

Modification of Charges at the International Criminal Court

Kandidatnummer: 70

Antall ord: 14 965



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01.06.2016

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List of Abbreviations

AC	Appeals Chamber
DCC	Document containing the charges
ICC	International Criminal Court (the Court)
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RegC	Regulations of the Court (the Regulations)
RPE	Rules of Procedure and Evidence (the Rules)
TC	Trial Chamber (the Chamber)
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

International criminal law (ICL) is the doctrine of individual criminal responsibility for international crimes, with the aim of ending impunity and preventing future crimes.¹ There is no set definition of ‘international crimes’, but the expression is commonly used about the so-called ‘core crimes’: genocide, crimes against humanity, war crimes and the crime of aggression.²

The evolution of ICL has been slow. The first internationalised criminal tribunal was the International Military Tribunal at Nuremberg, established in the aftermath of World War II.³ The principles governing the trial; the ‘Nuremberg principles’, were affirmed by the UN General Assembly in 1946, and have formed an important basis for the development of ICL.⁴

After the end of the Cold War, an initiative to establish a permanent criminal court was launched at the UN.⁵ Around the same time the UN International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) were established, and their success inspired the strive towards a permanent court.⁶ The International Law Commission presented a Draft Statute for a permanent court in 1994, which drew inspiration from the statutes and case law of the ICTY and ICTR.

The final Draft Statute was presented and negotiated at the Diplomatic Conference in Rome in 1998.⁷ Reaching consensus between diplomats from different legal traditions was a challenge, described as a “clash of cultures between the civil law and the common law”.⁸ The drafters ultimately agreed on structuring the Court mainly after an adversarial model, but with inquisitorial elements.⁹ The Rome Statute of the International Criminal Court (the Statute) came into force on 1 July 2002, and with this the International Criminal Court (the ICC or the Court) was established.¹⁰

¹ Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 3.

² Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 4.

³ Cassese (n 1) 253.

⁴ Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal 1946 (A/236); Cassese (n 1) 258.

⁵ International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities 1989 (A/RES/44/39).

⁶ Cassese (n 1) 262.

⁷ *ibid.*

⁸ Kai Ambos, ‘International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?’ (2003) 3 *International Criminal Law Review* 1, 20.

⁹ Cassese (n 1) 344.

¹⁰ All references to ‘Article’ will be to the Rome Statute, unless otherwise stated.

1.2 Research topic

This thesis will analyse modifications of charges at the ICC. The charges are of fundamental importance for any criminal process; defining the subject matter of the trial.¹¹ What crimes the accused may be convicted of depends on the formulation of the charges.¹² The principle of *ne bis in idem* also stipulates that no one shall be tried twice for the same conduct, therefore the charges serve the purpose of delimiting the subject matter of the case.¹³

International crimes are by nature challenging to prosecute. The crimes are often committed over a longer period of time, involving many victims and perpetrators. This complicates the investigations, and makes it difficult to complete the investigation before the start of trial. Therefore it is often necessary to make changes to the charges during the trial, to secure a materially correct conviction.

The aim of conviction must be balanced against the accused person's right to a fair trial.¹⁴ Sufficient information about the charges is necessary to build a proper defence to contradict the accusations. An important aspect of this analysis will be to examine whether the procedures for modifications adequately safeguard the charged person's right to a fair process.

The aim of this thesis is to establish when it is permissible to modify the charges during the proceedings at the ICC. Three main questions will be analysed: 1) Whether the possibility to modify the charges is dependent on the stage of the proceedings; 2) What competences the different participants have to modify the charges; and 3) When a modification is impermissible because it violates the defendant's right to a fair trial.

The legal sources of the Court contain several provisions allowing smaller modifications or larger amendments of the charges. Article 61 permits certain amendments during the so-called confirmation hearing. This is a stage of the proceedings, between indictment and the start of trial, governed by a Pre-Trial Chamber (PTC). The Statute does not regulate amendments after the start of trial, so it is governed by Regulation 55, of the Regulations of Court. These two provisions, the relationship between them and their application will be examined in detail.

¹¹ Håkan Friman and others, 'Charges' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 383.

¹² Rome Statute of the International Criminal Court 2002 (2187 UNTS 38544) Art. 74(2).

¹³ *ibid* Art. 20; Susanne Walther, 'Cumulation of Offences' in Antonio Cassese, Paola Gatea and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 477.

¹⁴ Rome Statute (n 12) Art.1, Art. 67.

The balance between securing a conviction and fair trial is often challenged in the application of these provisions. This is partly due to the Court being a product of compromise between different legal cultures. The ICC is still at an early stage, and many procedural questions remain unsolved. In the years to come several cases are anticipated to reach the trial-stage, and how procedural issues are resolved will affect the development of the Court. It has been questioned whether the ICC is a realistic project.¹⁵ Therefore the Court needs to show its critics that it conducts proceedings in accordance with its legal sources, and that accused persons are treated fairly. This is necessary to maintain the Court's legitimacy.

The questions raised here will be addressed through an interpretation of the legal framework regulating the charges, and an analysis of the Court's application of these provisions.

1.3 Sources

The ICC is a treaty-based organisation, with the Statute as its founding treaty. Article 21 of the Statute introduces the applicable law of the Court, set out in a hierarchy. It is a complex provision, worth introducing properly.¹⁶

The Court shall apply “[i]n the first place” the Statute, Elements of Crimes and the Rules of Procedure and Evidence (the Rules), and the Statute shall prevail in the event of conflict between these sources.¹⁷

An additional internal source, not mentioned in Article 21, are the Regulations of the Court (the Regulations).¹⁸ The Regulations were adopted by the judges, pursuant to Article 52 of the Statute. Although the hierarchical standing of this source is not addressed in Article 21, it should logically place subordinate to the primary sources and superior to the external sources.

Article 21(b) presents the Court's external sources. The Court shall apply “where appropriate, applicable treaties and the principles and rules of international law”.¹⁹ This includes treaties to which the Court is a party, but it is disputed which other treaties are ‘applicable’.²⁰ Furthermore

¹⁵ Carsten Stahn, ‘How Is the Water? Light and Shadow in the First Years of the ICC’ (2011) 22 *Criminal Law Forum* 175, 187.

¹⁶ Gudrun Hochmayr, ‘Applicable Law in Practice and Theory’ (2014) 12 *Journal of International Criminal Justice* 655, 655.

¹⁷ Rome Statute (n 12) Art. 21(1), Art. 51(5).

¹⁸ Regulations of the Court 2004.

¹⁹ Rome Statute (n 12) Art. 21(1)(b).

²⁰ *ibid* Art. 2, Art. 3; Hochmayr (n 16) 666–667.

there is no agreement on which ‘principles and rules of international law’ the Court may apply. It is undisputed that customary law is included, but the further scope is unclear.²¹ For application of these external sources there must be a *lacuna*; a gap in the law, which cannot be filled through treaty interpretation.²²

If the above-mentioned sources do not provide an answer, Article 21(1)(c) stipulates that the Court may apply general principles derived from national legal systems. This includes laws from states that normally have jurisdiction over the crime, provided that the principles are consistent with international norms.²³ In other words, the provision suggests national criminal law as a subsidiary source.²⁴

The subsequent paragraphs in Article 21 provide supplementary regulations.²⁵ Paragraph 2 provides that the Court “may” use interpretations from previous decisions. This means that the Court is not bound by its decisions, but that jurisprudence may be used as an aid for interpretation.²⁶ In practice, case law is frequently used, and sometimes the only source.²⁷ The judges often deviate from earlier interpretations without addressing it explicitly; seemingly reluctant to criticise their fellow judges.²⁸ This creates instability in the jurisprudence of the Court. At the same time, it gives the Court an opportunity to evolve without going through the difficult process of amending the Statute.²⁹

Paragraph 3 provides that “the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”. The judges have frequently used case law from the European Court of Human Rights.³⁰ One chamber indicated that it considers human rights superior to the Statute, but the implications of this is still disputed.³¹

This presentation of the ICC sources is limited to a minimum. There is considerable discussion

²¹ Hochmayr (n 16) 668.

²² Prosecutor v. Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir 2009 [ICC-02/05-01/09-3] para 44.

²³ Christoph Safferling, *International Criminal Procedure* (Oxford University Press 2012) 114.

²⁴ William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 393.

²⁵ Hochmayr (n 16) 656.

²⁶ *ibid* 673.

²⁷ Gilbert Bitti, ‘Article 21 and the Hierarchy of Sources of Law before the ICC’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 423–424.

²⁸ *ibid* 424.

²⁹ Rome Statute (n 12) Art. 121.

³⁰ Hochmayr (n 16) 674; See eg. Prosecutor v. Lubanga, Decision on the confirmation of charges 2007 [ICC-01/04-01/06-803-tEN] para 86 fn 97; Prosecutor v. Katanga Chui, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons 2012 [ICC-01/04-01/07-3319-tENG/FRA] para 18.

³¹ Prosecutor v. Katanga, Decision on an Amicus Curiae application and Witness Testimonies 2011 [ICC-01/04-01/07-3003-tENG] para 73; Hochmayr (n 16) 676.

amongst scholars of ICL about the interpretation of Article 21.³² Pointing out these ambiguities related to the sources is important to understand the following analysis. Although there will not be an in-depth analysis of these issues, the discussions that are of particular relevance for the research question will be addressed at a later stage of the thesis.

1.4 Methodology

The research question will be analysed through application of the sources as set out in Article 21. The meaning of the Statute will be established through treaty interpretation in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).³³ These principles are considered expressions of customary law.³⁴ The interpretations are mainly based on the ordinary meaning of the text, whilst also taking into consideration the object and purpose of the source.

A special remark must be given about the case law of the ICC. Although having opened a limited number of cases, the Court has produced a vast amount of decisions, some comprising of several-hundred pages. Not all issues raised in these decisions can be assessed in depth. Some older decisions will be presented, despite the interpretations in those decisions being rejected in later decisions. This is to illustrate the methodology of the judges, and to study how the Court's jurisprudence has evolved. Since decisions are non-binding there is also always a possibility that the judges evaluate an issue differently in the future.³⁵

This thesis will also take into consideration opinions from legal theory. Although not formally a source according to Article 21, the judges frequently rely on analysis by scholars to corroborate their interpretations.³⁶ Also, due to the lack of formal preparatory works (*travaux préparatoires*) from the negotiations of the ICC sources, it is necessary to rely more on commentaries and books about this process.³⁷ Legal theory will also be used to highlight the varying opinions on the interpretation of the Statute within the field of ICL.

³² Hochmayr (n 16) 656.

³³ Vienna Convention on the Law of Treaties 1980 (1155 UNTS 18232); See e.g. Prosecutor v. Bemba, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute 2009 [ICC-01/05-01/08-388] para 30.

³⁴ Safferling (n 23) 118.

³⁵ Rome Statute (n 12) Art. 21(2).

³⁶ See eg. Prosecutor v. Al Bashir Arrest Warrant Decision (n 22) para 17; Prosecutor v. 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 2009 [ICC/01-05-01/08-424] para 425.

³⁷ Cryer and others (n 2) 150.

The thesis will present a *de lege lata* analysis of the research question. *De lege ferenda* remarks will be gathered in the conclusion.

1.5 Limitations

The thesis will not discuss withdrawal of charges; a topic closely related to modification of charges. Withdrawals may affect the defendant's right to a fair trial, since the accused person is deprived of the right to defend him/herself against the accusations. However, withdrawals have not been subject of much discussion in Chambers. Therefore I will delimit further discussions about withdrawals, to focus on a more in-depth analysis of modifications of charges.

1.6 Outline of thesis

Chapter 2 will present how an investigation is initiated at the ICC, and explain the role of the Prosecutor. Then, an analysis of the concept of charges will be given.

Chapter 3 will begin with defining the difference between ‘modifications’ and ‘amendments’. Then, amendments of charges during the confirmation process will be examined. The analysis is structured chronologically, discussing the procedures at the different stages of the confirmation process.

Chapter 4 will analyse the possibilities of modifications during the trial stage, focusing on Regulation 55; a provision in the Regulations of the Court that allows modifications of the legal characterisation of the charges. Special attention will be given to this topic because it reflects some of the core structural disagreements about the Court.

Chapter 5 provides a summary of the main findings and some concluding remarks regarding the research topic. The conclusion will also place the topic in a larger context.

2 Proceedings at the ICC

2.1 Investigation

Investigations at the ICC are conducted by the Prosecutor.³⁸ The Office of the Prosecutor (OTP) is, unlike in domestic jurisdictions, a part of the Court structure. However, it is a separate organ, mandated to act independently.

An investigation at the ICC is initiated in one of three ways: (a) referral by a State Party; (b) referral by the Security Council; or (c) initiation of an investigation by the Prosecutor on her own initiative (*proprio motu*).³⁹

Through a preliminary examination, the Prosecutor determines whether there is reasonable basis to open an investigation.⁴⁰ If the investigation was initiated *proprio motu* by the Prosecutor, she must request authorisation from the Pre-Trial Chamber (PTC) to formally open an investigation.⁴¹ This authorisation was added as a safeguard, to please those states who worried that an independent Prosecutor would politicise the Court.⁴²

The Prosecutor starts investigating a ‘situation’, which then develops into a ‘case’ against specific perpetrators.⁴³ The Prosecutor has the discretion to decide whether or not to prosecute.⁴⁴ The aim of the Prosecutor's investigation is to establish the truth.⁴⁵ This aim materialises as a duty to investigate incriminating and exonerating circumstances equally, giving the OTP a role as “an officer of justice” more than just an adversary.⁴⁶

2.2 Charges

The Prosecutor is responsible for composing the charges.⁴⁷ Article 61(3)(a) instructs the Prosecutor

³⁸ Rome Statute (n 12) Art. 42(1).

³⁹ *ibid* Art. 13.

⁴⁰ *ibid* Art. 15(3) cf. Art. 53(1)(a)-(c).

⁴¹ *ibid* Art. 15(3).

⁴² Schabas (n 24) 316.

⁴³ Safferling (n 23) 237.

⁴⁴ Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003) 24.

⁴⁵ Rome Statute (n 12) Art. 54(1)(a).

⁴⁶ *ibid* Art. 54; Claus Kreß, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2003) 1 *Journal of International Criminal Justice* 603, 608.

⁴⁷ Rules of Procedure and Evidence 2002 121(3).

to provide the “document containing the charges” (DCC) before the confirmation hearing. The DCC is the equivalent to an indictment.⁴⁸

The term ‘charge’ is not defined anywhere in the ICC sources, but its content can be defined through the requirements for the DCC.⁴⁹ In addition to identifying information about the accused, the DCC must include a “statement of the facts” and “legal characterisation of the facts”. This highlights the two main elements of a charge.

The statement of facts must provide sufficient legal and factual basis for a trial, as well as the necessary facts to determine the Court's jurisdiction in the case.⁵⁰ These facts must be distinguished from the evidence presented to support the charge, which shall be listed in a separate document.⁵¹

The factual basis for the charges consists of a minimum of information: the person or persons engaged in the conduct, the nature of the conduct, the time, place and manner of the conduct and the results of the conduct.⁵² According to Article 74(2) these ‘facts and circumstances’ of the case may not be exceeded in the final decision by the Trial Chamber (TC), meaning that the TC is bound by these facts.

The legal characterisation means the relevant crime and the form of individual criminal responsibility; referred to as either ‘mode of liability’ or ‘form of participation’.⁵³ It is this legal characterisation that transforms the relevant acts into specific crimes.⁵⁴

According to Article 61(3)(a) the charged person shall be provided with a copy of the DCC “[w]ithin a reasonable time before the hearing”. ‘Reasonable time’ is specified in Rule 121(3) as no later than 30 days before the confirmation hearing. Any charges or evidence provided after this deadline will not be taken into consideration.⁵⁵

⁴⁸ Safferling (n 23) 243.

⁴⁹ RegC (n 18) 52; Safferling (n 23) 244.

⁵⁰ RegC (n 18) 52(b).

⁵¹ Rome Statute (n 12) Art. 61(3)(b); Prosecutor v. Lubanga, Judgment on the appeal of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts might be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ 2009 [ICC-01/04-01/06-2205] para 90 fn 163.

⁵² Prosecutor v. Ruto Sang, Order regarding the content of the charges 2012 [ICC-01/09-01/11-475] para 11.

⁵³ Rome Statute (n 12) Art. 6-8; RegC (n 18) 52(c); Rome Statute (n 12) Art. 30, Art. 25, Art. 28.

⁵⁴ Safferling (n 23) 249.

⁵⁵ RPE (n 47) 121(8).

3 Amendment of charges during the confirmation process

3.1 The confirmation process

The confirmation process is an intermediary phase between investigation and trial. This procedure has no similar predecessor in any domestic legal system, but draws elements from civil law-based systems.⁵⁶ The confirmation process was included in the Statute to ensure more judicial control over the Prosecutor, like in inquisitorial trials.⁵⁷ The aim of the confirmation hearing is to filter out unmeritorious cases and ensure that no charges are brought to trial on insufficient grounds.⁵⁸

Article 61(7) renders three possible outcomes of the confirmation hearing: the PTC shall either; (a) confirm the charges; (b) decline to confirm; or (c) adjourn the hearing to request the Prosecutor to consider (i) providing further evidence or investigation; or (ii) amending the charges.

The evidentiary threshold for confirmation is “substantial grounds” to believe that the charged crimes are committed.⁵⁹ This is lower than the burden of proof for conviction: “beyond reasonable doubt”.⁶⁰ This lower evidentiary threshold illustrates the preliminary character of the confirmation hearing. Since the confirmation hearing is prior to the actual start of trial, it is reasonable that certain modifications to the charges may still be made.

3.2 Defining ‘amendment’

The term ‘amendment’ is not explicitly defined in the Statute, and it is only used in Articles 61 and 74. A plain reading of the term indicates a change of a certain magnitude.

As illustrated, a charge consists of two elements: the facts, and the legal characterisation of these facts. If both elements change, there is no doubt that the charge can no longer be regarded as the same. The question is whether a modification of one of these elements amounts to an amendment of the charge.

⁵⁶ Kai Ambos and Dennis Miller, ‘Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective’ (2007) 7 *International Criminal Law Review* 335, 356.

⁵⁷ Schabas (n 24) 735.

⁵⁸ Volker Nerlich, ‘The Confirmation of Charges Procedure at the International Criminal Court’ (2012) 10 *Journal of International Criminal Justice* 1339, 1339.

⁵⁹ Rome Statute (n 12) Art. 67(7).

⁶⁰ *ibid* Art. 66(3).

Article 74(2) requires that “[t]he decision shall not exceed the facts and circumstances described in the charges and *any amendments* to the charges” (emphasis added). By mentioning amendments, Article 74(2) recognises the possibility of amending the original charges. The wording also clarifies that these amendments may change the facts and circumstances from the original charges. Thus, it can be concluded that any change to the facts and circumstances must be regarded as an amendment of the charge.

Since Article 74(2) only prohibits exceeding the facts and circumstances, this implies that the legal characterisation of a charge may be changed. In a decision in the Lubanga-case the Appeals Chamber (AC) confirmed this, stating that:

[i]t follows *a contrario* that article 74 (2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances.⁶¹

This also indicates that a change of the legal characterisation is generally not regarded as an amendment.⁶² Therefore, in the following, the term ‘amendment’ will be used about changes that alter the facts of the charges.

However, the question arises whether also a change of the legal characterisation can amount to an amendment that is prohibited by the Statute. This question can only be answered after an in-depth interpretation of the provisions governing amendments, and their application in practice. The question will be addressed in Section 4.7.

3.3 Amendments before the confirmation hearing

According to Article 61(4) the Prosecutor may amend the charges before the confirmation hearing. The accused person must be given “reasonable notice” of any amendment. Rule 121(4) specifies that the PTC and the accused must be notified of any amendments at the latest 15 days before the hearing. The decision to amend is fully in the hands of the Prosecutor, and the Court is given no authority to challenge the decision.

This wide possibility to amend is less problematic at this stage of the proceedings. Amendments

⁶¹ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) para 93.

⁶² See also Carsten Stahn, ‘Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55’ (2005) 16 Criminal Law Forum 1, 17.

will be less harmful to the accused person, since the defence will have the possibility to respond to the accusations during the confirmation hearing. However, 15 days is not a long time to prepare a defence, and the accused may therefore apply to have the confirmation hearing postponed.⁶³

3.4 Adjournment of the hearing to amend the charges

During the confirmation hearing, it is still possible to amend the charges, pursuant to certain conditions. According to Article 61(7)(c)(ii) the PTC shall:

Adjourn the hearing and request the Prosecutor to consider...[a]mending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

A literal interpretation of ‘hearing’ implies that adjournment must happen during the oral sessions. However, it is also within a literal meaning of the word to regard the hearing as ongoing until the final decision. The PTC has established that it is in accordance with VCLT Article 31(1) to give ‘hearing’ this broad scope through a contextual and teleological interpretation.⁶⁴ The PTC may therefore adjourn the hearing at any time during the oral hearings or deliberations, until its final confirmation decision.

According to Article 61(7)(c)(ii) amending the charges may only be considered when the evidence presented ‘appears’ to establish a different crime. Since the provision only requires that the evidence ‘appears’ to establish a different crime, it is sufficient that the PTC makes a *prima facie* finding, without an in-depth analysis of the evidence, to adjourn the hearing.⁶⁵ This illustrates that there is a low threshold for amendments during this stage of the proceedings. This corresponds with the preliminary character of the confirmation hearing.

The main requirement for an amendment is that the evidence appears to establish a “different crime”. A ‘crime’ implies any of the crimes within the jurisdiction of the Court: the crime of genocide, crimes against humanity, war crimes or the crime of aggression.⁶⁶ A literal interpretation of ‘different crime’ indicates any change in the charges from one of these core crimes to another.

However, within each of these core crimes there are specified acts that are also commonly

⁶³ RPE (n 47) 121(7).

⁶⁴ Prosecutor v. Bemba Adjournment Decision (n 33) para 34.

⁶⁵ *ibid* 25.

⁶⁶ Rome Statute (n 12) Art. 5.

understood as crimes: murder, torture, rape etc. Together with a mode of liability, any of these acts constitute a ‘crime’.⁶⁷ Both the acts and modes of liability are of vastly different character. The question is therefore whether a ‘different crime’ means a different core crime, a different act or a different mode of liability.

All three interpretations are within a literal understanding of the word ‘crime’. A consideration of the accused person's right to prepare his/her defence favours a broad interpretation of ‘different crime’, requiring an amendment for any changed element of the crime. However, some changes may have only minor implications on the overall subject matter of the case, making adjournment unnecessary. Delaying the trial with an adjournment might not be in the interest of either of the parties.

The Statute does not clearly determine the meaning of ‘different crime’. The term has therefore been further analysed by the judges. The question of adjournment came up in the first confirmation decision before the Court, against Thomas Lubanga.⁶⁸ Lubanga was the President of the *Union des Patriotes Congolais* and *Force Patriotique pour la Libération du Congo* in the Democratic Republic of Congo.⁶⁹ He was charged with war crimes, namely conscripting, enlisting and using child soldiers.⁷⁰

In the confirmation decision, the PTC did not confirm the exact charges that were set out in the DCC; war crimes in a *non-international* conflict. Instead the PTC confirmed the charges in the context of an *international* conflict, thus changing the context contended by the Prosecutor.⁷¹

The PTC explained why it had not requested adjournment to amend the charges.⁷² It argued that the purpose of Article 61(7)(c)(ii) was to prevent amending the charges to “materially different” crimes. The PTC further argued that because the “same conduct” was criminalised, regardless of whether it took place in a national or international context, it was not necessary to adjourn the hearing for the Prosecutor to amend the charges. The interpretation was not explained any further.

This interpretation is problematic for several reasons. First of all, the PTC's argument; that adjournment was not necessary because the same conduct was criminalised either way, must be

⁶⁷ RegC (n 18) 52(c); Rome Statute (n 12) Art. 30, Art. 25, 28.

⁶⁸ Prosecutor v. Lubanga Confirmation Decision (n 30) paras 200–204.

⁶⁹ ICC, ‘Lubanga Case Information Sheet’.

⁷⁰ Rome Statute (n 12) Art. 8(2)(e)(vii).

⁷¹ Prosecutor v. Lubanga Confirmation Decision (n 30) para 220; Rome Statute (n 12) Art. 8(2)(b)(xxvi).

⁷² Prosecutor v. Lubanga Confirmation Decision (n 30) paras 200–204.

scrutinised. A crime and a conduct is not the same.⁷³ For example, the act of murder can be both a crime of genocide and a crime against humanity.⁷⁴ As previously shown, the facts must be matched with the characterisation of a crime and a mode of liability to constitute a crime under the Statute. Therefore, that the same conduct is criminalised does not necessarily mean that it constitutes the same crime. Consequently, the grounds on which the PTC concluded that no adjournment was necessary were inadequate.

Secondly, the PTC defined the purpose of Article 61(7)(c)(ii) as not committing the accused to trial on ‘materially different’ crimes.⁷⁵ The wording of Article 61(7)(c)(ii) stipulates that an adjournment is required when there seems to be established a *different* crime, not a *materially different* crime. The PTC seemingly considers that adjournment is not necessary when a different crime is established, as long as it is not materially different. Here, the PTC sets a higher threshold for adjournment, which is not coherent with the wording of Article 61(7)(c)(ii).⁷⁶ The PTC did not corroborate this interpretation with any reference to the drafting documents.

A crime can be materially different for example due to the perpetrator's intent. This can even be read from the Statute itself.⁷⁷ A murder can be a crime of genocide or a crime against humanity depending on whether the perpetrator has genocidal intent, and whether it is a widespread and systematic attack. These distinctions exist to address the essence of the crime, not only the objective requirements. Different provisions protect different interests. Whether the reasons for criminalising are the same, should be taken into consideration when assessing whether the crime is ‘different’.

Heller also points out that the context in the Lubanga-case; national or international, makes the crimes materially different, because the TC has held that the nature of the armed conflict is an essential requirement of a war crime.⁷⁸ By the Court's own logic then, changing the nature of the context should make the crime materially different, requiring adjournment in accordance with Article 61(7)(c)(ii). This analysis shows the elements that the PTC should consider when assessing whether the context made Lubanga's act a different crime.

The result of these interpretations is that the PTC deprives the Prosecutor of the control over the

⁷³ Olympia Bekou, ‘Prosecutor v Thomas Lubanga Dyilo - Decision on the Confirmation of Charges’ (2008) 8:2 Human Rights Law Review 343, 345.

⁷⁴ Rome Statute (n 12) Art. 6(1)(a), Art. 7(1)(a).

⁷⁵ Prosecutor v. Lubanga Confirmation Decision (n 30) para 203.

⁷⁶ See also Kevin Jon Heller, ‘“A Stick to Hit the Accused with”: The Legal Recharacterization of Facts under Regulation 55’, *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 990.

⁷⁷ Rome Statute (n 12) Art. 7(1)(a), 6(1)(a).

⁷⁸ Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute 2012 [ICC-01/04-01/06-2842] para 504; Heller (n 76) 990.

charges, and deprives both parties of the necessary extra time to prepare submissions against or in support of a different crime. Both the defence and the Prosecutor objected to the PTC's amendments, but their applications for appeal were rejected.⁷⁹ The interpretations have also been criticised in the legal literature.⁸⁰

The question of adjournment also came up in the Bemba-case. Jean-Pierre Bemba Gombo was accused of committing war crimes and crimes against humanity, as the leader of *Mouvement de Libération du Congo*, during a conflict in the Central African Republic.⁸¹

After the confirmation hearing the PTC decided to adjourn the hearing in accordance with Article 61(7)(c)(ii), and requested the Prosecutor to amend the charges to include an alternative mode of liability; command responsibility under Article 28.⁸² In its interpretation of 'different crime' the PTC first concurred with the PTC's interpretation in the Lubanga-case; that only material changes warrant adjournment.⁸³ Then the PTC considered amendments of the mode of liability.⁸⁴ It concluded that the mode of liability had a "bearing on the structure of *the crime*", and therefore adjournment to amend was in the interest of fairness. The PTC thus clarified that both changes of the core crime and the mode of liability make the crime 'different'; warranting adjournment to amend.

The interpretations of 'different crime' from these two cases have not been confirmed or rejected in newer cases. This leaves the question of where to draw the line for adjournment to be more precisely determined in future cases. The complexity of the concept 'different crime' requires a more in-depth analysis than the TCs have done so far, to avoid expanding or narrowing the room for amendments more than what is envisaged in the Statute.

3.5 Confirmation of cumulative or alternative charges

Due to the complexity of international crimes the same conduct can often constitute several offences.⁸⁵ The expressions "cumulative charges" and "alternative charges" are used

⁷⁹ Prosecutor v. Lubanga, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges 2007 [ICC-01/04-01/06-915].

⁸⁰ See Heller (n 76); Bekou (n 73); Nerlich (n 58); Ambos and Miller (n 56).

⁸¹ ICC, 'Bemba Case Information Sheet'.

⁸² Prosecutor v. Bemba Adjournment Decision (n 33) para 19.

⁸³ *ibid* 23.

⁸⁴ *ibid* 26–28.

⁸⁵ Cryer and others (n 2) 461.

interchangeably, although there is a slight difference. Cumulative charges means that the conduct violates more than one provision, and could lead to cumulative convictions.⁸⁶ Alternative charges are mutually excluding charges, that cannot lead to cumulative convictions. Alternative charges are often used to present alternative modes of liability related to the same conduct. Cumulative and alternative charging reflect the issues arising in the doctrine of concurrence of offences.⁸⁷

The question is which competence the PTC has under Article 61(7)(c)(ii) to decline or confirm charges based on the same conduct. The Statute stipulates that an accused may be convicted for more than one crime, but not whether this includes crimes based on the same conduct.⁸⁸ The question of confirmation of such charges has therefore been subject to discussion by the Chambers.

In the Bemba-case, the PTC requested the Prosecutor to add an alternative mode of liability to the DCC. The Prosecutor complied with the request, adding the suggested mode of liability; command responsibility, to the amended DCC.⁸⁹ The DCC consequently contained two alternative modes of liability.

In the confirmation decision the PTC declined the original mode of liability.⁹⁰ In addition, it declined three of the charges.⁹¹ The PTC found the charges proven, but declined on the grounds that the charges were cumulative. It asserted that the practice of cumulative charging put an undue burden on the defence.

Specifically, the PTC argued that the charges of torture and rape were cumulative, because rape is an instrument of torture.⁹² The PTC argued that the same conduct could only be charged as different crimes if they were “distinct crimes”, meaning each crime had an “additional material element”. In the doctrine of concurrence of offences this is known as ideal or true concurrence.⁹³ Since the act of rape required the additional material element of penetration, the PTC regarded the act of torture as subsumed by the act of rape.⁹⁴ In other words; rape was regarded as a *lex specialis*, subsuming the ‘lesser included offence’; torture.⁹⁵

⁸⁶ Carl-Friedrich Stuckenberg, ‘Cumulative Charges and Cumulative Convictions’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 841.

⁸⁷ Kai Ambos, ‘Critical Issues in the Bemba Confirmation Decision’ (2009) 22 *Leiden Journal of International Law* 715, 724.

⁸⁸ Rome Statute (n 12) Art. 78(3).

⁸⁹ Prosecutor v. Bemba, Prosecution’s Submission of Amended Document Containing the Charges 2009 [ICC-01/05-01/08-395]; Rome Statute (n 12) Art. 28.

⁹⁰ Prosecutor v. Bemba Confirmation Decision (n 36).

⁹¹ *ibid* 199–205.

⁹² *ibid*.

⁹³ Stuckenberg (n 86) 844.

⁹⁴ Prosecutor v. Bemba Confirmation Decision (n 36) para 204.

⁹⁵ Ambos (n 87) 723; Walther (n 13) 490.

The PTC also argued that because of Regulation 55; which allows the TC to modify the legal characterisation of the charges, there was no need for the Prosecutor to charge cumulatively.⁹⁶

The Prosecutor applied to appeal the decision to decline certain charges, claiming that the Statute only allowed the PTC to decline to confirm charges on the basis of insufficient evidence.⁹⁷ The PTC rejected this appeal, stating that:

To restrict the competences of the Pre-Trial Chamber to a literal understanding of article 61(7) of the Statute, to merely confirm or decline to confirm charges, does not correspond to the inherent powers of any judicial body vested with the task to conduct fair and expeditious proceedings while at the same time paying due regard to the rights of the Defence.⁹⁸

The question is whether this is a correct interpretation of Article 61(7). According to the principles of interpretation of VCLT Article 31, the Court shall interpret the Statute in accordance with its ordinary meaning. The PTC stated that it deviated from a literal understanding of Article 61(7) because the meaning did not correspond with its inherent power to conduct the proceedings. However, the PTC did not specify which inherent powers these are.

Article 64(2) grants the power to ensure a fair and expeditious trial that respects the rights of the participants. The question is whether this provision is sufficient to depart from a literal understanding of Article 61(7).

VCLT Article 31(1) allows for a teleological interpretation in light of the context; meaning the rest of the Statute. However, this interpretation must still be in accordance with the ordinary meaning of the text. Thus, the context may only be taken into account where a literal interpretation does not provide a clear answer. The wording of Article 61(7) is not ambiguous; it does not indicate any possibility for the PTC to reject charges based on other grounds than insufficient evidence. Therefore an interpretation as suggested by the PTC would not be in accordance with Article 21 of the Statute, interpreted pursuant to VCLT.⁹⁹ Thus, both the PTC and the AC erred in their interpretations. According to Article 61(7), the PTC does not have the competence to reject cumulative or alternative charges.

⁹⁶ Prosecutor v. Bemba Confirmation Decision (n 36) para 203.

⁹⁷ Prosecutor v. Bemba, Prosecution's application for leave to appeal the decision pursuant to article 61(7)(a) and (b) on the charges against Jean-Pierre Bemba Gombo 2009 [ICC-01/05-01/08-427] para 14.

⁹⁸ Prosecutor v. Bemba, Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' 2009 [ICC-01/05-01/08-532] para 52.

⁹⁹ See also Heller (n 76) 15.

ICL scholars have questioned the legality of alternative charging.¹⁰⁰ According to Regulation 52, which concerns the DCC, the legal characterisation must include “the precise form of participation”. This indicates that charging several potentially cumulative or alternative forms of participation is not permissible. However, the Regulations shall be read “subject to the Statute”.¹⁰¹ Since it is established that Article 61(7)(c)(ii) does not allow rejecting cumulative charges, Regulation 52(3) must be read as a recommendation to charge precisely. To clarify this, the judges should consider amending the provision.¹⁰²

In newer confirmation decisions, PTCs have accepted cumulative charging, without explicitly rejecting the interpretations of the preceding PTCs.¹⁰³ The PTC in the Gbagbo-case explained its approach as follows:

Taking stock of past experience of the Court, the Chamber is also of the view that confirming all applicable legal characterisations on the basis of the same facts is a desirable approach as it may reduce future delays at trial, and provides early notice to the defence of the different legal characterisation that may be considered by the trial judges.¹⁰⁴

Clearly the PTC in the Gbagbo-case did not agree with the conclusion of the PTC in the Bemba-case; that cumulative charges could cause trial delays. On the contrary; the PTC emphasised the defendant's right to be informed about the charges, in favour of the PTC's right to control the proceedings.¹⁰⁵

In the recent confirmation decision against Ongwen, confirming a total of 70 charges, the PTC also addressed this question.¹⁰⁶ The PTC concluded that Article 61(7) only allows it to decline charges where the burden of proof is not met. Consequently, the interpretations of the PTC in the Bemba-case were explicitly rejected. The PTC also accepted that the Prosecutor had presented several alternative forms of responsibility for the same conduct, asserting that this could prevent future

¹⁰⁰ Elinor Fry, ‘Legal Recharacterisation and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?’ (2016) 29 *Leiden Journal of International Law* 577, 591.

¹⁰¹ RegC (n 18) 1(1).

¹⁰² Fry (n 100) 591.

¹⁰³ Prosecutor v. Ruto Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute 2012 [ICC-01/09-01/11-373] para 284; Prosecutor v. Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda 2014 [ICC-01/04-02/06-309] para 100; Prosecutor v. Gbagbo, Decision on the confirmation of charges against Laurent Gbagbo 2014 [ICC-02/11-01/11-656-Red] para 228.

¹⁰⁴ Prosecutor v. Gbagbo Confirmation Decision (n 103) para 228.

¹⁰⁵ Rome Statute (n 12) Art. 67(1)(a), Art. 64(2).

¹⁰⁶ Prosecutor v. Ongwen, Decision on the confirmation of charges against Dominic Ongwen 2016 [ICC-02/04-01/15-422-Red 23-03-2016] paras 29–33.

delays at trial.¹⁰⁷

The PTC rejected the argument from the Bemba-case, that cumulative charging should be avoided since the legal characterisation of a charge can be changed through Regulation 55.¹⁰⁸ The PTC pointed out that Regulation 55 did not concern situations where the same facts could constitute several crimes, and therefore several charges. The PTC clarified that the same facts may prove different crimes, that each may lead to conviction. The requirement is that each crime must have a “distinct legal element or offends a different protected interest”.¹⁰⁹ In the opinion of the PTC the question of concurrence of offences in relation to cumulative convictions should be left for the TC to decide on. At the stage of final deliberations, the TC will have heard all evidence and be as informed about the case as possible. This also corresponds with the division of power between the PTC and TC; the former simply being mandated with a control of the charges before trial.

In the Al Mahdi-case, the PTC confirmed the war crime charge in the DCC.¹¹⁰ The Prosecutor had presented several alternative modes of liability. In the confirmation decision, the PTC confirmed these alternative forms of responsibility, stating that this was consistent with the recent practice of the PTC.¹¹¹

It is therefore safe to say that the Court's view on cumulative charging has changed significantly in recent years. Now the PTC shall confirm any charge that is sufficiently proven, and leave it to the TC to consider whether there may be cumulative convictions. This is coherent with the competence afforded to the PTC, according to a literal interpretation of Article 61(7)(c)(ii). As evidenced, cumulative charging may be necessary to reflect the full extent of the crimes committed, which should be the aim of any case.¹¹²

3.6 Amendments by the Pre-Trial Chamber in the confirmation decision

The PTC holds the power to initiate the adjournment process under Article 61(7). However, the PTC must “request the Prosecutor to consider” amending the charges. This wording indicates that

¹⁰⁷ *ibid* 35.

¹⁰⁸ *ibid* 31.

¹⁰⁹ *ibid* 32–33.

¹¹⁰ Prosecutor v. Al Mahdi, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi 2016 [ICC-01/12-01/15-84-Red].

¹¹¹ *ibid* 22.

¹¹² See also Stuckenberg (n 86) 844.

the Prosecutor can decide whether to comply with the PTC's request or not.¹¹³

However, in the Lubanga-case, the PTC changed the context of the charges without requesting the Prosecutor to amend.¹¹⁴ When amending the charges *proprio motu*, the PTC clearly exceeded the authority it is granted in Article 61(7). This case illustrates that the division of competence at the pre-trial stage is unclear.

In the Bemba-case, the PTC exceeded its powers by declining certain charges. However, in the adjournment decision the PTC stated that;

[t]he wording of article 61(7)(c)(ii) of the Statute is formulated in a discretionary fashion, leaving it for the Prosecutor to decide whether to amend the relevant charge.¹¹⁵

Several ICL scholars agree with this understanding of Article 61(7).¹¹⁶ Safferling puts it simply: “[i]t is either a ‘yes’ or a ‘no’, or a request to the Prosecutor to amend the charge.”¹¹⁷ Article 61(7) does not give the PTC power to amend the charges, but also does not explicitly forbid it.

The question is whether other provisions of the Statute can be interpreted as giving the PTC competence to amend charges on its own initiative. The powers of the Chambers is set out in Article 64 for the TC and Article 57 for the PTC. Article 64 describes the duty to ensure a fair trial and the power to rule on “any other relevant matters”.¹¹⁸ The PTC is not granted similar powers in Article 57, which implies that the PTC has less power than the TC. This is reasonable, considering the structure of the confirmation hearing as a preliminary phase. Justification for the PTC to amend charges can thus not be found in the Statute.

In a decision by the PTC in the Ruto & Sang-case, the Judge stated that “it is to be clarified that the Chamber is not vested with the authority to modify the charges”, and that charges may only be amended by the Prosecutor through the procedure of Article 61(7)(c)(ii).¹¹⁹ Friman argues that the PTC here “explicitly rejected” the approach of the Lubanga-case, and that the practice of *proprio*

¹¹³ See also Ignaz Stegmiller, ‘Confirmation of Charges’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 900.

¹¹⁴ Prosecutor v. Lubanga Confirmation Decision (n 30) para 204.

¹¹⁵ Prosecutor v. Bemba Adjournment Decision (n 33) para 38.

¹¹⁶ Heller (n 76) 7; Margaux Dastuge, ‘The Faults in “Fair” Trials: An Evaluation of Regulation 55 at the International Criminal Court’ (2015) 48 *Vanderbilt Journal of Transnational Law* 273, 299; Safferling (n 23) 344.

¹¹⁷ Safferling (n 23) 344.

¹¹⁸ Rome Statute (n 12) Art. 64(2), Art. 64(6)(f).

¹¹⁹ Prosecutor v. Ruto Sang, Decision on the ‘Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact’ 2011 [ICC-01/09-01/11-274] paras 7–9.

motu changes by the PTC has not been repeated in later cases.¹²⁰ In conclusion, it is now clearly established that the PTC may not amend the charges *proprio motu*.

This conclusion is coherent with the division of competence vested in the roles of the Prosecutor and PTC. The Prosecutor is the one who must prove the charges at trial, and it is therefore reasonable that the power to decide the charges is also in her hands.

3.7 Amendments after the charges are confirmed

Article 61(9) stipulates that the Prosecutor may amend the charges between the confirmation decision and start of trial. Here the division of power is clear; only the Prosecutor may initiate an amendment. However, she must “have the permission of the Pre-Trial Chamber”.¹²¹ The wording indicates that this is more than a formality; the PTC must consider the request and choose to approve or decline it. Such a consideration is necessary, given that Article 61(9) demands that there be held a new confirmation hearing for certain amendments.

In a decision in the Kenyatta-case the PTC discussed Article 61(9).¹²² The Judge interpreted ‘permission’ as ‘authorisation’; requiring an active decision by the PTC. The Judge also stated that the request has to be “supported and justified”. Furthermore, the decision should be made based on an assessment of “all relevant circumstances”, both the Prosecutor's application and other available information. The division of competences here shows that as the proceedings move forward the PTC is granted more authority.

Amendments of charges after they have been confirmed by the PTC is further regulated by Rule 128. It is specified that the PTC may request written submissions by the Prosecutor on the facts or the law before making its decision. The Judge in the Kenyatta-decision emphasised that this gives the PTC the opportunity to take into consideration factors like fairness, expeditiousness and the rights of the accused.¹²³ Here it is explicitly acknowledged that the interest of amending the charges to secure a conviction must be weighed against the rights of the accused.

¹²⁰ Håkan Friman, ‘Trial Procedures - With a Particular Focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 918.

¹²¹ Rome Statute (n 12) Art. 61(9).

¹²² Prosecutor v. Kenyatta, Corrigendum to ‘Decision on the “Prosecution”s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’ 2013 [ICC-01/09-02/11-700-Corr] paras 21–22.

¹²³ *ibid* 22.

Furthermore, Article 61(9) stipulates that if the Prosecutor wishes to “add additional charges or to substitute more serious charges” a new confirmation hearing for these charges must be held. There is no jurisprudence on these criteria yet. To maintain the relevance of the confirmation hearing, the threshold for accepting amendments at this stage should be high.

In conclusion, Article 61(9) narrows the possibility for amendments after confirmation, by forbidding certain amendments, and through the additional power afforded to the PTC.

This analysis shows that the competence the PTC has corresponds with its task to provide judicial oversight with the confirmation hearing. As the proceedings progress the PTC is granted more authority, to ensure that amendments do not violate the defendant's right to a fair trial.

4 Modification of charges during the trial

4.1 Amendments after initiation of trial

Article 61(11) stipulates that “[o]nce the charges have been confirmed” a TC shall be constituted to conduct the trial proceedings. Article 61(11) shall be read subject to paragraph 9, which only allows amendments to the charges “before the trial has begun”. Thus, from the start of the trial-stage the charges must be confirmed, and further amendments are excluded.¹²⁴ In other words; the possibility to modify the charges is clearly limited when the proceedings move from pre-trial to trial.

However, in the Regulations of the Court there is a provision allowing certain modifications during the trial phase; Regulation 55.¹²⁵ Here, the interest of reaching a conviction has been prioritised in favour of the defendant being fully informed about the charges from the start of trial. The question is when these modifications must be forbidden because they conflict with the Statute or fair trial requirements.

4.2 Regulation 55

Regulation 55 is an expression of the principle *iura novit curia*; “the court knows the law”.¹²⁶ The principle originates from the civil law tradition, where the legal characterisation of the charges is often regarded as a recommendation.¹²⁷ In common law jurisdictions the prosecutor determines the charges, and the judges usually have no authority to change the legal characterisation.¹²⁸

The drafters of the Statute failed to reach an agreement on whether the principle of *iura novit curia* should apply at the ICC, and therefore left the text vague through so-called *constructive ambiguity*.¹²⁹ The judges were mandated with regulating the remaining issues through the Regulations of the Court, where they adopted Regulation 55.¹³⁰

Regulation 55 is titled “[a]uthority of the Chamber to modify the legal characterisation of facts”.

¹²⁴ Stahn (n 62) 15.

¹²⁵ RegC (n 18) 55.

¹²⁶ Friman and others (n 11) 431.

¹²⁷ Dastuge (n 116) 284.

¹²⁸ *ibid* 283.

¹²⁹ Kreß (n 46) 605.

¹³⁰ Rome Statute (n 12) Art. 52.

According to Regulation 55(1) the Chamber may “change the legal characterisation of facts” to conform with either the core crimes or the form of participation. The change shall happen in the Chamber's decision, and must be made “without exceeding the facts and circumstances” of the charges.¹³¹

The competence to recharacterise is given to “the Chamber”, which could be interpreted as both the PTC and TC. However, since the recharacterisation is made in the final decision, which the TC is responsible for, only the TC may use Regulation 55.

Regulation 55(2) furthermore stipulates that if, at any time during the trial, the Chamber considers that the legal characterisation might be changed, notice shall be given to the participants and they shall be granted the possibility to make submissions. In addition, Regulation 55(2) and (3) prescribe some safeguards, that will be presented in Section 4.6.

Regulation 55 is a controversial instrument, and has been the topic of much debate amongst ICL scholars.¹³² Regulation 55 has been expressed as a power of the Chamber to correct legal flaws in the charges, to avoid acquittals because of technicalities.¹³³ The Regulation has also been described as a means to enhance efficiency and judicial economy.¹³⁴ Unlike Article 61, Regulation 55 gives the Chamber *proprio motu* power to modify the charges during the trial.

4.3 Compatibility of Regulation 55 with the Statute

According to Regulation 1 the Regulations “shall be read subject to the Statute and the Rules”.¹³⁵ This means that the Regulations shall be read to comply with the Statute and the Rules.

The question of compatibility came up in the first trial to reach the hearing stage; the Lubanga case.¹³⁶ As mentioned, Lubanga was charged with the war crimes of recruitment and use of child soldiers. The TC gave notice pursuant to Regulation 55 that it might modify the legal

¹³¹ See *ibid* Art. 74(2).

¹³² See Stahn (n 62); Heller (n 76); Dov Jacobs, ‘A Shifting Scale of Power: Who Is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55’ in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013); Dastuge (n 116); Sienna Merope, ‘Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC’ (2011) 22 *Criminal Law Forum* 311.

¹³³ Stahn (n 62) 2.

¹³⁴ Dastuge (n 116) 288.

¹³⁵ RegC (n 18) 1.

¹³⁶ *Prosecutor v. Lubanga*, 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 2009 [ICC-01/04-01/06-2049].

characterisation to also include crimes of sexual violence, as a war crime or crime against humanity. It was not clear from the decision whether the recharacterisation would rely on new facts and circumstances.

Lubanga applied to appeal the decision to notify of possible use of Regulation 55, and the appeal was granted.¹³⁷ In the appeal the defence claimed that Regulation 55 was “inherently incompatible” with the Statute and Rules, general principles of international law and the rights of the accused.¹³⁸ Lubanga also argued that because Regulation 55 affected the substance of the trial and rights of the accused, the judges went beyond their powers adopting the Regulation. Lastly Lubanga claimed that Regulation 55 was in conflict with Article 61(4) and 61(9).¹³⁹

The AC unanimously reversed the TC's decision to give notice.¹⁴⁰ In assessing the compatibility of Regulation 55 with the Statute, the AC first examined Article 52.¹⁴¹ Article 52 authorised the judges to adopt regulations “necessary for [the] routine functioning” of the Court. The Statute does not give any guidance on the scope of ‘routine functioning’. In the Report of the Judges on the Regulations, ‘routine functioning’ was interpreted as “every step, deed or action that is incidental to the invocation and exercise of the Court’s jurisdiction”.¹⁴² The AC interpreted ‘routine functioning’ as a “broad concept”, thus expanding the scope of what issues the judges could decide on.

The AC considered that the fact that a modification could impact the substance of the trial and rights of the defendant did not mean that the matter could not be part of the Court's routine functioning. The AC also expressed that the adoption of Regulation 55 was necessary to resolve the disputed question of modifications of the legal characterisation, instead of leaving the question to be determined through case law. Therefore the AC did not consider the adoption of Regulation 55 a breach of Article 52.

Lubanga's second claim was that Regulation 55 was incompatible with Article 61(9).¹⁴³ The AC pointed out that Article 61(9) did not explicitly address or exclude the possibility of modifications

¹³⁷ Prosecutor v. Lubanga, Defence Application for Leave to Appeal the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court rendered on 14 July 2009 2009 [ICC-01/04-01/06-2073-tENG].

¹³⁸ Prosecutor v. Lubanga, 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 2009 [ICC-01/04-01/06-2112-tENG] para 5.

¹³⁹ Prosecutor v. Lubanga, Conclusions de la Défense sur des questions devant être tranchées à un stade précoce de la procédure 2007 [ICC-01/04-01/06-1033] para 37.

¹⁴⁰ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51).

¹⁴¹ *ibid* 69–72.

¹⁴² Stahn (n 62) 12.

¹⁴³ Prosecutor v. Lubanga Additional Defence Submission (n 139) para 37.

at the trial stage.¹⁴⁴ It therefore concluded that:

article 61 (9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.

The AC also dismissed Lubanga's claim that Regulation 55 was incompatible with principles of international law.¹⁴⁵ Since the judges adopted the Regulations pursuant to the Statute the AC concluded that there was no lacuna that needed to be filled through the interpretation of general principles of law.

Furthermore the AC found that Regulation 55 did not breach the accused person's rights as such; it must be considered in each case whether the safeguards are implemented.¹⁴⁶ The AC therefore concluded that Regulation 55 was not inherently incompatible with the Statute.

In newer cases, where the question of compatibility has become an issue, the Chambers have referred to the conclusions of the AC in the Lubanga-case.¹⁴⁷ In the remaining cases, the question of compatibility has not been discussed.¹⁴⁸ The judges seem to be in agreement that Regulation 55 is compatible with the Statute.

Some scholars disagree with this conclusion.¹⁴⁹ Dov Jacobs points out that the disagreement about *iura novit curia* in the drafting process does not automatically mean that the Statute is ambiguous.¹⁵⁰ He argues that the aim of eradicating impunity is a policy approach, and not a sufficient legal justification for a provision. This argument has some merit to it. Without the *travaux préparatoires* explicitly setting out that the drafters intended there to be a lacuna regarding modifications of the charges at the trial-stage, it is difficult to consider a teleological interpretation justified.

However, the judges were not mandated to adopt regulations to clarify the ambiguous parts of the Statute. The judges were mandated to regulate the trial process, which includes adopting regulations

¹⁴⁴ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) para 77.

¹⁴⁵ *ibid* 79–81.

¹⁴⁶ *ibid* 86–88.

¹⁴⁷ Prosecutor v. Bemba, Decision on Defence Request to Leave to Appeal Decision on Reg. 55(2) 2013 [ICC-01/05-01/08-2487-Red] para 28; Prosecutor v. Katanga Chui Decision on Reg. 55 Implementation (n 30) para 12.

¹⁴⁸ Prosecutor v. 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' 2013 [ICC-01/04-01/07-3363]; Prosecutor v. Gbagbo, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court 2015 [ICC-02/11-01/15-185].

¹⁴⁹ Heller (n 76); Jacobs (n 132); Fry (n 100).

¹⁵⁰ Jacobs (n 132) 214–216.

for questions that are not explicitly addressed in the Statute. As a treaty and founding document the Statute can not be expected to address all questions that might arise throughout the process. It is established that Regulation 55 is adopted in accordance with Article 52. Thus, this mandate granted to the judges through the Statute must be respected. Any other solution could open for discrediting other regulations, and create insecurity about the Court's legal framework.

The standard to assess the legality of Regulation 55 must then be whether it is contrary to any other provisions of the Statute. A key point here is that no provision in the Statute explicitly addresses modifications of the legal characterisation during trial. Article 61 concerns the confirmation process, not the trial stage. Therefore, there have to be other grounds to reject a Regulation created in accordance with the process prescribed by the Statute. The principle of legality and the consideration of predicability supports this reasoning. In conclusion, Regulation 55 must be deemed compatible with the Statute.¹⁵¹

This does not mean that any application of Regulation 55 is permissible. The Statute is not ambiguous regarding amendments.¹⁵² Thus, a modification made pursuant to Regulation 55 must not amount to an amendment. This will be further addressed in Section 4.7.

4.4 Interpretation of Regulation 55 in relation to Article 74(2) of the Statute

The wording of Regulation 55 is somewhat ambiguous. Regulation 55(1) explicitly stipulates that a change in the legal characterisation, “in [the TC's] decision”, must happen without exceeding the facts and circumstances. Regulation 55(2), on the other hand, stipulates that if notice is given “at any time during trial” certain requirements apply. Ergo, Regulation 55 can be interpreted as creating one procedure for modifications *in the decision*, according to Regulation 55(1), and one for modifications *during* trial, according to Regulation 55(2). Then Regulation 55(3) lists safeguards “[f]or the purposes of sub-regulation 2”, indicating that these safeguards only apply to modifications done during trial. This interpretation affords the accused less rights than if the paragraphs are read in conjunction. Therefore the latter interpretation should be favoured.

The judges did not agree on how to interpret Regulation 55 from the outset. In the Lubanga-decision, the TC interpreted Regulation 55(1) and (2) as two separate procedures for modifying the

¹⁵¹ See also Stahn (n 62) 31.

¹⁵² Rome Statute (n 12) Art. 61.

legal characterisation, subject to different conditions.¹⁵³ The TC considered that the limitations of Article 74(2) only applied to modifications *in the decision*, not to modifications *during* trial. This interpretation allowed the TC to include crimes of sexual violence even though the necessary facts were not described in the charges. Presiding Judge Fulford dissented to this decision, claiming that Regulation 55 did not provide two separate processes.¹⁵⁴

In the appeals decision the AC addressed the TC's interpretation of Regulation 55.¹⁵⁵ The AC found that reading Regulation 55(2) to allow introduction of new facts would conflict with Article 74(2). Given that the Regulations shall be read subject to the Statute, this interpretation was regarded as incorrect. In conclusion, the AC found that the limitations of Article 74(2) apply also to modifications pursuant to Regulation 55(1). The AC emphasised that new facts and circumstances may only be added under the procedure of Article 61(9).

Accordingly, Regulation 55 must be read as a whole: paragraph 1 introduces the power to modify, with some restrictions; paragraph 2 prescribes when and how it can be applied; and paragraph 3 lists the safeguards. The AC's interpretation has been cited in later cases, and it is now undisputed that changes pursuant to Regulation 55 must be in accordance with Article 74(2).¹⁵⁶

4.5 Timing of Regulation 55 notice

According to Regulation 55(2) the notice of a possible change in legal characterisation may be given “at any time during the trial”. An interpretation of the ordinary meaning of ‘trial’ renders two alternatives: the oral hearings or the entire trial stage.

The timing of the notice became an issue in the Katanga-case. Germain Katanga was charged as an indirect co-perpetrator of war crimes, as the leader of *Force de Résistance Patriotique en Ituri*, in the Democratic Republic of Congo.¹⁵⁷ Katanga's case was initially joint with the case of Mathieu Ngudjolo Chui, who allegedly ran another rebel group.¹⁵⁸ The PTC confirmed charges against them

¹⁵³ Prosecutor v. Lubanga Reg. 55 Notice (n 136) paras 27–28.

¹⁵⁴ Prosecutor v. Lubanga, 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’ 2009 [ICC-01/04-01/06-2054] para 30.

¹⁵⁵ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) paras 89–95.

¹⁵⁶ Prosecutor v. Katanga Chui Decision on Reg. 55 Implementation (n 30) para 21; Prosecutor v. Gbagbo Reg. 55 Notice (n 148) para 9; Prosecutor v. Bemba Decision on Requested Appeal of Reg. 55 Notice (n 147) para 19.

¹⁵⁷ ICC, ‘Katanga Case Information Sheet’.

¹⁵⁸ War Crimes Research Office, ‘Regulation 55 and the Rights of the Accused at the International Criminal Court’ (American University Washington College of Law 2013) Legal Analysis and Education Project 24.

as indirect co-perpetrators of crimes against humanity and war crimes.¹⁵⁹ However, Chui was acquitted and released in December 2012.¹⁶⁰

Six months after the oral hearings in the Katanga-trial had closed, the TC gave notice that Regulation 55 would be used to consider another mode of liability; complicity to a crime by a group acting with a common purpose.¹⁶¹

Judge Van den Wyngaert dissented from the decision giving notice to use Regulation 55.¹⁶² Wyngaert pointed out that the timing of the notice; at the end of the deliberations stage, deprived the accused of the possibility to effectively respond to it.¹⁶³

Katanga appealed the decision, claiming that it was too late to apply Regulation 55 during deliberations.¹⁶⁴ The appeal was rejected by the AC.¹⁶⁵ Regarding the question of timing, the AC found that the wording sets forth that recharacterisation could happen “at any time during the trial”, also at the deliberations stage.¹⁶⁶ The AC reinforced this interpretation by pointing out that the hearings may still be reopened at the deliberation stage. This conclusion was reiterated in the Gbagbo-case, where the TC established that a Regulation 55 notice may also be given before opening statements.¹⁶⁷

4.6 Fairness considerations when applying Regulation 55

Regulation 55(2) prescribes a number of safeguards for the accused. First of all, the parties shall be given the opportunity to make submissions. The hearing may also be suspended, or new hearings may be organised to hear matters related to the recharacterisation. In addition, Regulation 55(3) stipulates that the accused must be ensured adequate time and facilities to prepare a defence, and additional examination of witnesses or evidence, if necessary.

¹⁵⁹ Prosecutor v. Katanga Chui, Decision on the confirmation of charges 2008 [ICC-01/04-01/07-717]; Rome Statute (n 12) Art. 25(3)(a).

¹⁶⁰ Prosecutor v. Chui, Judgment Pursuant to Article 74 of the Statute 2012 [ICC-01/04-02/12-3-tENG].

¹⁶¹ Prosecutor v. Katanga Chui Decision on Reg. 55 Implementation (n 30); Rome Statute (n 12) Art. 25(3)(d).

¹⁶² Prosecutor v. Katanga Chui, Wyngaert Minority Opinion on Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons 2012 [ICC-01/04-01/07-3319].

¹⁶³ *ibid* 27.

¹⁶⁴ Prosecutor v. Katanga, Defence’s Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons 2013 [ICC-01/04-01/07-3339].

¹⁶⁵ Prosecutor v. Katanga Decision on Appeal of Reg. 55 Notice (n 148).

¹⁶⁶ *ibid* 17.

¹⁶⁷ Prosecutor v. Gbagbo, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’ 2015 [ICC-02/11-01/15-369] paras 51–52.

Beyond this, Regulation 55 does not explicitly prescribe that the TC shall consider the fairness of a recharacterisation. However, since the Regulations shall be read subject to the Statute, the overall fairness requirements apply also here.¹⁶⁸ This has been emphasised in several decisions.¹⁶⁹ The right to a fair hearing includes the right to prompt information about the charges, an adequate defence, trial without undue delay and the right to remain silent.

4.6.1 The freedom from self-incrimination

The accused has a right to silence, and may not be compelled to testify.¹⁷⁰ If the accused chooses to testify, the Prosecutor may cross-examine the accused, and the information may be used against him/her.¹⁷¹

In the Katanga-case, the defendant chose to testify during trial.¹⁷² The TC then used information from the testimony to recharacterise the charges to another mode of liability. In its decision to apply Regulation 55, the TC stated that Katanga was fully aware of the existence of Regulation 55 and therefore it was not problematic to use the testimony against him.¹⁷³

Judge Wyngaert was deeply critical to this assessment.¹⁷⁴ The TC eventually recharacterised Katanga's mode of liability, like notified.¹⁷⁵ In her dissenting opinion to the final judgment Wyngaert pointed out that;

the Majority has turned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility.¹⁷⁶

Allowing this use of Regulation 55 severely impedes the freedom from self-incrimination. Since there will always be the possibility that Regulation 55 could be invoked, it would never be advisable for the defendant to testify.

Article 67(1)(g) only explicitly protects the defendant from compelled self-incrimination. However, the TC declared additional requirements for the testimony and subsequent cross-examination; that

¹⁶⁸ Rome Statute (n 12) Art. 67.

¹⁶⁹ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) para 100; Prosecutor v. Katanga Chui Wyngaert Minority Opinion on Decision on Reg. 55 Implementation (n 162) para 25.

¹⁷⁰ Rome Statute (n 12) Art. 67(1)(g).

¹⁷¹ Schabas (n 24) 814.

¹⁷² Prosecutor v. Katanga Chui Wyngaert Minority Opinion on Decision on Reg. 55 Implementation (n 162) paras 45–47.

¹⁷³ Prosecutor v. Katanga Chui Decision on Reg. 55 Implementation (n 30) para 52.

¹⁷⁴ Prosecutor v. Katanga Chui Wyngaert Minority Opinion on Decision on Reg. 55 Implementation (n 162) paras 45–47.

¹⁷⁵ Prosecutor v. Katanga, Judgment pursuant to article 74 of the Statute 2014 [ICC-01/04-01/07-3436-tENG].

¹⁷⁶ Prosecutor v. Katanga, Annex I - Minority Opinion of Judge Christine Van den Wyngaert 2014 [ICC-01/04-01/07-3436-AnxI] para 58.

the questioning was limited to “the present case” and “strictly related to the charges”.¹⁷⁷ Thus, it could be argued that the testimony may not be used to substantially change the charges or the case. This could amount to a breach of the freedom from self-incrimination. As a minimum, the TC should have ensured that Katanga understood that the information from his testimony and cross-examination could be used in a later recharacterisation.

4.6.2 The right to be informed about the charges and to prepare an adequate defence

Although it is established that a Regulation 55 notice may be given at any stage during the deliberations, it must also be ensured that the timing of the notice is fair. The accused has a right to be “informed promptly and in detail of the nature, cause and content of the charges”.¹⁷⁸ The ‘nature’ refers to the legal characterisation of the alleged crime, the ‘cause’ to the facts, and the ‘content’ to evidentiary material.¹⁷⁹ This right must also be complied with if the charges are subject to change throughout the trial.¹⁸⁰

The information must be provided ‘promptly’. The deadlines for amendments of the charges before the confirmation hearing could give some guidance on what deadlines should apply.¹⁸¹ The accused person must be notified about any amendments to the charges at least 15 days before the confirmation hearing.¹⁸² It could be argued that a similar timeframe should apply for later modifications. However, the right to information about the charges must here be weighed against the need for modifications to secure a conviction. It must also be taken into consideration whether the safeguards provided in Regulation 55 are implemented. Late notice about a recharacterisation might be rectified by suspending the hearings so that the defendant can prepare.

However, the rights of the accused according to the Statute, are internally conflicting. Suspended or additional hearings may delay the trial and violate the defendant's right to trial without undue delay.¹⁸³ There is no clear answer to how these interests should be balanced. In the Gbagbo-case the TC rejected the defence's request for additional preparation time, because the request was not sufficiently justified.¹⁸⁴ This illustrates that there is a certain threshold for granting the safeguards prescribed in Regulation 55(2) and (3).

¹⁷⁷ *ibid* 53.

¹⁷⁸ Rome Statute (n 12) Art. 67(1)(a).

¹⁷⁹ *Friman and others* (n 11) 385; *Safferling* (n 23) 248.

¹⁸⁰ *Friman and others* (n 11) 456.

¹⁸¹ RPE (n 47) 121(3), 121(4).

¹⁸² *ibid* 121(4).

¹⁸³ Rome Statute (n 12) Art. 67(1)(c).

¹⁸⁴ *Prosecutor v. Gbagbo* Reg. 55 Notice (n 148) para 17.

The AC in the Katanga-case stated that the necessary information could even be provided subsequent to the notice.¹⁸⁵ This may be acceptable if the notice is given at an early stage of the proceedings, but not if there is little time until closing of hearing. Then the defendant may have insufficient time to change defence strategy. What constitutes ‘prompt’ information should also be adjusted to the significance of the change.

The wording ‘in detail’ shows that the information must be of a certain specificity. In order to prepare an adequate defence the notice must contain sufficient information about the recharacterisation.¹⁸⁶ A notice simply stating which legal characterisation might be considered is not sufficient. For the accused to prepare a proper defence the notice must also point out the specific facts the recharacterisation will rely on. The AC in the Katanga-case has confirmed this.¹⁸⁷

In the cases where Regulation 55 has been applied so far, lack of information has been recurring. In the Bemba-case, the notice only mentioned which mode of liability it might consider, without further explanation.¹⁸⁸ In the Lubanga-case, the AC pointed out that the TC's explanation for the notice was “extremely thin”.¹⁸⁹ The AC particularly remarked the lack of detail about the offences it considered including, and how these were covered by the facts and circumstances. Here, the AC shows that the notice should fulfil similar requirements as the original DCC. Since this information is regarded necessary for the defendant to be informed about the charges and prepare a defence at the beginning of trial, this position should not deteriorate throughout the trial.

4.7 Impermissible recharacterisations

As mentioned, it must be assessed whether some modifications to the legal characterisation of the charges are impermissible, because they are contrary to Article 61(9) or Article 74(2). The two are closely interconnected.

This question first came up in the Regulation 55 notice in the Lubanga-case. Judge Fulford dissented to the decision, asking; “can a charge remain “unamended” if one of the necessary

¹⁸⁵ Prosecutor v. Katanga Decision on Appeal of Reg. 55 Notice (n 148) para 101.

¹⁸⁶ Rome Statute (n 12) Art. 67(1)(b).

¹⁸⁷ Prosecutor v. Katanga Decision on Appeal of Reg. 55 Notice (n 148) para 101.

¹⁸⁸ Prosecutor v. Bemba, 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 2012 [ICC-01/05-01/08-2324] para 5.

¹⁸⁹ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) para 109.

ingredients, the legal characterisation, has changed?”¹⁹⁰ Fulford did not assess the issue any further.

The AC followed up, noting that; beyond the limitations of Article 74(2), it was not prescribed which changes in the legal characterisation were permissible, and that the particular circumstances in each case would have to be considered.¹⁹¹ However, this question was beyond the scope of the appeal.

The question is when a modification of the legal characterisation results in the decision exceeding the facts and circumstances of the charges. The challenge lies in defining the ‘facts and circumstances’, that set the limits for the decision.¹⁹² It is clear that the facts required in Regulation 52, like time and place of the alleged crime, are binding. However, the DCC may also contain other background information, that may be changed and added throughout the trial. The Prosecutor has been encouraged to separate these facts in the DCC, but this is not always done.¹⁹³ In the Katanga-case, the TC used information from footnotes in the confirmation decision, which can not qualify as confirmed and binding facts.¹⁹⁴

If the mode of liability is changed in accordance with Regulation 55, from facilitating the commission of a crime to directly committing the crime, the need for detailed facts increases. The same applies when changing the contextual elements; from a non-international to an international conflict, or between any of the core crimes. Either of these changes requires changing the facts that were initially confirmed. Not having clearly defined which ‘facts and circumstances’ are binding gives the Prosecutor leeway to give facts initially intended as background information a key role in a new narrative. In her dissenting opinion in the Katanga-case, Judge Wyngaert addressed the issue:

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 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. [...] 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”.¹⁹⁵

¹⁹⁰ Prosecutor v. Lubanga Fulford Dissenting Opinion on Reg. 55 Notice (n 154) para 18.

¹⁹¹ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) para 100.

¹⁹² Rome Statute (n 12) Art. 74(2).

¹⁹³ Prosecutor v. Ruto Sang Order about Charges (n 52) para 11.

¹⁹⁴ Prosecutor v. Katanga Wyngaert Dissenting Opinion to Final Judgment (n 176) para 19.

¹⁹⁵ Prosecutor v. Katanga Chui Wyngaert Minority Opinion on Decision on Reg. 55 Implementation (n 162) para 20.

To this the AC answered that it “does not accept that a change in the narrative exceeds *per se* the facts and circumstances described in the charges”.¹⁹⁶ With this it leaves the door open for considerations along the lines suggested by Judge Wyngaert. Stegmiller argues that “any change in characterization results in a change of narrative to a certain extent” and therefore it must be decided on a case-by-case basis whether a recharacterisation alters the facts and circumstances.¹⁹⁷

An example of a problematic recharacterisation is in the Gbagbo-case. The TC gave notice that it might change the legal characterisation to command responsibility; a mode of liability that was explicitly rejected by the PTC.¹⁹⁸ The AC found “no legal impediment” to this, and consequently dismissed Gbagbo's appeal.¹⁹⁹ Although Regulation 55 does not explicitly address this situation, allowing recharacterisation of rejected charges strips the PTC of its authority and disregards the structure of the proceedings.

Similarly, in the Bemba-case, the TC gave notice that it might apply Regulation 55, to change the legal characterisation from “knew” to “should have known”. These are both alternatives for the mental element of command responsibility.²⁰⁰ However, changing from a subjective to an objective requirement for the mental element would make it substantially easier for the Prosecutor to prove Bemba's knowledge of the crimes. To achieve this the TC would have to rearrange the facts of the case to fit this new narrative.

Although a change may be formally within the facts and circumstances, creating this new narrative may be problematic. Some modifications of the legal characterisation alter the charges to such an extent that it can be discussed whether the charges are still the same. If the charge is regarded as new Article 61(9) requires there to be held an additional confirmation hearing. In addition, this new narrative requires a completely new defence strategy. The system of the proceedings and the rights of the accused speaks against allowing such changes.

This analysis has shown that the facts and legal characterisation are closely interconnected, and cannot be considered as completely isolated elements of the charges. It is near impossible to draw the line on a general basis for when a recharacterisation exceeds the facts and circumstances. As illustrated, the permissibility of the change cannot be determined based solely on the type of

¹⁹⁶ Prosecutor v. Katanga Decision on Appeal of Reg. 55 Notice (n 148) para 58.

¹⁹⁷ Stegmiller (n 113) 903.

¹⁹⁸ Prosecutor v. Gbagbo Reg. 55 Notice (n 148) para 15.

¹⁹⁹ Prosecutor v. Gbagbo Judgment on Appeal of Reg. 55 Notice (n 167) para 32.

²⁰⁰ Prosecutor v. Bemba Reg. 55 Notice (n 188) para 5; Rome Statute (n 12) Art. 28(a)(i).

change; between core crimes, acts, mode of liability or context.

Whether a recharacterisation is permissible will depend on the confirmed facts of the case and the proposed recharacterisation. If the recharacterisation exceeds the facts and circumstances it is clear that this change is impermissible. However, it has also been established here that the consideration of fairness may bar certain recharacterisations. Hopefully the TCs will acknowledge this in future cases.

4.8 Adjudicating an error in law

Even when the TC might have erred in law, it is difficult to get a decision declaring it. An issue that significantly affects the fair and expeditious trial proceedings or outcome may be appealed, if it may materially advance the proceedings.²⁰¹ If it finds an error the AC has the choice between reversing or amending the decision on appeal.²⁰²

In the Lubanga-case the AC found that the TC had erred in its interpretation of Regulation 55.²⁰³ It found that the error had materially affected the decision, and therefore reversed the TC's decision. The TC then issued a new decision complying with the findings of the AC, and concluding that the legal characterisation could not be modified.²⁰⁴ This shows that it is possible to challenge the notice in an appeal. However, the appeal in the Lubanga-case concerned specific questions of legality regulated in the Statute and Regulations. Case law shows that the AC is more reluctant to make discretionary assessments about the fairness of a Regulation 55 notice.

In the Katanga-case, the AC expressed concern that the Regulation 55 decision was rendered at such a late stage, and emphasised the need to ensure a fair trial, especially the right to be tried without undue delay.²⁰⁵ The AC considered that the notice “[did] not provide much detail”, but still left it to the TC to determine the scope and timing of the information provided. The AC found it premature to assess the question of fairness until the final judgment.²⁰⁶ Judge Tarfusser dissented from this part of the majority decision.²⁰⁷ In particular, Tarfusser pointed out that since the AC did

²⁰¹ Rome Statute (n 12) Art. 82(1)(d).

²⁰² RPE (n 47) 158(1).

²⁰³ Prosecutor v. Lubanga Decision on Appeal of Reg. 55 Notice (n 51) para 112.

²⁰⁴ Prosecutor v. Lubanga, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court 2010 [ICC-01/04-01/06-2223] paras 37–38.

²⁰⁵ Prosecutor v. Katanga Decision on Appeal of Reg. 55 Notice (n 148) paras 97–99; Rome Statute (n 12) Art. 67(1)(c).

²⁰⁶ Prosecutor v. Katanga Decision on Appeal of Reg. 55 Notice (n 148) para 96.

²⁰⁷ Prosecutor v. Katanga, Dissenting Opinion of Judge Cano Tarfusser, in Judgement on the Appeal of Katanga on Regulation 55

not condemn the TC for providing insufficient information, the majority essentially accepted it.

In its final decision the TC briefly addressed the question of undue delay, finding that the accused was tried within reasonable time.²⁰⁸ Katanga decided not to appeal the final judgment, so the question of whether the recharacterisation was fair was never adjudicated.

When the Regulation 55 notice was given in the Bemba-case the defence sought leave to appeal, but the application for interlocutory appeal was rejected.²⁰⁹ The recharacterisation was expected to become an issue in the final judgment.²¹⁰ However, the TC established that Bemba “knew” that his forces committed or were about to commit crimes.²¹¹ Considering these findings, the Chamber did not need to recharacterise the charges pursuant to Regulation 55 to include “should have known” as the mental element. Therefore, the question of fairness will probably not be adjudicated in this case either.

These cases reveal an unfortunate pattern. If the judges refuse to address the question of fairness until the recharacterisation is made, the issue will not be assessed until the trial is over. If the issue is lack of information in the Regulation 55 notice, a determination in an appeal to the final judgment is too late. The accused person will not have the necessary information to argue against recharacterisation. It is therefore important that the AC uses the next appeal on this issue to set some fairness standards for the Regulation 55 notice. Ensuring that the accused is properly informed does not harm the overall goal of securing a materially correct conviction, and should therefore be prioritised.

A related question is how the AC would address an error in the actual recharacterisation. The recharacterisation would happen in the final decision, and the issue has not been subject to appeal yet. The final decision may be appealed based on an error of law, fact, fairness or procedural error.²¹² If the AC finds that the decision was materially affected by the error it may choose to reverse the decision, amend it, or order a new trial.²¹³ It remains to be seen how the Chambers will address this issue.

Notice 2013 [ICC-01/04-01/07-3363] paras 22–27.

²⁰⁸ Prosecutor v. Katanga Judgment (n 175) paras 1588–1591.

²⁰⁹ Prosecutor v. Bemba, 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 2012 [ICC-01/05-01/08-2483-Red]; Prosecutor v. Bemba Decision on Requested Appeal of Reg. 55 Notice (n 147).

²¹⁰ Friman (n 120) 917.

²¹¹ Prosecutor v. Bemba, Judgment pursuant to Article 74 of the Statute 2016 [ICC-01/05-01/08-3343] paras 717–718.

²¹² Rome Statute (n 12) Art. 81(1)(b).

²¹³ *ibid* Art. 83(2).

5 Conclusion

The aim of this thesis was to describe and analyse the provisions regulating modifications of charges at the ICC. The analysis has shown that the possibility to modify the charges is very dependent on the stage of the proceedings. During the confirmation process, the Prosecutor has a wide discretion to amend the facts or the legal characterisation of the charges. As the confirmation hearing progresses the opportunity to amend the charges narrows, and the PTC gains more authority over the Prosecutor's decisions.

At the trial stage fewer changes are permitted. In addition, the competence to modify the charges shifts from the Prosecutor to the TC. This corresponds with the adversarial structure of the trial; now the Prosecutor and the accused are opposing parties, and the Prosecutor should not have an advantageous position. The TC takes the role as the referee, and has the authority to make certain changes necessary to reach a conviction.

Although being controversial, Regulation 55 has been invoked in all four cases where judgment has been rendered, as well as in several other cases.²¹⁴ Still, the judges do not agree on the scope of Regulation 55. A fundamental disagreement about the role of the judge seems to influence the interpretation of the Court's legal framework.

However, with PTCs' acceptance of cumulative charging, Regulation 55 might not be as frequently used in the future. An aspect of this shift in charging practice worth considering is the effect on the accused person. Preparing a defence against an increased number of charges puts a large burden on the accused. However, the new charging practice will improve the defendant's possibility to stay informed about the case.

This analysis has shown that whichever interpretation the Chambers chooses, the question of fairness becomes an issue. Criminal justice is built on the balance between eradicating impunity and maintaining the rights of the defendant. Since the ICC is its own watchdog, the judges need to address the questions of fairness that arise during trial. The ICC also needs to appear fair in order to maintain its legitimacy.

A positive perception of the Court also requires a clear separation of roles; between the States Parties as legislators, the Prosecutor as the accuser and the Chambers as the judiciary.²¹⁵ It is

²¹⁴ Fry (n 100) 577.

²¹⁵ See also Jacobs (n 132) 221.

essential that the judges respect their role, and avoid judicial activism contrary to the Statute.

The role of the judge is also closely related to the overall aim of the proceedings. Whilst the main goal of a civil law system is to find the truth, common law systems are structured to prove that the accused is “guilty as charged”.²¹⁶ This illustrates how the fundamental differences between the legal traditions affects the charges. However, these varieties cannot take precedent over the tasks as they are explained in the Statute.

As evidenced, importing bits and pieces from different traditions without looking at the system as a whole creates a lack of coherence, and creates loopholes where breaches of fairness can happen. ICL must be acknowledged as an autonomous body of procedural law; a unique, hybrid system. By interpreting the law in this context, and not through common or civil law, the result will be more coherent.²¹⁷

Hopefully, with the increase in case law, the remaining ambiguities will diminish. This is necessary for the ICC to maintain its legitimacy and fulfil its mandate.

²¹⁶ Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) 221.

²¹⁷ Gideon Boas and others, *International Criminal Law Practitioner Library*, vol 3 (Cambridge University Press 2011) 16.

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