

Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?

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Abstract

The ICC's Regulation 55, which allows the Trial Chamber to modify the legal characterization of facts in the final judgment, has been used too often and too carelessly. Recharacterization must not exceed the facts and circumstances described in the charges, but material facts and their legal qualification are like communicating vessels; changing the latter affects the former (and *vice versa*). In their application of Regulation 55 to date, chambers have underappreciated this, treating cases as if they have blurry factual boundaries where material facts can be swapped, neglected, or created at will. This article is not a plea for abolition of Regulation 55, though, but explores which modifications are permissible, and finds that when comparing a change regarding the contextual elements or (sub)categories of crimes to a change regarding the mode of participation the latter is most problematic and often detrimental to the rights of the accused.

Key words

Regulation 55; legal (re)characterization; facts and circumstances; subsidiary facts; alternative charges

I. INTRODUCTION

In November 2014, oral closing statements were heard in the *Bemba* trial at the International Criminal Court (ICC). After *Lubanga*, *Ngudjolo Chui* and *Katanga*, this will be the fourth case in which a judgment by a Trial Chamber will be issued. In all these cases, as well as in a significant number of other cases before the Court,¹ Regulation 55 of the Regulations of the Court, adopted by the Court's judges, has played a significant role.

Regulation 55 allows the Chamber to modify the legal characterization of facts in its final judgment as long as the new legal label does not exceed the facts and circumstances described in the charges. If the Chamber anticipates that it might recharacterize the facts, it must notify the parties and allow them to make submissions. Moreover, the Chamber must ensure that the accused is given adequate time and facilities for the effective preparation of his or her defence, and if necessary,

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¹ These other cases are *Prosecutor v. Abdallah Banda Abakaer Nourain*, *Prosecutor v. Uhuru Muigai Kenyatta*, *Prosecutor v. William Samoei Ruto*, and *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*. All cases in which Regulation 55 is/was an issue or in which it has been applied are discussed in Section 3.2., *infra*.

allow the accused to (re-)examine witnesses or present other evidence. In *Bemba*, for instance, while the outcome will not become clear until the final judgment, parties and participants have been informed that the knowledge requirement for Bemba, who is allegedly responsible as military commander for two counts of crimes against humanity and two counts of war crimes, may change from ‘knew’ to ‘should have known’.²

Commentaries scrutinizing Regulation 55 have thus far focused on the legitimacy of the provision itself and its problematic application in the ICC’s cases to date.³ But one particular question has not yet been explored in a systematic fashion: which changes are permissible? This article makes this question concrete, and answers it not only by scrutinizing the ICC’s relevant case law to date, but also by exploring additional feasible types of recharacterization, i.e., with respect to changes regarding the contextual elements, the underlying (sub)categories of crimes or the form of participation. It then assesses for each type of alteration whether it (hypothetically) exceeds the facts and circumstances described in the charges of a case.

This query requires going back to the basic principles of pleading before international criminal tribunals. Matters such as the content of indictments, the ingredients comprising a charge, and the difference between subsidiary facts and material facts are the starting point for assessing whether a recharacterization exceeds the facts and circumstances described in the charges. The key question in this respect is whether the application of Regulation 55 leads to altering the *materiality* of facts. The importance of this question is found in the rationale behind pleading principles: the accused has the right to know what he or she is accused of, and therefore, the charges must be as specific as possible. Moreover, only material facts need to be proven beyond a reasonable doubt to provide the basis for a conviction, and awareness of those facts enables preparing an effective defence. Not knowing which facts are material leaves the defence in the awkward position of having to devise and put forth two or more mutually exclusive or counterfactual lines of defence, which is prejudicial.

This article will take a closer look at how Regulation 55 can and cannot be applied by first exploring and dissecting all relevant elements of a charge: the legal characterization, the facts and circumstances (i.e., the material facts), and other (subsidiary) facts (Section 2). It will then take a closer look at Regulation 55’s adoption and application in cases to date, discussing the *Lubanga*, *Bemba*, *Katanga*, *Banda*, and *Ruto and Sang* cases, as well as a related development regarding alternative charging, which has emerged as an apparent substitute to the Regulation 55 avenue in the 2014 confirmation of charges decisions in the *Ntaganda*, *Gbagbo*, and *Blé Goudé* cases (Section 3). Finally, it will explore different types of recharacterization, seeking

2 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2324, T.Ch. III, 21 September 2012, para. 5.

3 See, e.g., K.J. Heller, ‘“A Stick To Hit the Accused With”: The Legal Recharacterization of Facts Under Regulation 55’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 981; D. Jacobs, ‘A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court’, in W.A. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (2013), 205.

to answer the main question (Section 4): what determines whether a change is permissible? It will become clear that some recharacterizations are rather harmless, while others cannot but change the materiality of facts to the detriment of the accused, which is prohibited by Regulation 55. The provision has its merits, and this article is not a straight-out plea for abolition of the provision altogether, but experiences so far show that Regulation 55 has been utilized too often and too carelessly, while it should in fact be reserved for extraordinary instances only, with the upmost sensitivity to the rights of the accused.

2. BACK TO BASICS: CHARGES, FACTS, AND EVIDENCE

An indictment's unique and fundamental purpose is twofold: (1) to inform the accused about the charge(s), and (2) to settle the factual scope of the trial.⁴ Enabling the accused to know the case against him or her is crucial from a fair trial perspective, and the indictment is the core document on which that knowledge hinges. In other words, the accused must be put on notice as to the charges in order to be able to prepare a defence. Moreover, by providing this clarity the indictment also sets the case's factual parameters for trial, and to that end, keeps centre stage for the entire course of criminal proceedings.

The indictment is referred to as the Document Containing the Charges (DCC) at the ICC. It is the official accusatory instrument setting out the criminal charges against an accused. The ICC Regulations of the Court requires that the charging document contain the full name of the person and any other relevant identifying information, a statement of facts, and a legal characterization of those facts.⁵ It is the Prosecutor's responsibility to formulate and bring charges. The Pre-Trial Chamber confirms them.⁶ If, by means of its decision, the Pre-Trial Chamber makes amendments to the charges, the Prosecutor is required to file an updated DCC post confirmation.⁷ In case of a disparity between the Prosecutor's (updated) DCC and the Pre-Trial Chamber's Decision on the Confirmation of Charges, the latter takes precedence.⁸ After the trial has begun, the ICC Prosecutor may only withdraw charges.⁹ The ICC Statute and Rules of Procedure and Evidence (RPE) do not provide any possibilities for the Prosecutor to amend the charges after the trial has begun.¹⁰ But what is a charge, and what are the facts and circumstances of the case, demarcating the scope of the trial?

4 H. Friman et al., 'Charges', in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (2013), 381, at 383.

5 ICC Regulations of the Court, Reg. 52.

6 ICC Statute, Art. 61.

7 *Prosecutor v. Thomas Lubanga Dyilo*, Order for the prosecution to file an amended document containing the charges, ICC-01/04-01/06-1548, T.Ch. I, 9 December 2008, para. 13.

8 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence Application to Obtain a Ruling to Correct the Revised Second Amended Document Containing the Charges, ICC-01/05-01/06-935, T.Ch. III, 8 October 2010, para. 12.

9 ICC Statute, Art. 61(9).

10 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A.Ch., 1 December 2014, para. 129.

2.1 What is a charge?

Although the ICC's (as well as the ad hoc tribunals') legal framework does not provide a definition of a charge per se, it can be found by inference from the right of the accused to be put on notice of the charges. The statutes of international criminal courts and tribunals all follow the interpretation of a charge consisting of two elements – facts and their legal characterization – and mirror international human rights instruments in guaranteeing that an accused will be informed promptly and in detail in a language which he or she understands, of the nature *and* cause of the charge against him or her.¹¹ The nature of the charge translates as the legal qualification and the cause as the underlying material facts.¹²

The ICC Statute appears to add an extra component to a charge, stating that the accused has the right '[t]o be informed promptly and in detail of the nature, cause *and* content of the charge [...]'.¹³ However, it is unlikely that this third element has any independent meaning, because it is difficult to imagine a distinction between 'cause' and 'content'.¹⁴ The drafters probably added the word to convey comprehensiveness.¹⁵ Moreover, there is no ICC case law even hinting at any independent meaning of 'content', nor can anything be found on the matter in the official records of the Rome Conference.

2.2. Facts and circumstances: what is material?

The facts that should be included in an indictment are those that are essential to the outcome of the case, also known as the material facts. Those are the facts that must be proven to the requisite standard of proof – beyond a reasonable doubt. In other words, material facts are those on which the charges are premised and upon which the verdict is critically dependent. The conclusion of law is eventually drawn from the material facts and therefore the accused must be put on notice regarding these facts. They include all the facts that satisfy the legal elements of the individual crimes charged, the accused's criminal responsibility (including *mens rea*), and the contextual elements.¹⁶

At the ICC, terminology is not always consistent. The *Gbagbo* Pre-Trial Chamber has stated that the 'facts and circumstances described in the charges' as it is phrased

11 ICTY Statute, Art. 21(4)(a); ICTR Statute, Art. 20(4)(a); SCSL Statute, Art. 17(4)(a); STL Statute, Art. 16(4)(a); ICC Statute, Art. 67(1)(a); ECCC Internal Rules, Rule 21(1)(d).

12 *I.H. v. Austria*, Judgment of 20 April 2006, ECHR, Application No. 42780/98, at 30; *Pélessier and Sassi v. France*, Judgment of 25 March 1999, ECHR, Application No. 25444/94, at 51. See also W. Jordash and S. Martin, 'Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone', (2010) 23 LJIL 585, at 588; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 803.

13 ICC Statute, Art. 67(1)(a) (emphasis added).

14 W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 803; O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), 1257; Amnesty International, *Making the right choices – Part V: Recommendations to the diplomatic conference*, AI Index: IOR 40/10/98, at 60.

15 *Ibid.*

16 *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P.T.Ch. I, 3 June 2013, para. 19.

in Article 74 of the Statute indeed refer to the material facts of the case.¹⁷ However, the Appeals Chamber has declined to define the phrase, stating it would not in the abstract address ‘how narrowly or how broadly the term “facts and circumstances described in the charges” as a whole should be understood.’¹⁸

Subsidiary facts (also known as evidentiary facts at the ICTY and ICTR)¹⁹ are facts that are used as indirect proof, and therefore, do not need to be judicially established.²⁰ At the ICC, subsidiary facts have been defined as facts providing background information or indirect proof of material facts.²¹ While no Chamber has been particularly clear on it, this may be understood as creating the following chain: ‘direct evidence going to subsidiary (evidentiary) facts constitutes indirect evidence going to material facts.’²² In other words, material facts can be proven by inference from subsidiary facts. In numerous confirmation of charges decisions, Pre-Trial Chambers have reiterated that the facts and circumstances underlying the charges must be distinguished from other facts not mentioned in the charges but otherwise subsidiary or related to them.²³ This accords with pleading rules as developed in the case law of the ad hoc tribunals: all material facts must be in the indictment, but not the evidence tendered to prove them.²⁴ Naturally, only material facts are subject to confirmation as they are part of the charges.²⁵ While subsidiary facts help create the narrative of a case, they do not need to be individually established to the applicable standard of proof since they act as evidence. This is not to say that

17 *Prosecutor v. Laurent Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, ICC-02/11-01/11-325, P.T.Ch. I, 14 December 2012, para. 27.

18 *Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, ICC-01/04-01/07-3363, A.Ch., 27 March 2013, para. 50. Judge Van den Wyngaert mentions in one of her dissents that the following terms have been used: ‘factual allegations which support each of the legal elements of the crime charged’, ‘facts underlying the charges’, ‘material facts’, and ‘constitutive facts’. See footnote 18 in *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, ICC-01/04-01/07-3319, T.Ch. II, 21 November 2012, para. 14 (Dissenting Opinion of Judge Christine Van den Wyngaert).

19 See, e.g., *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-A, A.Ch., 29 July 2004, para. 219; *Prosecutor v. Simba*, Judgement, Case No. ICTR-01-76-A, A.Ch., 27 November 2007, para. 264.

20 In common law, evidentiary facts have been defined as those subsidiary facts introduced to prove material facts. See *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951): ‘Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.’ In common law, material facts are usually referred to as ‘ultimate facts’, but that terminology is not used at the international criminal courts and tribunals. See also Black’s Law Dictionary (Fifth ed., West Publishing Company 1979), at 500.

21 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Corr-Red, P.T. Ch. I, 7 March 2011, para. 37.

22 E. Fry, ‘International Crimes and Case Demarcation: What Are We Trying To Prove?’, (2015) 27 *Florida Journal of International Law* 163, at 192.

23 E.g., Banda and Jerbo Confirmation Decision, *supra* note 21, para. 36; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, P.T.Ch. II, 23 January 2012, para. 47.

24 *Prosecutor v. Naletilić and Martinović*, Judgment, Case No. IT-98-34-A, A.Ch., 3 May 2006, para. 23; Blaškić Appeal Judgment, *supra* note 19, para. 210; *Prosecutor v. Stakić*, Judgment, Case No. IT-97-24-A, A.Ch., 22 March 2006, para. 116; *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-A, A.Ch., 21 July 2000, paras. 61, 147, 153; *Prosecutor v. Ntagerura*, Judgement, Case No. ICTR-99-46-A, A.Ch., 7 July 2006, para. 21; *Prosecutor v. Simić*, Judgment, Case No. IT-95-9-A, A.Ch., 28 November 2006, para. 20; *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-A, A.Ch., 23 October 2001, para. 88.

25 *Prosecutor v. Laurent Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, ICC-02/11-01/11-325, 14 December 2012, para. 27.

judges will not need to make a finding regarding subsidiary facts at some level of probability in order for those facts to plausibly act as evidence.

This distinction is imperative, but it is not always an easy one to make in practice. Whether or not a fact may be regarded as material depends on the nature of the prosecution's case.²⁶ Decisive in this respect is the nature of the alleged criminal conduct, which mainly comes down to the proximity of the accused – both geographically and in terms of mode of liability – to the events alleged in the indictment.²⁷ For instance, if the accused is alleged to have personally committed the acts giving rise to the charges against him, the material facts would include such details as the identity of the victim, the place and the approximate date of the events in question, and the means by which the crime was committed. As the proximity of the accused to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused himself, upon which the prosecution relies to establish his responsibility as an accessory to or as a superior of the persons who personally committed the acts giving rise to the charges against him.²⁸

Generally, DCCs contain both material facts and subsidiary facts, albeit in different parts. A DCC has a separate section dealing with the charges, which should not include background information or evidence.²⁹ As long as the material facts are clearly distinguished from other facts and background information, Chambers have allowed other sections of the DCC to contain such additional information.³⁰ However, ICC case law continuously shows that keeping material facts clearly distinguished from other facts and evidence is not easy in cases involving international crimes, even when only looking at the charges section of a DCC. For example, on 1 December 2014, the ICC Appeals Chamber issued its first judgment on a verdict, namely in the *Lubanga* case, where the accused was found guilty of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.³¹ Nine individual cases of child soldiers initially comprised the core factual allegations central to the prosecution's case – the DCC's 'charges' segment contained a 'pattern' section and an 'individual cases' part. However, these nine individuals were deemed unreliable by the Trial Chamber, and the trial judges therefore reached the conclusion that it had not been proven beyond a reasonable

26 *Prosecutor v. Halilović*, Judgment, Case No. IT-01-48-A, A.Ch., 16 October 2007, para. 86; Naletilić and Martinović Appeal Judgment, *supra* note 24, para. 24; Kupreškić Appeal Judgment, *supra* note 24, para. 89; Blaškić Appeal Judgment, *supra* note 19, para. 210.

27 Halilović Appeal Judgment, *supra* note 26, para. 86; *Prosecutor v. Ntagerura et al.*, Judgement, Case No. ICTR-99-46-A, A.Ch., 7 July 2006, para. 121; *Prosecutor v. Krmojelac*, Judgment, Case No. IT-97-2S-A, A.Ch., 17 September 2003, para. 132; Kupreškić Appeal Judgment, *supra* note 24, para. 89; Blaškić Appeal Judgment, *supra* note 19, para. 210.

28 *Prosecutor v. Galić*, Decision on Application by Defence for Leave to Appeal, Case No. IT-98-29-AR72, A.Ch., 30 November 2001, para. 15; Kupreškić Appeal Judgment, *supra* note 24, paras 88-90; Banda and Jerbo Confirmation Decision, *supra* note 21, para. 134; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the confirmation of charges, ICC-01/05-01/08-424, P.T. Ch. II, 15 June 2009, para. 134.

29 *Prosecutor v. Muthaura & Kenyatta*, Order regarding the content of the charges, ICC-01/09-02/11-536, T.Ch. V, 20 November 2012, para. 14.

30 *Prosecutor v. Muthaura & Kenyatta*, Decision on the content of the updated document containing the charges, ICC-01/09-02/11-584, T.Ch. V, 28 December 2012, paras. 13, 23.

31 *Lubanga* Appeal Judgment, *supra* note 10.

doubt that these particular individuals had been conscripted or enlisted when under the age of 15, or that they had been used to participate actively in hostilities during the relevant time period of the indictment.³² On appeal, the Prosecutor then had to change her narrative, and in her Response to the Document in Support of the Appeal, she demoted the nine cases to ‘sample episodes chosen as evidence’ while the pattern section in the charges became the material focus of the case.³³ In her dissenting opinion to the Appeal Judgment, Judge Ušacka pointed to this re-categorization from material facts to evidence and the promotion of the pattern section to the main material facts underlying the charges, noting that because of it, Lubanga was convicted ‘on the basis of vaguely formulated allegations that had previously played a peripheral and subsidiary role in the case.’³⁴ Without the nine cases, there were indeed no details provided in the indictment as to the identities of any of the child soldiers, creating a discussion of whether sufficient notice as to the charges had been provided to the accused. Judge Ušacka opined that as a result of this shift in focus, Lubanga’s right to be informed in detail of the nature and cause of the charges had been violated and that the Trial Chamber should have acquitted the accused after having found that the factual allegations underlying the individual cases in the indictment had not been established beyond a reasonable doubt.³⁵ The majority, however, found that Lubanga had not substantiated his argument that the charges were insufficiently detailed regarding the particulars of the instances of enlistment, conscription and participation in hostilities.³⁶ The majority pointed at the Summary of Evidence as providing more details but refused to conduct a *proprio motu* review of this and other related documents.³⁷ Most worrisome, the Appeals Chamber found in general that such detail could have been derived from ‘other auxiliary documents’ or any submission made by the Prosecutor before the start of trial.³⁸

Since both material facts and subsidiary facts may be found in the DCC as a whole, it is worth noting a very peculiar statement made by the ICC’s Appeals Chamber in its Regulation 55 Judgment in the *Katanga* case. As stipulated above, only material facts are subject to confirmation, but perhaps we must conclude that the AC does not agree, or at least is confused, as it stated it was not persuaded by the argument that:

necessarily, only “material facts”, but not “subsidiary or collateral facts” may be the subject of a change in the legal characterisation. There is no indication of any such limitation in the text of article 74 (2) of the Statute or regulation 55 (1) of the Regulations

32 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012, paras. 478–84.

33 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A.Ch., 1 December 2014, para. 18 (Dissenting Opinion Judge Ušacka).

34 *Ibid.* para. 17.

35 *Ibid.*, para. 20.

36 Lubanga Appeal Judgment, *supra* note 10, para. 136.

37 *Ibid.*, paras. 132, 134.

38 *Ibid.*, paras. 124, 130, 132.

of the Court. Rather, those provisions stipulate that any change cannot exceed the “facts and circumstances”.³⁹

This seems a nonsensical assertion. Indeed, Article 74(2) and Regulation 55(1) do not explicitly exclude the obvious. While other facts may be found in the DCC in introductory sections, the ‘facts and circumstances described in the charges’ do not – or should not, at least – include subsidiary facts. In the words of Judge Van den Wyngaert, ‘[s]ubsidiary facts, by definition, are not part of the “facts and circumstances described in the charges”, are not confirmed by the Pre-Trial Chamber, and therefore do not form part of the factual matrix that can be recharacterised.’⁴⁰ One can only remain at a loss as to what the Appeals Chamber meant to convey with the above statement. It does, however, demonstrate that the issue of which facts are subject to recharacterization has been, and remains, confused at the ICC.

3. DECIDING ON CHARGES: THE ROLE OF REGULATION 55

Article 74(2) of the Rome Statute sets out the requirements for a decision on the charges (verdict), noting that the ‘decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.’ Referring to Article 74, this language is duplicated in Regulation 55(1). But the scheme, intended to correct potential legal flaws in the Prosecution’s charging, is not without its own faults and flaws, many of which have been criticized heavily throughout the Regulation’s existence. Shaky foundations, unfulfilled promises, and dubious application to the detriment of the accused have all been pointed out in relation to the power judges have granted themselves through Regulation 55. To get a sense of how the Regulation should be applied in the future, a few matters from its past must be reviewed.

3.1. Adoption

3.1.1. *The jura novit curia principle*

Regulation 55 is an expression of the *jura novit curia* principle, which means ‘the court knows the law’. In systems adhering to this principle, the facts’ legal qualification chosen by the Prosecutor is merely a recommendation, while judges are expected and required to establish the law. This principle can be found in many domestic civil law systems in one form or another.⁴¹ In these systems, the charged conduct is regarded as decisive, not its legal characterization.

39 *Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, ICC-01/04-01/07-3363, A.Ch., 27 March 2013, para. 50.

40 *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, ICC-01/04-01/07-3319, T. Ch. II, 21 November 2012, para. 15 (Dissenting Opinion of Judge Christine van den Wyngaert).

41 See Art. 373 Criminal Procedural Code (Albania); Section 262 Code of Criminal Procedure (Austria); §265 Code of Criminal Procedure (Germany); Art. 521(1) Code of Criminal Procedure (Italy); Art. 312 Code of Criminal Procedure (Japan). See also *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-T, T.Ch., 14 January 2000, paras. 733–7; Friman et al., *supra* note 4, at 467–9; C. Stahn, ‘Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55’, (2005) 16 *Criminal Law Forum* 1, 5–6.

The principle does not form part of common law systems, which place the emphasis on the charged offence as chosen by the Prosecutor. This means that the legal characterization accompanying a charge is generally binding. To avoid acquittals because an offence is not charged, even though the facts are deemed proven, common law indictments often contain many offences charged alternatively. Common law systems generally do provide, however, for a system of ‘lesser included offences’ and ‘alternative verdicts’. These systems set out which offences must be separately charged in the indictment and which may be regarded as automatically included as a lesser offence. For example, manslaughter is considered to be included in murder and theft to be included in robbery.⁴²

3.1.2. Purpose

Regulation 55 is said to have two purposes: to avoid impunity gaps and to allow more focused trials on clearly delineated charges aiding judicial economy.⁴³ Allowing the risk of acquittals that are merely the result of incorrect legal qualifications confirmed in the pre-trial phase would be contrary to the Statute’s aim to end impunity. According to the Appeals Chamber, Regulation 55 is intended to ‘close accountability gaps’, which, the Chamber argues, is consistent with the Rome Statute’s general aim to end impunity – as stated in the fifth paragraph of the Preamble. In other words, Regulation 55 is meant to avoid situations where an accused is acquitted even though there is proof beyond a reasonable doubt that he or she has committed a crime within the jurisdiction of the Court. Not allowing Chambers to modify the legal characterization of facts would be contrary to the ICC’s primary goal of ending impunity, so the argument goes.

The other rationale behind Regulation 55 is that it supposedly promotes judicial efficiency. The idea is that without Regulation 55 prosecutors would overburden judges with indictments containing many cumulative or alternative charges in order to avoid acquittals due to not having charged the correct crime or mode of liability. This would create legal uncertainty and also extend the length of trial, potentially violating the rights of the accused to be tried without undue delay.⁴⁴ Regulation 55 purportedly encourages the Prosecution to have ‘a precise charging practice from the very beginning of the proceedings’.⁴⁵ While it is impossible to gauge – or empirically establish – whether the impunity rationale is valid, this second rationale is partially refutable. The possibility that facts may be recharacterized creates an equal amount

42 See, e.g., Rule 31(c) of the US Federal Rules of Criminal Procedure; *Schmuck v. United States*, 489 U.S. 750 (1989); Section 6(3) Criminal Law Act 1967 (UK); *R. v. Mandair* [1994] 2 WLR 700, (H.L.); Section 662 Criminal Code 1985 (Canada). See also Kupreškić Trial Judgment, *supra* note 41, paras. 729–32.

43 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC-01/04-01/06-2205, A.Ch., 8 December 2009, para. 77. See also H.-P. Kaul, ‘Construction Site for More Justice: The International Criminal Court after Two Years’, (2005) 99 AJIL 370, at 377.

44 Stahn, *supra* note 41, at 3. See also ICC-OTP Informal Expert Paper, *Measures available to the International Criminal Court to reduce the length of proceedings* (2003), paras. 41–6, available at www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/length_of_proceedings.pdf.

45 Stahn, *supra* note 41, at 30.

of uncertainty, both from the prosecution's perspective as well as the defence's perspective, since neither party can rest assured that the charges will not change along the way. The Prosecutor might resort to formulating the facts of the case as generally as possible, leaving all options open for legal recharacterization and securing a conviction.⁴⁶ Moreover, as shown by the application of Regulation 55 in cases to date discussed below, the rights of the accused have suffered violations of considerable proportions, most notably in the *Katanga* case.

3.2. Application

3.2.1. *Lubanga: adding facts*

In the Court's first case, Regulation 55 played a role on more than one occasion. First, the Pre-Trial Chamber tacitly made use of Regulation 55's power when it confirmed the charges against Lubanga. The Prosecutor had initially charged Lubanga with three counts of war crimes under Article 8(2)(e)(vii), which is the crime of 'conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities' in an armed conflict not of an international character. The Pre-Trial Chamber found that part of the conflict in Ituri, namely from July 2002 till June 2003, could be qualified as international.⁴⁷ It reasoned that the war crimes of using child soldiers duplicated in Article 8(2)(e)(vii) (not international) and Article 8(2)(b)(xxvi) (international) criminalize the same conduct regardless of the nature of the armed conflict, and it was therefore not necessary to adjourn the hearing on the confirmation of charges and request the Prosecutor to amend the charges.⁴⁸ The Trial Chamber allowed parties to present evidence on both classifications,⁴⁹ and later, used Regulation 55 (explicitly this time) to change the nature of the armed conflict back from international to non-international for the relevant time period.⁵⁰

While within the competencies of the Trial Chamber to change it back, the Pre-Trial Chamber's move is technically not allowed by the Statute. Article 61(7) sets out very clearly the options available to the Pre-Trial Chamber at the confirmation of charges phase: confirm the charges, decline to confirm the charges, or adjourn the hearing on the confirmation of charges and request the Prosecutor to consider (1) providing further evidence or conducting further investigation with respect to a particular charge; or (2) amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court. Also, Regulation 55 must be read in conjunction with Article 74 of the Statute, i.e., the final decision made by Trial Chamber, and it is therefore not a competency of Pre-Trial Chambers. This remains, however, the only instance in which a Pre-Trial Chamber appeared

46 Heller, *supra* note 3, at 29–30.

47 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, P.T.Ch. I, 29 January 2007, para. 220.

48 *Ibid.*, para. 204.

49 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, T.Ch. I, 13 December 2007, paras. 49–50.

50 *Lubanga Trial Judgment*, *supra* note 32, para. 566.

to have made use of a Regulation 55 type power. Other Chambers have banned the application of Regulation 55 in the confirmation of charges process.⁵¹

The second way in which Regulation 55 played a role in the *Lubanga* case caused a lot more controversy. Upon the request of the victims' legal representatives (to re-characterize the facts to include charges of inhuman treatment, cruel treatment and sexual slavery as war crimes and sexual slavery as a crime against humanity),⁵² the Trial Chamber's majority issued a decision notifying the parties it would possibly change the legal characterization of facts pursuant to Regulation 55(2). The Appeals Chamber overturned the Trial Chamber's decision. The Trial Chamber's interpretation would have allowed additional facts to be introduced at trial in violation of Article 74(2), the purpose of which is to bind the Chamber to the factual allegations in the charges.⁵³ New facts may only be added under the procedure provided in Article 61(9) of the Rome Statute. Incorporating 'new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial'.⁵⁴

3.2.2. *Bemba: should have known*

In *Bemba*, the Trial Chamber notified the parties it considered changing the knowledge requirement for command responsibility from 'knew' to 'should have known'.⁵⁵ The defence, understandably, objected. It argued that the proposed change would be 'of monumental significance' as '[a]ctual knowledge requires proof of knowledge of the crimes alleged, whereas constructive knowledge can be based on a mere objective assessment of the available information about such matters'.⁵⁶ Consequently, this new theory of liability would be based on 'entirely different material elements'.⁵⁷ The defence continued by providing detailed examples of such new material elements, and argued that in the absence of notice of these material facts it could not properly conduct a defence. It concluded that the accused's right to be promptly informed of the case against him under Article 67(1)(a) would be adversely affected by changing the knowledge requirement from such a high standard to such a low standard.⁵⁸

Clearly, the objective mental state of 'should have known' (as opposed to the subjective mental state of actual knowledge) is much easier to prove, creating no problems for the prosecution. But it confronts the defence with a new theory, i.e., the

51 See, e.g., *Prosecutor v. William Samoei Ruto et al.*, 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", ICC-01/09-01/11-274, P.T.Ch. II, 19 August 2011, paras. 7–8.

52 *Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891-tENG, 22 May 2009, paras. 17 et seq.

53 *Lubanga Regulation 55 Appeal Decision*, *supra* note 43, paras 88–91.

54 *Ibid.*, para. 94.

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

56 *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Submission on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, Defence, 18 October 2012, para. 17.

57 *Ibid.*, para. 18.

58 *Ibid.*, paras. 18–20.

negligence version of the originally charged mode of participation, which requires a completely new defence strategy. The final outcome will not be certain until the decision under Article 74 is issued, but the notification stands – and the defence’s grievances were eventually dismissed.⁵⁹

3.2.3. *Katanga: changing the narrative*

Katanga, initially on trial together with Ngudjolo Chui until the charges against the two were severed, has experienced the effects of Regulation 55 most extremely. The two accused were charged as indirect co-perpetrators pursuant to Article 25(3)(a), meaning they ‘jointly committed’ the alleged crimes ‘through other persons’.⁶⁰ Well after the trial against the two was concluded, six months into deliberation, the Trial Chamber issued its severance decision and notified the parties that the mode of liability under which Katanga was charged would be subject to legal recharacterization on the basis of Article 25(3)(d)(ii), i.e., common purpose liability.⁶¹ About a month later, the Trial Chamber acquitted Ngudjolo Chui,⁶² and about 16 months after the severance and notice decision, Katanga was convicted on the basis of this new mode of liability.⁶³

Judge Van den Wyngaert argued in her dissent that the majority had not made clear on which factual allegations from the Confirmation Decision it intended to base the proposed recharacterization. This not only creates a serious problem in relation to the accused’s right to be put on notice, it also potentially opens the door to recharacterizing subsidiary facts since no clear distinction was made between material facts and subsidiary facts in this case.⁶⁴ As noted before, in *Lubanga* the Appeals Chamber later found no fault in that, but one can only hope the Court will ignore that incomprehensible holding. Also, Judge Van den Wyngaert argued that the recharacterization would change the narrative of the charges so drastically that it would exceed the facts and circumstances described in the charges:

Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. [...] Charges therefore constitute a narrative in which each material fact has a particular place. *Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative.* Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a “change in the statement of facts”.⁶⁵

59 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/0802497, ICC-01/05-01/08-2500, T.Ch. III, 6 February 2013.

60 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07-717, P.T. Ch. I, 30 September 2008, para. 487.

61 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319, T.Ch. II, 21 November 2012.

62 *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG, T.Ch. II, 18 December 2012.

63 *Prosecutor v. Germain Katanga*, Jugement rendu en application de l’article 74 du Statut, ICC-01/04-01/07-3436, T.Ch. II, 7 March 2014.

64 *Ibid.*, paras. 14–17.

65 *Ibid.*, para. 20 (emphasis added).

Pre-recharacterization, Katanga was branded the superior commander, acting intentionally and exercising authoritative control over a hierarchical group of executants, whose personal intentions or criminal responsibility were irrelevant, and who automatically complied with Katanga's orders. With the proposed recharacterization, a completely different story would emerge. Pursuant to Article 25(3)(d), Katanga's role as leader with almost absolute control over his subordinates and over the charged crimes, would transform into the role of an accomplice contributing to the charged crimes, who supported the criminal common purpose of an unidentified portion of his former subordinates.⁶⁶ The subjective element changed drastically, too: common purpose liability requires that the accused *knew* that the group intended to commit the charged crimes rather than *mens rea* being irrelevant.

The change in narrative was so fundamental that it exceeded the facts and circumstances of the charges in more than one way: (i) the majority had relied on parts of the Confirmation Decision (i.e., introductory sections, footnotes, etc.) that did not form part of the material facts of the case, still circumventing the crucial legal question of what constitutes 'the facts and circumstances' of the charges;⁶⁷ (ii) the majority had added new factual elements to the charges that are nowhere to be found as such in the Confirmation of Charges decision or the DCC (for example, the allegation that members of the relevant group were filled with a desire for revenge towards the Hema population and had been motivated by a so-called 'anti-Hema ideology'),⁶⁸ and (iii) even if the facts and circumstances were not exceeded formally, the fundamental change was still impermissible for two reasons: first, the accused had to significantly change his line of defence to address the new narrative, and second, certain factual elements in the original narrative were taken out of context and now played a completely different role in the new narrative.⁶⁹

One is left with the creeping suspicion that the case against Katanga was artificially moulded to reach a conviction. The majority, however, found support from the Appeals Chamber with respect to its notice decision, and the final judgment was not appealed, unfortunately. All this is not to say that any change in the narrative of a case is impermissible (provided it remains within the facts and circumstances, i.e., the material facts, of the charges): it is a matter of fact and degree.⁷⁰ A test could be this: would a reasonably diligent accused have conducted substantially the same line of defence against both the old and the new charge?⁷¹ In any event, the *Katanga*

66 *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319, T.Ch. II, 21 November 2012, para. 22 (Dissenting Opinion of Judge Christine van den Wyngaert).

67 *Katanga Trial Judgment*, *supra* note 63, para. 19 (Dissenting Opinion Judge Christine van den Wyngaert).

68 *Ibid.*, paras. 19–24. Note that Van den Wyngaert argues this added element is based on the Majority's erroneous interpretation of common purpose liability: 'it confuses a finding that a number of *individuals* acted with intent and knowledge with finding that a *group* had a common plan to commit crimes, which is a requirement under the newly charged mode of criminal responsibility (article 25(3)(d)'. She does concede that the latter may be inferred from the former (para. 23).

69 *Ibid.*, para. 28 et seq.

70 *Prosecutor v. Thomas Lubanga Dyilo*, Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 5(2) of the Regulations of the Court, ICC-01/04-01/06-2054, T.Ch. I, 17 July 2009, para. 19 (Dissenting Opinion of Judge Fulford).

71 *Katanga Trial Judgment*, *supra* note 63, para. 35 (Dissenting Opinion Judge Christine van den Wyngaert).

debacle seems to have had its effect, as a new trend regarding Regulation 55 and charging may be discerned from the cases that followed.

3.2.4. *Ruto, Banda, and Ntaganda: alternative charging in disguise?*

In the case against Ruto and Sang, the Trial Chamber gave notice that it would consider recharacterizing the facts against Ruto to also include the modes of liability under Article 25(3)(b), (c) or (d) of the Statute in addition to Article 25(3)(a) already charged.⁷² In the case against Banda, who is allegedly criminally responsible as co-perpetrator for three war crimes under Article 25(3)(a) of the Statute, the prosecution has also requested the Trial Chamber to provide notice to the parties pursuant to Regulation 55 that there is a possibility that the facts contained in the charges will be recharacterized to accord with Articles 25(3)(b), (c), (d), or 28(a) of the Statute.⁷³ Furthermore, in the case against Bosco Ntaganda, where all modes of liability are already charged alternatively except for direct co-perpetration, the prosecution has requested the Trial Chamber to provide notice that the missing mode of perpetration will be included, too.⁷⁴

The practice of requesting the Chamber to provide notice for a multitude of modes of liability is at odds with Regulation 55's purpose of correcting possible legal flaws in the prosecution's charging by ways of narrow exception.⁷⁵ It raises the question whether requesting notice to be given for every mode of liability on the menu is not just another way of charging alternatively. There is indeed an up-and-coming trend detectable, namely a practice of alternative charging. In all three cases in which the charges were confirmed in 2014,⁷⁶ the accused are charged with different modes of liability alternatively,⁷⁷ seemingly avoiding the application of Regulation 55 at a later

72 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, T.Ch. V(A), 12 December 2013, para. 44.

73 *Prosecutor v. Abdallah Banda Abakaer Nourain*, Prosecution request for notice to be given of a possible recharacterisation under Regulation 55, ICC-02/05-03/09-549, Prosecution, 28 March 2014.

74 *Prosecutor v. Bosco Ntaganda*, Prosecution request for notice of a possible recharacterisation pursuant to regulation 55(2), ICC-01/04-02/06-501, Prosecution, 9 March 2015.

75 See *Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3363, A.Ch., 27 March 2013 (Dissenting Opinion Judge Cuno Tarfusser).

76 *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, P.T.Ch. II, 9 June 2014, para. 97; *Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, P.T.Ch. I, 12 June 2014, para. 266; *Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11-186, P.T.Ch. I, 11 December 2014, para. 194.

77 Charging alternatively is not the same as charging cumulatively. While having the same practical effect of keeping more than one door open potentially delaying proceedings and overburdening the defence, charging cumulatively refers to the situation in which more than one crime is charged and may be convicted upon based on the same underlying facts – instead of choosing one of the alternatives, which the judges must do when deciding upon alternative charges. The practice at the ICC is still evolving regarding this matter: the *Bemba* Pre-Trial Chamber showed a general disinclination towards cumulative charging pointing at the negative effect on the rights of the defence and the availability of Reg. 55, while the Pre-Trial Chamber in *Al-Bashir* allowed it when issuing the arrest warrant. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P.T.Ch. II, 15 June 2009, paras. 200–3; *Prosecutor v. Omar Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, P.T.Ch. I, 4 March 2009, paras. 95–6 (accepting both extermination and murder as crimes against humanity based on the same underlying conduct). See also Friman et al., *supra* note 4, at 392–3.

stage. One of those cases shows, however, that it does not necessarily play out this way. Laurent Gbagbo was notified on 19 August 2015 that the charges against him may be recharacterized to also include modes of participation under Article 28(a) and (b) in addition to the alternatively charged modes of liability under Article 25(3)(a), (b), and (d).⁷⁸ In the Confirmation of Charges Decision, the Pre-Trial Chamber had stated it did not exclude ‘the possibility that the discussion of evidence at trial may lead to a different legal characterisation of the facts,’⁷⁹ but it had explicitly declined to consider Article 28 responsibility, reasoning that doing so would ‘depart significantly from [the Chamber’s] understanding of how events unfolded in Cote d’Ivoire during the post-electoral crisis and Laurent Gbagbo’s involvement therein.’⁸⁰ The Trial Chamber used the statement regarding the discussion of evidence at trial to claim there were ‘exceptional circumstances’ that justify the Regulation 55 notification.⁸¹

One of the rationales behind Regulation 55 is that it supposedly promotes judicial efficiency, the idea being that without the provision prosecutors would overburden judges with indictments containing many cumulative or alternative charges in order to avoid acquittals for mainly technical reasons.⁸² Ironically, it seems that Regulation 55, perhaps due to its time-consuming and imperfect application, is lately being replaced by exactly what the provision once was meant to prevent: a practice of alternative charging, most notably with respect to modes of liability.⁸³ However, and similarly as with Regulation 55, a practice of alternative charging that leaves all options of criminal responsibility open makes it very hard to prepare an effective defence. The narrative is all over the place in such cases. While the array of modes of liability may be pleaded with sufficient specificity if regarded individually, the sheer plurality of case theories makes it challenging to construct an effective defence strategy.⁸⁴ As shown by the recharacterization in *Katanga*, different modes of liability can create contradicting storylines: what role did the accused actually play if simultaneously he may have been the mastermind in full control as well as his subordinates’ equal in carrying out the crimes? In sum, alternative charging and Regulation 55 have very similar pitfalls.

Moreover, a practice of alternative charging is at odds with Regulation 52(c), which requires that the DCC contain ‘the *precise* form of participation under articles 25 and 28’. This regulation appears to bar a practice of alternative charging, and therefore, it would need to be amended in light of this new practice at the ICC.⁸⁵ Unfortunately, the Single Judge of Pre-Trial Chamber I did not engage with the defence’s argument that Regulation 52(c) and charging alternatively are incompatible as shown by her

78 *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, ICC-02/11-01/15-185, T.Ch. I, 19 August 2015.

79 See *Gbagbo* Confirmation of Charges Decision, *supra* note 76, para. 263.

80 See *Gbagbo* Confirmation of Charges Decision, *supra* note 76, para. 265.

81 See *Gbagbo and Blé Goudé* Regulation 55 Decision, *supra* note 78, para. 12.

82 See *supra*, Section 3.1.4.

83 *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, P.T.Ch. II, 9 June 2014, paras. 99–100.

84 K. Ambos, ‘Critical Issues in the *Bemba* Confirmation Decision’, (2009) 22 *LJIL* 715, at 724.

85 A. Whiting, ‘Guest Post: The ICC’s End Days? Not So Fast’, *Spreading the Jam*, 20 March 2014, available at dojacobs.com/2014/03/20/guest-post-the-iccs-end-days-not-so-fast/ (accessed 26 April 2015).

decision in the *Blé Goudé* case ignoring the defence's submissions to that end,⁸⁶ and no other Chamber has ever stated anything substantively on the matter.

4. WHICH RECHARACTERIZATIONS ARE PERMISSIBLE?

Only the facts and circumstances described in the charges – i.e., the material facts – can be subject to legal recharacterization, and modifying charges ought not to violate the accused's right to be put on notice of the charges. Given that the materiality of facts is determined by the nature of the prosecution's case, i.e., the legal characterization of the facts, and the two are dialectically connected, a paradox is created that should be kept in mind with every possible change.⁸⁷

The material facts include the contextual elements, the individual crimes charged, and the mode of liability. It is in that order that recharacterizations become more and more problematic, predominantly because the materiality of facts depends to a large extent on the proximity of the accused to the underlying crimes, and a change in mode of liability directly affects the narrative the accused is to refute.

4.1. Recharacterizing the crime

The recharacterization of a contextual element without changing the underlying individual crime as such, can only occur within the crime category of war crimes – changing the contextual elements for crimes against humanity turns it into a different crime. Changing the contextual elements in the war crimes category from an international to an internal armed conflict or the other way around has little to no effect on the role of the accused with respect to the underlying crimes, which are the same in both subcategories. If both can be based on material facts pleaded in the DCC, there is little harm done. But with respect to changing the context from internal to international this will probably not be the case, even though it also likely does not affect the role of the accused. A change from internal to international will increase the material facts, as the scenario will then include the additional involvement of a third state in an otherwise internal armed conflict. Perhaps the distinction should not have been imported from international humanitarian law at all. There is little need for a distinction between 'internal' and 'international' where the same crime exists in both subcategories, rendering the difference essentially irrelevant.⁸⁸ This is therefore probably the least problematic recharacterization thinkable, because the distinction as such has little added value as it is, but it still harbours the risk of adding new material facts if the change is one from internal to international.

This is different where another (sub)category of crimes is charged through re-characterization. The lack of examples in case law to date shows that this type

86 *Prosecutor v. Blé Goudé*, Decision on the "Defence request to amend the document containing the charges for lack of specificity", ICC-02/11-02/11-143, PT.Ch.1, 1 September 2014, paras. 8–9. See also *Prosecutor v. Blé Goudé*, Defence request to amend the document containing the charges for lack of specificity, ICC-02/11-02/11-126, Defence, 25 August 2014.

87 See *supra*, Section 2.2.

88 See Jacobs, *supra* note 3, at 211.

of recharacterization is far less probable than a recharacterization of the mode of liability or nature of the armed conflict.

War crimes and crimes against humanity often overlap, but there are still very significant differences between them. War crimes take place within the context of an armed conflict (whether internal or international), while crimes against humanity do not require the nexus with an armed conflict but demand the context of a widespread or systematic attack. If only war crimes are charged, they can probably not be recharacterized as crimes against humanity, because the contextual elements differ too much – the same goes for the other way around. For instance, a mass killing of civilians during an armed conflict can be qualified as both crimes,⁸⁹ but the material facts relating to the context of one of the crimes will not have been pleaded if only the other crime was charged. However, if both war crimes and crimes against humanity were charged (i.e., multiple counts) the material factual elements would be present in the original pleading document(s). In sum, it makes sense that the material facts of the case be viewed holistically – taken as a whole – and not per count.

The same may be concluded, for instance, when genocide is recharacterized as a crime against humanity. The main element that distinguishes genocide from a crime against humanity is that the alleged perpetrator must have ‘genocidal intent’. If such intent cannot be proven, the crime may still appear to fall within the category of crimes against humanity. However, the contextual elements of a crime against humanity, while possibly inferred from evidence of the initial genocide charge, will not have been part of the material facts in the original indictment and will therefore not have been pleaded with sufficient detail, violating the principle of specificity of charges. To illustrate, for crimes against humanity the ICC Elements of Crimes clarifies that the attack against a civilian population, which must be widespread and systematic, is to be understood to mean ‘a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.’⁹⁰ Regarding genocide, the requirement is only that the ‘conduct took place in the context of a manifest pattern of similar conduct’.⁹¹ Once again, if the charges contain numerous counts they may be viewed holistically, solving the problem, but evidence or a subsidiary fact can never be promoted to material fact.

Obviously, if the facts are recharacterized in such a way that the initially charged offence contains all the material elements that the crime after recharacterization also contains, the facts and circumstances of the case are not exceeded – i.e., ‘cases where the *lex specialis* invoked by the Prosecutor is found not to be applicable, whereas the *lex generalis* is still applicable.’⁹² This is reminiscent of the system of ‘lesser included offences’. However, the common law notion of ‘lesser included offences’ does not unequivocally apply at all the international criminal courts and tribunals.

89 Compare Art. 7(1)(a) and (b) with Art. 8(2)(a)(i), (b)(i), (c)(i), and (e)(i) of the ICC Statute.

90 ICC Elements of Crimes, Art. 7 (Introduction), para. 3.

91 *Ibid.*, Art. 6.

92 Kupreškić Trial Chamber Judgment, *supra* note 41, para. 742(c).

The ICTY has accepted the system, although only for limited instances, and only if sufficient notice is given to the defence.⁹³ Conversely, the ICTR has held that genocide, crimes against humanity and war crimes are not ‘lesser included offences’ of each other, because (i) they have different constituent elements, and (ii) they are intended to protect different interests.⁹⁴ The system of ‘lesser included offences’ is intended to dictate which crimes must be charged cumulatively and which may be regarded as implicitly charged – absorbed in the more serious offence – due to qualifying as a lesser included offence. Thus, the ICTR Trial Chamber concluded that ‘multiple convictions for these offences in relation to the same set of facts [are] permissible.’⁹⁵ However, as Cassese once noted in line with ICTY practice, perhaps this does not apply to some crimes within the same category of crimes, for example, different war crimes may be regarded as lesser included offence of one another.⁹⁶

At the ICC, there is seemingly no need for this common law counterpart of the *jura novit curia* principle: Regulation 55 has taken the civil law road. Nevertheless, the system of ‘lesser included offences’ may provide some guidance in determining the validity of recharacterizing the underlying crime. In the *Lubanga* case, the Pre-Trial Chamber stated, regarding the nature of the armed conflict, that it might entertain the system of ‘lesser included offences’ – or in the words of the Chamber do so ‘on the basis of the well established principle of *majori continet in se minus*, that the greater includes the lesser in relation to the nature of the armed conflict.’⁹⁷ Judge Fulford once suggested that the debate surrounding Regulation 55 would eventually revolve around whether or not its application would be restricted by lesser included offences.⁹⁸ The idea that Regulation 55 is limited to situations of lesser included offences was left unresolved by the Appeals Chamber, though.⁹⁹ It seems unlikely, however, that it could play a prominent role, given the provision’s explicit *jura novit curia* foundation.

4.2. Recharacterizing the mode of liability: less is worse

Significant problems arise if the form of participation is recharacterized. The notion of ‘lesser included offences’ cannot provide much guidance here. Applying a seemingly lesser form of liability, or a lesser degree of knowledge as happened in *Bemba* and *Katanga*, has the opposite effect to the detriment of the accused, seriously

93 Ibid., paras. 742–3.

94 *Prosecutor v. Jean-Paul Akayesu*, Judgement and Sentence, ICTR-96-4-T, T.Ch., 2 September 1998, para. 469.

95 Ibid., para. 470.

96 A. Cassese et al., *Cassese’s International Criminal Law* (2013), at 169.

97 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, T.Ch. I, 13 December 2007, para. 49.

98 *Prosecutor v. Thomas Lubanga Dyilo*, Corrigendum to ‘Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” of 17 July 2009’, ICC-01/04-01/06-2061-Anx, T.Ch. I, 21 July 2009, para. 20 (Minority Opinion Judge Adrian Fulford).

99 *Lubanga* Regulation 55 Appeal Decision, *supra* note 43, paras. 99–100. See also *Prosecutor v. Thomas Lubanga Dyilo*, 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, ICC-01/04-01/06-2223, T.Ch. I, 8 January 2010, para. 12.

compromising or erasing his previously built defence. The system of ‘lesser included offences’ generally leads to the accused being convicted of a less serious crime potentially carrying a lower penalty. Charging ‘less’ with respect to the objective and/or subjective elements of the form of participation, practically speaking enhances the provability of the accused’s involvement. For instance, ‘should have known’ is much easier to prove than ‘knew’. This does not create any problems from a prosecutorial perspective, but from a defence’s perspective it is injurious.

Most significantly, a change in mode of liability may alter which of the underlying facts must be regarded as material, given that the pleading principles dictate that the required degree of specificity of charges is the proximity of the accused to the crime – pertaining not only to geographical vicinity but also to the mode of liability. In *Bemba*, the defence argued along these lines regarding the change from ‘knew’ to ‘should have known’ showing the dialectical link between the facts and the legal characterization of those facts: ‘[i]n the instant case, the proposed re-characterisation would result, not in a modification of the legal characterisation of facts, but rather in the modification of the factual allegations themselves.’¹⁰⁰ It explained that ‘the factual (or material) elements relevant to establishing one category of *mens rea* (“knew”) is not identical, sufficient or comparable to fulfil the factual elements relevant to proving the other (“should have known”).’¹⁰¹ In other words, by changing the case’s theory regarding the proximity of the accused vis-à-vis the crimes, other facts than initially charged became material and had to be pleaded with sufficient specificity, the *Katanga* saga being illustrative in this respect. A *Katanga* type shift in case theory, completely altering the position of the accused vis-à-vis the crimes, leads to different facts being regarded as material. It is practically impossible to not exceed the material facts contained in the charges when radically changing the form of participation, because the materiality of facts is determined by the accused’s position.

5. CONCLUSION

Material facts and their legal qualification are like communicating vessels. Changing the latter affects the former (and *vice versa*). In its application of Regulation 55 to date, the ICC has underappreciated this, treating international crimes cases as having blurry factual boundaries where material facts can be swapped, neglected, or created at will. Regulation 55 has also been overused, even to the extent it appears to have now instigated the exact practice it was once designed to prevent: a system of charging alternatively. Perhaps alternative charging is the way forward, leaving only the very exceptional situations to be dealt with by Regulation 55. After all, this is how the provision was intended to function. At least a system of alternative charging would provide the accused with more certainty as to the case against him or her from a

¹⁰⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Submission on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, Defence, 18 October 2012, para. 21.

¹⁰¹ *Ibid.*, para. 26.

much earlier point in time, provided the alternatives are built upon clear factual foundations and are not radically contradictory. It would, however, entail having to amend Regulation 52(c), which demands including the *precise* form of participation in the indictment.

Pursuant to Regulation 55, only changes that remain within the facts and circumstances of the charges are allowed. In other words, the material facts dictated by the initial charges cannot be modified. The closer the changes come to the alleged acts of the accused, the more likely it will change the narrative of the case to such an extent that the materiality of the initially charged facts is affected. While the case's narrative is not the starting point for establishing whether a change is permissible, it certainly helps to compare narratives pre- and post-recharacterization in order to determine which are the material facts of the case, and whether they have changed impermissibly. As shown through case law, (i) changes on the periphery of the charges are not problematic (i.e., contextual elements of the crimes, most notably when kept in the same crime category); (ii) modifying the underlying crime may be possible in some instances, especially where the change goes from sub-crime to sub-crime (i.e., a war crime is altered into another war crime) or one crime may be regarded as a lesser included offence of the other; but (iii) modifying the charges as they relate most directly to the acts of the accused – the objective and subjective elements of the form of participation – drastically affects the nature of the prosecution's case, or narrative, and the material facts of the case. While not categorically impermissible, such changes must be approached with the greatest caution. In sum, the more added value an element has with respect to the narrative of the case, the more likely this is a solid clue that the facts and circumstances of the case will be surpassed in case of recharacterization.

As shown by the examples in this article, a treacherous temptation arises in practice: to use subsidiary facts, patterns or other information from various sources – pre-trial briefs, lists of evidence, or other submissions – to fill the gaps in the newly chosen narrative. Information that had previously been used as evidence, to demonstrate a pattern or to provide context and background, all of a sudden is promoted to the status of material fact. However, there is no certain way of telling from the initial charges which of those other pieces of information may be promoted one day. The only way an accused can defend himself against such changes is by assuming that every type of crime or mode of liability may be charged further down the line based on all information made available to him, rendering the distinction between material facts on the one hand, and subsidiary facts, background information and evidence on the other hand, completely moot. This is a slippery slope, because that distinction dictates which facts must meet the requisite standard of proof and to which facts the rights to be put on notice and be enabled to adequately prepare a defence attach.

Retroactively labelling subsidiary information as material facts undermines a series of fundamental principles and rights. Qualifying a fact as a material fact has certain profound legal consequences. It influences the standard of proof and a number of rights of the defence, i.e., the right to be put on notice and related rights of enabling an effective defence. The biggest ill the ICC suffers from is a lack of

appreciation of the difference between material facts and other facts and evidence. The distinction exists for very good reasons, though. In addition to making polite note of it, as most chambers do by default, the fundamental difference between the two ought to be respected.