Public Annex B19: 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

Stahn, C., "Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55," (2005) 16 *Criminal Law Forum*, pp. 10-11

Criminal Law Forum (2005) 16: 1–31
DOI 10.1007/s10609-005-2231-5

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MODIFICATION OF THE LEGAL CHARACTERIZATION OF FACTS IN THE ICC SYSTEM: A PORTRAYAL OF REGULATION 55

"I saw the angel in the marble and carved until I set him free"
Michelangelo

According to a popular historical anecdote, *Michelangelo* used a piece of marble that other sculptors rejected to create his famous statue of David. When a boy came by and asked him why he was working so hard on the stone, *Michelangelo* replied "Young boy, I saw an angel deep at rest within the marble, waiting to be set free to inspire Florence – and the world".

The relationship between the concept of the legal characterization of facts[1] and the ICC Statute is similar to *Michelangelo's* imagery of the angel in marble. The contours of the principle are enshrined in Article 74 of the Rome Statute, which distinguishes between "charges" and "facts and circumstances in the charges". The judges of the Court have now set it out in a Regulation dealing with the authority of the Trial Chamber to modify the legal characterization of facts (Regulation 55).

The regulation reads:

1. In its decision under Article 74, the Trial Chamber may change the legal characterization 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.
2. If, at any time during the trial, it appears to the Chamber that the legal characterization 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

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[1] This concept is a traditional civil law concept which allows courts to reclassify the legal qualification of facts submitted by the parties in the course of the trial.

participants the opportunity to make oral or written submissions. The Trial 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.

3. For the purposes of sub-regulation 2 the Trial Chamber shall, in particular, ensure that the accused shall:

   (a) have adequate time and facilities for the effective preparation of his or her defence in accordance with Article 67, paragraph (1) (b); and
   (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).[2]

This Regulation is more than another technical addition to the already voluminous procedural framework of the Statute. It is symptomatic of the procedural law of the ICC generally.[3] Regulation 55 reflects another step towards the crystallization of a truly international law of procedure in the ICC system.[4] It presents a unique procedural device, which is inspired by domestic legal traditions, but carefully adjusted to the particular needs of international criminal justice.

This contribution presents some of the general principles which underlie the adoption of this norm. It traces the origins (I), foundations (II) and shape (III) of the principle of the legal characterization of facts in the ICC system.

I. THE HISTORICAL AND CONCEPTUAL BACKGROUND

Regulation 55 was adopted in order to address the question whether and to what extent a Chamber of the Court is entitled to correct legal flaws in the charges in the course of the trial. This question is of crucial importance for the functioning of the ICC.

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[2] Text in ICC, Regulations of the Court, Adopted by the judges of the Court on 26 May 2004, Official Documents of the ICC, ICC-BD/01-01-04.

[3] See generally Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. J. (2003), 596.

[4] See generally Christoph J.M. Safferling, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 366 (2001).

There is, first of all, an issue of procedure. Neither the Statute, nor the Rules of Procedure and Evidence (RPE) have solved the question of how a Trial Chamber shall proceed, if the legal ingredients of a charge have not been proven but the evidence shows that a crime of a different nature may have been perpetrated. If a Trial Chamber is not in a position to change the legal qualification of crimes after the commencement of the trial, i.e., genocide instead of crimes against humanity, an accused might have to be acquitted on this point, even though the evidence presented at trial has clearly demonstrated that he or she was guilty of a crime within the jurisdiction of the Court.

Moreover, legal uncertainty about the possibility to correct flaws in the charges at the trial stage directly affects prosecutorial strategy and judicial economy. The absence of commonly accepted procedural methodology increases the risk that the Prosecutor will burden the Chambers of the Court with an overload of alternative or cumulative charges in order to avoid the risk of acquittal.[5] Long and excessive charges prolong the length of the trial and may compromise the right of the accused ''to be tried without undue delay'' (Article 67 (1) (c)) and the duty of the Trial Chamber to ensure the fairness and expeditiousness of the trial (Article 64 (2)).

Finally, the legal classification of crimes at the trial has procedural implications on related concepts such as *ne bis in idem* and sentencing. Both concepts build upon the legal classification of the conduct in question. Article 20 (1) specifies that ''no person shall be tried before the Court with respect to *conduct which formed the basis of crimes* for which the person has been convicted or acquitted by the Court''.[6] Article 78 (3), is even more explicit. It states that the ''Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment''.

1. The Conceptual Parameters

International legal practice has long been divided on the right methodology to deal with the problem of the legal classification of the charges. The picture is one of diversity, and sometimes even one of confusion. Domestic legal traditions apply different methodologies to

[5] For recommendations concerning the charging policy of the Office of the Prosecutor (OTP) and the adoption of the principle of the legal characterization of facts, see generally ICC, *Informal Expert Paper: Measures available to the International Criminal Court to reduce the length of proceedings* (2003), paras. 41–46, at http://www.icc-cpi.int/library/organs/otp/length_of_proceedings.pdf.

[6] Emphasis added.

correct flaws in the charges at the trial stage. A similar inclination towards a plurality of approaches is reflected in the practice of international criminal institutions. The ICTY has declined to adopt the principle of the legal characterization of the facts in its jurisprudence in the *Kupreskic* case.[7] The Trial Chamber found it inappropriate to grant the judges of the Tribunal the power to change the legal qualification of facts on their own motion, due to the alleged lack of precision in the definition of crimes under international criminal law at the given stage in time and the potential damage of the lack of legal certainty in the procedure to the rights of the accused.

The drafters of the constitutive documents of the ICC have adopted yet another approach. Neither the Statute, nor the RPE have provided a conclusive answer to the question. The concept of the legal qualification of facts was discussed at the Rome Conference and in the subsequent PrepCom process. But no common solution could be reached, due to divisions over a feasible methodology to deal with the problem of the legal re-classification of facts. This ''constructive ambiguity'' left the final say over the choice of concept in the hands of the judges of the Court.[8]

a) Re-qualification of facts v. amendment of the charges: different domestic methodologies

One of the root causes of the absence of a unified stance on the procedural treatment of changes in the qualification of crimes at the trial stage is a methodological divide, namely, a difference in approach by common law and civil law jurisdictions.[9]

(i) Common law approaches

Common law systems usually start from the assumption that courts are bound by the legal qualification of a type of crime submitted by the

[7] See ICTY, *Prosecutor* v. *Zoran Kupreskic et al.*, Case No. IT-95-16-T, Trial Chamber Judgment, 14 January 2000, para. 727.

[8] See more generally on the concept of ''constructive ambiguity'' in the procedural law of the ICC, Kress, *The Procedural Law of the International Criminal Court in Outline, supra* note 3, at 605.

[9] For a survey, see Gilbert Bitti, *Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursus Delictorum*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 273 (Horst Fischer, Claus Kress, Sascha Rolf Lüder eds., 2001). See also Hakan Friman, *The Rules of Procedure and Evidence at the Investigative Stage*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 191, 208–209 (Horst Fischer, Claus Kress, Sascha Rolf Lüder eds., 2001).

Prosecutor in the charges. Courts are generally required to seek a formal alteration of the charge at the trial stage or to dismiss the charge if the accused is found guilty of an offence not specially charged in the indictment. Alternatively, courts may convict an accused of lesser included offences (''system of lesser included offences''), if the essential elements of the latter are included in the offence charged (manslaughter, for example, need not be additionally charged in an indictment for murder, theft is always included in robbery etc.)[10] But common law jurisdictions are reluctant to grant courts the discretion to convict an accused for a crime with substantially different elements (treason, for example, is often considered a unique crime) or a more serious crime not specifically charged in the indictment.

(ii) Civil law approaches

Many civil law jurisdictions take a different approach. They grant judges greater latitude in the determination of the applicable law than courts in common law countries. In these civil law jurisdictions, the judge is both entitled and required to establish the law, while the parties are only expected to deliver and prove the facts underlying the act committed. This active conception of the role of the judge has implications for the treatment of the legal ingredients of the offence charged. Civil law jurisdictions frequently enable the judge to qualify the facts submitted by the Prosecution in a legally different format than the document containing the charges, without requiring a previous amendment of the charges. This approach is based on the understanding that the Prosecutor's legal classification of the crime is merely a recommendation, while the judge is in charge of determining the substantive content of the trial on the basis of the facts submitted by the parties.

This concept is expressly enshrined in, *inter alia*, Section 265 of the German Code of Criminal Procedure,[11] Section 262 of the Austrian

[10] See Rule 31 (c) of the U.S. Federal Rules of Criminal Procedure (''The defendant may be found guilty of an offence necessarily included in the offence charged or of an attempt to commit either the offence charged or an offence necessarily included therein if the attempt is an offence''). See also Section 270 of the South African Criminal Procedure Act 51 of 1977. It provides: ''If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged, but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved''.

[11] See Section 265 of the German Code of Civil Procedure (Change in legal reference), text below *infra* note 73.

Code of Criminal Procedure,[12] Article 521 (1) of the Italian Code of Criminal Procedure,[13] Article 350 of the Dutch Code of Criminal Procedure,[14] Article 373 of the Criminal Procedural Code of the Republic of Albania[15] and Article 312 of the Japanese Code of Criminal Procedure.[16] It was also adopted in the Spanish Code of Criminal Procedure[17] and in the case law of the French Cour de Cassation.[18] The procedural conditions under which a re-classification of facts may be undertaken vary from country to country. Some jurisdictions require specific safeguards for the defence if they wish to change the legal characterization of the facts (notice to the accused, adjournment of trial),[19] while others require only that the facts charged remain the same.[20]

[12] See Section 262 of the Austrian Code of Criminal Procedure (''Erachtet der Gerichtshof, daß die Anklage zugrunde liegenden Tatsachen an sich oder in Verbindung mit den erst in der Hauptverhandlung hervorgetretenen Umständen eine andere als die in der Anklage bezeichnete, nicht einem Gerichte höherer Ordnung vorbehaltene strafbare Handlung begründen, so hat er die Parteien über den geänderten rechtlichen Gesichtspunkt zu hören und über einen allgemein fälligen Vertagungsantrag zu entscheiden. Das Urteil schöpft er nach seiner rechtlichen Uberzeugung, ohne an die in der Anklageschrift enthaltene Bezeichnung der Tat gebunden zu sein''.)

[13] Article 521 (1) of the Italian Code of Criminal Procedure provides that ''in its judgment the court may give a legal definition to the facts different from that set forth in the charge as long as the crime is within the competence of that court''.

[14] See Article 350 of the Dutch Code of Criminal Procedure. The position of the Dutch Supreme Court is that courts are not bound by the qualification of the facts in the indictment. The deviant qualification must, however, be revealed to the accused. See Dutch Supreme Court (Hoge Raad), Judgment of 15 April 1997, No. 104.859.

[15] The provision reads: ''The Court may modify the qualification of a fact made by the Prosecutor, provided that the criminal offence is under its competency''.

[16] See Article 312 of the Japanese Code of Criminal Procedure of 10 July 1948, text below under III.2. b (1).

[17] See Articles 653, 732 and 793 of the Spanish Code of Criminal Procedure.

[18] See Cour de Cassation, Cass. Crim., 22 April 1986, in Bulletin Criminel, No. 136 (''[I]l appartient aux jurisdictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle á celle sous laquelle ils leur étaient déférés ... à la condition qu'il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tells qu'ils ont été retenus dans lácte de saisine''). See also Cass. Crim., 21 June 1989, in Bulletin Criminel, No. 267.

[19] See Section 265 of the German Code of Criminal Procedure and Article 262 of the Austrian Code of Criminal Procedure.

[20] See Article 521 (1) of the Italian Code of Criminal Procedure and the French case law.

b) The jurisprudence of the ICTY

The ICTY dealt with the problem of the different methodologies at the international level. The tribunal examined the issue in the context of its jurisprudence on cumulative and alternative charges in *Kupreskic*.[21]

(i) The solution adopted by the ICTY

In this case, the Trial Chamber opted for a common law-oriented approach with a limited possibility to legally reclassify the offence without amendment of the charges. The Chamber introduced a distinction between "included offences", "more serious offences" and "different offences". It decided that a Trial Chamber may apply a lesser included offence than that contained in the indictment[22] or reclassify the particular form of commission/participation, if it decides to convict the accused for participation instead of perpetration (e.g. aiding and abetting instead of commission).[23] But the Chamber required a Trial Chamber to request an amendment of the charges by the Prosecutor in cases in which the facts establish that the accused has committed *a more serious crime* or a *different offence*.[24]

The Chamber conducted a comparative survey of the treatment of the legal classification of facts in various jurisdictions. It concluded this analysis with the finding that "it is apparent ... that no general principle of criminal law common to all major legal systems of the world may be found".[25] The main contribution of the judgment lies

[21] See the *Kupreskic* judgment, *supra* note 7.

[22] *Ibid.*, para. 745.

[23] *Ibid.*, para. 746 ("[T]he Trial Chamber may conclude that the facts proven by the Prosecutor do not show that the accused is guilty of having perpetrated a war crime; they show instead that he aided and abetted the commission of the crime. In this case, the Trial Chamber may classify the offence in a manner different from that suggested by the Prosecutor, without previously notifying the Defence of the change in the nomen iuris").

[24] The Chamber noted: "If ... the Trial Chamber finds in the course of the trial that the evidence conclusively shows that the accused has committed *a more serious crime* than the one charged, it may call upon the Prosecutor to consider amending the indictment. Alternatively, it may decide to convict the accused of the lesser offence charged. The same course of action should be taken by the Trial Chamber in the event the Prosecutor should decide not to accede to the Trial Chamber's request that the indictment be amended. Similarly, if the Trial Chamber finds in the course of trial that only *a different offence* can be held to have been proved, it should ask the Prosecutor to amend the indictment. If the Prosecutor does not comply with this request, the Trial Chamber shall have no choice but to dismiss the charge". See *Kupreskic*, paras. 747–748 (emphasis added).

[25] *Ibid.*, para. 738.

in the fact that the Chamber went on by seeking to establish "a general principle of law consonant with the fundamental features and the basic requirements of international justice".[26] It determined two basic requirements, which it considered to be of paramount importance on account of the given status of international criminal law: "[T]he requirement that the *rights of the accused be fully safeguarded* ... [and] [t]he requirement ... that the Prosecutor and, more generally, the International Tribunal be in a position to exercise *all the powers* expressly or implicitly deriving from the Statute, or inherent in their functions, that are *necessary for them to fulfill their mission efficiently and in the interests of justice*".[27]

These two prerequisites may be said to form the conceptual cornerstones of the concept of the legal qualification of facts. They remain valid until the present day.

(ii) A methodological critique

The way in which the ICTY applied these two principles in *Kupreskic* is less convincing. The Trial Chamber decided not to adopt the principle of the legal qualification of facts in its jurisprudence on the basis of two assumptions: an apparent gap of legal certainty in the architecture of international criminal law and the potentially negative impact of this gap on the rights of the accused in the procedure of legal re-classification at the trial stage. The Chamber noted:

> "[I]t must be emphasized ... that at present, international criminal rules are still in a rudimentary state. They need to be elaborated and rendered more specific either by international law-making bodies or by international case law so as to gradually give rise to general rules. In this state of flux the rights of the accused would not be satisfactorily safeguarded were one to adopt an approach akin to that of some civil law countries. Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge. The task of the defence would become exceedingly onerous, given the aforementioned uncertainties which still exist in international criminal law. Hence, even though the *iura novit curia* principle is normally applied in international judicial proceedings, under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an accused are at stake. It would also violate Article 21 (4) (a) of the [ICTY] Statute, which provides that an accused shall be informed 'promptly and in detail' of the 'nature and cause of the charge against him'."[28]

[26] *Ibid.*, para. 738.
[27] *Ibid.*, para. 739 (emphasis added).
[28] *Ibid.*, para. 740.

These findings are open to two kinds of criticism.

The assertion that the rules of international criminal law are still in a state of flux is certainly correct and reasonably well founded in the context of the normative framework of the ICTY. But the argument of legal uncertainty applies with much less force to the ICC treaty system. With its 128 articles, 225 rules, the elements of crimes and over 100 Regulations, the legal framework of the ICC is quite detailed in substance and, in some areas like the definition of crimes, even exposed to the criticism of over-regulation.[29] The fear that the accused might be inadequately equipped to adjust its defence strategy to changes in the legal qualification of crimes due to uncertainties about the law is therefore much less founded under the ICC system.

Secondly, one may have some doubts whether it is justified to conclude in such abstract and general terms that the introduction of the concept of the legal qualification of facts is incompatible with the right of the accused to be informed ''promptly and in detail'' of the ''nature and cause of the charge''. International practice tends to point in a different direction. The concept of the legal characterization of facts is practiced by a large number of European jurisdictions on a regular basis. It has been upheld in principle by the jurisprudence of the European Court of Human Rights.[30] It is therefore overbroad and somewhat misleading to state that the rights of the

[29] This critique has, in particular, been voiced in relation to the Elements of Crimes. See generally, Mauro Politi, *Elements of Crimes*, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Vol. I, 443, at 446 (Antonio Cassese ed., 2002).

[30] Both the European Commission on Human Rights and the European Court of Human Rights have affirmed in constant practice that the right of a criminal chamber to legally re-characterize the facts submitted by the Prosecutor does not *per se* violate the right of the accused to be promptly informed about the cause and nature of the charges. See European Commission of Human Rights, *Daniel Democles* v. *France*, Application No. 20982/92, Decision of 24 October 1995; European Court of Human Rights, *Case of De Salvador Torres* v. *Spain*, Judgment of 24 October 1996, para. 33; European Court of Human Rights, *Case of Pélissier and Sassi* v. *France*, Application No. 25444/94, Judgment of 25 March 1999, para. 62 (''The Court accordingly considers that in using the right, which it unquestionably had to re-characterize facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the possibility of exercising their defence rights on that issue in a practical and effective manner, and, in particular, in good time''). Article 6 (3) (a) ECHR requires only that courts apply the principle of the legal qualification of the facts in a manner which allows the accused to exercise its defence rights ''in a practical and effective manner and, in particular, in good time''. See European Court of Human Rights, *Pélissier and Sassi* v. *France*, para. 62.

accused cannot be satisfactorily safeguarded by ''an approach akin to that of some civil law countries''.

c) The drafting history of the Statute and the RPE

The debate has remained unresolved in the context of the constitutive documents of the ICC. Several attempts were made to firmly establish either a common law or a civil law methodology in the Statute or the RPE. But none of the two approaches managed to gain full support among States parties.

In 1996, France made the first move to introduce the concept of the legal qualification of facts into the Statute within the context of the confirmation of the charges. It submitted a working paper to the Preparatory Committee on the Establishment of the International Criminal Court, which provided that the Pre-Trial Chamber ''may confirm only part of the indictment and amend it either by declaring the case inadmissible in part ... or by withdrawing certain charges deemed not sufficiently serious, *or by giving some facts another characterization*''.[31] But this proposal was not included in the Draft Statute of the Preparatory Committee on the International Criminal Court. The Statute granted the Pre-Trial Chamber instead the right to amend ''a proposed charge'' if ''the evidence submitted appears to establish a different crime within the jurisdiction of the Court''.[32]

The Draft Statute avoided, at the same time, taking a clear position on the common law/civil law division in the definition of the powers of the Trial Chamber. It failed to strictly limit the powers of the Trial Chamber to the terms of the indictment and provided in more general terms that ''the judgment shall not exceed the facts and circumstances described in the indictment or its amendment''[33] – a neutral formulation that was retained at the Rome Conference in the wording of Article 74 (2).[34]

The topic of the legal classification of facts by the Trial Chamber was taken up again in informal discussions held after the *Kupreskic* decision during the Fourth Session of the Preparatory Commission. This time, three different types of proposals were made. The Office of the Prosecutor of the ICTY, Portugal and Spain suggested that the

[31] See Article 48 (5) (b) of the Working paper submitted by France on the Draft Statute of the International Criminal Court, UN. Doc. A/AC.249/L. 3 of 26 July 1996.

[32] See Article 61 (6) (c) (ii) of the Draft Statute.

[33] See Article 72 (2) of the Draft Statute.

[34] See Article 74 (2) of the Statute.

principles of the *Kupreskic* case be incorporated into the RPE of the ICC, by granting the Trial Chamber, *inter alia*, the right to ''classify the particular form of participation in an offence in a different manner under Article 25 (3) than that contained in the indictment'', provided that ''parties are duly notified by the Trial Chamber and given appropriate opportunity to make submissions before the conclusion of the trial''.[35]

This proposal was rejected by common law delegations, which defended the principle that the powers of the Trial Chamber are strictly tied to the charges in the indictment. They introduced a counter-proposal (proposed Rule 6–22 bis), which did not contain any reference to the possibility of the Trial Chamber changing the legal characterization of facts, but allowed the Prosecutor to ''withdraw charges after the commencement of the trial'' or to substitute ''less serious charges under Article 25 (3)'', with ''the permission of the Trial Chamber and after notice to the accused''.[36]

The French delegation made a third proposal along the lines of Regulation 55, which suggested a pure and simple application of the concept of the legal qualification of facts, noting that the Pre-Trial Chamber may, subject to safeguards for the Defence[37] and ''without adding to the facts described in the charges confirmed by the Pre-Trial Chamber, change the qualification of the facts: (a) regarding the crime committed, according to Articles 6–8 of the Statute; (b) regarding the particular form of participation in the crime, according to Article 25 (3) of the Statute''.[38]

None of the three proposals was adopted due to continuing divergences about the scope of the powers of the Trial Chamber. The question therefore remained unresolved and open to later clarification. The compromise struck by States parties was to leave the concretization of the framework of Article 74 open to later clarification by the Court.[39]

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[35] Text in Bitti, *supra* note 9, at 284.

[36] *Ibid.*, at 285.

[37] ''Provided all those who participate in the proceedings are duly notified by the Trial Chamber and given appropriate opportunity to make submissions before the conclusion of the trial''.

[38] Text in Bitti, *supra* note 9, at 286.

[39] See also Hakan Friman, *supra* note 9, at 209 (''[T]his question was touched upon many times in informal discussions, but every time it was concluded that there would not be enough common ground to find a solution. Instead it will be up to the Court to decide on this principally very important matter'').

2. Article 52 of the Statute – An Opportunity for Regulation

The adoption of the Regulations by the judges of the Court at the May 2004 Plenary Session marked a unique opportunity to take a fresh look at the issue of the legal characterization of facts within the ICC system and to end the long-lasting dispute over the legal qualification of facts.

The historical parameters were favorable towards the crystallization of a solution. After the adoption of the RPE and the Elements of Crimes, the ICC system specifically could not be accused of lacking in legal certainty and specificity, which had been voiced by the ICTY in *Kupreskic* in relation to international criminal law more generally.[40] ICC Judges could draw lessons from the practice of the *ad hoc* tribunals, where the lack of legal certainty about the specificity of the indictment and the possibility to correct flaws at the trial stage facilitated an extensive charging practice, which enhanced the workload of the Chambers and the length of proceedings.[41]

Furthermore, the Regulations of the Court offered an opportunity to encourage a reasonable and concise charging practice of the Prosecutor in the first cases of the Court and to save the Court from the painful exercise of developing a coherent framework for the correction of flaws in the charges through the lengthy and maybe even contradictory means of jurisprudence.

Article 52 of the Statute authorizes the judges of the Court to adopt Regulations for the ''routine functioning'' of the Court. This provision entrusts judges with a mandate (''shall'') to elaborate provisions relating to the judicial proceedings before the Court.[42] The term ''routine functioning'' itself is not further defined in the Statute or the RPE.[43] But 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,[44] including a norm on the treatment of the legal characterization of facts.

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[40] See Bitti, *supra* note 9, at 287.

[41] See, on charging policy generally, OTP Expert Paper, *supra* note 5, paras. 41–44.

[42] General lawmaking powers are, however, reserved to the Assembly of States Parties. See Articles 121–123 of the Statute.

[43] The Report of Judges on the Regulations defines ''routine functioning'' as encompassing ''every step, deed or action that is incidental to the invocation and exercise of the Court's jurisdiction''.

[44] Article 52 must be read in conjunction with Article 4, which gives the Court the powers necessary for the exercise of its functions.

II. THE LEGALITY OF REGULATION 55

The adoption of the concept of the legal characterization of facts is in line with both the legal framework of the ICC and international human rights law. Two aspects deserve closer attention in this regard. First of all, Regulation 55 does not institute a new procedural device *per se*. It simply clarifies an *interpretative choice* offered to the judges of the Court under Article 74 (2). This option fits better into the system of the Statute than the alternative methodology, namely the concept of the amendment of the charges at the trial stage.

Moreover, the regulation addresses the human rights concerns raised by the ICTY Trial Chamber in *Kupreskic*. It grants the accused not only the minimum level of protection required under international human rights law and national Codes of Criminal Procedure, but provides additional substantial safeguards to ensure that the rights of the defence are adequately protected in all circumstances, in particular, in situations in which the legal re-characterization of the facts confronts the accused with new or different crimes in the course of the trial.

1. Statutory authority

The ICC system offers, at least, three procedural options to deal with the problem of the correction of flaws in the charges within the framework of the ICC system.

a) Interpretory choices under the ICC system

Taking into account the role of the Pre-Trial Chamber as a filter for the trial, one may argue that the charges are ''frozen'' after their confirmation by the Pre-Trial Chamber (''freezing theory'') – an interpretation which leaves little flexibility to the Trial Chamber. Alternatively, one might argue that the powers of the Trial Chamber are broad enough to allow a change of the content of the charges at any time at trial by way of an amendment of the charges (''amendment theory''). Finally, an intermediate approach acknowledges the power of Trial Chamber to change the legal classification of facts at trial, while excluding its authority to deviate from the facts described in the charges.

(i) The ''freezing'' theory

Proponents of the ''freezing theory'' criticize the permissibility and merits of the concept of the legal characterization of fact at the trial stage on the ground that it downplays the role and function of the Pre-Trial Chamber in the determination of the normative content of the

trial. Article 61 of the Statute, so goes the argument, contains specific provisions on both the content and possible amendments of the charges. These detailed procedural rules indicate that the Pre-Trial Chamber has the primary responsibility for determining the factual and legal ingredients which form the basis of the trial.

Nevertheless, this argument does not offer sufficient grounds to exclude the possibility of a change of the legal qualification of facts by the Trial Chamber. The powers of the Pre-Trial Chamber are not designed to curtail the powers of interpretation of the Trial Chamber. The Trial Chamber is bound by a stricter standard of assessment in the determination of guilt. It must be convinced "beyond reasonable doubt".[45] Moreover, it cannot be assumed that the Pre-Trial Chamber enjoys the exclusive responsibility to fix the content of the proceedings. The Trial Chamber enjoys considerable flexibility in the organization of trial. It may, in particular, refer "preliminary issues to the Pre-Trial Chamber",[46] "exercise any functions of the Pre-Trial Chamber referred to in Article 61, paragraph 11",[47] and "order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties".[48] Both factors indicate that the factual and the legal classification of crimes in the charges are not "frozen" by the evidence and legal findings made at the confirmation hearing. It is therefore untenable to challenge the principle of the legal characterization of facts at the trial stage on the basis of the functions of the Pre-Trial Chamber.

(ii) "The amendment theory"

The "amendment theory" is also subject to legal criticism. Under the ICC Statute, the charges are fixed at the stage of the confirmation hearing. Afterwards, "the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges" under Article 61 (9), third sentence.[49] But most authorities agree[50] that the Prosecutor cannot amend or aggravate the

[45] See Article 66 (3).

[46] See Article 64 (4).

[47] See Article 64 (6).

[48] See Article 64 (6) *lit* (d).

[49] See Article 61 (9), third sentence.

[50] See Kuniji Shibahara, *Article 61*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed. 1999), at 792 ("After commencement of the trial, amendment of the charges is not admitted"); Bitti, *supra* note 9, at 280 ("the charges are frozen after the commencement of the trial"); Friman, *supra* note 9, at 208 ("[I]t has been argued in the literature that amendments at trial are possible for reasons of practicability ... This argument is not obvious, however, since amendments at trial so clearly are omitted in the statutory provisions").

charges after the commencement of the trial (*argumentum e contrario*), because the two previous sentences of Article 61 (9), link the right to amend the charges, to add additional charges or to substitute more serious charges exclusively to the period "before the trial has begun".

The only way to justify possible amendments of the charges at the trial stage would be to argue that such a power is implied by Articles 64 (6) (a) and 61 (11), which allow the trial chamber to "exercise any function of the Pre-Trial Chamber that is relevant and capable of application" in trial proceedings – an argument made by Triffterer in his Commentary on the Rome Statute.[51] Such an interpretation conflicts, however, with the express wording of Article 61 (11), which states explicitly that the possible exercise of the powers of the Pre-Trial Chamber by the Trial Chamber is *"subject to"* Article 61 (9). This reference can only be reasonably interpreted as an exclusion of amendments of the charges at the trial stage. Otherwise the third sentence of Article 61 (9) would be pointless.

This position receives even further support from the Rules of Procedure and Evidence. The rules provide for an amendment of charges only in the phase before the closure of the Pre-Trial Procedure,[52] but not at the trial stage.[53] This regulatory omission reflects the reluctance of States parties to allow an amendment procedure at the trial stage.

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[51] See Otto Triffterer, *Article 74*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at 962. Triffterer argues that an amendment of charges at the trial stage is possible under Article 64 (6) *lit* (a) in conjunction with Article 61 (11). Article 64 (6) (a) provides that the Trial Chamber may, as necessary, exercise any functions of the Pre-Trial Chamber referred to in Article 61 (11). Article 61 (11) states that "[o]nce 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". Triffterer writes: "[S]ince the Trial Chamber according to paragraph 6 (a) may "exercise any functions of the Pre-Trial Chamber referred to in Article 61, paragraph 11", wherein there is reference to "any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings", meaning proceedings before the Trial Chamber, *the Chamber may, on a motion of the Prosecutor decide on an amendment of the charges "after notice to the accused*", as provided for in article 61, para. 9, and an opportunity to file a motion on the question of amending the charges has been provided. Depending on the stage of the proceeding, it must be guaranteed that an adequate defence and the principles of fair trial are not violated by belated notice of a proposed amendment" (emphasis added).

[52] See Chapter V, Section VI, Rule 128.

[53] See Chapter VI RPE.

(iii) The case in favor of the concept of legal characterization of facts

There is, however, a strong case in favor of the adoption of the concept of the legal qualification of facts under the ICC system. This approach preserves the principle of the exclusion of an amendment of the charges after the confirmation hearing, while providing the Trial Chamber with a flexible interpretative device to correct legal flaws in the indictment within the confines of the facts and circumstances described in the charges. The theory of the legal characterization of facts is in conformity with both, the wording of Article 74 (2) of the Statute, and the fine procedural balance between the Trial Chamber and the Pre-Trial Trial Chamber under the ICC system.

b) Legal foundations

Two lines of arguments may be made to support the view that the Trial Chamber is entitled to modify the classification of the offences contained in the charges. One interpretative option is to infer the concept of the legal characterization of facts specifically from the distinction between the charges and ''the facts and circumstances described in the charges'' in Article 74 (2) of the Statute, and the right of the Trial Chamber to exercise the powers inherent in its functions. Another possible argument is to derive the right to legally re-classify the facts from the general powers of the Trial Chamber under Article 64 (6), or the concept of implied powers.

(i) Article 74 (2)

Article 74 (2) of the Statute regulates the ''requirements for the decision'' of the Trial Chamber. It reads: ''The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendment to the charges''. This provision does not contain an express validation of the concept of the legal qualification of facts. But it may be interpreted as an implicit recognition of the possibility for the Trial Chamber to interpret the facts submitted to it in different legal terms than described in the indictment.

a) Only facts and circumstances in the charges are binding on the Trial Chamber, but not the legal qualification given to the facts by the Prosecutor

Article 74 (2) introduces a distinction between ''the charges'' on the one hand, and ''the facts and circumstances described in the charges'', on

the other hand. This distinction is unique to Part 6 of the Statute. The procedure of the confirmation hearing under Part 5 of the Statute is entirely focused on the concept and the formulation of "charges". It forces the Prosecutor to seek an amendment of the charges in the case of a proposed addition or substitution of crimes at the pre-trial stage (with the permission of the Pre-Trial Chamber after the charges are confirmed[54]). Part 6 deploys a different methodology. It places the focus on the Trial Chamber, by untying the powers of the Trial Chamber from the tenor of the charges. The distinction between the "the facts and circumstances described in the charges" and the charges in the context of Part 6 of the Statute suggests that only facts and circumstances in the charges are binding on the Trial Chamber, but not the legal characterization of these facts by the Prosecutor. This flexibility in interpretation offers the Trial Chamber the possibility of changing the legal classification of facts.

b) It is possible to change the legal qualification of a crime without changing the charges

To grant the Trial Chamber the power to change the legal qualification of facts is also in accordance with the conception of the notion of charges under the Statute. 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 crimes",[55] and a legal element, the "legal characterization of facts".[56] 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.

(ii) Article 64 (6) lit (f)

A second provision which indicates that a Trial Chamber may be entitled to adopt the principle of the legal characterization of facts in practice is Article 64 (6) *lit* (f).[57] It states: "In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary [...] [r]ule on any other relevant matters". This provision

[54] See Article 61, paragraphs 7 and 9.

[55] See Regulation 52, *lit*. b.

[56] See Regulation 52, *lit*. c.

[57] In favor of justification under "Art. 64, para. 6 lit (f) and Art. 74, para. 2", see Bitti, *supra* note 9, at 286.

was inserted in order to grant the judges the possibility to adapt their practice "to the configuration of the trial before them".[58] It allows the judges, in particular, to issue practice directions to the parties in areas where the text of the Statute is silent. Article 64 (6) *lit* (f) could arguably also serve as a basis to justify the adoption of the principle of the legal characterization of facts in the jurisprudence of the Court.

(iii) Implied powers

Finally, one may argue that the principle of the legal qualification of facts is covered by the concept of implied powers. The Regulations of the Court are not only an instrument to streamline proceedings, but also a mechanism to enable the Court to exercise its powers effectively.[59] The Trial Chamber will have to deal with situations in which the facts establish at the trial stage that a different crime or a different sub-category of crime has been committed. The possibility of changing the legal characterization of facts may, in such circumstances, be a power necessary for the Trial Chamber to effectively perform its functions under Article 64.

2. Safeguards for the accused

The main legal challenge arising in relation to Regulation 55 is therefore not so much the issue of statutory authority, but the question of to what extent the principle of the legal characterization of facts can be reconciled with the rights of the accused in light of the *Kupreskic* jurisprudence of the ICTY.[60]

a) Regulation 55 and international standards

Two international guarantees for the accused must be preserved in the "determination of any charge", including the process of the legal characterization of facts, in international criminal proceedings: the right of the accused to "be informed promptly and in detail

[58] See Frank Terrier, *Powers of the Trial Chamber*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. II, 1275 (Antonio Cassese, *et al*., eds. 2002).

[59] See *supra* note 44.

[60] The Trial Chamber in *Kupreskic* made this point very clear when it noted that the principle of the legal characterization of facts could not be introduced in international criminal proceedings, without providing sufficient protection for the accused, including the right to "be informed 'promptly and in detail' of the 'nature and cause of the charge against him'". See para. 740 of the *Kupreskic* judgment.

of the nature, cause and content of the charge''[61] and the right ''to have adequate time and facilities for the preparation of the defence''.[62] Regulation 55 was drafted in the light of these two guarantees.

(i) Legal qualification of facts and the right to be informed promptly and in detail of the nature, cause and content of the charge (Article 67 (1) (a))

Regulation 55 takes into account the right of the accused to be informed promptly and in detail of the nature and cause of the charge, which is enshrined in Article 67 (1) (a) of the Statute, Article 14 (3) of the International Covenant of Civil and Political Rights (ICCPR) and Article 6 (3) (a) of the European Convention on Human Rights (ECHR).

The requirements by which courts are bound, have been elaborated in international human rights jurisprudence.[63] Both the European Commission on Human Rights and the European Court of Human Rights have found that Article 6 (3) (a) grants the defendant the right ''to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and in which the accusation is based, but also the legal characterization of facts''.[64] In particular, the Court emphasized that ''in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the Court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair''.[65]

Regulation 55 addresses these requirements. The text of sub-regulation 2 obliges the Trial Chamber to inform the participants about a possible legal re-characterization of facts before the adoption of such a change.[66] This condition puts the participants on note and places them in a position to contest the re-characterization of facts by the Chamber, as required by Article 67 (1) (a). Furthermore, the

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[61] See Article 67 (1) (a) of the Statute.

[62] Article 67 (1) (b) of the Statute.

[63] This jurisprudence is relevant to the interpretation of Article 67 (1) (a) of the Statute in line with Article 21 (3).

[64] See European Commission of Human Rights, *Daniel Democles* v. *France*, Application No. 20982/92. See also the view of the Commission in European Court of Human Rights, *Case of De Salvador Torres* v. *Spain*, Judgment of 24 October 1996, para. 28 and European Court of Human Rights, *Pélissier and Sassi* v. *France, supra* note 30, para. 51.

[65] European Court of Human Rights, *Pélissier and Sassi* v. *France*, para. 52.

[66] See sub-regulation 2 (''[T]he Chamber shall give notice to the participants of such a possibility'').

accused has the opportunity to contest a change in legal qualification through the submission of written observations under sub-regulation 2. This possibility puts the accused in a similar position as in the case of an amendment of the charges under Rule 128, sub-rule 2.[67]

(ii) Legal qualification of facts and the right to have adequate time and facilities for the preparation of the defence (Article 67 (1) (b))

Human rights jurisprudence has also specified that "the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence".[68] This right is expressly provided for in Article 67 (1) (b) of the Statute, Article 14 (3) (b) of the ICCPR and Article 6 (3) (b) of the ECHR. It requires the Court to give the accused "adequate time and facilities for the preparation of the defence" in regard to the new legal situation arising out of the re-characterization. According to the European Commission of Human Rights, this means that the accused must have "the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court".[69] The accused must be put in a position to contest the legal qualification of facts and to present evidence.

Regulation 55 addresses this concern in several ways. The right of the accused to adequate time and facilities for the effective preparation of his or her defence in the case of a change in legal characterization is expressly reaffirmed in sub-regulation 3 (a), which makes a direct reference to Article 67 (1) (b) of the Statute. This general clarification is complemented by express procedural protections for the accused. Sub-regulation 2 clarifies that the accused may seek a suspension of the hearing if this is necessary for the preparation of the defence, or even a new hearing. Moreover, sub-regulation 3 (b) gives the accused an opportunity to examine again, or have examined again a previous witness, to call new witnesses and to present other evidence admissible under the Statute in accordance with Article 67 (1) (e). Both procedural clarifications ensure that the accused is able to present his or her defence at any stage of the trial proceedings.

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[67] Rule 128, sub-rule 2 provides that "[b]efore deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law".

[68] See European Court of Human Rights, *Pélissier and Sassi* v. *France*, para. 55.

[69] See European Commission of Human Rights, *Can* v. *Austria*, 30 September 1985, Ser. A, No. 96, para. 53.

b) Regulation 55 and national standards

Regulation 55 is not only in compliance with international human rights law; it grants the accused even wider safeguards than most domestic jurisdictions which apply the concept of the legal characterization of facts.

(i) A survey of domestic systems

The procedural requirements for the protection of the rights of the accused under domestic legal systems vary from country to country. In some countries, courts may give a different legal characterization of the facts from that propounded by the Prosecution, without necessarily advising the accused. In France, case-law has established the principle that the court is authorized to find that the crime of which the accused is guilty is more serious than that charged by the Prosecutor merely on the condition that the facts charged remain the same.[70] The same principle applies in Italy. Courts are only required to warn the accused in cases where the facts are changed in the trial.[71] In Spain, courts are empowered to give the parties a warning in extraordinary circumstances and to ask them to present their views on the matter. A warning, however, is only required under constitutional law, if the accused is sentenced on a more serious charge.[72]

Broader rights for the accused are provided under the Codes of Criminal Procedure of Japan, Germany and Austria. These codes establish both a notification requirement and a possibility for the accused to demand the suspension of the trial for the preparation of the defence. Article 312 of the Japanese Code of Criminal Procedure provides, for example:

The court, may, when it deems proper in view of the development of proceedings, order to add or change the count or penalty

1. In case, the addition, withdrawal or change of the count or penalty Article has been made, the court shall forthwith inform the accused of the part added, withdrawn or changed.
2. The court shall, when it deems that there exists *a danger of causing a substantial disadvantage to the defence of the accused* through the

[70] See the jurisprudence of the Cour de Cassation, *supra* note 18.

[71] See Court of Cassation, Judgment of 8 July 1985 (*Sconocchia* case), in Giustizia penale 1986, at 562–564; Court of Cassation, Judgment of 16 April 1991 (*Parente* case), in Guirisprudenza italiana, 1992 II, at 297.

[72] Article 733 of the Spanish Code of Criminal Procedure allows the court to give the parties a warning that the charges may qualify in a different manner. But the warning is not mandatory.

> addition or change of the count or penalty Article, *suspend by ruling*, upon request of the accused or the counsel, the public trial procedure necessary in order to cause the accused to prepare the sufficient defence therefore (emphasis added).

A similar system applies in Austria and Germany. Section 262 of the Austrian Code of Criminal Procedure obliges the Trial Chamber to hear the parties before a legal re-qualification of the facts and to decide on a motion for suspension. The German Code of Criminal Procedure makes an express distinction between ''newly discovered circumstances'' which lead to the application of a more severe criminal norm against the defendant and ''other'' changes in circumstances, which require additional time for the preparation of the defence.[73] Section 265 of the German Code of Criminal Procedure specifically grants the defendant a full-fledged entitlement to suspension of the evidence at trial and suggests *new circumstances* that would make the application of a more severe offence or sanction possible.[74]

The procedural rights of the accused have been clarified by later jurisprudence. The Federal Court of Justice has ruled that the right to suspension of the trial under Section 265 (3), entitles the accused not only to an interruption of the trial, but to a new hearing in cases where the new circumstances require the application of a

[73] Section 265 of the German Code of Criminal Procedure (Change in Legal Reference) states:

> ''(1) The defendant may not be sentenced on the basis of a penal norm other than the one referred to in the charges admitted by the court without first having his attention specifically drawn to the change in the legal reference and without having been afforded an opportunity to defend himself [...]
>
> (3) The main hearing shall be suspended upon the defendant's application, if alleging insufficient preparation for defence, he contests *newly discovered circumstances which admit the application of a more severe penal norm against the defendant* than the one referred to in the charges admitted by the Court [...]
>
> (4) The Court shall, in other cases as well, suspend the main hearing upon an application or *proprio motu*, if in consequence of the change in *circumstances it appears reasonable for adequate preparation of the charges or of the defence*'' (emphasis added).

[74] Suspension remains within the discretion of the Court in the situations covered by Section 265 (3). See Löwe-Rosenberg, *Die Strafprozeßordung und das Gerichtsverfassungsgesetz*, Vol. 4 (2001), Section 265, para. 95.

fundamentally more severe penal norm against the defendant at an advanced stage of the trial.[75]

(ii) Regulation 55 – More than the strict minimum

The framework of Regulation 55 is geared towards the highest level of protection for the accused. It grants the accused not only the minimum level of protection, but comprehensive safeguards to ensure that the rights of the defence are adequately protected in all circumstances, including situations in which the legal re-characterization of the facts confronts the accused with new or different crimes in the course of the trial.

The Regulation deviates significantly from the minimalist system practiced in France and Italy, by making notification of the accused a mandatory requirement before a change in legal classification and by giving the accused an express opportunity to state his or her views in the procedure. Moreover, the Regulation goes even beyond the accused-friendly provisions of the Japanese, Austrian and German Codes of Criminal procedure, by making express provision for an opportunity of the accused to request a new hearing. This additional protection is necessary because the crimes which form the subject of a change in legal qualification in the ICC system are typically more serious in nature than crimes ordinarily dealt with in domestic systems. This makes it necessary to grant the accused a wide degree of protection.

The option of a new hearing may be relevant in two situations: where the Trial Chamber is already in deliberation when it undertakes the legal qualification of the facts and where the change in the legal characterization requires a fundamental change of the strategy of defence.[76] In particular, a new hearing may be considered in situations

[75] The Court had to decide over an appeal in a case in which the defendant had been accused of failure to report murder, but was finally convicted for incitement to murder after a change in legal qualification, without being granted the benefit of a new hearing under Section 265 (3). The Federal Court quashed the judgment, arguing that in the light of the circumstances of the case, the accused had been entitled to a new hearing. The Court made reference to the right of the accused to an effective defence under Article 6 (3) (c) of the ECHR and found that the holding of a new hearing may be the only means to safeguard the rights of the accused under Section 265 (3) in cases where the legal re-qualification forces the Defence to fundamentally renew or adjust its defence strategy to the new circumstances and where the right of the accused to raise defences or to remain silent can only be effectively exercised before a Chamber that is not influenced by the taking of evidence in the course of the previous proceedings. See Federal Court of Justice, Judgment of 24 January 2003, 2 StR 215/02, in *Neue Juristische Wochenschrift*, Vol. 24 (2003), 1748, at 1750.

[76] The right to have adequate time and facilities for the preparation of the defence may in such circumstances go so far as requiring a new hearing.

in which the different legal characterization of the Trial Chamber entails an increase in the qualification of the crime. An analogy may be drawn to the rights of the accused under Article 61 (9). This provision requires the Pre-Trial Chamber to hold a hearing on the amended charges in cases where the Prosecutor seeks to add "additional charges" or to "substitute more serious charges" at the pre-trial stage.[77] The accused may be entitled to request a parallel procedure at the trial stage, if the purported change in legal qualification entails an "increase in qualification" (e.g. genocide instead of crimes against humanity).

III. STRUCTURAL PRINCIPLES UNDERLYING REGULATION 55

The procedural framework of Regulation 55 strikes a careful balance between the rights of the accused, the role of the Trial Chamber and the interests of the Prosecutor. It is based on four cardinal principles: flexibility in the scope of application of the provision; maintenance of procedural control by the Trial Chamber; transparency of the procedure of re-characterization; and preservation of judicial economy.

1. Flexibility in the scope of application

The scope of application of the Regulation was expressly defined in wide terms, in order to allow the Trial Chamber flexibility in the classification of the conduct of the accused described in the charges.[78] There may be a need for the Chamber to rule that there is evidence of

[77] See Article 61 (9), second sentence and Rule 121, sub-rule 4.

[78] An alternative option would have been to simply adjust the components of the *Kupreskic* formula to the framework of the Statute (e.g. "Provided the parties are duly notified by the Trial Chamber and given appropriate opportunity to make submissions before the conclusion of the trial, the Trial Chamber may (a) apply a lesser included offence than that contained in the charges; or classify the particular form of participation in an offence in a different manner under Article 25 (3) than contained in the charges"). This approach would have given the Trial Chamber the power to convict the accused for a lesser offence or to reclassify the form of participation in the offence, without allowing convictions for a different or a more serious crime, based on the assumption that the Prosecutor cannot amend the charges or substitute more serious charges after commencement of the trial under Article 61 (9). But this solution would have provided fewer benefits for judicial economy and the charging practice in the ICC system. The Regulation would not have provided an incentive to the Prosecutor to limit his or her charges. On the contrary, an adjusted *Kupreskic* formula would have encouraged the Prosecutor to use alternative charges in order to avoid impunity gaps at the trial stage.

torture as a crime against humanity rather than rape as a crime against humanity. Similarly, the Chamber may conclude that the accused engaged in torture as a crime against humanity rather than in a war crime consisting of inhumane treatment of civilians, or that there is evidence of killing members of an ethnic group as genocide rather than extermination of civilians as crimes against humanity.

Regulation 55 covers these different situations (re-qualification of the modalities of the same crime, re-characterization of facts as a different crime) by giving the Chamber authority to change the legal characterization of facts to accord with ''the crimes under articles 6, 7, 8'' or with ''the form of participation of the accused under articles 25 and 28''. This formulation covers several cases, including:

– a change in the *form of the perpetration* of the crime under Article 25 (3) (e.g. re-classification of the form of participation, or re-qualification of participation as commission);
– a qualification of conduct as a *different sub-category of crime* (e.g. classification as torture as a crime against humanity rather than rape as a crime against humanity); and
– a qualification *as a different category of crime*, including a possible *''increase in qualification''* (e.g. qualification of conduct as torture as a crime against humanity rather than inhumane treatment of civilians as a war crime, or classification of conduct as genocide rather than extermination of civilians as a crime against humanity).[79]

The wide scope of application of the concept of the legal characterization of facts ensures that Regulation 55 operates as an efficient device to counter accountability gaps.

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[79] It should be noted that an ''increase in qualification'' of crimes by the Trial Chamber is not excluded by Article 61 (9) of the Statute. All the core crimes carry the same penalty. See Article 77 of the Statute. A change in legal qualification does therefore not necessarily entail a conviction for ''a more serious crime'', even if the conduct of the accused is qualified as genocide rather than as a crime against humanity. Furthermore, 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.

2. Chamber control over the proceedings

One potential implication of this procedural design is that it may create risks of procedural abuse and excessive litigation on a proposed re-qualification. Regulation 55 seeks to counter these risks by granting the Trial Chamber wide procedural control over the application of the provision.

The regulation vests the Trial Chamber with a double form of control: control over the initiation of a legal re-classification and supervision of its procedural application. This system provides adequate safeguards against an overflow of requests for re-classification and a possible re-opening of the trial. Moreover, it is in line with the strong powers of the Trial Chamber in the ICC proceedings more generally.[80]

a) Control over the initiation of a legal re-classification

During the discussions of the Working Group of Judges on Regulation 55, proposals were made to grant the parties a formal right to request a change in legal characterization. This approach was, however, criticized in the light of the trial experience in the ICTY. It was noted that the reference to an express right of the parties to request a change in legal qualification could compromise the trial, because it might give the Prosecutor an open-ended opportunity to re-open the trial on every occasion in which the OTP receives newly discovered evidence or witnesses.

Regulation 55 adopts a compromise solution. It reserves the decision to initiate a change in legal qualification for the Trial Chamber. But it does not exclude that both parties and participants may bring a proposed change to the attention of the Chamber. Such a proposition may be made within the framework of status conferences held under Rule 132, sub-rule 2.[81] The Chamber is, however, entitled to reject a request by the parties. In addition, the Chamber alone has the authority to decide whether an envisaged change in legal qualification comes within the limits imposed by Article 74 (2). The Trial Chamber determines whether a proposed change in legal qualification exceeds the limits of the facts and circumstances described in the

[80] See in particular the powers of the Trial Chamber under Article 64 (8) (b) and Article 69 (3).

[81] Rule 132, sub-rule 2 provides that that the "Trial Chamber may confer with the parties by holding status conferences as necessary", in order to "facilitate the fair and expeditious conduct of the proceedings".

charges. The fact that these two prerogatives remain in the hands of the Chamber attenuates the risk that the trial will be overshadowed by ongoing requests for re-classification.

b) Control over the application of a legal re-classification

Regulation 55 grants the Chamber wide flexibility in the organization of the trial in the case of a proposed re-classification. Sub-regulation 2 leaves the Trial Chamber discretion in its decision whether to suspend the hearing or to order an additional hearing to consider matters relevant to the proposed change.[82] Sub-regulation 3 entitles the Trial Chamber to allow, in cases where it is necessary to do so, the defence to re-examine previous evidence or to introduce new evidence. These carefully structured powers in the initiation and examination of a change in legal qualification ensure that the Trial Chamber remains "master of the proceedings" at all stages of the trial.

3. Transparency in the proceedings and procedural equality of the parties/participants

The procedure of the legal qualification of facts is drafted in a way so as to grant all parties/participants equal information about the proposed change and a possibility to comment on the change. The Trial Chamber is under an obligation to notify all participants if it considers it warranted to modify the legal characterization of facts at the trial stage. Subsequently, all participants (Defence, OTP, victims) may express their views on the purported change. Finally, Regulation 55 takes into account the interests of all sides in the context of a possible suspension of the hearing or order of a new hearing. The language of sub-regulation 2 is drafted broad enough to allow the Defence, the Prosecutor and other participants to request a suspension of the hearing or an additional hearing.[83] A request by the defence must, of course, be assessed by the Chamber in the light of the special rights of the accused under Article 67 (1) *lit* (b).[84]

[82] The Trial Chamber "may" suspend the hearing and order a new hearing "if necessary". See Regulation 55, sub-regulation 2. The discretion of the Chamber is, however, limited by the rights of the accused and must be exercised in accordance with Regulation 55, sub-regulation 3.

[83] Note that Regulation 55, sub-regulation 3 (a) regulates specific, but not exclusive ("the Trial Chamber shall, *in particular*, ensure") privileges for the accused.

[84] See Regulation 55, sub-regulation 3 (a).

4. Preservation of judicial economy

Last, but not least, the drafters of Regulation 55 made explicit efforts to maintain efficiency and judicial economy throughout the proceedings. Two factors deserve specific attention in this regard.

Sub-regulation 1 clarifies that the change of legal qualification is formally undertaken in the judgment of the Chamber (''[i]n its decision under article 74''). But the suggestion to initiate a change in legal qualification may be made ''at any time during the trial'', even at an early stage of proceedings.[85] If a Trial Chamber should, for example, be of the opinion that the facts and circumstances described in the charges establish a different form of perpetration or participation than that identified in the charges, it may raise this point at the beginning of the trial proceedings and notify the participants of an envisaged change in legal qualification at that early stage. This type of ''early warning'' may foster judicial efficiency by preventing unnecessary duplications of evidence in the procedure.

A similar rationale underlies the timing of oral or written submissions by participants under sub-regulation 2. Regulation 55 specifies that the Trial Chamber shall give participants an opportunity to make submissions on the change of legal qualification of facts after the hearing of evidence (''having heard the evidence'').[86] This procedural requirement has a double purpose: it ensures that the Trial Chamber has a complete picture of the facts of the case before making a decision on the change in legal qualification, and it may help direct the submissions on the change of legal qualification on specific points so as to avoid repetitions of evidence.

IV. CONCLUSIONS

Regulation 55 is an important new addition to the procedural framework of the ICC and to international criminal law more generally. Its significance goes far beyond the level of technical craftsmanship. The adoption of the regulation reflects specific structural developments within the international criminal law system.

1. Regulation 55 – A unique and truly international procedural device

Regulation 55 first of all, teaches some lessons about the nature and conception of the procedural law of the ICC. It illustrates once more

[85] See the opening words of Regulation 55, sub-regulation 2.

[86] See the text of Regulation 55, sub-regulation 2.

that the procedural law of the ICC is in many ways unique in form and in substance.[87] The Regulation establishes a truly international procedural device which exists neither at the international, nor at the domestic level in this form. Both the jurisprudence of the ICTY and domestic codes of criminal procedure have served as a starting point for the development of the provision. But none of these systems has delivered a blueprint for the institutional design of the norm at the level of the ICC.

Both the scope of application of the regulation and its procedural machinery differ from systems and practices at the national or international level. The concept of the legal characterization of facts 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. Its scope of application is therefore broader than in some civil law jurisdictions. At the same time, the drafters of the regulation took additional steps to increase the safeguards for the defence in the light of the gravity of crimes dealt with by the ICC. The regulation extends the safeguards for an accused beyond the standards practiced at the domestic level, in order to grant the accused sufficient opportunity to adjust his or her defence strategy to respond to fundamental changes in legal characterization.

2. Regulation 55 – an ICC specific device

The need for a unique and case-specific procedural device was strongly guided by the necessity to adopt an approach which fits within the particular procedural structure of the ICC system. The choice of methodology was dictated by the need to construe a device which maintains the institutional competences of Pre-Trial Chamber and Trial Chamber, on the one hand, and a fair balance between the interests of the Prosecutor and the defence, on the other. This is reflected in the design of the regulation. The drafters of the regulation gave preference to a civil law methodology (''legal qualification of facts'') over a common law methodology (''amendment of the charges'') because the former was better equipped to maintain the careful balance between the powers of the Trial Chamber and the powers of the Pre-Trial Chamber within the specific context of Article 61 (9).

The determination of the procedure was driven by similar considerations. The Regulation built on the active conception of the role

[87] See also the convincing argument by Kress, *supra* note 3, at 605.

of the judge in the ICC trial procedure (''master of the proceedings''),[88] in order to address potential tensions between the interests of the defence and the Prosecution in the procedure of legal qualification.

3. Lessons learned from the practice of the ad hoc tribunals

Regulation 55 deserves broader attention in the international context because it captures specific trends in the development of the international criminal system. The adoption of the regulation signals that the practice of the *ad hoc* tribunals is an important, but by no means an exclusive parameter of legal and procedural design. The inclusion of the concept of the legal characterization of facts in the Regulations of the ICC indicates that the jurisprudence of the ICTY Trial Chamber in *Kupreskic* was very system-oriented and perhaps over-pessimistic in its general objection to the concept of the legal characterization of facts on the grounds of the protection of the accused.

It is even more fundamental to note that the adoption of Regulation 55 as such was essentially driven by the rationale to draw lessons from the practice of the *ad hoc* tribunals. Regulation 55 marks a first attempt by the judges of the ICC to enhance the efficiency of proceedings through the encouragement of a precise charging practice from the very beginning of the proceedings.[89] It must be read together with Regulation 52, which obliges the Prosecutor to include a legal characterization which accords with both ''the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28''.[90] Together, both regulations seek to avoid the pitfalls of the ICTY practice, where problems of legal specificity in the indictment and the broad possibility to correct flaws at the trial stage facilitated an extensive charging practice which enhanced the workload of the Chambers and the length of proceedings.

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[88] See generally Frank Terrier, *Powers of the Trial Chamber*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Vol. II, 1259, at 1295–1299 (Cassese ed., 2002); Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Vol. II, 1439, at 1475–1477.

[89] Regulation 55 implements, to some extent, the recommendations made in the Informal Expert Paper, *supra* note 5, paras. 42–43.

[90] See Regulation 52, *lit* c.

4. Regulation 55 – a quiet mode of legal reform

Finally, the adoption of Regulation 55 raises an interesting point about legal methodology. The case for a change in practice was conveyed in a quiet fashion in the ICC system, namely by legal interpretation, rather than by judicial lawmaking. The concept of the legal characterization of facts was implanted by the drafters of the Statute in the wording of Article 74, sub-regulation 2. Regulation 55 did nothing but crystallize and refine it, in an attempt to give a clear and concise meaning to the Statute – a little bit like *Michelangelo* and his *David*.