

Excerpts from Margaux Dastugue, *NOTE: The Faults in "Fair" Trials: An Evaluation of Regulation 55 at the International Criminal Court*, 48 Vand. J. Transnat'l L. 273 (2015).

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I. Introduction

In June 2004, the International Criminal Court (ICC) began an investigation into the Ituri Province of the Democratic Republic of Congo; conflict over natural resources and land between the Hema and Lendu ethnic groups had ravaged the province for years.¹ After finding sufficient evidence to suggest that he had commanded a Lendu militia in a targeted attack against Hema civilians in the village of Borgoro, the Prosecutor of the ICC opened a case against Germain Katanga.² The Prosecutor charged Katanga with indirect co-perpetration of several war crimes and crimes against humanity [*275] under Article 25(3)(a) of the Rome Statute.³ After the Pre-Trial Chamber confirmed these charges in September of 2008, Katanga began preparing his defense against those charges.⁴ During over two years of trial, Katanga testified and defended himself against these charges of indirect co-perpetration.⁵ Six months after the closing arguments, the Trial Chamber determined it did not have evidence sufficient to convict Katanga of indirect co-perpetration and notified the parties that it would consider a re-characterization of the charges against Katanga pursuant to Regulation 55.⁶ Nearly a decade after the initial investigation, and three years after the defense rested on the initial charges, the ICC convicted Katanga on five counts of a lesser mode of liability.⁷ Such use of Regulation 55 to change the legal characterization of charges is not unique to Katanga.⁸

¹ See Press Release, The Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation, ICC-OTP-20040623-59 (June 26, 2004) (on file with author); Case Information Sheet, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 (May 27, 2014), <http://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf> [<http://perma.cc/CM2J-SEYY?type=pdf>] (archived Oct. 11, 2014). See generally Germain Katanga & Mathieu Ngudjolo Chui at the International Criminal Court: Background, Int'l Just. Monitor, <http://www.ijmonitor.org/germain-katanga-and-mathieu-ngudjolo-chui-background> (last visited Oct. 11, 2014) [<http://perma.cc/VA5N-3QJB>] (archived Oct. 3, 2014) (providing historical background and context of the conflict in the Ituri Province).

² See Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest (July 2, 2007).

³ See *id.* (listing the war crimes and individual charges against Katanga); see also Germain Katanga & Mathieu Ngudjolo Chui at the International Criminal Court: A Closer Look at Regulation 55 at the ICC, Int'l Just. Monitor (May 28, 2013), <http://www.katangatrial.org/2013/05/a-closer-look-at-regulation-55-at-the-icc/> [<http://perma.cc/NSV7-DY9M>] (archived Oct. 3, 2014) (discussing the original charges against Katanga and Ngudjolo).

⁴ Case Information Sheet, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 (May 14, 2012), <http://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaChuiEng.pdf> [<http://perma.cc/X5UV-AZDJ?type=pdf>] (archived Oct. 11, 2014). The judiciary of the International Criminal Court is divided into three divisions: Pre-Trial Division, Trial Division, and Appeals Division. See Rome Statute of the International Criminal Court art. 34, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute], <http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf> [<http://perma.cc/YTG4-SFTQ?type=pdf>] (archived Oct. 11, 2014) (defining the "organs of the Court"). The Pre-Trial Division handles the first phase of judicial proceedings, including authorizing investigations, issuing arrest warrants or summons to appear, and holding a hearing on the confirmation of charges. See *id.* arts. 56-58 (defining the role and functions of the Pre-Trial Chamber).

⁵ See Case Information Sheet, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 (May 27, 2014), <http://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf> [<http://perma.cc/CM2J-SEYY?type=pdf>] (archived Oct. 11, 2014).

⁶ See Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, P 6 (Nov. 21, 2012) [hereinafter Katanga Decision on Regulation 55] ("The legal characterisation of facts relating to Germain Katanga's mode of participation is likely to be changed ...").

⁷ See Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Jugement rendu en application de l'article 74 du Statut, 709-10 (March 7, 2014) [hereinafter Katanga Final Judgment].

⁸ See, e.g., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-2324, 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, P 33 (Sept. 21, 2012) [hereinafter Bemba Notice on Regulation 55] (quoting Regulation 55 as

[*276] The judges of the ICC increasingly rely on Regulation 55 to avoid acquitting defendants.⁹ However, this reliance has significant consequences for a defendant's right to a fair and impartial trial.¹⁰ As evidenced by international customary law and the Rome Statute governing the ICC,¹¹ there are few judicial foundations more significant than the defendant's fair trial rights. The ICC must recognize and ensure fair trial rights in order to maintain its legitimacy.¹² If the judges of the ICC continue to infringe upon both the fair trial rights of defendants and the statutorily proscribed power of the Prosecutor by re-characterizing the charges against the defendant at various stages in the proceedings, the integrity of the ICC is in jeopardy.¹³ This Note will evaluate the impact of Regulation 55 on fair trial rights in the ICC and propose several procedural modifications to ensure the legitimacy of the ICC.

Part II details the relevant Rome Statute articles and ICC Regulations at issue in this analysis. It also presents the historical development of these governing documents within the larger context of the ICC's procedural instruments and describes certain pretrial processes critical to the analysis. Part III presents a comparative examination of criminal procedure, emphasizing the key distinctions between common law and civil law traditions on particular issues relevant to Regulation 55 and the ICC. Part IV chronicles the most recent ICC jurisprudence relating to Regulation 55 through an analysis of the Katanga case. Part V details the major criticisms of Regulation 55 and its impact on due process rights, namely a defendant's right to be informed of charges, his right to prepare and organize a defense, and his right to trial without undue delay. Lastly, Part VI presents several proposals regarding the use of Regulation 55 by the ICC Trial Chambers that would serve to emphasize the role of efficient pretrial processes, minimize the use of Regulation 55, and, **[*277]** most importantly, ensure the effective protection of the due process rights of the accused.

II. Background

A. The International Criminal Court (ICC)

In 2002, 122 countries ratified the Rome Statute and established the ICC as the first permanent treaty-based international criminal court to end impunity for the perpetrators of "the most serious crimes of concern to the international community," namely genocide, war crimes, and crimes against humanity.¹⁴ The Rome Statute governs the ICC.¹⁵ An investigation by the ICC Prosecutor may be initiated by referral from any of the 122 ratifying

authorizing the Chamber to "change the legal characterisation of facts"); see also Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 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 of the Regulations of the Court, P 27 (July 14, 2009) [hereinafter Lubanga Notice on Regulation 55] ("Regulation 55(1) confers on the Chamber, in [the] final stage, the power to change the legal characterisation of facts"); Anthony Diala, Victims' Justice and Re-Characterizing Facts in the Lubanga Trial at the ICC, 7 *Eyes on the ICC* 59, 59 (2011) (describing the issuance of a change in "the legal characterization of the facts" under Regulation 55(2) by Trial Chamber I in the case against Thomas Lubanga Dyilo).

⁹ See, e.g., Bemba Notice on Regulation 55; Lubanga Notice on Regulation 55.

¹⁰ See Diala, *supra* note 8, at 59 (describing the Lubanga case, in which Trial Chamber I altered the charges against the accused under the authority of Regulation 55).

¹¹ See Rome Statute, *supra* note 4, art. 67.

¹² See, e.g., Sara Anoushirvani, Comment, The Future of the International Criminal Court: The Long Road to Legitimacy begins with the Trial of Thomas Lubanga Dyilo, *22 Pace Int'l L. Rev.* 213, 214 ("In light of ... the Tribunal's insistence upon upholding the principle of a defendant's right to a fair trial, the ICC has taken one step forward in establishing itself as a legitimate judicial institution.").

¹³ See Katanga Final Judgment, *supra* note 7, Minority Opinion of Judge Christine Van den Wyngaert, PP 1-2, 53-54 (arguing that implementation of the re-characterization was "fundamentally unfair and ... violated several of the accused's most fundamental rights," including extension of the accused's waiver of the right to remain silent beyond its permissible scope).

¹⁴ See Int'l Criminal Court, Fact Sheet: The ICC at a Glance 1 (2011) [hereinafter ICC Fact Sheet], available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/ICCAatAGlanceEng.pdf> [<http://perma.cc/Z4C3-4SDW?type=pdf>] (archived Oct. 11, 2014).

¹⁵ See The States Parties to the Rome Statute, Int'l.fer the charges are confirmed and before the trial has begun, argue there is permissive discretion for armed conflict law. isl Criminal Court, <http://www.icc->

countries, referral from the United Nations Security Council, or authorization from a Pre-Trial Chamber upon request by the Prosecutor.¹⁶ The judicial organ of the ICC is composed of three divisions: Pre-Trial, Trial, and Appeals Divisions.¹⁷ The Pre-Trial Division manages the first stage of judicial proceedings, which includes authorizing investigations, authorizing arrest warrants or summons to appear, and conducting a hearing to confirm charges.¹⁸ At the end of the confirmation hearing, the case will be assigned to a Trial Chamber for trial.¹⁹ The judges of the Trial Chamber conduct the subsequent proceedings and determine the guilt or innocence of the accused.²⁰ Both the Prosecutor and the defendant have the power to appeal decisions made during the course of proceedings in both the Pre-Trial and Trial Divisions to the Appeals Division.²¹

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B. Pretrial Process and Confirmation Hearing

Following the issuance of an arrest warrant and initial appearances before the Pre-Trial Division, the defendant first learns the full details of the nature, cause, and content of the charges as well as the legal characterization of facts as presented by the Prosecutor during the pretrial confirmation hearing.²² The ICC has held eight confirmation hearings in its first ten years of existence, some lasting up to twenty days while another only four.²³

The confirmation hearing provided for in Article 61 serves as a mechanism by which the Pre-Trial Division determines whether there are "substantial grounds to believe that the person committed each of the crimes charged."²⁴ The Pre-Trial Division must evaluate and assess the evidence in relation to the crimes and modes of

[cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Oct. 11, 2014) [<http://perma.cc/CWM8-VZK7>?type=image] (archived Oct. 11, 2014).

¹⁶ See ICC Fact Sheet, *supra* note 14.

¹⁷ See *id.*

¹⁸ See Rome Statute, *supra* note 4, arts. 56-58 (providing for the "role of the Pre-Trial Chamber in relation to a unique investigative opportunity," "functions and powers of the Pre-Trial Chamber," and "issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear").

¹⁹ See William A. Schabas, Article 61. Confirmation of the Charges Before Trial, in *The International Criminal Court: A Commentary on the Rome Statute* 732, 744 (2010) ("Once the charges have been confirmed, the Presidency is required to constitute a Trial Chamber and refer the case.").

²⁰ See Rome Statute, *supra* note 4, arts. 62-76 (defining trial rights and procedures).

²¹ See *id.* arts. 81-82 (providing for appeals against decisions of acquittal, conviction, sentence, and other decisions).

²² See *id.* art. 61 (governing "confirmation of the charges before trial").

²³ See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, P 30 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> [<http://perma.cc/VY3Q-UGUL>] (archived Nov. 11, 2014) (rendering a decision on the confirmation of charges after a hearing lasting twenty days); Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, P 12 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> [<http://perma.cc/7CM-43CQ>] (archived Nov. 11, 2014) (rendering a decision on the confirmation of charges after a hearing lasting four days); Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PP 16, 398 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [<http://perma.cc/BQ9K-D958?type=pdf>] (archived Oct. 11, 2014) (rendering a decision on the confirmation of charges after a hearing lasting fifteen days); Prosecutor v. William Sanoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute PP 18, 282-367 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> [<http://perma.cc/QA3P-NNRC?type=pdf>] (archived Oct. 11, 2014) (rendering a decision on the confirmation of charges after a hearing lasting eight days).

²⁴ Rome Statute, *supra* note 4, art. 61(7).

liability charged by the Prosecutor.²⁵ The Pre-Trial Division permits both the Prosecution and defense to present evidence and examine witnesses, although the burden of proof remains with the Prosecution.²⁶ On the basis of the confirmation hearing, the Pre-Trial Division must determine whether there are "substantial grounds to believe" the defendant committed each of the crimes charged, which generally is thought to include the mode of liability, or form of participation, [*279] associated with each crime.²⁷ However, neither the Rome Statute nor the Rules of Procedure and Evidence defines the criteria of "substantial grounds to believe."²⁸ In *The Prosecutor v. Thomas Lubanga Dyilo*,²⁹ the Pre-Trial Division reviewed international human rights jurisprudence, including European Court of Human Rights judgments and those of the ad hoc tribunals, to conclude that the Prosecution must present concrete proof to support its specific allegations.³⁰ The confirmation of Germain Katanga's charges followed the Lubanga interpretation of the standard.³¹

According to the Rome Statute, at the end of the confirmation hearing, the Pre-Trial Division determines the next stage of the trial.³² The Pre-Trial Division has one of three options at the close of the hearing: (1) confirm the charges and submit the defendant to a Trial Chamber for trial, (2) decline to confirm the charges, or (3) adjourn the hearing and request the prosecutor to provide further evidence or consider amending a charge.³³ Once the Pre-Trial Division has confirmed charges against a defendant, the Pre-Trial Division refers the case to a Trial Chamber

²⁵ See Lubanga Case Background to Confirmation Hearing, Int'l Bar Ass'n, http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/Lubanga_case_Background_to_confirmation_hearing.aspx (last visited Oct. 12, 2014) [<http://perma.cc/H8H9-N9CP>] (archived Oct. 12, 2014).

²⁶ See *id.* ("The purpose of the confirmation hearing is for the Prosecution to show it has sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Defence can object to the charges, challenge Prosecution evidence and bring its own evidence at this stage of the proceedings.").

²⁷ See Rome Statute, *supra* note 4, art. 61(7); see, e.g., *Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PP 428-30 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [<http://perma.cc/8VYW-3HZN>?type=pdf] (archived Oct. 12, 2014) (reaching conclusions as to confirmation of the charges against the accused with respect to both the requirements of the substantive offenses charged and the modes of liability asserted). At the ICC, the modes of liability applying to genocide, crimes against humanity, and war crimes are planning, instigating, ordering, committing, aiding and abetting in the preparation or execution of a crime, joint criminal enterprise, superior or command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration. See Int'l Criminal Law Serv., *Modes of Liability: Commission and Participation 4* (2009), available at http://wcjp.unicri.it/deliverables/docs/Module_9_Modes_of_liability.pdf [<http://perma.cc/U6XG-AJRQ>] (archived Jan. 19, 2015).

²⁸ See Rome Statute, *supra* note 4, art. 61.

²⁹ Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

³⁰ See *id.* PP 37-39 ("For the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.").

³¹ See *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, P 65 (Sept. 30, 2008) ("In the current case, the Chamber sees no compelling reason to depart from its application of the standard as established in the Lubanga case ...").

³² See Rome Statute, *supra* note 4, art. 61(7).

³³ See *id.*

for trial. ³⁴ Once charges [*280] are confirmed, the parties traditionally begin their initial preparations for trial relying on the confirmation hearing decision. ³⁵

C. Governing Instruments of the International Criminal Court

Several instruments, including the Rome Statute, ³⁶ Rules of Procedure and Evidence, ³⁷ Regulations of the Court, ³⁸ and Regulations of the Registry, ³⁹ govern the substantive and procedural framework of the ICC. ⁴⁰ The Regulations of the Court merit particular attention for this Note. Under Article 52(1), the ICC judges have the authority to create the Regulations of the Court, which address both internal and external routine functions of the Court. ⁴¹ The first version of the ICC's Regulations of the Court was enacted on May 26, 2006, four years after the creation of the ICC. ⁴² The amended version enacted in February of 2011 reflects the current Regulations utilized by the ICC today. ⁴³ The regulations address a range of issues including, among other administrative matters, the composition of the ICC chambers, the distribution of documents, and translation requirements. ⁴⁴

[*281] Regulation 55, entitled "Authority of the Chamber to modify the legal characterization of facts," was adopted to determine whether and to what extent the Pre-Trial Division judges and Trial Chamber judges may "correct legal flaws" in the charges during trial. ⁴⁵ The judges originally adopted, and the Assembly of States Parties approved,

³⁴ See Schabas, *supra* note 19 ("With the exception of amendment of the charges, which remain the responsibility of the Pre-Trial Chamber until the beginning of the trial, the Trial Chamber takes over authority for the case."); see also Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA8, Reasons for "Decision of the Appeals Chamber on the Defence Application 'Demande de suspension de toute action ou procedure afin de permettre la designation d'un nouveau Conseil de la Defense' filed on 20 February 2007" issued on 23 February 2007, P 6 (Mar. 9, 2007) ("Under the provisions of article 61(11) of the Statute, upon the confirmation of the charges, the Presidency 'shall constitute a Trial Chamber' and sequentially thereto transmit, as provided in rule 130 of the Rules of Procedure and Evidence, the decision as well as the record of the proceedings of the Pre-Trial Chamber to the Trial Chamber.").

³⁵ See Katanga Final Judgment, *supra* note 7, Minority Opinion of Judge Christine Van den Wyngaert, P 37-40 (stressing that an accused should be required to defend only against those charges specifically confirmed by the Pre-Trial Chamber).

³⁶ See generally Rome Statute, *supra* note 4.

³⁷ See generally Int'l Criminal Court, Rules of Procedure and Evidence, U.N. Doc. ICC-ASP/1/3 (Part II-B) (Sept. 9, 2002), <http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> [<http://perma.cc/KCL5-EFLJ?type=pdf>] (archived Oct. 12, 2014).

³⁸ See generally Int'l Criminal Court, Regulations of the Court, U.N. Doc. ICC-BD/01-03-11 (May 26, 2004) [hereinafter Revised Regulations] <http://www.icc-cpi.int/NR/rdonlyres/50A6CD53-3E8A-4034-B5A9-8903CD9CDC79/0/RegulationsOfTheCourtEng.pdf> [<http://perma.cc/J3UP-BM7X?type=pdf>] (archived Oct. 12, 2014).

³⁹ See generally Int'l Criminal Court, Regulations of the Registry, U.N. Doc. ICC-BD/03-01-06 (March 6, 2006) http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBD_030106_English1.pdf [<http://perma.cc/KVZ3-5SLK?type=pdf>] (archived Oct. 12, 2014).

⁴⁰ See Claus Kriebeta, The Procedural Texts of the International Criminal Court, 5 J. Int'l Crim. Just. 537, 538-42 (2007) (describing the several instruments used to facilitate the functioning of the International Criminal Court).

⁴¹ See Rome Statute, *supra* note 4, art. 52(1) (providing authority to the judges of the International Criminal Court to adopt regulations necessary to the court's "routine functioning"); Kriebeta, *supra* note 40, at 540 (stating that the ICC's provisions have "banned rule-making by judges to a considerable degree" but that ICC judges "still possess the power to create the Regulations of the Court under Article 52").

⁴² See Int'l Criminal Court, Regulations of the Court, U.N. Doc. ICC-BD/01-01-04 (May 26, 2004), http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf [<http://perma.cc/L8TX-ZWBW?type=pdf>] (archived Oct. 12, 2014).

⁴³ See generally Revised Regulations, *supra* note 38.

⁴⁴ See, e.g., *id.* regs. 7, 21, 31.

⁴⁵ See Carsten Stahn, Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55, 16 Crim. L.F. 1, 2 (2005) (noting the "crucial importance" of this question for the functioning of the International Criminal Court).

Regulation 55 in 2004, and it has not since been amended. ⁴⁶ Regulation 55 permits the judges to amend the legal characterization of the facts against the defendant in order to more accurately comply with the evidence presented on either the crime(s) charged or form of participation alleged. ⁴⁷ Proponents of Regulation 55 are quick to emphasize its sub-regulations - particularly 2 and 3 - as effective procedural safeguards for the accused. ⁴⁸ First, Regulation 55(1) limits the judges' ability to amend the charges to only the facts and circumstances described in the charges or, if applicable, amended charges. ⁴⁹ Additionally, Regulation 55(2) requires the judges to give notice of the possibility of such changes at an appropriate stage of the proceedings and to give the parties the opportunity to present oral or [*282] written submissions. ⁵⁰ Regulation 55(2) also permits the judges to suspend the hearing in order to allow the parties to prepare for the proposed change. ⁵¹ Lastly, Regulation 55(3) specifically requires the judges to ensure that the defense is afforded adequate time and facilities to effectively prepare his or her defense and, if necessary, to give the defense the opportunity to present additional evidence or witnesses and reexamine previous witnesses. ⁵² However, as this Note will demonstrate in Parts V and VI, the textual restrictions in these sub-regulations only work as such safeguards in theory.

Regulation 55 must be examined in light of the entire procedural framework of the ICC, particularly Articles 61 and 74 of the Rome Statute. ⁵³ Article 61 deals, in part, with the amendment of charges at different stages of the trial. ⁵⁴ Article 61(9) grants the Prosecutor the authority to amend the charges against the defendant after the

⁴⁶ See Revised Regulations, supra note 38, reg. 55.

⁴⁷ See id. The text of Regulation 55 provides:

1. In its decision under article 74, the Chamber may change the legal characterization of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 or 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterization of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

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

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1(b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1(e).

Id.

⁴⁸ See infra notes 49-52. But see infra Parts V-VI (explaining the limitations of Regulation 55's textual restrictions).

⁴⁹ See Revised Regulations, supra note 38, reg. 55(1).

⁵⁰ See id. reg. 55(2) ("If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility ...").

⁵¹ See id. reg. 55(3) ("The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.").

⁵² See id. (providing for the protection of the defendant's right to a trial without undue delay and the right to prepare and organize a defense).

⁵³ See Rome Statute, supra note 4, arts. 61, 74 (governing "confirmation of the charges before trial" and "requirements for the [Trial Chamber's] decision"); Revised Regulations, supra note 38, at 22 (referring to "its decision under Article 74").

⁵⁴ See generally Rome Statute, supra note 4, art. 61 (containing provisions addressing the amendment process at various stages of trial).

confirmation of charges and before the beginning of trial.⁵⁵ In such a scenario, the Prosecutor must first receive permission from the Pre-Trial judges and provide notice to the defense.⁵⁶ A hearing must be held in order for the Prosecutor to add charges or substitute more serious charges than those originally confirmed.⁵⁷ A hearing must then be held to confirm any additional charges.⁵⁸ After the trial has begun, the Prosecutor may withdraw charges only with the permission of the Trial Chamber.⁵⁹ Additionally, Article 74 of the Rome Statute provides the requirements for a Trial Chamber judgment.⁶⁰ Specifically, Article 74(2) limits the decision to the facts **[*283]** and circumstances described in the charges and, if applicable, any amendments to the charges.⁶¹

III. Comparative Perspective on Criminal Procedure and Regulation 55

A judge's unilateral decision to change the legal characterization of facts at any stage of a criminal proceeding raises several developmental issues in the field of international criminal law while simultaneously highlighting some of the differences between the civil law and common law approaches to criminal procedure.⁶² While it may seem unusual to grant such expansive authority to judges from a common law perspective, this procedural device is not uncommon among civil law jurisdictions.⁶³ This designation of power at the ICC was the result of an inability to compromise among the delegates from both civil law and common law traditions during the Rome Conference.⁶⁴

Generally, common law judges may not unilaterally change the legal characterization of the crime or crimes charged against a defendant.⁶⁵ In most common law jurisdictions, a judge wishing to make such an amendment must seek a formal alteration during the trial stage.⁶⁶ In most situations, if the defendant is found guilty of an offense not specifically charged in the indictment, a common law judge must not convict on that offense, subject to the lesser included offense doctrine.⁶⁷ In common law systems, the prosecutor possesses **[*284]** the primary

⁵⁵ See id. art. 61(9) ("After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges.").

⁵⁶ See id. (mandating a notice requirement). The notice requirement helps to ensure the defendant's right to prepare his or her defense.

⁵⁷ See id. ("If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.").

⁵⁸ See id.

⁵⁹ See id.

⁶⁰ See id. art. 74 (providing requirements for attendance by judges, the form and basis of decisions, and the secrecy of deliberations).

⁶¹ See id. art. 74(2) (limiting the Trial Chamber's inquiry to "evidence submitted and discussed before it at the trial").

⁶² See Stahn, *supra* note 45, at 3-6 ("One of the root causes of the absence of a unified stance on the procedural treatment of changes in the qualification of crimes at the [international] trial stage is a methodological divide, namely, a difference in approach by common law and civil law jurisdictions.").

⁶³ See id. at 5 ("Civil law jurisdictions frequently enable the judge to qualify the facts submitted by the Prosecution in a legally different format than the document containing the charges, without requiring a previous amendment of the charges.").

⁶⁴ See id. at 4 (remarking that neither the Rome Statute nor the Rules of Procedure and Evidence provide a "conclusive answer" to the question because "no common solution could be reached, due to divisions over a feasible methodology to deal with the problem of the legal re-classification of facts. This 'constructive ambiguity' left the final say over the choice of concept in the hands of the judges of the Court.").

⁶⁵ See Gilbert Bitti, *Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursum Delictorum*, in *International and National Prosecution of Crimes Under International Law: Current Developments* 273, 282 (Horst Fischer, Claus Kriebeta & Sascha Rolf Luder eds., 2001).

⁶⁶ See Stahn, *supra* note 45, at 5.

⁶⁷ See id. It should be noted that judges are permitted to convict a defendant of a lesser included offense when different from the original crime contained in the indictment. See id. ("[Common law c]ourts may convict an accused of lesser included offences ... if the essential elements of the latter are included in the offence charged But common law jurisdictions are reluctant to

authority to determine the charges against the defendant.⁶⁸ The prosecutor does this by drafting an indictment and having the indictment approved by a grand jury or by drafting and filing an information.⁶⁹

Perhaps unsurprisingly, civil law jurisdictions grant more authority to the judges in determining an individual defendant's charges in a particular case.⁷⁰ In these systems, there is an assumption that the initial legal classification of a crime is not binding.⁷¹ A civil law prosecutor's legal classification of a crime is instead a recommendation for the judge.⁷² This initial assumption lays the framework for a trial process characterized by a relatively active judicial role in the determination of charges.⁷³ Typically, civil law jurisdictions permit judges to re-characterize the facts submitted by both parties without a formal amendment.⁷⁴ While the procedural details may vary among civil law countries, most jurisdictions provide notice to the defendant of charges as well as an opportunity for the defendant to present additional evidence.⁷⁵ These are recognized by international standards of human rights as minimal procedural safeguards.⁷⁶

[*285] Common law and civil law jurisdictions take divergent approaches to the role of judges and, specifically, a judge's authority to re-characterize legal facts, and there is no general consensus on the proper role of judges at the international level.⁷⁷ As the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded in *Kupreskic*, after conducting a survey of the treatment of judicial re-characterizations in different jurisdictions, "it is apparent ... that no general principle of criminal law common to all major legal systems of the world may be found."⁷⁸

grant courts the discretion to convict an accused for a crime with substantially different elements ... or a more serious crime not specifically charged in the indictment.").

⁶⁸ See Jingbo Dong, *Prosecutorial Discretion at the International Criminal Court: A Comparative Study*, 2 *Can. Ctr. Sci. & Educ. J. Pol. & L.* 109, no. 2, June 2009, at 109, 110 (footnote omitted) ("In stark contrast [to the civil law system], under [the] common law system, the officer charged with public prosecutions has absolute discretion on whether a case will be carried forward, what the formal charges will be, and even if the charges should be later dropped.").

⁶⁹ See Yale Kamisar et al., *Advanced Criminal Procedure* 1015-17, 1041-44 (13th ed. 2012) (outlining procedural requirements for the screening of charges in the United States); see also Dong, *supra* note 68, at 109 (discussing the charging discretion of prosecutors in common law jurisdictions).

⁷⁰ See Dong, *supra* note 68, at 109 (describing how the prosecutor's discretion is subjected to judicial control in civil law jurisdictions).

⁷¹ See *id.* at 109-10.

⁷² See Stahn, *supra* note 45, at 5 ("The Prosecutor's legal classification of the crime is merely a recommendation, while the judge is in charge of determining the substantive content of the trial on the basis of the facts submitted by the parties.").

⁷³ See Dong, *supra* note 68, at 109-10 (identifying France, Germany, and China as examples of the traditional prosecutorial role under civil legal tradition).

⁷⁴ See *id.* at 109-10 (emphasizing the role of the judiciary by describing how the Prosecutor is not permitted to drop charges without judicial permission).

⁷⁵ See Stahn, *supra* note 45, at 6 (citing Austrian, German, Italian, and French codes of criminal procedure); *Zivilprozessordnung [ZPO] [Code of Civil Procedure]* Jan. 30, 1877, *Reichsgesetzblatt [RGBl.]* as amended, § 265, para. 1 (Ger.) (prohibiting a change in legal reference without first affording the defendant an opportunity to defend himself); *Minji Soshoho [Minsoho] [C. Civ. Pro.]* 1996, art. 312, para. 4 (Japan) (requiring the court to suspend the trial for a period necessary for the accused to prepare for a sufficient defense upon the request of the accused or his or her counsel if the court deems an alternation may cause substantial disadvantage to the defense).

⁷⁶ See, e.g., *Rome Statute*, *supra* note 4, art. 67(a), (e) (providing that, among other "minimal guarantees" to which an accused is entitled, an accused "shall be entitled ... to be informed promptly of the nature, cause and content of the charge" and "to raise defences and to present other evidence admissible under [the Rome Statute].").

⁷⁷ See *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, *Judgement*, P 728 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (noting "the lack of any general principles of international criminal law" applicable to cases involving "an erroneous legal classification of facts by the Prosecutor").

⁷⁸ *Id.* P 738.

There is a general international consensus on the bundle of rights that composes those most essential for an accused. In Kupreskic, the ICTY noted that there existed "a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice."⁷⁹ These requirements included two significant standards that are relevant in the analysis of the ICC's use of Regulation 55: (1) "the requirement that the rights of the accused be fully safeguarded" and (2) the requirement that the prosecutor be afforded the means necessary to execute its functions "efficiently and in the interests of justice."⁸⁰

Drafters representing both legal traditions attempted to solidify either a common law or civil law character for the Rome Statute and ICC Rules of Procedure and Evidence.⁸¹ During the Rome Conference, the drafters of the Rome Statute considered the procedural treatment of judicial re-characterization of crimes, but were unable to reach a consensus on the issue.⁸² The drafters introduced multiple different proposals on the issue of legal re-characterization of facts by the Trial Chamber judges after the Confirmation of Charges.⁸³

The ICTY prosecutor, Portugal, and Spain, introduced proposals that would permit a Trial Chamber re-characterization.⁸⁴ These proposals would have allowed the Trial Chamber to unilaterally **[*286]** recharacterize the form of participation so long as the parties were notified and were provided the opportunity to make submissions.⁸⁵

Delegates who hailed from a common law tradition instead recommended a Prosecutor re-characterization proposal that would restrict the Trial Chamber to the charges contained in the indictment and would permit only the Prosecutor to withdraw or substitute lesser charges.⁸⁶ The delegates from civil law countries rejected this proposal.⁸⁷

A final proposal that would permit Pre Trial re-characterization, presented by the French delegation, is the most similar to the current version of Regulation 55.⁸⁸ This proposal granted the Pre-Trial Chamber the authority to change the characterization of facts so long as it maintained adequate safeguards for the defense.⁸⁹

Since the delegations to the Rome Conference were representative of both civil law and common law traditions, ultimately all initial proposals were rejected due to the disagreement about the scope of authority exercised by the Trial Chamber judges.⁹⁰

⁷⁹ Id.

⁸⁰ Id. P 739.

⁸¹ See Stahn, *supra* note 45, at 10-11 ("Several attempts were made to firmly establish either a common law or a civil law methodology in the Statute or the RPE. But none of the two approaches managed to gain full support among the State parties.").

⁸² See Bitti, *supra* note 65, at 284-86 (discussing proposals made during the Fourth Session of the Preparatory Commission).

⁸³ See *id.* (discussing the ICTY Prosecutor's Office proposal, which was derived from the Kupreskic case, the Portuguese and Spanish proposal, the proposal presented by the common law countries, and the French proposal).

⁸⁴ See *id.* at 284.

⁸⁵ See *id.* (allowing the Trial Chamber to "classify the particular form of participation in an offence in a different manner under Article 25 (3) than that contained in the indictment"). Common law countries rejected these proposals because they were in contravention with their common law system in which judges are bound by the indictment as drafted by the Prosecutor. See *id.* at 285.

⁸⁶ See *id.* (explaining that for the common law countries, the first two proposals by the ICTY Prosecutor and Portugal "went much too far").

⁸⁷ See *id.* at 286.

⁸⁸ See *id.* (giving the Trial Chamber substantial discretion in qualifying facts regarding the crime allegedly committed and form of participation in said crime).

⁸⁹ See *id.* (requiring only due notice and an opportunity to for the parties make submissions). Like the others, no agreement was reached on this proposal. See *id.*

In 2004, at the time of the Fifth Plenary Session where the Regulations of the Court were adopted, the majority of elected ICC judges hailed from countries that represented the civil law tradition.⁹¹ Thus, Regulation 55 permits legal re-characterization of facts with notice to the defense and the opportunity to make submissions.⁹² While such procedural safeguards are laudable, it is less certain that the ICC effectively utilizes such safeguards to ensure that the defendant is afforded proper fair trial rights.

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IV. Use of Regulation 55 in the ICC

A. General Application of Regulation 55

In the ICC, Regulation 55 permits the Trial Chamber to modify the legal characterization of facts at any time during the trial, even if the resulting characterization is at odds with how the Prosecution presented the evidence or how the charges were confirmed after the confirmation hearing.⁹³ For example, if the prosecution charges the accused with directly committing a particular crime after the confirmation hearing - for example, in the case of Germain Katanga, 25(3)(a) primary liability for crimes against humanity under the Rome Statute - but the evidence later suggests that the evidence in fact supports a different charge - 25(3)(d) liability for being an accessory of the crimes - the Trial Chamber can convict the accused under the different charge.⁹⁴ It is irrelevant that this new mode of liability was not considered or confirmed during the confirmation hearing.⁹⁵

B. Aims of Regulation 55

Commentators, critics, and justices of the ICC have advanced several purported objectives of Regulation 55.⁹⁶ First, commentators [*288] have advanced the prevention of impunity gaps as a primary purpose of Regulation 55.

⁹⁰ See Hakan Friman, *The Rules of Procedure and Evidence in the Investigative Stage, in International and National Prosecution of Crimes Under International Law: Current Developments*, supra note 65, at 191, 208-09 (expanding on the lack of agreement and pointing out that the decision ultimately rests with the ICC judges).

⁹¹ See Results of the Election of the Judges of the International Criminal Court, United Nations, [http://legal.un.org/icc/elections/results/judges_results](http://legal.un.org/icc/elections/results/judges_results.htm).htm (last visited Sept. 24, 2014) [<http://perma.cc/GXU3-UCVU>] (archived Sept. 28, 2014) (listing the judges, first elected in 2003, who served at the ICC as of 2004).

⁹² See Stahn, supra note 45, at 1 n.1 (describing Regulation 55 as "a traditional civil law concept").

⁹³ See Jennifer Easterday, *Germain Katanga & Mathieu Ngudjolo Chui at the International Criminal Court: A Closer Look at Regulation 55 at the ICC*, *Int'l Just. Monitor* (May 28, 2013) [hereinafter Easterday, *Closer Look*], <http://www.katangatrial.org/2013/05/a-closer-look-at-regulation-55-at-the-icc/> [<http://perma.cc/K7X4-ECA5>] (archived Sept. 28, 2014) (discussing the decision of the Appeals Chamber in Katanga).

⁹⁴ See *id.*

⁹⁵ See *id.* ("According to the [Katanga] Appeals Chamber majority, the trial chamber can give notice "at any time during the trial' without limit, as long as it provides the parties with the opportunity to make oral and written submissions about the proposed change at an appropriate stage of the proceedings.").

⁹⁶ See, e.g., Diala, supra note 8, at 64-66 (citing an argument by the defense in the Lubanga trial to the effect that the sole purpose of Regulation 55 is "to correct legal qualifications that could otherwise invalidate investigations," and does not allow the Trial Chamber to "incorporate qualifications not envisaged" by the prosecution); Fiona O'Regan, *Prosecutor vs. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism*, *43 Geo. J. Int'l L.* 1323, 1344-47 (2012) (stating that the Appeals Chamber in Lubanga "displayed a desire to restrict the ambit of Regulation 55 and ensure that it would only be used in exceptional circumstances to fulfill its primary function of "closing accountability gaps") (quoting *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 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", P 88 (Dec. 8, 2009)); Stahn, supra note 45, at 13-16 ("The adoption of the concept of the legal qualification of facts ... preserves the principle of the exclusion of an amendment of the charges after the confirmation hearing, while providing the Trial Chamber with a flexible interpretative device to correct legal flaws in the indictment within the confines of the facts and circumstances described in the charges.").

⁹⁷ In such scenarios, the use of Regulation 55 is intended to avoid situations in which an accused is acquitted on a premature legal technicality even though there is proof beyond a reasonable doubt that he or she has committed some crime within the jurisdiction of the court. ⁹⁸

The drafters of Regulation 55 identified efficiency and judicial economy as additional purposes of Regulation 55. ⁹⁹ Regulation 55 can prevent "overburdening ... judges with cases involving cumulative or alternative charges" and "allow[] for more efficient, timely trials." ¹⁰⁰ Since trials at the ICC are already lengthy processes, the judges have sought to avoid hearing the parties present and address evidence on cumulative charges. ¹⁰¹ Thus, the judges have concluded that they can use Regulation 55 to avoid the burden of cumulative charging. ¹⁰² Whether the use of Regulation 55 actually aids in an efficient trial process will be addressed in Part VI.

V. Regulation 55 in the Katanga Case

[...]

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VI. Criticisms of Regulation 55

An examination of the Trial Chamber's use of Regulation 55 in the Katanga case highlights the consequences of such a recharacterization **[*293]** on the defendant's fair trial rights. ¹³⁹ The major criticisms surrounding Regulation 55 emphasize the insufficient protection afforded to the defendant's trial rights. ¹⁴⁰ Article 67 of the Rome Statute,

⁹⁷ This argument was proposed by the Prosecution to the Appeals Chamber in the Katanga case following the Trial Chamber's decision to change the charges against the accused. See Jennifer Easterday, Germain Katanga & Mathieu Ngudjolo Chui: Appeals Chamber Confirms Decision on Potential Charges to Katanga Case, Int'l Just. Monitor (Mar. 28, 2013), <http://katangatrial.org/2013/03/appeals-chamber-confirms-decision-on-potential-changes-to-katanga-case> [<http://perma.cc/W6GE-BUAJ>] (archived Sept. 28, 2014) [hereinafter Easterday, Appeals Chamber].

⁹⁸ See Easterday, Closer Look, supra note 93 (suggesting that 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").

⁹⁹ See Stahn, supra note 45, at 28.

¹⁰⁰ See Easterday, Closer Look, supra note 93.

¹⁰¹ See id.; see, e.g., Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, 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", P 21 (Mar. 27, 2013) [hereinafter Katanga Judgment on Appeal] (noting "the length, complexity and evidentially voluminous nature of the proceedings that come before [the ICC]").

¹⁰² See Easterday, Closer Look, supra note 93. This purpose was advanced by the Pre-Trial Chamber in its decision in the Bemba case concerning cumulative charges, where the judges rejected the cumulative charges presented by the Prosecutor, relying on the fact that they could later amend the charges if evidence proved otherwise. See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, P 203 (June 15, 2009) [hereinafter Bemba Decision Pursuant to Article 61(7)(a) and (b)].

¹³⁹ See Katanga Judgment on Appeal, supra note 101, PP 59-105 (discussing the alleged violations of Katanga's fair trial rights).

¹⁴⁰ See generally Susana SaCouto & Katherine Cleary, War Crimes Research Office, American University Washington College of Law, Defining the Case Against an Accused Before the International Criminal Court: Whose Responsibility Is It? (2009) [hereinafter SaCouto & Cleary, Defining the Case], available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCRO&uscore>; Report on _Defining_Case_Nov2009.pdf [<http://perma.cc/EAN8-GK9P?type=pdf>] (archived Oct. 17, 2014) ("Surely these [trial] rights would be more meaningful if the accused was given some certainty over the charges on which he or she will be tried."); Diala, supra note 8 (discussing the ICTY

entitled "Rights of the Accused," provides the minimum guarantees that must be afforded to the accused before and during the trial.¹⁴¹ These rights of the accused, including the right to trial without undue delay, the right to be informed of charges, and the right to prepare a defense, reflect internationally recognized human rights.¹⁴² While it is true that the language of the Rome Statute and Regulation 55 recognize such procedural safeguards, it is far from certain that these fundamental rights are adequately protected in practice.¹⁴³

A. The Right to Be Informed of Charges

Article 67(1)(a) provides for the defendant's right to be informed promptly and in detail of the nature, cause, and content of the charges.¹⁴⁴ This fundamental right has been preserved in nearly every major human rights treaty, including Article 6(3)(a) of the European Convention on Human Rights (ECHR) and Article 14(3) of [*294] the International Covenant of Civil and Political Rights (ICCPR).¹⁴⁵ The primacy of this right has been emphasized in international human rights jurisprudence.¹⁴⁶ This jurisprudence is particularly relevant to the interpretation of Article 67 under the Rome Statute due to Article 21(3), which provides that, "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."¹⁴⁷ Both the European Commission on Human Rights and the European Court of Human Rights have found that Article 6(3) of the ECHR extends to the legal characterization of the facts.¹⁴⁸ Particularly, in *Pelissier and Sassi v. France*, the Court elaborated that "in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair."¹⁴⁹

Proponents of Regulation 55 argue that Regulation 55 addresses any infringement on the right to be informed of charges by the text of sub-regulation 2, which requires the Trial Chamber to inform the parties about the potentially changed legal characterization of facts.¹⁵⁰ However, as practice has proven, the Trial Chambers at the ICC have

Trial Chamber's decision not to recharacterize the facts in the Kupreskic case because it would "prejudice the rights of the accused to proper notice of the nature of the charges against him").

¹⁴¹ See Rome Statute, *supra* note 4, art. 67.

¹⁴² See, e.g., International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 14668 [hereinafter ICCPR] (providing for the right of an accused "to be informed promptly ... of the charge against him," "to have adequate time and facilities for the preparing of his defence," and "to be tried without undue delay"); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 6, Sept. 3, 1953, 213 U.N.T.S. 2889 [hereinafter ECHR] (providing for the right of an accused "to be informed promptly ... of the accusation against him" and "to have adequate time and facilities for the preparation of his defence").

¹⁴³ See Revised Regulations, *supra* note 38, reg. 55 (requiring notice to the accused as well as adequate time and facilities for effective defense preparation); see also Jacob Katz Cogan, International Criminal Courts and Fair Trials: Difficulties and Prospects, [27 Yale J. Int'l L. 111, 136-39 \(2002\)](#) (reviewing the limitations on defense at the ICTY and ICTR and suggesting that the ICC will have even greater difficulties protecting the fair trial rights of the accused).

¹⁴⁴ See Rome Statute, *supra* note 4, art. 67(1)(a).

¹⁴⁵ See ICCPR, *supra* note 142, art. 14(3); ECHR, *supra* note 142, art. 6(3)(a).

¹⁴⁶ See, e.g., *Pelissier & Sassi v. France*, App. No. 25444/94, Eur. Ct. H.R., P 51 (1999) [hereinafter *Pelissier case*] ("The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the 'accusation' to the defendant.").

¹⁴⁷ Rome Statute, *supra* note 4, art. 21(3).

¹⁴⁸ See *Pelissier case*, *supra* note 146, P 52. In these circumstances, the legal characterization of the facts involves a determination as to whether the facts and circumstances pleaded in the charges should be characterized as a different crime or a different mode of liability than initially pleaded.

¹⁴⁹ *Pelissier case*, *supra* note 146, P 52.

¹⁵⁰ See Revised Regulation, *supra* note 38, reg. 55(2) ("If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility");

invoked Regulation 55 at late stages in the trial process - in one case, after the Prosecution had completed its case and, in a more alarming case, after the end of trial.¹⁵¹ Even if the Trial Chamber fulfills its obligation to provide notice to the parties about changing the charges, it is too little, too late.¹⁵² Both Prosecution and Defense [*295] generally rely on the Trial Chamber's initial confirmation of charges before and during the trial process to prepare their cases.¹⁵³ The bare minimum protections provided in Regulation 55(2) provide scant assurance that the defendant remains informed of the charges during the trial.¹⁵⁴ By changing the mode of liability during or after the parties have begun presenting their cases, the Trial Chamber judges undermine one of the most fundamental due process rights.¹⁵⁵

B. The Right to Prepare Defense

Article 67(1)(b) provides for the defendant's right to have adequate time and facilities for the preparation of the defense.¹⁵⁶ This right, like the right to be informed of the charges, finds substantial support in the various international human rights treaties, such as Article 14(3)(b) of the ICCPR and Article 6(3)(b) of the ECHR.¹⁵⁷ The European Commission of Human Rights describes this right as "the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court."¹⁵⁸

Proponents of Regulation 55 believe that sub-regulation 3 provides a sufficient safeguard to protect this right.¹⁵⁹ Regulation 55(3)(a) provides an express procedural protection for the defendant, permitting the accused to seek suspension of the hearing in order to prepare the defense or to seek a new hearing.¹⁶⁰ Additionally, Regulation 55(3)(b) provides the opportunity for the accused to examine again a previous witness, to call new witnesses or to present other admissible evidence.¹⁶¹

see, e.g., Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99(2) *Am. J. Int'l L.* 370, 377 (2005); Stahn, *supra* note 45, at 19-20.

¹⁵¹ See *Katanga Judgment on Appeal*, *supra* note 101, PP 2-4 (providing in its procedural history of the case that the Regulation 55 recharacterization occurred after the Trial Chamber had retired for deliberations); *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-2324, Decision giving notice to the parties and participant that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, P 5 (Sept. 21, 2012).

¹⁵² See *Katanga Final Judgment*, *supra* note 7, Minority Opinion of Judge Christine Van den Wyngaert, P 40 ("By springing article 25(3)(d)(ii) at the end of the trial, the Katanga Defence may have conceded, or less vigorously contested, certain points of fact that it might have contested differently had it been properly informed." (emphasis added)).

¹⁵³ See *id.* P 26 ("The purpose of formulating charges [in the Confirmation Decision] is precisely to make clear which inferences are being alleged ...").

¹⁵⁴ See *id.* PP 60-67 (discussing the problematic implications for fair notice of the Trial Chamber's decision to withhold notice until the close of evidence); see also Revised Regulations, *supra* note 38, reg. 55 (providing that notice shall be given "at any time during trial" (emphasis added)).

¹⁵⁵ See *Katanga Final Judgment*, *supra* note 7, Minority Opinion of Judge Christine Van den Wyngaert, PP 60-70.

¹⁵⁶ See *Rome Statute*, *supra* note 4, art. 67(1)(b) (providing for the accused's right "to adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence").

¹⁵⁷ See ICCPR, *supra* note 142, art. 14(3)(b) ("Everyone shall be entitled to ... have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."); ECHR, *supra* note 142, art. 6(3)(b) (providing that an accused has the right "to have adequate time and facilities for the preparation of his defence").

¹⁵⁸ *Can v. Austria*, App. No. 9300/81, *Eur. Comm'n H.R.*, P 53 (1984).

¹⁵⁹ See Revised Regulations, *supra* note 38, reg. 55(3); see, e.g., Hans-Peter Kaul, *supra* note 150, 377; Stahn, *supra* note 45, at 20.

¹⁶⁰ See *id.* reg. 55(3)(a).

¹⁶¹ See *id.* reg. 55(3)(b).

[*296] However, even these express procedural protections do very little to ensure that an ICC defendant has a right to prepare and organize his defense in a meaningful way.¹⁶² For example, in Bemba, after the defense had begun presenting its case, the judges of Trial Chamber invoked Regulation 55 and gave notice to the parties of a potential change to lower the knowledge requirement for the crimes charged.¹⁶³ The defense objected to such a modification, arguing that this change would require at least six to nine months of additional investigation and time to prepare.¹⁶⁴ The defense sought leave to appeal this decision on the grounds that the improper use of Regulation 55 violated a defendant's trial rights, but the Trial Chamber denied the appeal.¹⁶⁵ Unwilling to further delay an already lengthy trial, the defense moved to recommence the trial. In this motion, the defense maintained that, absent a formal decision to amend the charges or a decision that Regulation 55 is being relied upon by the Trial Chamber, re-characterization of the facts for a lesser mens rea would result in actual prejudice.¹⁶⁶ The Trial Chamber declined to render a formal decision about the knowledge requirement it would impose on the defendant, depriving Bemba of his right to notification of the charges against him.¹⁶⁷

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C. The Right to Trial without Undue Delay

Article 67(1)(c) provides for the defendant's right to be tried without undue delay.¹⁶⁸ The trial process at the ICC is already extensive and lengthy, compared to domestic legal systems and even other international judicial bodies.¹⁶⁹ Regulation 55 causes unnecessary delays by requiring the both parties to make additional submissions - after

¹⁶² See, e.g., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Defence Submissions on the Trial Chamber's Notification Under Regulation 55(2) of the Regulations of the Court, PP 27-32 (Oct. 18, 2012) [hereinafter Bemba Defense Submissions] ("Given that the Defence case is already well underway, the Defence has neither the time nor the resources to investigate and prepare to refute an alternative theory of liability."). See generally *infra* notes 163-69.

¹⁶³ See Bemba Defense Submissions, *supra* note 162, PP 1-10 (explaining the procedural history of the Bemba case prior to the Trial Chamber's invocation of Regulation 55); Bemba Notice on Regulation 55, *supra* note 8, P 5 (giving notice to the parties of the Trial Chamber's desire to consider recharacterization of the charges pursuant to Regulation 55(2)).

¹⁶⁴ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, 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, P 6 (Dec. 18, 2012) [hereinafter Bemba Defence Request for Leave] ("The Defence estimated that the minimum time necessary would be 6-9 months.").

¹⁶⁵ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Public Redacted Version of "Decision on "Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural Deadlines" of 11 January 2013, P 36 (Jan. 16, 2013) (denying the defense's request for leave to appeal); Bemba Defence Request for Leave, *supra* note 164, P 20 (explaining the defense's proposed grounds for appeal).

¹⁶⁶ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Defence Motion to Vacate Trial Chamber's "Decision on the Temporary Suspension of the Proceedings" of 13 December 2012 and Notification Regarding the Envisaged Re-Qualification of Charges Pursuant to Regulation 55, P 9 (Jan. 28, 2013).

¹⁶⁷ See *id.* P 12 ("Given the accused has received no valid, prompt and legally adequate notification of any such allegation, the Defence cannot be required at this late stage of the proceedings to prepare and answer the possibility of a different basis of liability." (emphasis added)).

¹⁶⁸ See Rome Statute, *supra* note 4, art. 67(1)(c).

¹⁶⁹ See Susana SaCouto & Katherine Cleary, War Crimes Research Office, American University Washington College of Law, Expediting Proceedings at the International Criminal Court 1, 11 (2011) [hereinafter SaCouto & Cleary, Expediting Proceedings], available at <http://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf> (attributing such delays to the difficulty of collecting evidence in conflict-prone countries, dislocated witnesses, translation needs, the need to establish contextual elements of crimes, and the large scale of the crimes at issue).

one or both parties have already presented evidence during the confirmation hearing to confirm the charges.¹⁷⁰ Potentially, parties could be required to call new witnesses or re-examine previous witnesses, to perform new investigations, and to hold new hearings.¹⁷¹ When such interruptions are instigated during an ongoing trial and, especially, after the close of trial, Regulation 55 extends the trial process to the detriment of the defendant.¹⁷²

It was nearly six months after the close of Katanga's two and a half year trial, when a majority of the Trial Chamber notified the parties that it was considering a re-characterization of the mode of liability.¹⁷³ Trial Chamber Judge Van den Wyngaert issued a strong dissenting opinion in response to the majority decision, concluding that the notice of a potential re-characterization threatens the defendant's right to a fair and impartial hearing.¹⁷⁴ Katanga agreed, and appealed the Trial Chamber's decision, arguing that such a decision violated his fair trial rights and indicated that the majority was biased against him.¹⁷⁵ However, the majority of the Appeals [*298] Chamber concluded that the timing and the scope of the Trial Chamber's decision fit within the framework of Regulation 55.¹⁷⁶

Although the Appeals Chamber found that the use of Regulation 55 did not automatically violate Katanga's fair trial rights, it did acknowledge that there was a risk of such a violation.¹⁷⁷ According to the Appeals Chamber, the Trial Chamber could violate the defendant's rights depending on how the additional proceedings were conducted.¹⁷⁸ The Appeals Chamber acknowledged that the late timing of the Trial Chamber decision could violate Katanga's right to trial without undue delay.¹⁷⁹ Therefore, the majority stated that if the Trial Chamber did decide to change the mode of liability against Katanga, it is required to ensure that he still received a trial without undue delay.¹⁸⁰

Katanga conspicuously leaves open the question of what constitutes "undue delay" in the eyes of the ICC. Considering that Katanga was first charged six years before, any conception of "undue delay" by the ICC is bound to be a narrow one.

D. Judicial Expansion of Power at the Expense of the Prosecution

¹⁷⁰ See Katanga Final Judgment, *supra* note 7, Minority Opinion of Judge Christine Van den Wyngaert, PP 13-14 ("I strongly believe that the length of these proceedings is incompatible with the Chamber's obligation under article 64(2) to conduct the trial expeditiously and with the accused's right to be tried without undue delay under article 67(1)(c).").

¹⁷¹ See Revised Regulations, *supra* note 38, reg. 55 (allowing the defense to reexamine witnesses or call new witnesses and allowing the Chamber to suspend hearings or call new hearings).

¹⁷² See Katanga Final Judgment, *supra* note 7, Minority Opinion of Judge Christine Van den Wyngaert, PP 13-14 ("We must not lose sight of the fact that [the accused], who has endured these delays whilst in detention awaiting verdict, has in no way contributed to them." (citation omitted)).

¹⁷³ See Katanga Decision on Regulation 55, *supra* note 6.

¹⁷⁴ See *id.* P 53 (characterizing the majority's decision as "incompatible with Article 67(1)(a), (b), (c), (g), and (i)") (translated by Lydia Ansermet).

¹⁷⁵ See Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, 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 (Jan. 10, 2013).

¹⁷⁶ See Katanga Judgment on Appeal, *supra* note 101, PP 85-105.

¹⁷⁷ See Katanga Judgment on Appeal, *supra* note 101, P 89 (finding that the Trial Chamber's measures adequately safeguarded the rights of the accused while acknowledging the danger of violating such rights by way of a Regulation 55 recharacterization).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* P 99.

¹⁸⁰ See Rome Statute, *supra* note 4, art. 67(c) (providing that an accused is entitled "to be tried without undue delay").

One significant line of criticism aimed at Regulation 55 focuses on the judges' attempt to expand their control over proceedings by improperly invoking the regulation.¹⁸¹ For example, following the Lubanga trial before the ICC, critics condemned the use of Regulation 55 to add new charges against the defendant in the middle of the trial.¹⁸² According to Dov Jacobs, who has written extensively about the proceedings of the Lubanga case, both the Pre-Trial Division and Trial Chamber improperly expanded their control over the case by first amending, and then adding, charges.¹⁸³ Jacobs emphasizes that **[*299]** under the text of the Rome Statute, the Prosecutor is "solely responsible for choosing the charges and the underlying factual elements."¹⁸⁴ Nothing in the Rome Statute or the ICC Rules of Procedure and Evidence permits a role for the judges in this determination because the drafters chose not to grant this power to the judges, even though this process was discussed at the Rome Conference.¹⁸⁵ Thus the Rome Statute technically dictates that judges should have no role in determining the content of the charges.¹⁸⁶

In particular, critics argue that Regulation 55 infringes on the power of the Prosecutor to amend charges under Article 61(9).¹⁸⁷ Article 61 of the Rome Statute limits the actions of the Pre-Trial Division to three options upon the completion of the confirmation hearing.¹⁸⁸ First, the Pre-Trial Division may confirm the charges for which it has determined there is sufficient evidence to establish substantial grounds to believe the accused is responsible and then commit the accused to a Trial Chamber for trial on the confirmed charges.¹⁸⁹ Secondly, the Chamber may decline to confirm those charges for which it has determined there is insufficient evidence.¹⁹⁰ The Pre-Trial Division has a third option if it is not persuaded of the sufficiency of the evidence or it believes that the charges as presented do not properly reflect the evidence.¹⁹¹ Under these circumstances, the Pre-Trial Division may "adjourn the hearing and request that the Prosecutor present more evidence or amend the charges."¹⁹² Under a strict interpretation of Article 61(7) of the Rome Statute, the Pre-Trial Chamber can only exercise these three actions at the close of the confirmation hearing, and the Prosecutor alone exercises the authority to amend the charges.¹⁹³ In support of this argument, critics cite other provisions of the Rome Statute confirm that the Prosecutor should enjoy the exclusive authority to frame the charges **[*300]** against an accused.¹⁹⁴ Article 58(6) provides that an

¹⁸¹ See, e.g., Dov Jacobs, Lubanga Decision Roundtable: Lubanga, Sexual Violence and the Legal Re-Characterization of Facts, *Opinio Juris* (Mar. 18, 2012, 1:00 PM), <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-sexual-violence-and-the-legal-re-characterization-of-facts> [\[http://perma.cc/MW4R-LJS3\]](http://perma.cc/MW4R-LJS3) (archived Oct. 4, 2014) ("The Judges, in their never-ending quest to maintain control over the proceedings, included in the Regulations of the Court ... a Regulation 55 allowing them to legally re-characterize the facts ...").

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *id.* ("Whatever one thinks of the opportunity of judges having such a power, the fact is that the drafters of the Statute and the RPE chose not to grant it, and it was not the judges' decision to make to grant it to themselves ...").

¹⁸⁶ See *id.*

¹⁸⁷ See, e.g., SaCouto & Cleary, *Defining the Case*, *supra* note 140, at 8-9 (arguing that while certain interpretations of Regulation 55 render it compatible with Article 74(2), "any use of Regulation 55 might still violate Article 61(9)," which only permits the Prosecutor to amend charges).

¹⁸⁸ See *id.* at 7-8.

¹⁸⁹ See *id.* at 1 ("The Pre-Trial Chamber must confirm those charges in relation to which it has determined there is sufficient evidence ... and commit the person to a Trial Chamber for trial on those charges.").

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² *Id.*

¹⁹³ See *id.* at 6-8 ("Given the plain language of Article 61(7), as well as the relevant drafting history behind the creation of the Pre-Trial Chamber, it is difficult to understand the Bemba Pre-Trial Chamber's finding," i.e., that a fourth option, recharacterization of the facts, is available to the Pre-Trial Chamber).

¹⁹⁴ See *id.* at 7 (referring specifically to Articles 58(6) and 74(2)).

arrest warrant may be amended only at the request of the Prosecutor.¹⁹⁵ Article 61(9) directly states that charges may only be amended on the initiative of the Prosecutor and with permission of the Pre-Trial Division and only after the confirmation hearing.¹⁹⁶ Article 74(2), by inference, provides that the Trial Chamber may not sua sponte amend the charges because the final judgment cannot exceed the facts and circumstances described in the charges and amendments to the charges.¹⁹⁷

VII. Suggested Proposals

Although the ICC Appeals Chamber upheld the validity of Regulation 55 in Katanga, the past application of this procedural device has raised some serious concerns about its soundness in practice.¹⁹⁸ This part advances three related proposals concerning the use of Regulation 55 and the pretrial processes at the ICC that will more effectively safeguard the due process rights of the accused. The first proposal mandates a strict interpretation of Regulation 55, permitting only changes to certain modes of liability. The second proposal would restrict the judges' invocation of Regulation 55 to the earliest stages of the proceedings so as to ensure the defendant maintains his right to a trial without undue delay. The final proposal suggests a more transparent and extensive pretrial process that allows the defense to know the extent of the charges at the beginning of trial.

A. A Strict Interpretation of the Changes for Which Regulation 55 May Be Invoked

The history and adoption of Regulation 55 suggests that it is a procedural device of a very unique nature.¹⁹⁹ Considering the debate [*301] surrounding the adoption of the Regulation at the Rome Conference, the application of this regulation should in all circumstances be narrowly prescribed to the text of the Regulation.²⁰⁰ A strict application of Regulation 55 is consistent with the treatment used by the ad hoc tribunals - the ICTY and the International Criminal Tribunal for Rwanda (ICTR) - in interpreting a comparable procedural device that permits the court to "cure defects" in the indictment.²⁰¹ Both the ICTY and ICTR have restricted the use of such modifications to the most exceptional cases - those in which the indictment was vague or ambiguous.²⁰² Even still, the judges of

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* ("Article 61(9) provides that, after the charges are confirmed and before the trial has begun, the charges may only be amended on the initiative of the Prosecutor and with the permission of the Pre-Trial Chamber.").

¹⁹⁷ See *id.*

¹⁹⁸ See, e.g., Katanga Judgment on Appeal, *supra* note 101, PP 97-99 (upholding the Trial Chamber's implementation of Regulation 55 during the deliberations stage of the trial proceedings but expressing concerns regarding the potential for undue delay).

¹⁹⁹ See Katanga Judgment on Appeal, *supra* note 101, Dissenting Opinion of Judge Cuno Tarfusser, PP 5-9 (describing the regulation as one of an "exceptional nature"); Susana SaCouto & Katherine Cleary, War Crimes Research Office, American University Washington College of Law, Regulation 55 and the Rights of the Accused 1, 43 (2013) [hereinafter Easterday, Closer Look], available at [http://www.wcl.american.edu/warcrimes/icc/documents/Report 17.pdf](http://www.wcl.american.edu/warcrimes/icc/documents/Report%2017.pdf) [<http://perma.cc/U56G-8R4U?type=pdf>] (archived Oct. 18, 2014) (noting that despite its characterization as a unique provision, "Regulation 55 has assumed a prominent role in the majority of trials to come before the ICC to date.").

²⁰⁰ See Bitti, *supra* note 65, at 284-86 (detailing the competing proposals presented and rejected at the Rome Conference).

²⁰¹ See Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-A, Judgement, P 20 (Aug. 29, 2008) ("The principle that a defect in an indictment may be cured is not without limits."); Prosecutor v. Ferdinand Nahimana et al., Case No. ICTR-99-52-A, Judgement, P 325 (Nov. 28, 2007) [hereinafter Nahimana Judgement] ("It is possible to remedy ambiguity or vagueness in an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underpinning the charges Omitted charges can be incorporated into the indictment only by formal amendment"); Prosecutor v. Andre Ntagerura et al., Case No. ICTR-99-46-A, Judgement, P 114 (July 7, 2006) [hereinafter Ntagerura Judgement] ("Although the Appeals Chamber allows that defects in an indictment may be 'remedied' under certain circumstances, it emphasizes that this should be limited to exceptional cases."); Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement, P 33 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) [hereinafter Kvočka Judgement]. See generally SaCouto & Cleary, Regulation 55, *supra* note 199, at 44-49 (recommending that use of Regulation 55 should be limited to "exceptional circumstances by analogy to the ad hoc tribunal's approach to 'curing' defective indictments").

²⁰² See generally Nahimana Judgement, *supra* note 201; Kvočka Judgement, *supra* note 201.

the ICTY and ICTR mandated that the defendant have "timely, clear and consistent information" that would be sufficient to provide adequate notice to prepare a defense.²⁰³

In accordance with this established jurisprudence, the ICC Chambers could strictly limit the application of Regulation 55 to its curative potential, and use it only in cases where the defendant lacked the requisite notice and ability to prepare an adequate defense based on the charges in the indictment - be it because of the indictment's ambiguity or its lack of cohesion with the evidence. Therefore, the altered charges under Regulation 55 would in fact give the defendant the notice necessary to effectuate his right to prepare a defense.²⁰⁴ As Judge Tarfusser explained in his Katanga dissent, the [*302] paradigm example of such an optimal use of Regulation 55 would be in cases where the charges shift from those of individual responsibility under Article 25 of the Rome Statute, to those of commander responsibility under Article 28.²⁰⁵ Although Tarfusser goes as far as to suggest that Regulation 55 is not triggered for shifts among forms of responsibility within Articles 25 and 28 respectively, his underlying rationale for the defendant's right to an expeditious trial supports a convincing argument for an even more restrictive interpretation of Regulation 55.²⁰⁶ Judge Tarfusser was concerned about the Trial Chamber "unreasonably broadening the scope of application of regulation 55" and made several recommendations to ensure a defendant's fair trial rights, particularly a narrow interpretation of Regulation 55.²⁰⁷

This restriction is entirely consistent with the language of the Regulation, as adopted by the judges of the ICC and confirmed by the Assembly of States Parties.²⁰⁸ The language of Regulation 55 permits a change the legal characterization of facts "to accord" with the crimes listed in Articles 6, 7, and 8 - genocide, crimes against humanity, and war crimes, respectively - or "to accord" with the form of participation of the accused under articles 25 and 28.²⁰⁹ Restricting the Regulation's use to a strict "either/or" - to change the type of crime charged, or to change the form of the actor's participation in the crime between Articles 25 and 28 - is in accordance with the policy underlying Judge Tarfusser's dissenting opinion in the Katanga Appeals Chamber judgment.²¹⁰ As Judge

²⁰³ Nahimana Judgement, supra note 201; see also Kvočka Judgement, supra note 201 (imposing the same "timely, clear, and consistent information" requirement).

²⁰⁴ See Katanga Judgment on Appeal, supra note 101, Dissenting Opinion of Judge Cuno Tarfusser, P 23 ("Regulation 55 of the Regulations of the Court reflects the right of the accused to be adequately informed of the charges ... by providing, inter alia, that the accused shall "have adequate time and facilities for the effective preparation of his or her defence"); Ntagerura Judgement, supra note 201 (emphasizing that defects may be cured only in "exceptional cases," and that even where an indictment's defects are "remedied in each individual instance," a reviewing court "would still have to consider whether the overall effect of the numerous defects would not have rendered the trial unfair in itself").

²⁰⁵ See Katanga Judgment on Appeal, supra note 101, Dissenting Opinion of Judge Cuno Tarfusser, PP 10-20 ("Regulation 55 only applies to changes to the form of participation which require shifting from article 25 to article 28 of the Statute, and vice versa.").

²⁰⁶ See id. P 11 ("I take the view that no envisaged shift from one form of responsibility listed in respectively article 25 and 28 to another form included in the same provision amounts to a modification in the "legal characterisation of facts' suitable of triggering the application of regulation 55"). His concern with this type of re-characterization relates to its potential impact on the expeditiousness of the proceedings. See id. P 18.

²⁰⁷ See id. PP 6, 17.

²⁰⁸ See Revised Regulations, supra note 38, reg. 55. Signatories to the Rome Statute are States Parties that meet in the Assembly of States Parties as the legislative body of the ICC. See ICC - Assembly of States Parties, Int'l Criminal Court, http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx (last visited Sept. 23, 2014) [<http://perma.cc/P6XZ-QQY7>] (archived Oct. 19, 2014).

²⁰⁹ Revised Regulations, supra note 38, reg. 55 ("The Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28").

²¹⁰ See Katanga Judgment on Appeal, supra note 101, Dissenting Opinion of Judge Cuno Tarfusser, P 10 ("In my view, a change in "the legal characterization of facts to accord with [...] the form of participation of the accused under articles 25 and 28' triggering the application of regulation 55 of the Regulations of the Court only occurs when a Chamber envisages the possibility of switching from (any of the forms of responsibility provided under) article 25 to (any of the forms of responsibility provided under) article 28 of the Statute, or vice versa.").

Tarfusser concludes, "both [*303] the general principles governing the interpretation of the instruments of the Court ... and the overarching features of its proceedings make it mandatory to restrictively interpret regulation 55" ²¹¹ Any looser interpretation would infringe on the defendant's right to be informed of charges such that he can prepare a defense. ²¹²

B. A Strict Limit on When Regulation 55 May Be Invoked

The current limitless use of Regulation 55 carries significant consequences for a defendant's right to a trial without undue delay in the ICC. ²¹³ When such interruptions are instigated during an ongoing trial and, especially, after the close of trial, Regulation 55 can unnecessarily delay an already lengthy trial process to the detriment of the defendant. ²¹⁴ This is particularly true when a defendant must request a stay in proceedings in order to call new witnesses and prepare an additional defense strategy - i.e., in cases where the charges in the indictment were not sufficiently ambiguous or unsupported by evidence. ²¹⁵ The ICC should consider restricting the application of Regulation 55 only to the earliest stages of the proceedings. While such a restriction would be within the judge's discretion, it is reasonable to conclude that judges could make a comprehensive evaluation of the fairness of any proposed changes. In considering the impact of Regulation 55 on a defendant's fair trial rights, the judges should consider the timing and sufficiency of the notice, the length of the proceedings, the progress and depth of the arguments, the potential delay in proceedings, and, ultimately, prejudice to the defendant.

While acknowledging that it may be possible for a Trial Chamber to invoke Regulation 55 in a way that consistent with the right to be informed of the charges and prepare a defense, the use of Regulation 55 must be restricted to the earliest stages of the trial. The War Crimes Research Office of American University suggests that the line should be drawn before the Defense puts on its case and the accused [*304] takes the stand. ²¹⁶ Otherwise, a late invocation of Regulation 55 inhibits the effectiveness and expeditiousness of any defense effort. ²¹⁷ After spending years preparing and organizing a defense based on the confirmed charges, the defense is unequivocally burdened by any alteration in the charges during the trial - especially one that occurs after the defense has rested its case. Thus, the judges should strictly limit themselves to the earliest stages of the proceedings when providing a Regulation 55 notice.

C. A More Transparent, Extensive Pretrial Process

One of the most common justifications for Regulation 55 is "to enhance the efficiency of proceedings through the encouragement of a precise charging practice from the very beginning of the proceedings." ²¹⁸ The Pre-Trial Division has emphasized judicial efficiency as an essential justification for declining cumulative charges. ²¹⁹

²¹¹ Id. P 19 (evaluating the regulation in lights of the court's governing instruments and the practices of the Trial Chamber).

²¹² See id. PP 22-27 (discussing the impact of a loose interpretation of Regulation 55 on trial fairness).

²¹³ See id. P 18; see also Katanga Final Judgment, supra note 7, Minority Opinion of Judge Christine Van den Wyngaert, P 14.

²¹⁴ See SaCouto & Cleary, Expediting Proceedings, supra note 171, at 1, 11 (discussing lengthy trials that the ICC has conducted).

²¹⁵ See Katanga Decision on Regulation 55, supra note 6, Minority Opinion of Judge Christine Van den Wyngaert, PP 48-52; see also Katanga Final Judgment, supra note 7, Minority Opinion of Judge Christine Van den Wyngaert, PP 118-28.

²¹⁶ See SaCouto & Cleary, Regulation 55, supra note 199, at 52 ("While it is perhaps conceivable that a Trial Chamber could invoke Regulation 55 in a manner that alters the fundamental nature of the charges against the accused in a manner consistent with his or her right to be informed of the charges and to prepare a defense, that use of Regulation 55 would need to come very early in proceedings, certainly before the Defense put on its case and the accused took the stand.").

²¹⁷ For an indication as to how the timing of use of Regulation 55 may affect defense strategy, see Katanga Decision on Regulation 55, supra note 6, Minority Opinion of Judge Christine Van den Wyngaert, PP 37-41.

²¹⁸ Stahn, supra note 45, at 30.

²¹⁹ See Bemba Decision Pursuant to Article 61(7)(a) and (b), supra note 102, PP 201-03 ("As a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges.").

However, the use of Regulation 55 has only served to further delay especially lengthy proceedings, such as in Katanga when the Trial Chamber once had to suspend trial for three months in order to allow the Appeals Chamber to review the interlocutory appeal filed after the Trial Chamber gave notice of its consideration of Regulation 55.²²⁰ As the ICC jurisprudence to date has demonstrated, the invocation of this regulation often necessitates a reevaluation of defense strategy, since a shift in liability - even if Regulation 55 is restricted to shifts between Article 25 and 28 - will contain distinct elements. If such invocation occurs at a later stage of the proceedings, the time needed for additional preparation is even greater.

In order to avoid the unnecessary delays inherent with the use of Regulation 55, the Pre-Trial Division should require a more transparent and extensive pretrial process. Currently, the confirmation hearing, as evidenced by the frequent use of Regulation [*305] 55, inadequately prepares the Pre-Trial Division to make accurate assessments of the evidence presented and to confirm the correct charges.²²¹ Although the defense is permitted to present evidence at the confirmation hearing, the Prosecutor is not required to disclose any significant amount of evidence during the pretrial process preceding the confirmation hearing.²²² A more transparent process mandating mutual and extensive disclosure before the confirmation hearing would better enable all parties, including the Trial Chambers, to more accurately assess the evidence and confirm adequate charges and modes of liability based on the available evidence. Consequently, the defense would be able to rely on the charges confirmed after the hearing and be able to effectively prepare a defense before the beginning of trial.

With more extensive and reliable evidence provided earlier in the trial process, the likelihood of interlocutory appeals and further delays would significantly diminish. By emphasizing the preparation required before the trial begins, the ICC Chambers could avoid the extensive litigation and filings that invariable arise after the invocation of Regulation 55. As the War Crimes Research Office indicates, such cumbersome and lengthy litigation surrounding the application of Regulation 55 seriously undermines the purported rationale of the regulation.²²³ It cannot be said that this regulation still ensures the efficiency of the trial process when it perpetuates further delays until the resolution of the trial.

VIII. Conclusion

In the first twelve years of the ICC, the young institution has been faced with significant challenges, not the least of which is its legitimacy and legacy.²²⁴ Of crucial importance to this legacy is the court's ability to end impunity while simultaneously ensuring the defendant's right to a fair and impartial trial. However, as the Katanga case demonstrates, the use of Regulation 55 by the judges of the ICC can be seen as a sacrifice of the defendants' fair trial rights in order to avoid a disappointing acquittal. The judges of the ICC Pre-Trial Division and the Trial Chambers have routinely used [*306] Regulation 55 to re-characterize the legal qualification of charges against the accused far after the confirmation hearing authorized the initial charges against the defendant.²²⁵ Undoubtedly, the defense relies on the document confirming the charges after the confirmation hearing to prepare and strategize.²²⁶ However, the judges have invoked Regulation 55 at such late stages of the trial - on one occasion during an ongoing trial and another during deliberations - that there are serious doubts as to the defendant's ability to properly

²²⁰ See Katanga Judgment on Appeal, *supra* note 101, PP 3-8 (discussing the procedural history of the case).

²²¹ See SaCouto & Cleary, *Expediting Proceedings*, *supra* note 171, at 1, 62-63 (describing delays in the disclosure of evidence by the Prosecution due to sensitive information, necessary redactions, and the protection of witnesses).

²²² See *id.* at 9; Rome Statute, *supra* note 4, art. 61(5).

²²³ See SaCouto & Cleary, *Regulation 55*, *supra* note 199, at 1, 53-54 (explaining that the rationale behind the rule was to make trials more efficient by making it possible for prosecutors to avoid charging every alternative in the indictment).

²²⁴ See, e.g., Anoushirvani, *supra* note 12, 214-25 (discussing the ICC's struggle to achieve legitimacy).

²²⁵ See SaCouto & Cleary, *Regulation 55*, *supra* note 199, at 6, 17 (discussing the timing of the Trial Chamber's Regulation 55 notice in the Lubanga and Bemba cases).

²²⁶ See discussion *supra* Part VI.A.

prepare an adequate defense to the new charges. ²²⁷ There is no doubt that such late changes have the potential to cause additional delays in an already length trial process - a serious infringement upon the defendant's right to a trial without undue delay.

This Note recommends restricting the time and manner in which Regulation 55 may be invoked, while simultaneously increasing the transparency of the ICC's pretrial process. It recommended a number of proposals for the ICC that would serve to more effectively protect the fair trial rights of the accused while still permitting the court to achieve its objectives and maintain legitimacy. The ICC, while still in its early stages as the first international court of its kind, must seriously reevaluate its current procedural framework to mandate the protection of such fundamental trial rights in order to sustain legitimacy and create its legacy.

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²²⁷ See supra Part VI.A.