

REGULATION 55 AND THE RIGHTS OF THE ACCUSED AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
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*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad,
2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy
Aurora Hartwig De Heer*

A village elder meets with people from the surrounding area.

Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

*Archbishop Desmond Tutu and Minister Simone Veil at the second
annual meeting of the Trust Fund for Victims, courtesy ICC Press
Office*

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EXECUTIVE SUMMARY

Regulation 55 of the Regulations of the Court is a provision that permits a Trial Chamber of the International Criminal Court to convict an accused of a crime other than that with which he was originally charged by the Prosecution, or to base its conviction on a different mode of liability than originally charged, subject to certain conditions. In particular, the recharacterization will only be permitted if it does not exceed the facts and circumstances described in the charges as confirmed by the Court's Pre-Trial Chamber, if the parties are given the opportunity to respond to the proposed recharacterization, and if the Defense has sufficient time and facilities to defend against the changes. Significantly, in three out of the six cases to reach trial at the ICC to date – *Lubanga*, *Katanga*, and *Bemba* – the Trial Chamber has, at some stage, put the parties on notice that it may “change the legal characterization” of the facts against the accused pursuant to Regulation 55. In another two cases – the two Kenya cases – the Prosecutor has filed an application asking the Trial Chamber to invoke Regulation 55, but the Chamber has yet to rule on the request.

Notably, one of the rationales behind the adoption of Regulation 55 by the ICC was that it would render the proceedings *more* efficient by obviating the need for the Prosecution to charge alternative or cumulative charges at the start of a case. However, as described in detail in this report, a significant amount of litigation has been devoted to issues surrounding the regulation, both at the Trial Chamber level and before the Appeals Chamber. In fact, trial proceedings have been suspended for multiple weeks in two cases due to an invocation of Regulation 55, and Germain Katanga has been waiting more than sixteen months since the parties delivered the closing statements in his trial for a judgment due to the contemplated use of Regulation 55 in that case. At the same time, in the Kenya cases, the Prosecution has asked for Regulation 55 to be used to put the accused on notice that they may be convicted pursuant to a variety of potential modes of liability, meaning that the Regulation 55 “backstop” does not necessarily eliminate the need for alternative or cumulative charging. Even more significantly, the use of the regulation under certain scenarios raises serious questions regarding the Trial Chamber's

ability to protect the rights of the accused to be informed of the charges against him, even with the safeguards spelled out in the regulation, as seen in the *Katanga* case described in this report.

In light of these concerns regarding the rights of the accused and the inefficiencies brought about by the frequent use of Regulation 55, this report recommends limiting the use of Regulation 55 to exceptional circumstances. More specifically, we recommend that the provision not be used when a recharacterization will result in a significant transformation of the case against the accused, particularly if the accused is not notified of the potential recharacterization until after the Defense has put on its case before the Chamber. In addition, we recommend that, rather than relying on the potential use of Regulation 55 down the line to correct for too limited a charging strategy from the start, the Prosecution adopt a more flexible approach to charging where necessary from the outset. Along the same lines, we recommend that the Pre-Trial Chambers not insist on strictly narrowing the case at the confirmation stage, as the standard of proof is much lower at confirmation than at trial and the level of evidence presented is significantly reduced.

I. INTRODUCTION

At the time of this writing, six of the cases initiated at the International Criminal Court (ICC) have reached the trial stage of proceedings. Significantly, in three out of these six cases,¹ the Trial Chamber has, at some stage, put the parties on notice that it may “change the legal characterization” of the facts against the accused, invoking Regulation 55 of the Regulations of the Court. In another two cases,² the Prosecutor has filed an application asking the Trial Chamber to invoke Regulation 55, but the Chamber has yet to rule on the request.

Regulation 55 provides as follows:

1. In its decision under article 74 [relating to the final judgment of the Trial Chamber], the [Trial] 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.

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,

¹ Specifically, these cases, discussed in detail below, are: *The Prosecutor v. Thomas Lubanga Dyilo*, *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, and *The Prosecutor v. Jean-Pierre Bemba Gombo*.

² These cases are *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*.

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 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).³

Given the significant role that Regulation 55 has assumed in the trials before the ICC to date, this report examines the relevant jurisprudence on the provision issued thus far and offers recommendations as to how the regulation should be interpreted going forward.

³ International Criminal Court, Regulations of the Court, ICC-BD/01-01-04, Reg. 55, *adopted* 26 May 2004.

II. RELEVANT JURISPRUDENCE

A. The Prosecutor v. Thomas Lubanga Dyilo

1. *Victims' Request for a Modification of the Charges and the Trial Chamber's Decision Notifying the Parties of Potential Recharacterization under Regulation 55*

The first case in which the Trial Chamber sought to invoke its power under Regulation 55 was the first case to be tried before the ICC, namely, the case against Thomas Lubanga Dyilo. As described in detail in a 2009 report drafted by the War Crimes Research Office,⁴ the issue arose during the course of the trial against Mr. Lubanga when the Legal Representatives of the victims participating in the *Lubanga* case filed a joint application with the Trial Chamber “pertaining to the implementation of the procedure provided for by [R]egulation 55 of the Regulations of the Court.”⁵ Specifically, the victims’ Legal Representatives requested that the Trial Chamber invoke Regulation 55 to apply “an additional legal characterization” to the facts and circumstances described in the charging document, which only contained charges of conscripting, enlisting, and using children to participate in armed conflict as a war crime.⁶ In particular, the victims’ application argued that the Trial Chamber should amend the charges against Mr. Lubanga to include the crime against humanity of sexual slavery and the war crimes of sexual slavery and cruel and/or inhuman treatment.⁷ According to the victims, these charges could

⁴ See War Crimes Research Office, *Defining the Case Against An Accused Before the International Criminal Court: Whose Responsibility Is It?* (November 2009), http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_Defining_Case_Nov2009.pdf.

⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure Under Regulation 55 of the *Regulations of the Court*, No. ICC-01/04-01/06-1891-tENG, ¶ 5 (ICC Trial Chamber I, 22 May 2009).

⁶ *Id.* ¶ 41.

⁷ *Id.* ¶¶ 15, 41.

properly be added under the Trial Chamber’s authority to “change the legal characterisation of the facts” because, in the view of the victims, the proposed additional charges fell within the context of the facts and circumstances described in the charges against Mr. Lubanga as confirmed by the Pre-Trial Chamber.⁸

In a decision issued 14 July 2009, the same day that the Prosecution finished presenting its evidence in the case against Mr. Lubanga as confirmed by the Pre-Trial Chamber, the majority of Trial Chamber I notified the parties that it would consider adding the victims’ Legal Representatives’ proposed charges.⁹ Significantly, while the victims had argued that the proposed charges fell within the facts and circumstances of the confirmed charges, the majority of the Trial Chamber held that it *was not bound* by the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber.¹⁰ It reached this conclusion by finding that Regulation 55 creates “two distinct stages” at which the Trial Chamber could change the legal characterization of the facts.¹¹ During one stage, described in Regulation 55(1), the Trial Chamber determined that it may change the legal characterization of the facts in its final judgment on the guilt or lack of guilt of the accused, so long as the new charges do not exceed the “facts and circumstances described in the charges and any amendment to the charges.”¹² During the second stage, according to the majority, the Chamber may change the legal characterization of the facts against the accused at any time during the trial *without being limited to the facts or circumstances described in the charges*, so long as the Trial Chamber provides the parties with the procedural protections contained in Regulations 55(2) and (3), such as notice to the parties.¹³ The Chamber then went on to advise the parties that it

⁸ See generally *id.*

⁹ See *Prosecutor v. Thomas Lubanga Dyilo*, 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, ICC-01/04-01/06-2049 (ICC Trial Chamber I, 14 July 2009).

¹⁰ *Id.* ¶¶ 27-32.

¹¹ *Id.* ¶ 27.

¹² *Id.*

¹³ *Id.*

was considering changing the legal characterization of facts pursuant to the second stage, *i.e.*, pursuant to Regulation 55(2), suggesting that the Chamber did not consider itself bound by the “facts and circumstances described in the charges and any amendments to the charges.”¹⁴ Judge Fulford dissented from the majority’s decision, challenging the majority’s interpretation of Regulation 55 as creating two distinct stages at which the Chamber could recharacterize the charges.¹⁵

2. *Appeals Chamber Decision Overturning Trial Chamber’s Interpretation of Regulation 55*

Both the Defense and the Prosecution were granted leave to appeal the Chamber’s 14 July 2009 decision.¹⁶ In its submission, the Defense first argued that, regardless of the interpretation, Regulation 55 is

¹⁴ *Id.* ¶¶ 34-35. In a subsequent “clarification” to the 14 July 2009 decision, the majority of the Trial Chamber seemed to step back somewhat from its holding that it was in no way bound by the facts and circumstances contained in the Prosecution’s charges. *Prosecutor v. Thomas Lubanga Dyilo*, Clarification and Further Guidance to Parties and Participants in Relation to the “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” ICC-01/04-01/06-2093 (Trial Chamber I, 27 August 2009). Specifically, the majority held that it would only consider adding the charges proposed by the victims – which ostensibly fell within the facts and circumstances of the confirmed charges because the allegations of sexual slavery and cruel and/or inhumane treatment were based on acts committed against child soldiers – as opposed to throwing the case wide open to, for example, charges of genocide. *Id.* ¶ 7. Furthermore, while the majority continued to state that it was not bound by the “facts and circumstances described in the charges” so long as it provides notice to the parties of the new charges, it added that any additional facts incorporated into the case by the Trial Chamber “must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.” *Id.*

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009,” ICC-01/04-01/06-2069-Anx-1 (ICC Trial Chamber I, 31 July 2009).

¹⁶ *See The Prosecutor v. Thomas Lubanga Dyilo*, Decision adjourning the evidence in the case and consideration of Regulation 55, ICC-01/04-01/06-2143, ¶ 10 (ICC Trial Chamber I, 2 October 2009).

“inherently incompatible” with the Rome Statute and the rights of the accused to a fair trial.¹⁷ The Defense also challenged the Chamber’s decision to read Regulation 55 as creating two stages at which it could recharacterize the facts,¹⁸ an argument that was also made by the Prosecution in its submission.¹⁹ The Appeals Chamber issued its decision on 8 December 2009, overturning the Trial Chamber’s holding that Regulation 55 creates “two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions),” but refusing to find that the provision is “inherently incompatible” with the Rome Statute or the rights of the accused.²⁰

Regarding the Defense’s arguments in support of the claim that Regulation 55 as a whole is necessarily incompatible with the Rome Statute and the rights of the accused, the Appeals Chamber first dismissed the notion that the regulation was adopted in violation of Article 52(1) of the Rome Statute, which authorizes the judges to adopt regulations for the court that are “necessary for its routine functioning.”²¹ According to the Appeals Chamber, although the term

¹⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Defence Appeal against the Decision 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, ICC-01/04-01/06-2112, ¶ 5 (ICC Defence, 10 September 2009).

¹⁸ *Id.* ¶¶ 8-35.

¹⁹ *See The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Document in Support of Appeal against 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” and urgent request for suspensive effect, ICC-01/04-01/06-2120 (ICC Office of the Prosecutor, 14 September 2009).

²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” ICC-01/04-01/06-2205, ¶ 37 (ICC Appeals Chamber, 8 December 2009).

²¹ Rome Statute of the International Criminal Court, *adopted on* 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9 (1998), Art. 52(1).

“routine function” is not defined in any of the documents governing the ICC, it has been described as a “broad concept” that may concern “matters of ‘practice and procedure.’”²² Furthermore, the Chamber found that the question of whether judges have the authority to recharacterize the charges was a question that was “left for determination by the judges of the Court” by virtue of the fact that the Rules of Procedure and Evidence are silent on the issue, and that without a regulation settling the matter, judges could have produced “inconsistent jurisprudence.”²³ Because such inconsistent jurisprudence would have had “a considerable impact on the day-to-day conduct of the trials and the efficient use of judicial resources,” the Chamber reasoned, Regulation 55 was “necessary for the Court’s routine functioning.”²⁴ The Appeals Chamber also rejected the Defense’s claim that Regulation 55 is, under any interpretation, inherently incompatible with Article 61(9) of the Rome Statute, which, as noted above, describes the process by which the Prosecutor may amend the charges after confirmation.²⁵ The Defense argued that *any* modification to the charges amounted to an amendment, and thus could only be achieved through the process described in Article 61(9).²⁶ The Appeals Chamber disagreed, holding that the provision of the Rome 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,”²⁷ and that as

²² *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” *supra* n. 20, ¶ 69 (citing H.-J. Behrens, C. Staker, Article 52 - Regulations of the Court, in: O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2d edition, 2008)).

²³ *Id.* ¶ 70.

²⁴ *Id.*

²⁵ Rome Statute, *supra* n. 21, Art. 61(9).

²⁶ *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” *supra* n. 20, ¶ 75.

²⁷ *Id.* ¶ 76.

long as the Trial Chamber was not adding new facts or circumstances, it was not usurping the role of the Prosecutor to investigate crimes under the jurisdiction of the Court and select the charges against suspects.²⁸ In addition, the Appeals Chamber determined that the Defense's interpretation "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" and that "[t]his would be contrary to the aim of the Statute to 'put an end to impunity.'"²⁹ Lastly, the Appeals Chamber rejected the Defense's argument that Regulation 55 is necessarily inconsistent with the rights afforded to the Defense under Article 67(1) of the Statute, including the rights of an accused to be notified of the charges against him, the right to prepare a defense, and the right to be tried without undue delay, although it agreed that such rights could be implicated depending on the manner in which Regulation 55 is applied.³⁰

With regard to the Defense's challenge to the Trial Chamber's interpretation of the regulation, the Appeals Chamber agreed that the lower court's approach to Regulation 55 conflicted with Article 74(2) of the Rome Statute,³¹ which provides that the judgment of the Trial Chamber at the end of the trial "shall not exceed the facts and circumstances described in the charges and any amendments to the charges."³² It also found that the Chamber's interpretation of the Statute was inconsistent with Article 61(9) of the Statute, which provides as follows:

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,

²⁸ *Id.* ¶¶ 77, 94.

²⁹ *Id.* ¶ 77.

³⁰ *Id.* ¶¶ 82-87.

³¹ *Id.*

³² Rome Statute, *supra* n. 21, Art. 74(2).

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.³³

The Trial Chamber's reading of Regulation 55 conflicted with this provision, according to the Appeals Chamber, because "new facts and circumstances not described in the charges may only be added under the procedure of [A]rticle 61 (9) of the Statute."³⁴ The Appeals Chamber elaborated:

[T]he incorporation of new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial. The Appeals Chamber observes that it is the Prosecutor who, pursuant to article 54 (1) of the Statute,^[35] 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,^[36] proffers charges against suspects. To give

³³ *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," *supra* n. 20, ¶ 37.

³⁴ *Id.* ¶ 94.

³⁵ Article 54(1) of the Rome Statute states: "The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and (c) Fully respect the rights of persons arising under this Statute." Rome Statute, *supra* n. 21, Art. 54(1).

³⁶ Article 61 of the Rome Statute provides, in part:

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before

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.”³⁷

Finally, because the Trial Chamber’s interpretation of Regulation 55 would allow the Chamber, if acting pursuant to Regulation 55(1), to recharacterize the charges against the accused without providing the accused with notice or an opportunity to respond, so long as the

the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

Id. Art. 61.

³⁷ *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” *supra* n. 20, ¶ 94.

Chamber limited the recharacterization to facts and circumstances described in the charges, the Appeals Chamber held that the decision was inconsistent with internationally recognized human rights and thus violated Article 21(3) of the Rome Statute.³⁸

It should be noted that Lubanga's Defense also argued in its submission to the Appeals Chamber that, if the Appeals Chamber upheld the validity of Regulation 55, the provision could nevertheless only be used for "lesser included offenses."³⁹ The Appeals Chamber declined to address this point, as it determined that it was beyond the scope of the issues certified for appeal, stating only that, while "the text of Regulation 55 does not stipulate, beyond what is contained in subregulation 1, what changes in the legal characterisation may be permissible," the "particular circumstances of the case will have to be taken into account."⁴⁰

3. *Trial Chamber's Decision that Proposed Recharacterization Fell Beyond Facts and Circumstances Described in the Document Containing the Charges*

Following the Appeals Chamber's decision on Regulation 55, the Trial Chamber determined that it could not modify the charges against Mr. Lubanga as requested by the victims' Legal Representatives because the "proposed modifications would infringe the Appeals Chamber's interpretation of Regulation 55 of the Regulations of the Court."⁴¹

³⁸ *Id.* ¶ 98. Article 21(3) of the Rome Statute states: "The application and interpretation of law pursuant to this article [entitled "Applicable Law,"] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender..., age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status." Rome Statute, *supra* n. 21, Art. 21(3).

³⁹ *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," *supra* n. 20, ¶ 99.

⁴⁰ *Id.* ¶ 100.

⁴¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Legal Representatives'

Hence, the Trial Chamber's March 2012 judgment in the *Lubanga* case concerns only those crimes with which the accused was originally charged.⁴²

B. The Prosecutor v. Jean-Pierre Bemba Gombo

1. The Confirmation Process and Document Containing the Charges

The next case in which questions regarding the use of Regulation 55 by the Trial Chamber arose was the case against Jean-Pierre Bemba Gombo, the alleged president and commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo, or MLC).⁴³ Mr. Bemba was arrested 23 May 2008 and surrendered to the International Criminal Court 3 July 2008 for crimes allegedly committed in the Central African Republic.⁴⁴ On 15 June 2009, Pre-Trial Chamber II confirmed charges against Mr. Bemba for the crimes of murder as a crime against humanity and as a war crime, rape as a crime against humanity and as a war crime, and pillaging as a war crime,⁴⁵ holding that there were substantial grounds to believe that the accused bore responsibility for such crimes under Article 28(a) of the Rome Statute, which allows a superior to be held criminally responsible for the conduct of his subordinates.⁴⁶ Specifically, Article 28(a) states:

Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-2223, ¶ 37 (ICC Trial Chamber I, 8 January 2010).

⁴² See generally *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 (ICC Trial Chamber, 14 March 2012).

⁴³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Revised Second Amended Document Containing the Charges, ICC-01/05-01/08-856-AnxA-Red ¶ 5 (ICC The Office of the Prosecutor, 18 August 2010).

⁴⁴ *Id.* ¶ 8.

⁴⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (ICC Pre-Trial Chamber II, 15 June 2009).

⁴⁶ *Id.* ¶ 405.

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁴⁷

In its decision confirming the charges against Mr. Bemba, the Pre-Trial Chamber outlined the elements that must be fulfilled to prove criminal responsibility within the meaning of Article 28(a).⁴⁸ Regarding the knowledge requirement, the Chamber explained that

⁴⁷ Rome Statute, *supra* n. 21, Art 28(a).

⁴⁸ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 45, ¶ 407 (requiring the following elements for responsibility under Article 28(a), “(a) The suspect must be either a military commander or a person effectively acting as such; (b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute; (c) The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them; (d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and (e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution”).

Article 28(a)(i) encompasses two standards of knowledge.⁴⁹ The first standard, which is identified by the term “knew,” requires the existence of *actual knowledge*, whereas the second term, identified by the term “should have known,” requires only that the superior was “negligent in failing to acquire knowledge of his subordinates’ illegal conduct.”⁵⁰ Turning to the evidence before it on the issue of knowledge, the Chamber found that there was “sufficient evidence to establish substantial grounds to believe Mr Jean Pierre Bemba *knew* that the MLC troops were committing or were about to commit the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging.”⁵¹ As a result, the Chamber refrained from analyzing the “should have known” standard in relation to the facts of the case.⁵²

Following the confirmation decision, the Prosecution submitted to the Trial Chamber a revised Document Containing the Charges (DCC),⁵³ intended to reflect the confirmed charges on which the case against Mr. Bemba would go to trial.⁵⁴ Interestingly, in its amended DCC, the

⁴⁹ *Id.* ¶ 429.

⁵⁰ *Id.* ¶¶ 429, 432.

⁵¹ *Id.* ¶¶ 447, 478–89 (emphasis added) (relying particularly on the following facts: “the widespread nature of the illegal acts committed by the MLC troops; the length of the period over which these acts were committed; Mr Jean-Pierre Bemba’s visit to his forces in Bangui in early November 2002 after the commission of crimes in late October 2002; his suspension of two commanders after his visit; his statement cautioning his forces about future misconduct; the existence of an effective reporting system at Mr Jean-Pierre Bemba’s disposal; his ability to use the existing means of communication to contact the commanders in the field during the entire period of intervention; the fact that he was informed by his political circle and intelligence adviser of the commission of murder, rape and pillaging by his MLC forces at least 3 months before the complete withdrawal of his troops; and the existence of media broadcasts throughout the entire period of intervention which reported about the commission of murder, rapes and pillaging by MLC forces”).

⁵² *Id.* ¶¶ 478–89.

⁵³ Article 61(3) of the Rome Statute provides that, “[w]ithin a reasonable time before the [confirmation] hearing, the [accused] shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial...” Rome Statute, *supra* . 21, Art. 21(3).

⁵⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Amended Document Containing the Charges, ICC-01/05-01/08-593-Anx-Red (ICC The Office of the

Prosecution alleged the accused either “knew or should have known” that the MLC troops were committing or about to commit the charged crimes.⁵⁵ In response, the Defense requested that the Trial Chamber reject the Prosecution’s revised DCC, arguing that it did not accurately reflect the charges confirmed by the Pre-Trial Chamber and that the Prosecution was attempting to broaden the scope of the alleged responsibility by adding the Article 28(a)(i) standard of “should have known” under the *mens rea* element.⁵⁶ The Trial Chamber agreed,⁵⁷ and the Prosecution submitted a second revised DCC, which alleged only that “upon deploying the MLC troops to the CAR for the 2002-2003 military operation, [Bemba] *knew* that his MLC troops were committing or were about to commit crimes within the jurisdiction of the Court rape, looting and murder.”⁵⁸

2. Trial Chamber’s Notice Pursuant to Regulation 55

Mr. Bemba’s trial commenced on 22 November 2010,⁵⁹ and the Prosecution’s case closed on 20 March 2012.⁶⁰ The Defense opened its case on 14 August 2012.⁶¹ However, on 21 September 2012 – three years after the charges were confirmed and almost two years after the start of the trial – the Trial Chamber gave notice pursuant to Regulation 55 that it may modify the legal characterization

Prosecutor, 04 November 2009).

⁵⁵ *Id.* ¶¶ 78–100

⁵⁶ *Le Prosecutor c. Jean-Pierre Bemba Gombo*, Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges, ICC-01/05-01/08-694 (ICC Equipe de la Défense, 12 Février 2010).

⁵⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, ICC-01/05-01/08-836 (ICC Trial Chamber III, 20 July 2010).

⁵⁸ *Bemba*, Revised Second Amended Document Containing the Charges, *supra* n. 43, ¶ 78 (emphasis added).

⁵⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Submission on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, ¶ 6 (ICC Defence, 18 October 2012).

⁶⁰ *Id.*

⁶¹ *Id.* ¶ 8.

of the facts to consider whether the accused *should have known* forces under his effective command and control committed or were about to commit crimes with which he was charged under Article 28(a).⁶² The Chamber made clear that it would not decide whether to recharacterize the charges in this manner until it had heard all of the evidence in the case, and that it was merely notifying the parties of the possibility of a recharacterization, pursuant to Regulation 55(2).⁶³ The Chamber also requested that the parties submit observations as to the “procedural impact” of the notification.⁶⁴

In response, the Prosecution filed a submission stating that it did not object to the proposed recharacterization and that, in its opinion, the possible recharacterization at this stage of the trial is not likely to cause prejudice to the accused.⁶⁵ Specifically, the Prosecution argued: (i) the proposed recharacterization is not a drastic departure from the mode of liability identified in the confirmation of charges;⁶⁶ (ii) during the presentation of its case, the Prosecution produced evidence indicating that information about the ongoing crimes was widespread and available to the accused;⁶⁷ and (iii) there was a “substantial overlap in the types of evidence used to prove known and should have known.”⁶⁸ The Prosecution’s argument also emphasized that even if some prejudice were to occur, “Regulation 55(3) authorizes the Chamber to take steps to ameliorate the prejudice by ensuring that the Defense has adequate time and facilities to respond to the change and the opportunity to recall witnesses or present new witnesses or

⁶² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision giving notice to the parties and participant that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2324, ¶ 5 (ICC Trial Chamber III, 21 September 2012).

⁶³ *Id.* ¶ 4.

⁶⁴ *Id.* ¶ 6.

⁶⁵ *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Submissions on the Procedural Impact of Trial Chamber’s Notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2334 (ICC The Office of the Prosecutor, 8 October 2012).

⁶⁶ *Id.* ¶ 15.

⁶⁷ *Id.* ¶ 18.

⁶⁸ *Id.* ¶ 20.

evidence.”⁶⁹

For its part, the Defense objected to the proposed recharacterization, putting forth a number of arguments to support its position that the Chamber’s proposal “would result in manifest unfairness and actual prejudice to the accused...”⁷⁰ First, the Defense asserted that the proposed recharacterization would violate the accused’s rights afforded by Article 67(1) of the Statute,⁷¹ including the right under Article 67(1)(a) to be informed promptly and in detail of the nature, cause, and content of the charges against him.⁷² Citing jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY), the Defense asserted that the rationale behind Article 67(1)(a) is to “provide defendants in criminal cases with a clear and timely understanding of the charges to enable preparation in full equality.”⁷³ The right to notice of the charges against the accused also relates directly to the right to be tried without undue delay, according to the Defense.⁷⁴ In its opinion, “[b]eing forced to continuously adapt to a changing theory of liability would render these rights illusory.”⁷⁵ Furthermore, the Defense argued, its right to “prompt” notification of the charges was being violated by the proposed recharacterization because, “[e]ven at this late stage of the process, Mr. Bemba has received no notice of the ‘material facts’ that would support an allegation that he ‘should have known’ that crimes were being committed or were about to be committed by those allegedly under his command.”⁷⁶ Next, the Defense argued that the recharacterization would violate Mr. Bemba’s right to equality of arms and his right to

⁶⁹ *Id.* ¶ 14.

⁷⁰ *Bemba*, Defence Submission on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court, *supra* n. 59, ¶ 10.

⁷¹ *Id.* ¶¶ 12–26.

⁷² Rome Statute, *supra* n. 21, Art. 67(1)(a).

⁷³ *Bemba*, Defence Submission on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court, *supra* n. 59, ¶ 13 (citing Prosecutor v. Kupreskic et al. Case No. IT-95-16-A, Judgement, 23 October 2001, para. 122 (“It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely, to inform him of the case he has to meet.”)).

⁷⁴ *Id.*

⁷⁵ *Id.* ¶ 14.

⁷⁶ *Id.* ¶ 16.

adequate time and facilities to prepare a defense, explaining:

The Defence has investigated, formulated a strategy, and prepared and presented evidence in response to the allegation that Mr. Bemba “knew” of the crimes with which he was charged. No such effort was made in relation to the allegation – rejected by the Pre-Trial Chamber – that he “should have known” of these crimes. Given that the Defence case is already well underway, the Defence has neither the time nor the resources to investigate and prepare to refute an alternative theory of liability.⁷⁷

The Defense also reminded the Chamber that Mr. Bemba had been in detention for four and a half years, and argued that an amendment to the charges at such a “late stage would require the Defence be given a meaningful period of time to investigat[e] and prepare” for the new allegation, which would further delay the proceedings, thereby violating his right to be tried without undue delay.⁷⁸ Next, the Defense raised the issue of impartiality, arguing “[w]here a trial chamber takes over the responsibility of prosecuting the case or where an appearance thereof is created, the guarantee of an impartial tribunal is violated.”⁷⁹ Lastly, the Defense made a general argument regarding the fundamental fairness of the trial, stating:

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

⁷⁷ *Id.* ¶¶ 28-29.

⁷⁸ *Id.* ¶ 42.

⁷⁹ *Id.* ¶ 36.

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.⁸⁰

On 19 November 2012, the Chamber rendered a decision responding only to the Defense's claim that it would need additional time to investigate and prepare for the potential recharacterization, specifically requesting that the Defense provide more information in relation to which Prosecution witnesses it would intend to recall, and the envisaged time needed for further investigations and preparations.⁸¹ In response, the Defense filed a submission asserting that it was unable to properly respond to the Chamber's request without notice of the material facts and relevant circumstances underlying the proposed recharacterization.⁸² Further, the Defense argued that the Chamber's requests for more detail regarding which witnesses it would intend to recall and the envisaged time needed for further investigations would require the Defense to reveal its strategy.⁸³ The Defense requested that the Chamber "provide the accused with precise details of the material facts and circumstances" from the confirmation decision upon which it intends to rely for the proposed recharacterizations, and "allow the Defense an opportunity to expand on its response to the Chamber's Request."⁸⁴

⁸⁰ *Id.* ¶ 43 (emphasis in original).

⁸¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision requesting the defence to provide further information on the procedural impact of the Chamber's notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2419, ¶ 11–31 (ICC Trial Chamber III, 19 November 2012).

⁸² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defence further submissions on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge, ICC-01-05/01-08-2451-Red (ICC Defence, 30 November 2012) (arguing that the accused could not meaningfully respond to the Chamber's request without notice of the material facts and circumstances underlying the proposed re-characterization and that the Chamber's request would require the Defense to reveal its strategy).

⁸³ *Id.* ¶¶ 32–33.

⁸⁴ *Id.* ¶ 34.

The Chamber addressed the Defense's requests in a 13 December 2012 decision, reiterating that the only potential change would be "to modify the legal characterisation of the facts so as to consider in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i) of the Statute,"⁸⁵ and that "the sole facts and circumstances that may be relevant for the envisaged recharacterisation are those upon which the form of knowledge contained in Article 28(a)(i) of the Statute is based in the charges," referring to specific paragraphs of the confirmation decision and the most recent Document Containing the Charges.⁸⁶ Furthermore, in response to the Defense's claim that it would need time for further investigation and preparation, the Chamber announced that it would temporarily suspend the proceedings for a period of three months.⁸⁷

Following the Chamber's temporary suspension of the proceedings, the Defense filed a request for leave to appeal the decision, reiterating many of the arguments it raised against the proposed recharacterization in its initial submission to the Trial Chamber on the matter.⁸⁸ The Trial Chamber denied the request, finding that the Defense had not adequately met the requirements necessary for an interlocutory appeal.⁸⁹ Shortly thereafter, just a little over one month

⁸⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, ICC-01/05-01/08-2480, ¶ 11 (ICC Trial Chamber III, 13 December 2012).

⁸⁶ *Id.* ¶ 11.

⁸⁷ *Id.* ¶ 15.

⁸⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural Deadlines, ICC-01/05-01/08-2483-Red (ICC Defence, 18 December 2012) (arguing the Chamber improperly applied regulation 55 by adding a new set of facts and factual allegations to the charges, and the improper application of regulation 55 violated the accused's right to prompt and detailed notice of the charges; right to be presumed innocent and have the Prosecution bear the burden of proof; right to be tried without undue delay; and right to be tried by a tribunal which does not lack the appearance of impartiality).

⁸⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural

after the Chamber suspended the proceedings to allow the Defense to pursue further investigations and prepare for the possible recharacterization, the Defense filed a motion to vacate the Chamber's decision on the temporary suspension of the proceedings.⁹⁰ In this motion, the Defense reiterated its position that the proposed recharacterization was not part of the initial charges and that a modification in the mode of liability in the Trial Chamber's judgment would result in unfairness and actual prejudice to the accused.⁹¹ Despite the Defense's continued objections, however, it announced that it would not request to recall any Prosecution witnesses, or seek to call any additional evidence.⁹² The Defense explained this decision by stating that it did not need to counter an allegation that did not form part of the charges against the accused.⁹³ In addition, the Defense explained that it had determined that any additional investigation was impossible, citing the Defense's lack of resources, the lack of state cooperation of both the Democratic Republic of Congo and the Central African Republic, the accused's ongoing detention, and "the impermissible and prejudicial course take by the Trial Chamber in denying the Defense an opportunity to appeal its Regulation 55 decision."⁹⁴ Accordingly, the Defense requested that the trial recommence as soon as possible.⁹⁵

On 6 February 2013, the Trial Chamber granted the Defense's request, lifting the temporary suspension of the proceedings.⁹⁶ With this

Deadlines" of 11 January 2013, ICC-01/05-01/08-2487-Red (ICC Trial Chamber III, 16 January 2013).

⁹⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Motion to Vacate Trial Chamber's "Decision on the temporary suspension of the proceedings" of 13 December 2012 and Notification Regarding the Envisaged Re-Qualification of Charges Pursuant to Regulation 55, ICC-01/05-01/08-2490-Red (ICC Defence, 28 January 2013).

⁹¹ *Id.* ¶ 9.

⁹² *Id.* ¶ 24.

⁹³ *Id.* ¶ 24.

⁹⁴ *Id.* ¶¶ 18–22.

⁹⁵ *Id.*

⁹⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/0802497, ICC-01/05-

decision, the Trial Chamber reiterated that Regulation 55 does not require a formal decision, making clear that the Chamber will invoke Regulation 55 before the final judgment so long as the parties and participants have been notified of a possible recharacterization and had the opportunity to be heard on the matter.⁹⁷ Thus, it is unlikely that there will be any further jurisprudence on the issue of the potential recharacterization of Mr. Bemba's mode of liability until the final judgment in the case.

C. The Prosecutor v. Germain Katanga

1. *The Confirmation Process and Joint Trial of Germain Katanga and Mathieu Ngudjolo Chui*

The third case in which the Trial Chamber has raised the possibility of using Regulation 55 to recharacterize the facts against the accused is the case against Germain Katanga. Mr. Katanga, alleged military leader of the *Force de Résistance Patriotique en Ituri* (FRPI) in the Democratic Republic of Congo (DRC), was first arrested in October 2007 on charges relating to an attack that occurred in the village of Bogoro in the DRC on 24 February 2003.⁹⁸ Shortly thereafter, his case was joined with that of another accused, Mathieu Ngudjolo Chui, who was alleged to have led another rebel force, the *Front des nationalistes et intégrationnistes* (FNI), that worked with the FRPI in carrying out the Bogoro attack.⁹⁹ The two accused were charged with liability for a number of war crimes and crimes against humanity pursuant to Article 25(3)(a) of the Rome Statute, which provides that a person may be held criminally responsible for a crime if that person “commits such a crime, whether as an individual or jointly with another or through another person, regardless of whether that other

01/08-2500 (ICC Trial Chamber III, 6 February 2013).

⁹⁷ *Id.* ¶ 25.

⁹⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of the charges, ICC-01/04-01/07-717, ¶¶ 6, 42 (ICC Pre-Trial Chamber I, 30 September 2008).

⁹⁹ *See The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01-04-01-07-257 (ICC Pre-Trial Chamber I, 10 March 2008).

person is criminally responsible.”¹⁰⁰

On 30 September 2008, Pre-Trial Chamber I issued its decision on the confirmation of the charges in the joint case against Mssrs. Katanga and Ngudjolo.¹⁰¹ On the subject of the responsibility of the accused, the Chamber first explained that, in order to find criminal responsibility under Article 25(3)(a), the accused must be a principal that exercised control over the crime.¹⁰² The Pre-Trial Chamber identified three forms of principal liability under Article 25(3)(a), explaining “a principal is one who: a. physically carries out all elements of the offence (commission of the crime as an individual); b. has, together with others, control over the offence by reason of the essential tasks assigned to him (commission of the crime jointly with others); or c. has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).”¹⁰³ It then went on to find that there was sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui were indirect co-perpetrators within the meaning of Article 25(3)(a), meaning they “jointly committed” the alleged crimes “through other persons.”¹⁰⁴ The objective elements of joint commission of a crime were identified as: (i) the existence of an agreement or common plan between two or more persons;¹⁰⁵ and (ii) a coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.¹⁰⁶ The objective elements for commission of a crime through another person were identified as: (i) the principal has control over the organization;¹⁰⁷ (ii) the organization must be based on

¹⁰⁰ Rome Statute, *supra* n. 21, Art. Art. 25(3)(a).

¹⁰¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges, *supra* n. 98.

¹⁰² *Id.* ¶ 487.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Note that, with respect to the war crime of using children under the age of fifteen years to actively participate in hostilities, the Chamber found that the two acted as direct co-perpetrators.

¹⁰⁵ *Id.* ¶ 522.

¹⁰⁶ *Id.* ¶ 524.

¹⁰⁷ *Id.* ¶ 500.

hierarchical relations between superior and subordinates;¹⁰⁸ and (iii) the execution of the crimes are secured by almost automatic compliance.¹⁰⁹ In terms of *mens rea*, the Chamber made clear that, first, the suspects must “carry out the subjective elements of the crimes with which they are charged...”¹¹⁰ In addition, indirect co-perpetration requires, according to the Chamber, that the suspects must: be mutually aware that implementing their common plan will result in the realization of the objective elements of the crime; undertake such activities with the specific intent to bring about the objective elements of the crime, or be aware that the realization of the objective elements will be a consequence of their acts in the ordinary course of events; and be aware of the factual circumstances enabling them to exercise control over the crime through another person.¹¹¹ Finally, the suspects must be aware of the “factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person.”¹¹²

Applying the concept of indirect co-perpetration to the facts of the *Katanga & Ngudjolo* case, the Chamber found, first, that there was sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 through late 2004, Germain Katanga had control over the FRPI,¹¹³ and that Mathieu Ngudjolo Chui had control over the FNI from early 2003 through October 2006.¹¹⁴ Next, it established that the FRPI and FNI were hierarchically organized groups,¹¹⁵ each providing its leaders with an extensive supply of interchangeable soldiers, “ensur[ing] that the orders given by the highest commanders, if not complied with by one soldier, w[ould] be complied with by another one.”¹¹⁶ In addition, the Chamber pointed out that the soldiers of both organizations were young, subjected to a

¹⁰⁸ *Id.* ¶ 511.

¹⁰⁹ *Id.* ¶ 515.

¹¹⁰ *Id.* ¶ 527.

¹¹¹ *Id.* ¶¶ 533-34.

¹¹² *Id.* ¶ 538.

¹¹³ *Id.* ¶ 540.

¹¹⁴ *Id.* ¶ 541.

¹¹⁵ *Id.* ¶¶ 543-44.

¹¹⁶ *Id.* ¶ 546.

“brutal military training regime,” and had allegiance to the leaders of their ethnic groups, and thus were likely to comply with the orders of these leaders “almost automatically.”¹¹⁷ The Chamber also found “substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to ‘wipe out’ Bogoro”¹¹⁸ “by directing the attack against the civilian population, killing and murdering the predominately Hema population and destroying their properties.”¹¹⁹ The implementation of this common plan, “in the ordinary course of events, ... would inevitably result in the pillaging of the Bogoro village... and in the rape or sexual enslavement of civilian women there.”¹²⁰ Additionally, for the attack on Bogoro village, Messrs. Katanga and Ngudjolo “agreed upon the use of children under the age of fifteen years to actively participate,” including those children acting as their own bodyguards.¹²¹ Next, the Chamber found that both Messrs. Katanga and Ngudjolo “played an overall coordinating role in the implementation of the common plan” and “personally performed other tasks in the implementation of the common plan.”¹²² Importantly, the Chamber stressed that “FRPI soldiers would obey only orders issued by FRPI commanders and that, similarly, FNI soldiers would obey only orders issued by FNI commanders,” as the groups were organized along ethnic lines.¹²³ Thus, the cooperation of Messrs. Katanga and Ngudjolo, as the “highest commanders of the Ngiti and Lendu combatants,” was necessary for the implementation of the common plan.¹²⁴ Finally, the Chamber was satisfied that the suspects were aware of the factual circumstances enabling them to exercise joint control over the crimes or joint control over the crimes through their respective organizations,¹²⁵ and that they were mutually aware and mutually accepted that the implementation of their common plan would result in

¹¹⁷ *Id.* ¶ 547.

¹¹⁸ *Id.* ¶ 548.

¹¹⁹ *Id.* ¶ 549.

¹²⁰ *Id.* ¶¶ 550-51.

¹²¹ *Id.* ¶ 553.

¹²² *Id.* ¶ 555.

¹²³ *Id.* ¶ 560.

¹²⁴ *Id.*

¹²⁵ *Id.* ¶¶ 562-63.

the realization of the crimes.¹²⁶

Following the Pre-Trial Chamber's decision to confirm the charges, the joint case against Mssrs. Katanga and Ngudjolo proceeded to trial. The case opened in November 2009 and the parties concluded their closing arguments in May 2012.¹²⁷ Notably, Germain Katanga took the stand and testified in his own defense,¹²⁸ despite his right to remain silent under the Rome Statute.¹²⁹

2. *Trial Chamber Decision Providing Notice under Regulation 55 and Severing the Case*

Almost six months after the closing of trial in the joint case against Mssrs. Katanga and Ngudjolo, a majority of the Trial Chamber issued a decision notifying the parties that “[Mr.] Katanga’s mode of participation could be considered from a different perspective from that underlying the Confirmation Decision.”¹³⁰ It also stated that, “[a]s this step does not concern the Accused Mathieu Ngudjolo, the decision also severs the charges against him.”¹³¹ The following month, in December 2012, the Trial Chamber issued a judgment concerning Mr. Ngudjolo alone, acquitting him of all charges.¹³²

Regarding the potential recharacterization of facts against Mr.

¹²⁶ *Id.* ¶¶ 564-72.

¹²⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons, ICC-01/04-01/07-3319-tENG/FRA, ¶¶ 3-4 (ICC Trial Chamber II, 21 November 2012).

¹²⁸ *See The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, ICC-01/04-01/07-3319-tENG/FRA, ¶ 45 (ICC Trial Chamber II, 21 November 2012).

¹²⁹ Rome Statute, *supra* n. 21, Art. 67(1)(g).

¹³⁰ *Katanga and Ngudjolo*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons, *supra* n.127, ¶ 6.

¹³¹ *Id.* ¶ 9.

¹³² *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG (ICC Trial Chamber II, 18 December 2012).

Katanga, the majority of the Trial Chamber specifically informed the parties that the accused's responsibility should also be considered not only under Article 25(3)(a) of the Statute, but also under Article 25(3)(d)(ii).¹³³ Article 25(3)(d) states that, in addition to the modes of liability identified in Article 25(3)(a) through (c),¹³⁴ a person may be responsible for a crime if that person:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.¹³⁵

Elaborating on the proposed application of this provision in the case against Mr. Katanga, the Trial Chamber explained that, while the Pre-

¹³³ *Id.* ¶ 7.

¹³⁴ Article 25(3)(a) – (c) provides as follows:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Rome Statute, *supra* . 21 Art. 25(3)(a) – (c).

¹³⁵ *Id.* Art. 25.

Trial Chamber confirmed the accused's responsibility as an indirect co-perpetrator, the proposed recharacterization would "consider[] that Germain Katanga contributed in another way to the commission of crimes by a group of Walendu-Bindi commanders and combatants acting with a common purpose to attack Bogoro on 24 February 2003."¹³⁶ The majority further explained that the proposed recharacterization would be limited to the facts and circumstances laid out in the confirmation of charges pertaining to Mr. Katanga's liability.¹³⁷

Judge Christine Van den Wyngaert dissented from the decision regarding the potential application of Regulation 55 and the severing of charges against the two accused, arguing that the majority's decision both violated Regulation 55 itself and violated the rights of the accused to a fair trial.¹³⁸ As to the first point, Judge Van den Wyngaert argued that the majority violated Regulation 55 by failing to adequately identify which of the facts and circumstances in the confirmed charges it would rely upon when recharacterizing the charges and by failing to make clear that it was relying on facts and circumstances that supported the confirmed charges, as opposed to "subsidiary facts" merely mentioned in the confirmation decision.¹³⁹ In addition, she found that the majority was improperly relying on Regulation 55 because its proposed recharacterization would "fundamentally change the narrative of the charges in order to reach a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the prosecution."¹⁴⁰ She explained:

Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to

¹³⁶ *Katanga and Ngudjolo*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons, *supra* n. 127, ¶ 26.

¹³⁷ *Id.* ¶ 34.

¹³⁸ *Id.* Dissenting Opinion of Judge Christine Van den Wyngaert.

¹³⁹ *Id.* ¶¶ 14-17.

¹⁴⁰ *Id.* ¶ 19.

certain events, defining what role they played in them and how they related to and were influenced by a particular context. Charges therefore constitute a narrative in which each material fact has a particular place. Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative. Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a “change in the statement of facts”, something the Appeals Chamber has found to be clearly prohibited by Regulation 55(1).^{141]} Yet, the Majority is, in my view, guilty of fundamentally changing the narrative in this case. As the Majority does not explain on the basis of which facts it proposes to apply Article 25(3)(d)(ii), it is not possible for me to make very specific comments on this point. However, I am in no doubt that the Majority’s proposed migration to Article 25(3)(d)(ii) inevitably forces it to engage in extensive factual acrobatics in order to find sufficient factual support in the Confirmation Decision to meet the elements of this new form of criminal responsibility.¹⁴²

As an example, Judge Van den Wyngaert cited to the fact that the majority referred to a paragraph from the confirmation decision dealing with the organization over which, according to the Pre-Trial Chamber, Mr. Katanga exercised authoritative control, explaining that under Article 25(3)(d), the members of this same organization would be transformed from “fungible” soldiers blindly carrying out the will of Mr. Katanga into a “group acting with a common purpose.”¹⁴³ Similarly, Judge Van den Wyngaert continued, under the proposed recharacterization, Mr. Katanga is “demoted from a leader with almost total control (in the sense of Article 25(3)(a)) to an accomplice who is

¹⁴¹ Citing the Appeals Chamber decision in the *Lubanga* case discussed above. *See supra* n. 20 *et seq.* and accompanying text.

¹⁴² *Id.* ¶¶ 20-21.

¹⁴³ *Id.* ¶ 22.

now supporting the criminal common purpose of an unidentified subsection of his former subordinates (in the sense of Article 25(3)(d)).”¹⁴⁴

On the issue of the accused’s rights to a fair trial, Judge Van den Wyngaert began by asserting that the “guarantees contained in paragraphs (2) and (3) of [Regulation 55] are not, in and by themselves, sufficient to ensure a fair trial,” as the Trial Chamber is bound under Article 64(2) of the Rome Statute to ensure the fairness and expeditiousness of the trial, and it must guarantee the accused’s rights under Article 67 “are fully respected.”¹⁴⁵ She then explained that, in her view, the majority had failed to act in accordance with Articles 64 and 67 of the Statute. First, she argued that the majority’s decision violated the accused’s right to a fair and impartial trial, stating that, “by triggering Regulation 55 to change the mode of liability at *the end of the deliberation stage*,” the majority had created “the unpalatable suspicion that the Chamber is intervening to ensure the conviction of Germain Katanga.”¹⁴⁶ Second, Judge Van den Wyngaert contended that, because the majority’s notification was “entirely unforeseeable” to the Defense and was given “at a point in the proceedings when the [D]efence is unable to effectively respond to it,” the decision violated the accused’s right to be “informed promptly and in detail of the nature, cause and content of the charge,” as well as the right “not to be compelled to testify or to confess guilt.”¹⁴⁷ Finally, Judge Van den Wyngaert argued that the majority’s decision threatened the accused’s right to a speedy trial because, to “meaningfully defend itself against the charges under Article 25(3)(d)(ii), the [D]efence may... have to present an entirely new case.”¹⁴⁸

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 25.

¹⁴⁶ *Id.* ¶¶ 27-28 (emphasis added).

¹⁴⁷ *Id.* ¶ 36.

¹⁴⁸ *Id.* ¶ 49.

3. *The Appeals Chamber's Decision Upholding the Trial Chamber's Decision Notifying the Parties of a Potential Recharacterization*

At the request of the Defense, the Trial Chamber granted leave to appeal its decision regarding the potential recharacterization of the facts under Regulation 55.¹⁴⁹ The Appeals Chamber issued its decision on 27 March 2013, addressing three issues: (i) whether the timing of the impugned decision was “in conformity” with Regulation 55; (ii) whether the scope of the proposed recharacterization was “in conformity” with Regulation 55; and (iii) whether the impugned decision violated the rights of Mr. Katanga to a fair trial.¹⁵⁰ On the first issue, the Appeals Chamber held that, because subparagraph 2 of Regulation 55 states that the Trial Chamber may recharacterize the facts “at any time” during the trial, the decision was “not incompatible” with the regulation,¹⁵¹ although it also stressed that “it is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible.”¹⁵² As to the second issue, a majority of the Appeals Chamber held that, while it was not “immediately apparent” that the proposed recharacterization would exceed the facts and circumstances described in the charges, the “actual” change in characterization had not yet taken place, meaning that the Appeals Chamber was not yet able to determine whether the charges in this case could be recharacterized as contemplated by the Trial Chamber.¹⁵³ In reaching the conclusion that the proposed recharacterization did not obviously exceed the facts and circumstances in the charges, the Appeals Chamber rejected the

¹⁴⁹ *The Prosecutor v. Germain Katanga*, Decision on the “Defence Request for Leave to Appeal the Decision 3319,” ICC-01/04-01/07-3327 (ICC Trial Chamber II, 28 December 2012).

¹⁵⁰ *The Prosecutor v. Germain Katanga*, 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,” ICC-01/04-01/07-3363, ¶ 10 (ICC Appeals Chamber, 27 March 2013).

¹⁵¹ *Id.* ¶ 17.

¹⁵² *Id.* ¶ 24.

¹⁵³ *Id.* ¶¶ 45-58.

Defense’s argument, supported by Judge Van den Wyngaert, that the proposed recharacterization must be limited to the “material facts” underlying the charges in the confirmation decision, noting that “[t]here is no indication of any such limitation in the text of article 74(2) of the Statute or regulation 55(1) of the Regulations of the Court.”¹⁵⁴ The majority of the Appeals Chamber also essentially withheld judgment on the issue of whether the change in characterization would violate the Defense’s right to a fair trial, saying it would be impossible to comment on measures that the Trial Chamber could take in the future, and thus the Chamber could not rule upon the potential impact of the proposed change on the ability to effectively prepare a defense.¹⁵⁵ Similarly, the Appeals Chamber found that without knowing the precise nature of the recharacterization or the evidence on which the Trial Chamber will rely, it would be premature for the Appeals Chamber to comment on the impact of the decision on the effectiveness of the defense as a whole.¹⁵⁶ However, to this end, the Appeals Chamber did emphasize the Trial Chamber’s need to review whether it remains possible to prepare an effective defense in light of the proceedings of the trial to date and the possible recharacterization.¹⁵⁷ Likewise, the Appeals Chamber warned the Trial Chamber to be particularly vigilant in ensuring that Mr. Katanga’s right to trial without undue delay is not violated going forward.¹⁵⁸ The Appeals Chamber did rule on the Defense’s claims that the proposed recharacterization violated Mr. Katanga’s rights to be informed

¹⁵⁴ *Id.* ¶ 50.

¹⁵⁵ *Id.* ¶ 95 (reasoning that the Appeals Chamber had no knowledge of the precise nature of the possible re-characterization nor the evidence on which the Trial Chamber may rely).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (suggesting that Trial Chamber II assess whether Mr Katanga has been prejudiced by a recharacterization made at such a late stage, or whether Mr. Katanga has been “deprived of mounting the defence in relation to article 25(3)(d) of the Statute that he otherwise would have wished to present).

¹⁵⁸ *Katanga*, 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, *supra* n. 150, ¶ 99 (recalling that Article 64(2) of the Statute requires that the Trial Chamber ensures that the proceedings are fair and expeditious).

promptly of the charges against him and his right to an impartial trial, holding that the notification of the possible recharacterization satisfied the right to be informed of the charges and that the act of notifying the parties as to the potential change was a “neutral act.”¹⁵⁹

Judge Cuno Tarfusser wrote a dissenting opinion, in which he concurred with the majority regarding the timing of the Regulation 55 notice, but dissented from the majority opinion as to whether the contemplated change was compatible with the regulation and whether the impugned decision violated Mr. Katanga’s right to a fair trial.¹⁶⁰

Judge Tarfusser began his separate opinion by noting that, in his view, Regulation 55 “is a provision of an exceptional nature” and, “as such,” is “subject to narrow interpretation.”¹⁶¹ Turning to the specific issues raised by the impugned decision, Judge Tarfusser first explained that, in his opinion, the language in Regulation 55(1) permitting a change in “the legal characterisation of facts to accord with [...] the form of participation of the accused under articles 25 and 28” means that a Trial Chamber may employ the provision to “switch[] from (any of the forms of responsibility provided under) article 25 to (any of the forms of responsibility provided under) article 28 of the Statute, or vice versa,” but not “from one form of responsibility listed in respectively article 25 and 28 to another form included in the same provision.”¹⁶² He based this view first on a textual argument, noting that Regulation 55(1) refers to a change to the characterization “to accord with the *crimes*” under Articles 6, 7, or 8 of the Statute “or to accord with the *form* of participation of the accused under articles 25 and 28,” and stating that “had the drafters meant to make the regulation applicable each time a shift within either article 25 or article 28 was envisaged, reference would have been likewise made to the ‘forms’ of responsibility.”¹⁶³ Furthermore, Judge Tarfusser argued that, given the

¹⁵⁹ *Id.* ¶¶ 100-05.

¹⁶⁰ *Katanga*, 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, *supra* n.150, Dissent Judge Cuno Tarfusser.

¹⁶¹ *Id.* Subheading A.

¹⁶² *Id.* ¶¶ 10-11 (emphasis in original).

¹⁶³ *Id.* ¶ 13.

unsettled nature of the jurisprudence interpreting the various forms of responsibility under Article 25(3)(a), and the multiplicity of *types* of responsibility listed therein, “holding that any shift from one form of participation to another listed within one and the same provision (be it article 25 or article 28 of the Statute) triggers the application of regulation 55 of the Regulations of the Court would result in introducing a degree of uncertainty and unpredictability in the proceedings” that is ultimately inconsistent with the basic tenets of a fair trial.¹⁶⁴ Regarding the impact of the impugned decision on the fair trial rights of the accused, Judge Tarfusser took issue with the lack of detail in the Trial Chamber’s notification, arguing that notice of a possible recharacterization “must be [as] specific and precise as feasible as to both the legal and factual boundaries of the envisaged change, including by reference to all relevant evidence.”¹⁶⁵ He asserted that the notification lacked such information and thus infringed on Mr. Katanga’s right to be informed of the charges against him in detail.¹⁶⁶

4. *The Trial Court’s Decision Transmitting Additional Legal and Factual Material*

Following the Appeals Chamber decision, the majority of the Trial Chamber (Judge Van den Wyngaert again dissenting) issued a second decision on the subject of the proposed recharacterization for the purpose of transmitting “additional legal and factual material” relating to the contemplated change aimed at enabling the Defense to “prepare more appropriately and thus more effectively by grounding its arguments not in purely hypothetical foundations but in the law which the Chamber will apply.”¹⁶⁷ The Chamber began by instructing the Defense as to the elements of Article 25(3)(d)(ii) of the Statute, stating that those elements include the following:

¹⁶⁴ *Id.* ¶¶ 14-19.

¹⁶⁵ *Id.* ¶ 25.

¹⁶⁶ *Id.*

¹⁶⁷ *The Prosecutor v. Germain Katanga*, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), ICC-01/04-01/07-3371-tENG, ¶ 11 (ICC Trial Chamber II, 15 May 2013).

a crime under the jurisdiction of the Court was committed; the persons who committed the crime belong to a group with a common purpose which was to commit the crime or [which] involved in its commission including the ordinary course of events; the Accused made a significant contribution to the commission of the crime; the contribution was made with intent, insofar as the Accused meant to engage in the conduct and was aware that such conduct contributed to the activities of the group acting with a common purpose; and the Accused's contribution was made in the knowledge of the intention of the group to commit the crime forming part of the common purpose.¹⁶⁸

The Chamber then addressed four factual elements relating the Mr. Katanga's responsibility under Article 25(3)(d)(ii), pointing to various facts in the confirmation decision.¹⁶⁹

In response to the Chamber's decision, the Defense filed a submission reiterating its position that it "has insufficient knowledge of the facts and evidence the Chamber intends to rely on in the event it decides to alter the mode of liability."¹⁷⁰ In addition, the Defense explained that it would need an additional six months to conduct the investigations necessary to respond to potential charges under Article 25(3)(d)(ii).¹⁷¹ The Trial Chamber, Judge Van den Wyngaert again dissenting, rejected the request for six months, but granted the Defense three months to pursue ongoing investigations.¹⁷² It also stated that, if it

¹⁶⁸ *Id.* ¶ 16.

¹⁶⁹ *Id.* ¶¶ 19-24.

¹⁷⁰ *The Prosecutor v. Germain Katanga*, Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), ICC-01/04-01/07-4479-Red (ICC Defence, 3 June 2013) (asserting the details provided in the *Decision transmitting material* "do not give the defendant adequate notice of the basis of the modified charge as required by article 67(1)(a) of the Statute").

¹⁷¹ *Id.* ¶¶ 56-58.

¹⁷² *Le Procureur c. Germain Katanga*, Décision relative aux requêtes présentées par la Défense dans ses observation 3379 et 3386 des 3 et 17 juin 2013, Dissenting opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3388-Anx (ICC La Chambre de Première Instance II, 26 juin 2013).

decides to reopen the case, it will potentially hold hearings beginning in September 2013.¹⁷³

D. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang

The fourth case in which Regulation 55 has been raised is the case against William Samoei Ruto and Joshua Arap Sang, who are charged with crimes allegedly committed during the post-election violence in Kenya in 2007 and 2008.¹⁷⁴ The charges against the two accused were confirmed in January 2012 by Pre-Trial Chamber II, which determined that there were substantial grounds to believe that Mr. Ruto is responsible as an indirect co-perpetrator¹⁷⁵ under Article 25(3)(a) of the Rome Statute for the crimes against humanity of murder, deportation or forcible transfer of the population, and persecution; and that Mr. Sang is responsible for contributing to the commission of the same crimes under Article 25(3)(d)(i)¹⁷⁶ of the Statute.¹⁷⁷ Following the confirmation decision, the case proceeded to the trial stage before Trial Chamber V.

During a status conference before the Trial Chamber on 11 June 2012, the Office of the Prosecutor indicated that it intended to make an application for the legal recharacterization of certain facts.¹⁷⁸

Subsequently, the Prosecutor filed a submission formally requesting that the Trial Chamber give notice that it may invoke Regulation 55 to change the legal characterization of Mr. Ruto's criminal responsibility from that of an indirect co-perpetrator to one of several other forms of

¹⁷³ *Id.*

¹⁷⁴ See generally *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373 (ICC Pre-Trial Chamber II, 23 January 2012). Note that the Pre-Trial Chamber declined to confirm any of the charges against Henry Kosgey. *Id.*

¹⁷⁵ For details about the theory of indirect co-perpetration as developed by Pre-Trial Chamber jurisprudence to date, see *supra* n. 104 *et seq.* and accompanying text.

¹⁷⁶ See *supra* n. 135 and accompanying text.

¹⁷⁷ *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 174, ¶¶ 349, 367.

¹⁷⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Transcript, ICC-01/09-01/11-T-15-ENG at 25:16–29:1 (ICC Trial Chamber V, 11 June 2012).

liability under subparagraphs (b), (c), or (d) of Article 25(3).¹⁷⁹ Notably, the Prosecution urged the Trial Chamber to provide this notice as early as possible to ensure the fairness of the trial and permit the Defense to present evidence regarding all potential forms of liability.¹⁸⁰

In response to the Prosecution's submission, Ruto's Defense team argued that the Prosecution's request was "too hypothetical" and that it was based on an improper understanding of Regulation 55.¹⁸¹ Specifically, the Defense argued:

If the Prosecution is apprehensive as to the appropriateness of the present characterisation then it should make a decision now and apply, on clear grounds, for recharacterisation. It should not seek to have the Chamber refer, in a general manner, to the Chamber's capacity to recharacterise. That adds nothing to the plain words of Regulation 55 and assists neither the Chamber nor, most importantly, the accused. The Prosecution's approach is contrary to the rights of the accused and judicial economy and should not be condoned as a legitimate use of the Chamber's

¹⁷⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC-01/01-01/11-433 (ICC Office of the Prosecutor, 3 July 2012).

¹⁸⁰ *Ruto and Sang*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, *supra* n.179, ¶ 41 (arguing advanced knowledge will only help the accused and advance the interests of a fair trial).

¹⁸¹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Defence Response to the Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC-01/09-01/11-442 (ICC Defence, 24 July 2012).

Regulation 55 powers.¹⁸²

Stressing the right of the accused to be informed promptly and in detail of the charges against him, the Defense argued the Chamber “should be vigilant in ensuring that Mr. Ruto is not subjected to uncertainty as to the mode in which he is alleged to have participated in the crimes,” and that therefore it should reject the Prosecution’s request.¹⁸³ The Chamber has yet to rule on the Prosecution’s motion at the time of this writing, although it did recently request that the Prosecution exhaustively indicate the facts and circumstances described in the charges that would support the proposed recharacterization.¹⁸⁴ The Prosecution submitted the requested information on 17 September 2013.¹⁸⁵

E. The Prosecutor v. Uhuru Muigai Kenyatta

The final case in which Regulation 55 has arisen to date is the case against Uhuru Muigai Kenyatta, the second case to arise in the Kenya situation. Mr. Kenyatta was initially charged with two co-accused, but the Pre-Trial Chamber declined to confirm any of the charges against Mohammed Hussein Ali,¹⁸⁶ and the Prosecution has withdrawn the charges against Francis Kirimi Muthaura.¹⁸⁷ Pursuant to the

¹⁸² *Id.* ¶ 32.

¹⁸³ *Id.* ¶ 38.

¹⁸⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-907 (ICC Trial Chamber V(a), 5 September 2013).

¹⁸⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution Filing in Compliance with the Chamber’s ‘Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation,’ ICC-01/09-01/11-943 (ICC Office of the Prosecutor, 17 September 2013).

¹⁸⁶ *See The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red (ICC Pre-Trial Chamber II, 23 January 2012).

¹⁸⁷ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687 (ICC Office of the Prosecutor, 11 March 2013) (reasoning that after review of its evidence against Muthaura, the Prosecution was not satisfied that the evidence was sufficient to meet the Article 66(3) standard of

confirmation decision, Mr. Kenyatta is charged with criminal responsibility as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Statute for crimes against humanity of murder, deportation or forcible transfer of population, rape, other inhumane acts, and persecution.¹⁸⁸

At the time of this writing, the procedural posture of the *Kenyatta* case is similar to that described above with regard to the *Ruto & Sang* case in terms of the possible application of Regulation 55. Specifically, as in the other Kenya case, the Prosecution has requested that the Trial Chamber provide the accused notice under Regulation 55¹⁸⁹ and the Defense has objected,¹⁹⁰ but the Trial Chamber has yet to rule on the matter. In this case, the Prosecution has requested that notice be given that both the mode of liability may be subject to change – again requesting that the accused be put on notice that the Chamber may characterize his responsibility under *any* of the subparagraphs of Article 25(3)¹⁹¹ – and that certain facts may be recharacterized as different crimes.¹⁹² In particular, the Prosecution asserts that facts relating to forcible circumcision and penile amputation, which the Pre-Trial Chamber characterized as “other inhumane acts” under Article

beyond a reasonable doubt and find the accused guilty).

¹⁸⁸ *Id.* ¶ 298.

¹⁸⁹ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds’ individual criminal responsibility, ICC-01/09-01/11-444 (ICC The Office of the Prosecutor, 3 July 2012).

¹⁹⁰ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Response to the “Prosecution’s application for notice to be give under Regulation 55(2) with respect to certain crimes charged”, ICC-01/09-02/11-455 (ICC Defence, 24 July 2012); *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Corrigendum to ‘Response to the “Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accused’s individual responsibility,”’ ICC-01/09-02/11-457-Corr (ICC Defence, 24 July 2012).

¹⁹¹ *Muthaura and Kenyatta*, Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds’ individual criminal responsibility, *supra* n.189, ¶¶ 26-31.

¹⁹² *Id.*

7(1)(k) of the Statute, “can and should be characterized as ‘other forms of sexual violence’ under Article 7(1)(g).”¹⁹³ Further the Prosecution submitted that facts relating to looting and property destruction, which were characterized by the Pre-Trial Chamber as predicate acts underlying the charge of deportation or forcible transfer under Article 7(1)(d), should be “considered as predicate acts underlying the charge of persecution under Article 7(1)(h),” in addition to the charge of deportation or forcible transfer under Article 7(1)(d).¹⁹⁴

In response, Mr. Kenyatta’s defense argued first that the Prosecution’s request under Regulation 55 was premature.¹⁹⁵ Specifically, the Defense argued that because the trial had yet to take place, the correct method by which to deal with the arguments raised would be for the Prosecution to request an amendment to the charges under Article 61(9) of the Statute.¹⁹⁶ The Defense also asserted that the proposed recharacterizations of “other inhumane acts” and “property destruction and looting” exceed the facts and circumstances found in the confirmation of charges.¹⁹⁷ With regard to the proposed change in mode of liability, the Defense argued that there was no evidence to support such a recharacterization in the Pre-Trial Chamber’s decision.¹⁹⁸ Again, the Trial Chamber has yet to rule on the Prosecution’s requests.

¹⁹³ *Id.* ¶¶ 2, 18–22 (advancing the argument that “genital mutilation is inherently sexual in nature,” and thus such acts should be characterized under Article 7(1)(g)).

¹⁹⁴ *Id.* ¶¶ 2, 23–26.

¹⁹⁵ *Muthaura and Kenyatta*, Response to the “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged,” *supra* n. 190, ¶ 11.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* ¶¶ 13, 22.

¹⁹⁸ *Muthaura and Kenyatta*, Corrigendum to ‘Response to the “Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accused’s individual responsibility,”’ *supra* n. 190, ¶ 13.

III. ANALYSIS AND RECOMMENDATIONS

As described in detail above, Regulation 55 has assumed a prominent role in the majority of trials to come before the ICC to date, despite Judge Cuno Tarfusser's observation that the regulation is a "provision of an exceptional nature,"¹⁹⁹ which suggests it would be used sparingly. Moreover, in each of the trials, a significant amount of litigation has been devoted to issues surrounding the regulation, both at the Trial Chamber level and before the Appeals Chamber. Notably, as demonstrated prominently by the dissenting opinions of Judge Van den Wyngaert in the *Katanga* case, significant questions remain regarding the effect of the regulation on the fair trial rights of the accused. Furthermore, the amount of time and resources that has been devoted by the parties, participants, and judges to questions regarding the use of Regulation 55 calls into question one of the primary justifications for the judges' adoption of the provision, namely that the regulation represents an effort "to enhance the efficiency of proceedings through the encouragement of a precise charging practice from the very beginning of the proceedings."²⁰⁰

The following recommendations represent an attempt to alleviate potential violations of the rights of the accused and inefficiencies brought about by the frequent use of Regulation 55 in a way that will ideally result in a diminished use of the provision so as to ensure that the rights of the accused to a fair and expeditious trial are safeguarded while maintaining the Trial Chamber's authority to recharacterize in exceptional circumstances.

A. **Limiting the Use of Regulation 55 to Exceptional Circumstances to Safeguard the Rights of the Accused and Ensure an Expeditious Trial**

¹⁹⁹ See *supra* n. 161 and accompanying text.

²⁰⁰ Carston Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, 16 *Crim. L. Forum* 1, 5 (2005).

1. *Limiting the Use of Regulation 55 to Exceptional Circumstances by Analogy to the Ad Hoc Tribunal's Approach to "Curing" Defective Indictments*

Although the ICC Appeals Chamber has upheld the validity of Regulation 55 generally, it has stressed that the Trial Chamber must ensure that the rights of the accused to a fair and impartial trial are "fully" protected, and has suggested that safeguards in addition to those outlined in Regulation 55(2) and (3) may be required depending on the circumstances of the case.²⁰¹ In line with this language, and given serious concerns raised by the contemplated use of Regulation 55 in the *Katanga* case, as expressed by Judge Van den Wyngaert in her dissenting opinions described above, we recommend that the Trial Chambers limit the use of the provision to exceptional circumstances. Specifically, we recommend that the ICC Trial Chambers adopt an approach to Regulation 55 similar to that followed by the ICTY and the ICTR in analyzing whether a vague or ambiguous indictment has been "cured" by the "provision of timely, clear and consistent information" sufficient to provide the accused adequate notice to prepare a defense. Following this jurisprudence will limit the use of Regulation 55 to situations that will not radically transform the nature of the case against the accused, particularly after the accused has already presented his or her defense to the Chamber.

a) The Principle of "Curing" a Defective Indictment Before the Ad Hoc Tribunals

The ability of the Prosecution to cure a defective indictment has been recognized by the *ad hoc* tribunals in a number of cases. As the ICTY Appeals Chamber explained in the *Kvočka, et al.* case:

In reaching its judgement, a Trial Chamber can only convict the accused of crimes [that] are charged in the

²⁰¹ *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," *supra* n. 20, ¶ 85.

indictment. If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused has nevertheless been accorded a fair trial. In some instances, where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness, a conviction may be entered. Where the failure to give sufficient notice of the legal and factual reasons for the charges against him has violated the right to a fair trial, no conviction may result.²⁰²

Thus, for example, in the *Kvočka, et al.* case, the Appeals Chamber rejected the Defense's appeal against the conviction of the accused on the basis of their participation in a joint criminal enterprise (JCE), despite the fact that it was not clear in the indictment that the Prosecution was relying on a theory of JCE liability, because the Prosecution had adequately cured this defect.²⁰³ Specifically, the Appeals Chamber pointed to the fact that the Prosecution had referred to "the common purpose doctrine" in its Pre-Trial Brief and "concentra[ted] on joint criminal enterprise" in its opening statement at trial, in addition to emphasizing the mode of liability in other arguments early in the trial.²⁰⁴ Hence, the Appeals Chamber concluded, the Prosecution gave timely, clear and consistent information to the Appellants, "which detailed the factual basis of the charges against them and compensated for the Indictment's failure to give proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility."²⁰⁵ Similarly, in the *Kordić and Cerkez* case, the ICTY Appeals Chamber held that, although "the means by which the Prosecution envisaged the participation of Kordić in the commission of the [charged] crimes" in the indictment was "too generally formulated," the indictment was "supplemented by the

²⁰² *The Prosecutor v. Kvočka, et al.*, Judgement, Case No. IT-98-30/1-A, ¶ 33 (ICTY Appeals Chamber, 28 February 2005).

²⁰³ See generally *Kvočka* Appeals Chamber Judgement, *supra* n. 202, ¶¶ 43-54.

²⁰⁴ *Id.* ¶¶ 45-48.

²⁰⁵ *Id.* ¶ 50.

Prosecution’s Pre-Trial Brief as to the form of responsibility envisioned,” which “expressly allege[d] that Kordić’s liability [arose] from his intentional participation in a common plan or design as a co-perpetrator,” thereby curing the ambiguities in the indictment.²⁰⁶

We recognize that “curing” is not directly analogous to a Regulation 55 recharacterization before the ICC, as the former involves the addition of new facts intended to clarify an otherwise vague indictment, whereas the latter is a recharacterization of facts contained in the charges from the outset. Nevertheless, the *effect* at the *ad hoc* tribunals of a finding that a defective indictment has been “cured” is that a conviction supported by the evidence presented at trial will stand, despite a claim from the Defense that it did not receive adequate notice of the charge or the opportunity to prepare a defense.²⁰⁷ In other words, the purpose of allowing a defective indictment to be cured is similar to that of Regulation 55, which has been described as necessary “to close accountability gaps”²⁰⁸ by giving the Trial Chamber the ability “to correct flaws in the charges at the trial stage.”²⁰⁹

b) “Curing” Limited to Exceptional Circumstances

Importantly, although the *ad hoc* tribunals have repeatedly recognized the possibility that a defective indictment can be cured in such a way as to ensure that the right of the accused to a fair trial is preserved, the tribunals have stressed that the “*possibility of curing defects in the*

²⁰⁶ *The Prosecutor v. Kordić and Cerkez*, Judgement, Case No. IT-95-14/2-A, ¶¶ 139-40 (ICTY Appeals Chamber, 17 December 2004).

²⁰⁷ Furthermore, the situation is similar because the *ad hoc* tribunals will not consider a claim from the Prosecution that a defective indictment has been cured if the effect is to “add new elements to the case,” which would require a formal amendment to the indictment. *The Prosecutor v. Bagosora, et al.*, Judgement and Sentence, Case No. ICTR-98-41-T, ¶ 124 (ICTR Trial Chamber, 18 December 2008).

²⁰⁸ *Lubanga*, 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 characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” *supra* n. 20, ¶ 77.

²⁰⁹ Stahn, *supra* n. 200, at 2.

indictment is not unlimited,”²¹⁰ and should only be permitted in “exceptional cases.”²¹¹ While the tribunals have not set forth an express list of the circumstances under which they will accept a change in the charges based on information provided to the defense after indictment, the overall theme is that “fairness is crucial in determining whether the Defence has been materially prejudiced in preparing its case.”²¹²

One set of cases in which the *ad hoc* tribunals have refused to allow the Prosecution to cure defective charges is where there has been a “radical transformation of the case.”²¹³ For instance, in the *Kupreškić, et al.* case, the Appeals Chamber overturned the convictions of two of the accused – Zoran and Mirjan Kupreškić – for persecution as a crime against humanity after the two successfully challenged their convictions on the ground that they did not receive fair notice of the charges against them.²¹⁴ In this case, the Prosecution charged Zoran and Mirjan with a number of crimes, but the Trial Chamber convicted the two men solely for the crime of persecution, based on the testimony of a witness who told the Chamber that they were present at the house of a man named Suhret Ahmić on 16 April 1993, immediately after Ahmić and another were shot and immediately before the house was set on fire and Ahmić’s family was forcibly

²¹⁰ *The Prosecutor v. Nahimana, et al.*, Judgement, Case No. ICTR-99-52-A, ¶ 325 (ICTR Appeals Chamber, 28 November 2007) (emphasis added). See also *The Prosecutor v. Muvunyi*, Judgement, Case No. ICTR-2000-55A-A, ¶ 20 (ICTR Appeals Chamber, 29 August 2008) (“[T]he principle that a defect in an indictment may be cured is not without limits.”).

²¹¹ *The Prosecutor v. Ntagerura, et al.*, Judgement, ¶ 114 (ICTR Appeals Chamber, 7 July 2006).

²¹² *The Prosecutor v. Bagosora, et al.*, Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision, Case No. ICTR-98-41-T, ¶ 29 (ICTR Trial Chamber, 17 April 2007).

²¹³ *Muvunyi Appeals Chamber Judgement*, *supra* n. 210, ¶ 20. See also *The Prosecutor v. Zigiranyirazo*, Judgement, Case No. ICTR-01-73-T, ¶ 18 (ICTR Trial Chamber, 18 December 2008) (“The Prosecution’s ability to cure a defective indictment is not without limits: new material facts should not radically transform the Prosecution case.”).

²¹⁴ *The Prosecutor v. Kupreškić, et al.*, Judgement, Case No. IT-95-16-A, ¶¶ 79-125 (ICTY Appeals Chamber, 23 October 2001).

removed.²¹⁵ Notably, however, these allegations were not included in the Prosecution's indictment against Zoran and Mirjan. Rather, the indictment broadly alleged that the two men, along with the other accused in the case, planned and implemented a broad attack on the town of Ahmići on 16 April.²¹⁶ Thus, as the Appeals Chamber subsequently determined, the "main case against Zoran and Mirjan Kupreškić was *dramatically transformed* from alleging integral involvement in the preparation, planning, organisation and implementation of the attack on Ahmići on 16 April 1993, as presented in the Amended Indictment, to alleging mere presence in Ahmići on that day and direct participation in the attack on two individual houses, as presented at trial."²¹⁷ The Trial Chamber discounted the evidence relating to one of these houses, and the other – the house of Suhret Ahmić – was not mentioned in the indictment.²¹⁸ While the Appeals Chamber recognized that the Prosecution eventually provided details about its revised case to the accused, it found that "[n]o certain conclusion could be drawn as to how [the evidence regarding the attack on Ahmić's house] was going to be relied upon by the Trial Chamber" and that "[i]n these circumstances, the conclusion that this uncertainty materially affected Zoran and Mirjan Kupreškić's ability to prepare their defence is unavoidable."²¹⁹

A similar approach was adopted by the ICTR Appeals Chamber in the *Muvunyi* case. There, the Appeals Chamber upheld the Trial Chamber's finding that it could not convict the accused of rape as a crime against humanity based on evidence suggesting his alleged responsibility for a series of rapes committed by one set of perpetrators – a group of soldiers from the *Ecole des Sous-Officiers* (ESO) Camp – because the indictment alleged that the same rapes had been carried out by a different set of soldiers from the Ngoma Camp.²²⁰ The Prosecution claimed that the defect in the indictment had subsequently

²¹⁵ *Id.* ¶ 86.

²¹⁶ *Id.* ¶ 83.

²¹⁷ *Id.* ¶ 93 (emphasis added).

²¹⁸ *Id.*

²¹⁹ *Id.* ¶ 119.

²²⁰ *Muvunyi*, Judgement, *supra* n. 210, ¶¶ 160-66.

been cured by information contained in the Prosecution's Pre-Trial Brief and opening statement, but the Appeals Chamber rejected this argument, holding that the subsequent references to ESO Camp soldiers did not represent an attempt to *clarify* an otherwise vague charge in the indictment, but rather represented a *change* in the charge itself.²²¹ Furthermore, the Chamber noted that the later references to ESO Camp were themselves general in nature and thus did not provide the accused with clear and timely notice as to the Prosecution's altered approach.²²² Ultimately, the Appeals Chamber stressed that "[i]t is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges."²²³

Along the same lines as the above cited cases, the *ad hocs* have also considered whether the cumulative effect of numerous defects in the indictment, even if cured with timely information, would "materially prejudice[] the accused's right to a fair trial by hindering the preparation of a proper defence."²²⁴ Yet another limitation imposed by the *ad hoc* tribunals is that "[i]t is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds."²²⁵ Finally, the *ad hoc* tribunals have also refused to find that the Prosecution can cure a defect in the indictment through information provided in its *closing*, as opposed to pre-trial, brief, holding that, in such circumstances, the change is not sufficiently timely to provide the accused time to prepare his defense.²²⁶

²²¹ *Id.* ¶166.

²²² *Id.* ¶167.

²²³ *Id.* ¶166.

²²⁴ *The Prosecutor v. Bagosora, et al.*, Judgement and Sentence, Case No. ICTR-98-41-T, ¶ 123 (ICTR Trial Chamber, 18 December 2008).

²²⁵ *The Prosecutor v. Simić, et al.*, Judgement, Case No. IT-95-9-T, ¶ 110 (ICTY Trial Chamber, 17 October 2003).

²²⁶ See, e.g., *Zigiranyirazo* Trial Judgement, *supra* n. 213, ¶ 78; *The Prosecutor v. Seromba*, Judgement, Case No. ICTR-2001-66-I, ¶ 313 (ICTR Trial Chamber, 13

2. *Application to the Katanga Case Before the ICC*

While the *Kupreškić* and *Muvunyi* cases mentioned above involved the attempted addition of facts not contained in the indictment, as opposed to a recharacterization of facts, the principles enunciated by the Appeals Chamber in those cases that the charges against an accused should not be “radically transform[ed]” from those upon which the accused prepared his defense could be equally applied to the contemplated use of Regulation 55 in the *Katanga* case before the ICC. As Judge Van den Wyngaert pointed out in her dissent to the Trial Chamber’s decision to invoke Regulation 55, the reformulated case against Germain Katanga being considered by the Trial Chamber differs substantially from the case originally charged.²²⁷ For instance, as noted above, Judge Van den Wyngaert explained that the Trial Chamber’s new approach to the case, the members of Mr. Katanga’s armed group are transformed from mere automatons blindly carrying out the will of their powerful leader to a group acting with a common purpose to which Mr. Katanga does not even belong.²²⁸ Similarly, Mr. Katanga is himself transformed from the powerful, authoritative leader of soldiers to a mere accomplice to a group acting without his direction.²²⁹ Such transformations in the charges, particularly after the close of evidence in a case in which the accused testified in his own defense, seems to reach the level of “materially prejudic[ing] the accused’s right to a fair trial by hindering the preparation of a proper defence,”²³⁰ suggesting that the recharacterization, even if technically permitted under the terms of Regulation 55, should not be undertaken.

At the same time, the Trial Chamber’s decision to invoke Regulation 55 at the end of trial in the *Katanga* case suggests that the Chamber is “moulding the case against the accused”²³¹ depending on the way the evidence unfolded at trial, further weighing against the use of the

December 2006).

²²⁷ See *supra* n. 140 *et seq.* and accompanying text.

²²⁸ See *supra* n. 143 and accompanying text.

²²⁹ See *supra* n. 144 and accompanying text.

²³⁰ *Bagosora, et al.* Trial Judgment, *supra* n. 224, ¶ 12.3

²³¹ *Simić, et al.* Trial Judgment, *supra* n. 225, ¶ 110.

provision in this instance. Finally, there is nothing in the legal framework of the ICC suggesting that an accused before that court should not assume that he or she may build a defense based on the charges confirmed against him. Indeed, the *Katanga* Trial Chamber itself required the Prosecutor to submit an “in-depth analysis chart” to the Defense prior to the start of trial detailing how each piece of the Prosecution’s evidence related to each of the charges leveled against the accused, based on a finding that such information was necessary to give meaning to the right of the accused to prepare a defense.²³² Notably, in response to the Prosecution’s objection to its order to produce the requested chart, the *Katanga* Chamber explained:

The table will ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1) (b) of the Statute, by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them. In this respect, the Chamber appreciates the concern expressed by both Defence Counsel that the amount of evidence in this case is such that, without the assistance of a structured preliminary analysis of the evidence by the Prosecution, the Defence will need more time to prepare. *The Chamber further agrees with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case.* Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select

²³² See *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, ICC-01/04-01/07-956 (Trial Chamber II, 13 March 2009); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the “Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth - Analysis Chart,” ICC-01/05-01/08-682 (Trial Chamber III, 29 January 2010).

counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. *This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of the trial.*²³³

Furthermore, in a subsequent decision rejecting the Prosecution's application for leave to appeal its initial ruling requiring the chart, the Chamber explained that "[t]he burden of proof in relation to the guilt of the accused lies with the Prosecution *and the Defence is entitled to know the exact case against it*, sufficiently in advance of the trial."²³⁴ Yet, if the Chamber is subsequently entitled to radically transform the case against the accused, this preparation of a defense based on the Prosecution's "exact" case is meaningless.

Ultimately, the combination of the timing of the change and the dramatic change in the nature of the case against the accused demonstrate that, if the ICC were to limit the use of Regulation 55 to "exceptional" circumstances, it would not use the provision in such a manner as contemplated in *Katanga*. While it is perhaps conceivable that a Trial Chamber could invoke Regulation 55 in a manner that alters the fundamental nature of the charges against the accused in a manner consistent with his or her right to be informed of the charges and to prepare a defense, that use of Regulation 55 would need to come very early in proceedings, certainly before the Defense put on its case and the accused took the stand. Similarly, while it is possible to imagine a late invocation of Regulation 55 that does not interfere with the accused's fair trial rights, the recharacterization would have to be

²³³ *Katanga & Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, *supra* n. 232, ¶ 6 (emphasis added).

²³⁴ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol,'" ICC-01/04-01/07-1088, ¶ 34 (Trial Chamber II, 1 May 2009).

very minor.

B. Addressing Efficiency Concerns Through a More Flexible Approach to Charging

As noted above, one of the rationales behind the adoption of Regulation 55 by the ICC was that it would render the proceedings *more* efficient. For instance, one proponent of the provision has written:

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. 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)).²³⁵

Similarly, ICC Judge Hans Peter Kaul has said that Regulation 55 was adopted to “avoid lengthy indictments with cumulative and alternative charges... [as] the judges want to conduct focused trials on clearly delineated charges, in the interest both of judicial economy and of the defence.”²³⁶ Finally, the Pre-Trial Chamber in the *Bemba* case reasoned that it need not confirm “cumulative”²³⁷ charges against the

²³⁵ Stahn, *supra* n. 200, at 3.

²³⁶ Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99 Am. J. Intl. L. 370, 377 (April 2005).

²³⁷ As explained in a report issued by the War Crimes Research Office in May 2010, the charge dismissed by the Pre-Trial Chamber – rape as a crime against humanity – was not in fact “cumulative” to the charge of torture as a crime against humanity, even though the Prosecution relied on the same evidence to establish each charge, as each charge contains an element materially distinct from the other. *See* War Crimes Research Office, *The Practice of Cumulative Charging at the International Criminal Court* (May 2010), http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_May2010.pdf.

accused because, in the opinion of the Chamber, the existence of Regulation 55 meant that there was “no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber” and that it was in the interests of expeditiousness to narrow the charges.²³⁸

However, the actual impact of Regulation 55 has been to bring about substantial *delays* in almost every trial that has gone before the ICC to date. For instance, in *Lubanga*, the giving of evidence was suspended for over three months to allow for the Appeals Chamber to review the Trial Chamber’s decision giving notice to the parties that it may invoke Regulation 55.²³⁹ In *Bemba*, the finalization of the Document Containing the Charges was delayed by the litigation over whether the Prosecutor could include allegations that the accused “knew” or “should have known” of the crimes being perpetrated by his subordinates, with the Trial Chamber ultimately determining that the charges *must* be limited to whether Mr. Bemba “knew” of the alleged crimes because that was the only mode of liability confirmed by the Pre-Trial Chamber.²⁴⁰ Then, more than two years later, the same Trial Chamber suspended proceedings in the case for a period of three months to allow for the Defense to prepare for the potential recharacterization of the charges to include allegations that he “should have known” of the crimes.²⁴¹ While the Defense ultimately requested that the suspension be lifted after only approximately six weeks had passed, the amount of litigation over the inclusion of the “should have known” standard has been significant. Perhaps most dramatically,

²³⁸ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 45, ¶ 203.

²³⁹ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision adjourning the evidence in the case and consideration of Regulation 55, ICC-01/04-01/06-2143, ¶ 23 (ICC Trial Chamber I, 2 October 2009) (suspending all evidence in the case “to await the decision of the Appeals Chamber” on the Regulation 55 decision); *The Prosecutor v. Thomas Lubanga Dyilo*, Scheduling Order, ICC-01/04-01/06-2198 (ICC Trial Chamber I, 30 November 2009) (scheduling the recommencement of trial for 6 January 2010).

²⁴⁰ See *supra* n. 53 *et seq.* and accompanying text.

²⁴¹ See *supra* n. 62 *et seq.* and accompanying text.

Germain Katanga is still awaiting a judgment in his trial more than *sixteen months* after the parties delivered their closing arguments in his trial because the Trial Chamber decided to invoke Regulation 55 almost six months after the close of trial proceedings.²⁴²

Furthermore, as demonstrated in the *Ruto & Sang* and *Kenyatta* cases, in which the Prosecution has requested *after* the confirmation of charges process that the Defense be placed on notice that the accused may be convicted on the basis of *any* of the modes of liability contained in the Rome Statute, the availability of Regulation 55 effectively allows for cumulative charging in any event, while calling into question the utility of the confirmation process itself.²⁴³ The same may be said of the Pre-Trial Chamber's decision to narrow the mode of liability in the *Bemba* case to charge only that the accused "knew" of the alleged crimes, as nearly two years after the trial commenced, the accused was once again put in the position of having to defend against allegations that he "knew" and "should have known" of the crimes, due to the Trial Chamber's use of Regulation 55.²⁴⁴ Thus, even if a certain amount of the litigation seen to date on the issue of Regulation 55 has been due to the novel nature of the provision and a need to define its limits, the fact that the provision has been invoked in nearly every case that has gone to trial suggests it will continue to consume the time and resources of the parties going forward.

We therefore recommend that, rather than relying on the potential use of Regulation 55 down the line to correct for too limited a charging strategy from the start, the Prosecution adopt a more flexible approach to charging where necessary from the outset. For instance, the Prosecution might consider charging multiple modes of liability in cases such as the Kenya cases, rather than specifying a single mode of liability in its initial charges and then requesting a Regulation 55 notice from the Trial Chamber, to the extent that more than one mode is supported by the evidence and it is difficult for the Prosecution to narrow its case on the information available to it at the time the

²⁴² See *supra* n. 127 *et seq.* and accompanying text.

²⁴³ See *supra* n. 179 *et seq.* and accompanying text.

²⁴⁴ See *supra* n. 62 *et seq.* and accompanying text.

Document Containing the Charges must be submitted. Of course, as in the *ad hoc* tribunals, the Prosecution should only be permitted to rely alternatively on “one or more legal theories” if “it is done clearly, early enough and, in any event, allowing enough time to enable the accused to know what exactly he is accused of and to enable him to prepare his defence accordingly.”²⁴⁵ Similarly, we recommend that the Pre-Trial Chambers not insist on strictly narrowing the case at the confirmation stage, as seen in the *Bemba* case, as the standard of proof is much lower at confirmation than at trial and the level of evidence presented is significantly reduced. Adopting a more flexible approach at this stage, rather than relying on Regulation 55 to correct for an inappropriate narrowing of the charges at confirmation, will avoid unnecessary litigation and delays once trial has commenced.

²⁴⁵ *The Prosecutor v. Krnojelac*, Judgement, IT-97-25-A, ¶ 115 (ICTY Appeals Chamber, 17 September 2003). Note that while it may seem contrary to the interests of the accused to allow the Prosecutor to charge multiple, alternative theories of liability at the outset, it is presumably more advantageous that the accused know about the alternative theories at the start of the case, rather than at some point after the trial has started and the defense has devised its litigation strategy. This argument is spelled out in detail in a the WCRO’s November 2009 report entitled *Defining the Case Against An Accused Before the International Criminal Court: Whose Responsibility Is It?*. See *supra* n. 4.

IV. CONCLUSION

As detailed above, Regulation 55 has assumed a prominent role in nearly every case to reach the trial stage at the ICC. Furthermore, the manner in which the provision has been invoked has cast serious doubt on the utility of the regulation in promoting efficiency of the proceedings, and in some circumstances has raised serious concerns about whether the right of the accused to a fair trial is being respected. To address these problems, we recommend that the use of Regulation 55 be limited to exceptional circumstances, and in particular should not be used where the accused is first notified of the potential recharacterization late in the trial and the changes would involve a substantial transformation of the case. In addition, we recommend that the Prosecutor and the Pre-Trial Chambers adopt a more flexible approach to charging from the start of a case against the accused, ideally minimizing the necessity of invoking Regulation 55 later in the trial.

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REGULATION 55 AND THE RIGHTS OF THE ACCUSED AT THE INTERNATIONAL CRIMINAL COURT

In nearly every case that has reached trial before the International Criminal Court (ICC) to date, a significant amount of time and litigation has been devoted to questions regarding the potential use by the Trial Chamber of Regulation 55 of the Regulations of the Court. This is a provision that permits the Chamber to convict an accused of a crime other than that with which he was originally charged by the Prosecution, or to base its conviction on a different mode of liability than originally charged, subject to certain conditions. Notably, one of the rationales behind the adoption of Regulation 55 by the ICC was that it would render the proceedings more efficient by obviating the need for the Prosecution to charge alternative or cumulative charges at the start of trial. However, as described in detail in this report, Regulation 55 has in fact resulted in substantial inefficiencies. Even more significantly, the use of the regulation under certain scenarios raises serious questions regarding the Trial Chamber's ability to protect the rights of the accused to be informed of the charges against him, even with the safeguards spelled out in the regulation, as seen in the *Prosecutor v. Germain Katanga* case described in this report.

In light of these concerns, this report offers recommendations aimed at limiting the availability of Regulation 55 so as to ensure that the rights of the accused to a fair and expeditious trial are safeguarded while maintaining the Trial Chamber's authority to recharacterize in exceptional circumstances. In addition, the report advocates a more flexible approach to charging on the part of the Prosecution and the Pre-Trial Chambers in the hope that such changes may reduce the need for a Trial Chamber to invoke Regulation 55 after trial proceedings have commenced.



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