* Decision on Charges (n 46) para 203.
[53] SáCouto and Cleary (n 7) 26-27.
[54] *Bemba* Decision on Charges (n 46) para 15.
[55] SáCouto and Cleary (n 7) 20.

war crimes against humanity under Art. 25(3)(a) of the Rome Statute, which holds a person criminally responsible if he 'commits such a crime, whether as an individual or jointly with another or through another person, regardless of whether that other person is criminally responsible'. The Pre-Trial Chamber confirmed nearly all of the charged crimes, holding that there was sufficient evidence to conclude that the accused was responsible for them as an indirect co-perpetrator.[56] Trial began in November 2009 and ended in May 2012.[57]

Six months later, the Trial Chamber notified the parties that it intended to consider the accused's criminal responsibility not only as an indirect co-perpetrator under Art. 25(3)(a), but also as a person who 'contributes to the commission… [of] a crime by a group of persons acting with a common purpose' under Art. 25(3)(d).[58] The accused immediately sought leave to appeal, arguing, *inter alia*, that Regulation 55 did not permit a Trial Chamber to legally recharacterize facts during deliberations.[59] The Trial Chamber granted leave, but the Appeals Chamber rejected the accused's argument, holding that recharacterization during deliberations was consistent with Regulation 55(2)'s 'at any time during the trial' requirement:

> The Appeals Chamber observes that, at the time the Impugned Decision was rendered, the trial was at the deliberations stage and that no decision under article 74 of the Statute had yet been rendered. Furthermore, nothing in the Statute, the Rules of Procedure and Evidence or the Regulations of the Court prevents the Trial Chamber from re-opening the hearing of evidence at the deliberations stage of the proceedings. The Appeals Chamber therefore concludes that, for the purposes of regulation 55 of the Regulations of the Court, the trial is ongoing at the present time. The timing of the Impugned Decision was therefore not

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[56] *Prosecutor v Katanga*, ICC-01/04-01/07-717, Decision on the Confirmation of the Charges (30 Sept 2008) 210-212.

[57] Susana SáCouto and Katherine Cleary, 'Regulation 55 and the Rights of the Accused at the International Criminal Court' (War Crimes Research Office, Oct 2013) 28.

[58] *Katanga* Regulation 55 Decision (n 1) para 7.

[59] *Prosecutor v Katanga*, ICC-01/04-01/07-3363, 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' (27 Mar 2013) para 9.

> incompatible with regulation 55 of the Regulations of the Court.

The Appeals Chamber's argument is unconvincing. The question was not whether the Trial Chamber is entitled to hear additional evidence during deliberations, but whether deliberations falls within Regulation 55's requirement that recharacterization take place 'during the trial'. Nothing in the Rome Statute or Rules of Procedure and Evidence clearly specifies when 'trial' is over. Nevertheless, the Appeals Chamber's insistence that the trial does not end until judgment has been rendered under Art. 74 is inconsistent with a number of provisions in the Rome Statute. Paragraph 1 of Art. 63, for example, provides that '[t]he accused shall be present during the trial'. The accused obviously has no right to be present during deliberations, indicating that 'the trial' in Art. 63 refers to the proceedings that end with closing arguments.

The Appeals Chamber's interpretation of 'during the trial' also conflicts with Art. 64(7)'s insistence that '[t]he trial shall be held in public'. If the trial includes deliberations, deliberations must also be public – which is specifically prohibited by Art. 74(4), which provides that '[t]he deliberations of the Trial Chamber shall remain secret'. Similarly, including deliberations within the trial creates a direct conflict between Art. 74(4)'s secrecy requirement and Art. 64(10), which requires the Trial Chamber to 'ensure that a complete record of the trial… is made and that it is maintained and preserved by the Registrar'.

Finally, and most important, it is impossible to reconcile the Appeals Chamber's position with Art. 74(1), which provides that '[a]ll of the judges of the Trial Chamber shall be present at each stage of the trial *and* throughout their deliberations'. Art. 74 explicitly distinguishes between the trial phase and the deliberation phase of a case – and has so distinguished since PrepCom.[60]

[60] See eg 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for an International Criminal Court', A/Conf.183/2/add.1 (14 April 1988) art 72(1) ('A quorum consists of [at least four] [all] members of the Trial Chamber. The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations.'); see also Otto Triffterer, 'Article 74' in Triffterer (n 44) 1392 (noting that unlike at the trial phase, all of the members of the Trial Chamber only need to be present for 'the decisive parts of the deliberations').

III. IS REGULATION 55 CONSISTENT WITH THE RIGHTS OF THE PROSECUTION AND THE DEFENCE?

In addition to being *ultra vires* and improperly interpreted by the judiciary, Regulation 55 has also consistently been applied by the Pre-Trial Chamber and Trial Chamber in ways that undermine both prosecutorial independence and the accused's right to a fair trial.

A. Prosecutorial Independence

Prosecutorial independence is at the heart of the ICC's institutional structure.[61] That independence is at its apex prior to trial, where the OTP has nearly exclusive authority regarding whom to charge, what charges to bring, and whether to amend or withdraw charges.[62] But it remains critical at trial, as well, where the adversarial nature of the proceedings means that the prosecution controls the presentation of the inculpatory case – deciding which witnesses to call, what questions to ask them, which documents to introduce into evidence, how to conduct cross-examination, etc.[63]

Legal recharacterization prior to trial has consistently undermined prosecutorial independence. That effect is most obvious in *Bemba*, where the Pre-Trial Chamber refused to confirm the charges of torture as a crime against humanity and outrages upon person dignity as a war crime, despite acknowledging that the prosecution had established substantial grounds to believe the accused had committed them. The decision meant that the prosecution had to go to trial on the Pre-Trial Chamber's preferred charges, not on its own – a serious violation of the OTP's rights under Art. 67 of the Rome Statute. Moreover, the non-confirmation had a negative impact on the prosecution's trial strategy; as the OTP noted in its (rejected) application for leave to appeal, rape and torture as crimes against humanity have different elements, requiring different proof:

> For instance, the Prosecution need not prove to secure a conviction for rape a certain quantum of pain or suffering endured by the victim, and a torture victim need not have endured 'a physical invasion of a sexual nature' a distinctive element of rape. Not all rape that is validly so charged will meet the legal standards for

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[61] See eg Rome Statute, art 42(1) ('The Office of the Prosecutor shall act independently as a separate organ of the Court'.).

[62] ibid art 67.

[63] See Sergey Vasiliev, 'Trial', in Luc Reydams et al (eds), *International Prosecutors* (OUP 2012) 714.

> torture, but that which does should be able to be charged as such, notwithstanding that it is torture committed through rape. Moreover, the man forced to watch his wife being raped repeatedly and viciously is not himself a victim of rape, but he can be properly viewed as a torture victim.[64]

The OTP also noted that the logic of the Pre-Trial Chamber's rejection of cumulative charging could be extended to prevent it from charging both multiple categories of international crime – war crimes and crimes against humanity, or crimes against humanity and genocide – based on the same acts.[65] That is a disturbing possibility, given that such charges have long been an accepted part of international criminal practice.[66]

The Pre-Trial Chamber's recharacterization of the conflict in *Lubanga* from non-international to international also undermined the OTP's right to determine how to present its case at trial. Simply put, the prosecution did not believe that the evidence indicated the conflict was international and was concerned that the Pre-Trial Chamber's recharacterization threatened the viability of its case.[67] Fortunately for the OTP – and unfortunately for the defence – the Trial Chamber simply re-recharacterized the conflict back to non-international at the end of trial.

The other recharacterization dispute in *Lubanga* provides an even more striking example of the tension between Regulation 55 and prosecutorial independence. As noted earlier, had the Trial Chamber ultimately granted the OPCV's request for recharacterization, the accused would have faced five additional charges involving sexual violence. Such recharacterization would have undermined the OTP's charging practice in the case – which is why the OTP protested the Pre-Trial Chamber's decision in no uncertain terms.[68] Rightly or

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[64] *Lubanga* Leave to Appeal (n 24) para 18.
[65] ibid.
[66] See eg Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 91.
[67] *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Status Before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decision of the Pre-Trial Chamber in Trial Proceedings, and the Manner in Which Evidence Shall be Submitted (13 Dec 2007), para 28.
[68] *Lubanga* Leave to Appeal (n 24) para 24 ('[T]he Majority Decision intrudes on the Prosecutor's role and ability "to exercise the powers and fulfil the duties" allocated in the Statute, including seeking an amendment of the charges.').

wrongly,[69] the OTP made a conscious choice to restrict the charges against Lubanga to the conscription, enlistment, and use of child soldiers – as it noted in its 2003-2006 activities report, including sexual violence charges would have required additional investigation, and the OTP needed to begin trial before Lubanga was released from custody in the DRC.[70]

Adding five additional sexual violence charges through recharacterization would also have significantly complicated the OTP's plan for the trial. In part, that would have reflected the timing of the Trial Chamber's notice of the recharacterization, which was issued on the final day of the prosecution's case in chief.[71] As the OTP noted in its request for leave to appeal, such a significant change to the charges against the accused would have required it 'to investigate, prepare and address incidents and events that were not pleaded' in the original Document Containing the Charges.[72] More fundamentally, though, adding sexual-slavery charges would have upended the OTP's entire trial strategy, which was to prove Lubanga's responsibility for using child soldiers and then use sexual violence as an aggravating factor to justify 'an appropriately severe sentence'.[73] The OTP thus insisted that recharacterizing the facts would not only be unnecessary, it would actually be counterproductive:

> [T]he aggravating (or mitigating) factors and the 'circumstances of the crime' which will be relevant under Rule 145(1)(b) for sentencing are not the same as or limited to the 'circumstances described in the charges'. Just because a factor or circumstance is appropriate for consideration at sentencing under Rule 145(1)(c) or (2)(b) does not necessarily make it one of the 'circumstances described in the charges' to be considered for the purposes of a recharacterisation under Regulation 55. There will be factors or circumstances relevant for sentencing that will not have been described in the charges; and it is entirely appropriate for the Chamber to take into consideration

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[69] See eg Sienna Merope, 'Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC' (2011) 22 Crim L Forum 311-346.
[70] Office of the Prosecutor, 'Report of the Activities Performed During the First Three Years (June 2003-June 2006)' (12 Sept 2006) 8.
[71] SáCouto and Cleary (n 7) 29.
[72] *Lubanga* Leave to Appeal (n 24) para 25.
[73] *Prosecutor v Lubanga*, ICC-01/04-01/06, Prosecution's Observations on the Consequences of the Appeal Judgment of 8 December 2009 (22 Dec 2009) para 19.

> for sentencing the full range of factors regarding the crime and the damage to victims details of the commission of the crimes and their particular impact on the victims which emerge during the trial.[74]

In retrospect, the OTP's strategy was seriously mistaken: the Trial Chamber ultimately refused to consider sexual violence an aggravating factor, concluding that 'the link between Mr. Lubanga and sexual violence, in the context of the charges, ha[d] not been established beyond a reasonable doubt'.[75] Indeed, the Trial Chamber 'strongly deprecate[d] the attitude of the former Prosecutor' – Luis Moreno-Ocampo – 'in relation to the issue of sexual violence', specifically citing his failure to charge the accused with sexual slavery.[76] The OTP's failure, however, does not justify the Trial Chamber's interference with its trial strategy in *Lubanga*: an integral aspect of prosecutorial independence is the right to be wrong.

B. The Right to a Fair Trial

Art. 64(2) of the Rome Statute requires the Court to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused'. One of the most important rights of the accused is the right '[t]o have adequate time and facilities for the preparation of the defence'.[77] Indeed, as noted by Judge Van den Wyngaert in her Regulation 55 dissent in *Katanga*, that right 'is of such significance in the [recharacterization] context that it is recapitulated with additional language in Regulation 55(3)(a), which provides that the accused must be given "adequate time and facilities for the effective preparation of his or her defence".'[78]

The central assumption of Regulation 55 is that the effective preparation of a defence requires little more than rebutting the facts in the Document Containing the Charges. That assumption is what justifies permitting the Trial Chamber to legally recharacterize facts to support new crimes and different modes of participation in the middle of trial – or after it. If the core of an effective defence is simply rebutting facts, it does not matter how those facts are legally characterized; the defence will remain the same.

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[74] ibid para 20.
[75] *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (10 July 2012) para 75.
[76] ibid para 60.
[77] Rome Statute, art 67(1)(b).
[78] *Katanga* Regulation 55 Dissent (n 1) para 48 (emphasis in original).

This view of criminal defence is openly embraced by both judges and scholars. Here is the Trial Chamber in *Katanga*, explaining its belief that recharacterizing the accused's mode of production and reopening the trial after the defence had presented its entire case-in-chief would not prejudice the accused:

> In this case, all the facts likely to be considered for recharacterisation on the basis of article 25(3)(d) of the Statute were already discussed at the trial and the Accused had the opportunity to defend himself and did so.[79]

And here is Stahn, explaining why the accused would not be prejudiced by recharacterizing facts during or after trial to support a crime not originally charged:

> [A] qualification of conduct as a different legal crime does not constitute an 'additional charge' or a 'more serious charge' within the meaning of Article 61(9). The qualification of facts by the Trial Chamber is not an amendment of the charge after the beginning of the trial (as prohibited by Article 61(9), third sentence), but a technique of legal interpretation of the Chamber, which must be exclusively based on the facts and circumstances described in the original charge. This safeguard excludes any possibility that the accused is convicted on the basis of factual elements or conduct that was not made available to him/her.[80]

This is a desiccated understanding of defence strategy. In some cases, the defence will indeed focus solely on rebutting facts – attacking the credibility of a witness or establishing an alibi, for example. In most cases, though, the defence will not only attempt to rebut the facts, it will also focus on rebutting the prosecution's legal characterization of those facts – its claim that the facts, if proven, establish that the accused was responsible for the charged crime. Indeed, it is a time-honored defence strategy to concede certain facts (and in some cases, even uncharged crimes) to highlight their inability to prove the accusded's responsibility for the charged crime. After all, an accused is convicted of *crimes*, not *acts*.

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[79] *Katanga* Regulation 55 Decision (n 1) para 33.
[80] Stahn (n 6) 25 n 79.

Because effective criminal defence focuses on rebutting facts *and* rebutting legal characterizations, recharacterizing facts to support new legal characterization during or after trial will almost always substantially undermine the accused's right to effectively prepare his defence. Indeed, to see the truth of that claim, we have to look no further than the five cases in which the Trial Chamber has recharacterized facts, considered recharacterizing facts, or been asked to recharacterize facts.

1. *Lubanga*

Although the Trial Chamber ultimately decided not to use Regulation 55 to add new charges in the middle of trial, the Appeals Chamber quite pointedly refused to rule out such additions. On the contrary, as noted earlier, it simply 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'.[81] It is thus highly likely that either the OTP or the victims will attempt to add charges in a future case.

Lubanga serves as an object lesson for why such additions are inconsistent with the accused's right to prepare an effective defence. The accused's entire defence strategy – investigation, opening argument, cross-examination of the prosecution's witnesses, direct testimony of the witnesses for the defence, closing argument – was designed to accomplish two things: (1) rebut the facts on which the child-soldier charges were based; and (2) counter the prosecution's argument that those facts legally constituted the 'conscription', 'enlistment', or 'use' of child soldiers. Had the Trial Chamber added new sexual violence and inhuman treatment charges in the middle of trial, that defence would have been fatally undermined – and that would have been true even if the facts underlying the child-soldiers charges were capable of supporting the sexual-violence and inhuman-treatment charges, an idea that the Trial Chamber ultimately rejected.[82] As the defence pointed out, the war crime of conscripting, enlisting, or using child soldiers has only one material element in common with the war crimes of sexual slavery, cruel treatment, and inhuman treatment: the existence of armed conflict.[83]

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[81] *Lubanga* Appeals Judgment (n 3) para 100.

[82] *Prosecutor v Lubanga*, ICC-01/04-01/06, 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 (8 Jan 2010) paras 33-36.

[83] *Prosecutor v Lubanga*, ICC-01/04-01/06, Defence Appeal Against the Decision of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that

And, of course, the war crime of conscripting, enlisting, or using child soldiers does not even have that contextual element in common with the crime against humanity of sexual slavery – which would have required the defence to develop a legal strategy for rebutting the idea that the accused's actions were part of a widespread or systematic attack on a civilian population. In short, had the Trial Chamber granted the victims' request for recharacterization, the defence would have needed to develop a completely new legal strategy in the middle of trial. How that would have been possible, even if the Trial Chamber had granted the defence a liberal amount of time to prepare, is difficult to imagine.

2. *Bemba*

As noted earlier, the Pre-Trial Chamber complied with Art. 67(1)(c)(ii) when it adjourned the confirmation hearing and successfully requested the OTP allege that the accused was responsible for the charged crimes not only as an indirect co-perpetrator, but also as a superior under Art. 28 of the Rome Statute. Strangely, after the restarted confirmation hearing was over, the Pre-Trial Chamber did not analyze whether the OTP had introduced sufficient evidence to establish that the accused 'should have known' that the forces under his control were committing crimes, because it concluded that the evidence indicated he had actual knowledge of those crimes.[84] Moreover, when the OTP's subsequently-filed Amended Document Containing the Charges included the 'should have known' language, the Pre-Trial Chamber struck the allegation at the defence's request.[85]

That was, however, only the beginning of the story. Five weeks into the defence's case-in-chief, and two years after the beginning of trial, the Trial Chamber gave notice that it might invoke Regulation 55 to recharacterize the mental element of superior responsibility to include whether the accused should have known that his forces were committing crimes.[86] The defence, not surprisingly, was outraged, pointing out that the contemplated recharacterization was

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the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court' (10 Sept 2009) para 53.

[84] *Prosecutor v Bemba*, ICC-01/05-01/08, 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 (21 Sept 2008) para 1. Either mental state suffices for the responsibility of a military commander. See Rome Statute, art 28(a)(i).

[85] See SáCouto and Cleary (n 57) 16-17.

[86] *Bemba* Regulation 55 Notice (n 84) para 5.

completely inconsistent with how the Pre-Trial Chamber had framed the issue and would undermine the strategy it had been pursuing since the investigation phase of the case:

> Mr Bemba was charged with one theory of liability; the alternative now proposed was rejected by the Chamber competent to set the framework of charges; Defence preparations were made on that basis; the Trial Chamber heard that case and the evidence relevant to it and let the Prosecution proceed and close its case on that basis; like the Defence (and Prosecutor), the Chamber asked questions based on that case; the Defence investigated and decided to present evidence relevant to that case, and no other; the Defence never prepared for or sought to meet an alternative theory of liability (nor was it required to); the witnesses which it now intends to call have been interviewed and they are being called in relation to that case.[87]

The OTP argued, by contrast, that the recharacterization would not prejudice the accused, because '(a) the proposed change is not a substantial departure from the findings in the confirmation decision', and '(b) the evidence offered to establish the Accused's knowledge would also necessarily prove that he should have known of the crimes'.[88]

The defence clearly had the better of the argument. To begin with, it is difficult to describe an objective mental state (negligence) as 'not a substantial departure' from a subjective mental state – and a high one at that (knowledge). It is obviously considerably easier to prove that a reasonable person would have known a particular fact than that the accused actually knew it. Indeed, to see the folly of the OTP's position, we need only consider a scenario in which the Trial Chamber recharacterized the mental state of a crime from negligence to knowledge. In that situation, would the OTP dismiss the difference as 'not a substantial departure'? To ask the question is to answer it.

The OTP's second claim was even weaker. It is true that, if the prosecution proved that the accused knew his forces were committing crimes, it would necessarily prove that he should have

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[87] *Prosecutor v Bemba*, ICC-01/05-01/08-2365-Red, Defence Submission on the Trial Chamber's Notification Under Regulation 55(2) of the Regulations of the Court (18 Oct 2012) para 43.

[88] *Prosecutor v Bemba*, ICC-01/05-01/08-2334, Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification Pursuant to Regulation 55(2) of the Regulations of the Court (8 Oct 2012) para 3.

known they were. *But that assumes the prosecution can prove knowledge.* If the prosecution cannot prove knowledge, the Trial Chamber's recharacterization could easily mean the difference between conviction and acquittal: whereas the accused would have to be acquitted under the charges as confirmed by the Pre-Trial Chamber, he could still be convicted under the charges as recharacterized by the Trial Chamber (because the prosecution might still be able to prove negligence).

Predictably, the Trial Chamber went ahead with the recharacterization – thereby making it easier in the middle of trial for the prosecution to obtain a conviction. That action not only undermined the accused's right to prepare an effective defence, it violated his right under Art. 67(1) of the Rome Statute 'to a fair hearing conducted impartially' – an issue discussed in more detail below.

3. *Katanga*

As discussed above, the Trial Chamber notified the parties well after trial had ended that it intended to consider whether the accused could be convicted of the charged crimes on the basis of an uncharged mode of participation – common-purposes liability. Judge Van den Wyngaert dissented from the majority's decision, arguing that its application of Rule 55 went 'well beyond any reasonable application of the provision and fundamentally encroaches upon the accused's right to a fair trial'.[89] And she reiterated that complaint after the Trial Chamber convicted Katanga on the basis of the recharacterized mode of participation.[90]

It is difficult to disagree with Judge Van den Wyngaert, because the recharacterization undermined the defence's entire trial strategy, which focused solely on rebutting the prosecution's claim that the accused was responsible for the charged crimes as an indirect co-perpetrator – the mode of participation that the Pre-Trial Chamber had confirmed. The defence did not need to address the very different idea that Katanga was liable for the charged crimes as a contributor to a group crime, and not simply because that mode of participation was not confirmed. More important – and more troubling – the Pre-Trial Chamber had specifically noted in its

[89] *Katanga* Regulation 55 Dissent (n 1) para 1.

[90] *Prosecutor v Katanga*, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert (17 Mar 2014) para 1.

Confirmation Decision that its findings on indirect co-perpetration 'render[ed] moot further questions of accessorial liability'.[91]

Had Katanga known – or even been able to foresee – that the Trial Chamber would consider convicting him as a contributor to a group crime, the defence would have pursued a very different strategy.[92] To begin with, the two modes of participation have very different mental elements: indirect co-perpetration requires proof that the accused *intended* to commit the charged crimes; common-purpose liability simply requires proof that the accused *knew* that the group intended to commit those crimes. The defence not only had no reason to deny that the accused knew his (unidentified) former subordinates intended to engage in criminal activity – because doing so would not incriminate him as an indirect co-perpetrator – Katanga himself *conceded* that knowledge during his testimony.[93] As any good defence attorney knows, making non-inculpatory factual admissions is often an effective legal strategy. The Trial Chamber's decision to recharacterize the charged mode of participation thus relied, at least in part, on Katanga's own testimony – a troubling situation, as Judge Van den Wyngaert pointed out in her Regulation 55 dissent.[94]

The two modes of participation also have different physical elements: whereas indirect co-perpetration requires the accused have 'control' over the charged crimes, common-purpose liability simply requires the accused to 'contribute' the charged crimes. As with the mental element, therefore, the defence could freely admit that Katanga contributed to the charged crimes without running the risk of being held responsible for them as an indirect co-perpetrator. Indeed, that is precisely what Katanga did.[95] The Trial Chamber's decision to recharacterize thus meant, as Judge Van den Wyngaert explains in her dissent to the trial judgment, that a sound strategic decision by the defence ultimately helped convict Katanga:

> 57. [T]he Chamber questioned Germain Katanga extensively on his role as coordinator between the APC and the fighters of Walendu- Bindi. It should come as no surprise that Germain Katanga enthusiastically answered the many questions about

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[91] See *Katanga* Regulation 55 Dissent (n 1) para 30.

[92] See ibid para 39.

[93] See http://www.katangatrial.org/2011/10/germain-katanga-completes-testimony-before-the-icc/. *Prosecutor v Ruto and Sang*, ICC-01/09-01/11, Decision on Victims' Representation and Participation (3 Oct 2012) para 14.

[94] See *Katanga* Regulation 55 Dissent (n 1) para 45.

[95] See ibid para 5.

> his role as avcoordinator. Undoubtedly, he was under the impression that the Chamber was interested in his defence against the Prosecutor's allegation that he was the top commander of the Ngiti fighters of Walendu-Bindi and that he had total control over their actions. This allegation was crucial for him to be considered an indirect perpetrator under the control theory interpretation of article 25(3)(a). The facts concerning his role as coordinator, about which Germain Katanga testified, were, viewed in this context, purely exculpatory as they undermined the Prosecutor's thesis that he had 'control over the crimes' committed by his subordinates.
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> 58. However, now the Majority relies heavily on Germain Katanga's role as a coordinator for its finding that he made a 'significant contribution' in the sense of article 25(3)(d). In other words, the Majority has turned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility.[96]

Judge Van den Wyngaert is right: this is 'nothing short of the Chamber co-opting a valid defence and turning it against the accused'.[97]

4. *Ruto* and *Kenyatta*

The Trial Chamber has yet to decide whether it will consider Ruto and Kenyatta's guilt not only as indirect co-perpetrators, but also on the basis of *any* of the accessorial modes of participation in Art. 25(3) – ordering, soliciting, inducing, aiding or abetting, or contributing to a group crime. Unfortunately, it has granted the OTP's request in *Ruto* to give notice that it may do so.[98] The danger of such 'recharacterization', even when the accused has notice of it (unlike in *Katanga*), is evident: the defence will now have to rebut each and every possible form of complicity during trial, because it cannot be sure which one(s) the Trial Chamber will ultimately deem to be the proper legal characterization of the facts. Having to defend against such ambiguous charges is not only manifestly unfair, it will also

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[96] *Katanga* Trial Dissent (n 90) paras 57, 58.

[97] Ibid para 40.

[98] *Prosecutor v Ruto and Sang*, ICC-01/09-01/11, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation (12 Dec 2013) para 44.

make Ruto's trial far more complicated and time-consuming than necessary.

C. Practical Implications

Regulation 55, in short, significantly complicates the accused's ability to prepare an effective defence. Most fundamentally, as *Ruto* and *Kenyatta* illustrate in stark detail, the constant threat of recharacterization forces the defence to rebut every factual allegation in the Document Containing the Charges – even those that can, in light of the charged crimes and mode of participation, be safely ignored or conceded. The defence cannot safely ignore or concede *any* facts in favor of challenging the prosecution's legal argument, because those facts could end up being legally recharacterized to support uncharged crimes or uncharged modes of participation during or after trial.[99]

Regulation 55 is thus also likely to frustrate efficient trial management. In order to promote shorter, more streamlined trials, Rule 69 of the Rules of Procedure and Evidence permits the Trial Chamber to consider proven any 'alleged fact... contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested'. Trial Chambers have routinely relied on Rule 69; in *Lubanga*, for example, the Chamber used it to justify ordering the parties 'to prepare a draft schedule of agreed facts to be considered by the Chamber eight weeks before the commencement of the trial'.[100] In light of the ongoing possibility of recharacterization, no rational defence team will agree to any fact that is even remotely contested – thus rendering Rule 69 a virtual nullity.

Moreover, contrary to Stahn's argument that Regulation 55 encourages 'a precise charging practice from the very beginning of the proceedings',[101] the never-ending threat of recharacterization actually does precisely the opposite. First, it encourages the OTP to 'draft the document containing the charges as broadly as possible, leaving the facts and circumstances at a level of generality that will then allow for evidence that emerges at trial to easily fit within them

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[99] See eg Merope (n 69) 344 (noting that the result of a broad interpretation of Regulation 55 requires 'a hyper vigilant defence that closely curtailed any statement made by a witness, lest it be used as a basis for new charges').

[100] *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on Agreements Between the Parties (8 Jan 2010) para 11.

[101] Stahn (n 6) 30.

and thus allow legal recharacterization'.[102] The broader the factual allegations, the greater the possibility of recharacterization. Second, the Regulation reduces the OTP's incentive to be precise concerning the legal characterization of the facts in the Document Containing the Charges, 'because any "mistake" in the legal characterisation could be "corrected" at trial'.[103]

Even worse, the possibility of recharacterization after trial, explicitly countenanced by the Appeals Chamber in *Katanga*, undermines another essential component of the right to a fair trial: the accused's right 'not to be compelled to testify or confess guilt and remain silent'.[104] Because Regulation 55 permits post-trial recharacterization of the charges, the accused cannot make an informed determination about whether he should testify in his own defence – if the charges change after he has testified, his testimony could end up being inculpatory instead of exculpatory, especially if part of his defense strategy is to concede the existence of facts that are harmless relative to the charged crimes and mode of participation.

Indeed, as discussed above, that is precisely what happened in *Katanga*. The accused chose to testify on the assumption that the prosecution had to prove that he was guilty of the charged crimes as an indirect co-perpetrator. As part of his defence strategy, he effectively conceded both the mental and physical elements of contributing to a group crime – a rational decision, given that the Pre-Trial Chamber had assured him 'further questions of accessorial liability' were moot. The Trial Chamber then recharacterized the mode of participation to include common-purpose liability – relying heavily on Katanga's own testimony to do so – and convicted him on the basis of the recharacterized mode. The Trial Chamber thus directly penalized the accused for exercising his right to testify on his own behalf, as Judge Van den Wyngaert notes in her dissent to the trial judgment.[105]

Although the majority in the Regulation 55 decision acknowledged that 'the Accused might have expressed himself differently had he known beforehand that his statements would be used under article 25(3)(d)', it insisted that Katanga 'elected of his own free will to testify' and 'was fully aware of the existence of Regulation 55'.[106]

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[102] Merope (n 69) 343.
[103] Jacobs (n 10) 218.
[104] Rome Statute, art 67(1)(g).
[105] *Katanga* Trial Dissent (n 90) para 58.
[106] *Katanga* Regulation 55 Decision (n 1) para 52.

Judge Van den Wyngaert rightly mocks this position in her trial dissent, noting that the majority's hyper-formalism 'begs the question why the Chamber did not think of this possibility itself at the time and, if it did so, why it did not find it necessary to inform the accused of [that] fact'.[107] More fundamentally, however, the majority's exceedingly narrow view of 'free will' – which reduces it to the absence of physical coercion – simply underscores how dramatically Regulation 55 undermines the right to silence enshrined in Art. 67(1)(g) of the Rome Statute: no rational accused will ever testify on his own behalf if the mere existence of Regulation 55 puts him on notice that anything he says can be used – even long after trial has ended – to convict him of any charge that might be supported by the "facts and circumstances" in the Confirmation Decision.

D. The 'Impunity' Rationale and Judicial Impartiality

The Appeals Chamber has consistently taken the position that Regulation 55 is necessary to avoid impunity. Its statement in *Lubanga* is typical:

> [T]he Appeals Chamber notes that Mr Lubanga Dyilo's interpretation of article 61(9) of the Statute bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the Statute to 'put an end to impunity' (fifth paragraph of the Preamble). The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.[108]

There are two fundamental problems with this defence of Regulation 55. First, even if the impunity rationale provided a compelling normative argument for recharacterization, that rationale would not justify the Regulation itself. The *ultra vires* issue is not whether the ICC functions better with Regulation 55 than without it, but whether

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[107] *Katanga* Trial Dissent (n 90) para 56.

[108] *Lubanga* Appeals Judgment (n 3) para 77; see also *Katanga* Appeals Judgment (n 59) para 21. Scholars have also defended the impunity rationale. See Stahn (n 6) 3; Gilbert Bitti, 'Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursus Delictorum' in Horst Fischer et al (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin Verlag 2001) 287.

the Regulation is a routine function and consistent with the Rome Statute.[109] And as discussed in Section I, Regulation 55 is neither.

Second, the impunity rationale does not, in fact, provide a compelling normative argument for recharacterization – at least not in the manner that the Appeals Chamber has suggested. To see why, it is important to distinguish between the two phases of Regulation 55 recharacterization: *pre-recharacterization*, when the Trial Chamber is deciding whether to invoke subregulation 2; and *post-recharacterization*, when the Trial Chamber adopts measures under subregulation 3 designed to ensure that the accused has the time and resources necessary to effectively prepare a defence to the recharacterized charges.

The Appeals Chamber's defence of Regulation 55 focuses on the pre-recharacterization phase. Its impunity rationale imagines and depends upon the following sequence of events: (1) the OTP brings charges against an accused; (2) the Pre-Trial Chamber confirms those charges; (3) the prosecution's fails to prove the confirmed charges at trial; but (4) the evidence introduced at trial proves different and unconfirmed charges. In such a situation, according to the Appeals Chamber, it would create an 'accountability gap' to require the Trial Chamber to acquit the accused even though – to quote *Katanga* – 'the evidence presented clearly established his or her guilt based upon the appropriate legal characterisation of the facts'.[110]

The problem with the Appeals Chamber's argument is the assumption that the accused's guilt regarding an uncharged crime[111] can be 'clearly established' by the evidence presented at trial. That confident assumption overlooks a critical fact: *the evidence of the accused's guilt for the uncharged crime will never have been adversarially tested prior to recharacterization*. The prosecution and defence will have focused their attention on the charged crime; they will not have argued for and against the uncharged crime. Recharacterization pursuant to Regulation 55, therefore, is actually based on *the Trial Chamber's* belief that the evidence presented at trial 'clearly establishes' the accused's guilt for an uncharged crime, not on the prosecution's. In *Katanga*, for example, 'the prosecution

[109] See Jacobs (n 10) 217 ('One can wonder whether this broad teleological policy approach can be an adequate legal justification for a statutory provision').
[110] *Katanga* Appeals Judgment (n 59) para 21.
[111] Or the charged crime on the basis of a different mode of participation, as in *Katanga*.

made no effort to charge under Article 25(3)(d), even in the alternative'.[112]

The existence of the adversarial post-recharacterization phase does not change this basic flaw in the impunity rationale. Although subregulation 3 is designed to provide the accused with sufficient time to prepare an effective defence to the new charge, it is far from clear whether that is possible in the middle of trial – much less long after it has ended. In *Bemba*, for example, the defence ultimately asked for the trial to be restarted early, because it concluded that additional investigation was impossible in light of its lack of resources, the absence of cooperation from the DRC and CAR, and the accused's ongoing detention.[113] Even more obviously, the Trial Chamber's decision to recharacterize in *Katanga* was motivated, at least in part, by the accused's own testimony. All the time in the world to prepare a new trial strategy could not undo that damage.

More importantly, though, the existence of the post-recharacterization phase does not compensate for the fact that the impetus to recharacterize comes from the Trial Chamber, not from the prosecution.[114] Simply put, when the Trial Chamber decides to recharacterize, the judges are functioning as advocates, not as neutral umpires[115] – they are intervening in the case to ensure that the accused is convicted despite the prosecution's failure to prove the charged crimes beyond a reasonable doubt. Such activism may be appropriate in an inquisitorial system, but it is not appropriate at the ICC, whose trials are – for all their inquisitorial elements – still fundamentally adversarial.[116] Indeed, as Judge Van den Wyngaert noted in her Regulation 55 dissent in *Katanga*, the Rome Statute specifically imposes the duty 'to establish the truth… of whether there is criminal responsibility under this Statute' on the prosecution[117]; the Trial Chamber has no equivalent duty.[118]

A decision by the Trial Chamber to recharacterize *sua sponte*, therefore, is inconsistent with Art. 67(1) of the Rome Statute, which guarantees the accused 'a fair hearing conducted impartially'. A Trial

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[112] *Katanga* Regulation 55 Dissent (n 1) para 30.
[113] SáCouto and Cleary (n 57) 23.
[114] This is the case even where, as in *Lubanga*, the OPCV asks for recharacterization. Victims are not parties to the proceedings. See *Prosecutor v Ruto and Sang*, ICC-01/09-01/11, Decision on Victims' Representation and Participation (3 Oct 2012) para 14.
[115] Jacobs (n 10) 219.
[116] See *Katanga* Regulation 55 Dissent (n 1) para 34; Jacobs (n 10) 219.
[117] See Rome Statute, art 54(1)(a).
[118] *Katanga* Regulation 55 Dissent (n 1) para 34.

Chamber does not act impartially when it intervenes during or after a trial to save the prosecution from itself – especially in light of Art. 64(8)(b), which gives the Trial Chamber the right to conduct trial proceedings in a non-adversarial manner if it so chooses.[119] If a Trial Chamber wants to assume primary responsibility for determining the accused's guilt, it should adopt an inquisitorial trial structure *ex ante*, not *in media res* or *ex post*.

CONCLUSION

Regulation 55 is deeply problematic. The most damning criticism is that the judges lacked the authority to adopt the Regulation in the first place, because recharacterization is not a 'routine function' and cannot be reconciled with the Rome Statute's well-defined procedures for amending the charges against an accused. The Regulation has also been consistently misinterpreted, wrongly invoked to recharacterize facts both before and after trial. And finally, both the Pre-Trial Chamber and the Trial Chamber have routinely applied the Regulation in a manner that undermines both prosecutorial independence and the accused's right to a fair trial.

An impartial judiciary concerned with maintaining the Rome Statute's distribution of authority between the judges, the OTP, the victims, and the defence would invalidate Regulation 55. Unfortunately, with regard to the Regulation, the judiciary is anything but impartial. After all, the judges themselves wrote it. Regulation 55 thus represents the most indefensible form of judicial lawmaking – particularly aggressive and particularly self-interested all at once.

[119] A fact that Judge Van den Wyngaert noted in her *Katanga* Regulation 55 dissent. See ibid para 54.