

On the Future of Regulation 55

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FICHL Policy Brief Series No. 55 (2016)

1. Regulation 55, *Quo Vadis?*

The *Katanga* trial judgment of the International Criminal Court ('ICC') is a tossed stone raising many ripples.¹ Critics have attacked it saying that the "Prosecutor essentially did not prove any of his allegations"² and that the "confirmation hearing actually confirms nothing".³ Regulation 55 of the ICC Regulations of the Court has been at the centre of the waves.⁴ As per one of the typical comments: "Reg. 55 has become one of the most contested procedural devices employed by the judges at the International Criminal Court".⁵ The attention given to Regulation 55 invites consideration of its legitimacy, whether it needs amendment, and of how well-founded the criticism has been. Is it time to modify or understand better the 'stick' of ICC?⁶

2. Practice

The Regulations of the Court is an official document adopted under Article 52 of the ICC Statute. The latter

authorizes the judges of the Court to adopt Regulations for the "routine functioning" of the Court. Regulation 55 gives the power to the Trial Chamber to change the legal characterization of facts to accord with the crimes or the form of participation of the accused without exceeding the facts and circumstances described in the charges and any amendments to the charges, at any time during the trial with notice and some other safeguards to the accused.

According to one report on the use of Regulation 55, in three out of the six cases to reach trial at the ICC by October 2013 (*Lubanga*, *Katanga* and *Bemba*) the trial chamber ('TC') put the parties on notice that it may "change the legal characterization" of the facts against the accused pursuant to Regulation 55.⁷ By the time of writing in March 2016, there were four other cases (*Ruto*, *Kenyatta*, *Gbagbo*, and *Bemba et al.*) where the Prosecutor filed an application asking the TC to invoke Regulation 55. The Chambers responses varied. In the *Kenyatta* case the Prosecutor withdrew the charges. In the *Ruto* and *Gbagbo* cases, the relevant TCs granted the applications and provided notices, while the Prosecutor's request was denied in the *Bemba et al.* case.⁸ Among the initial 23 cases in 11 situations, there were 7 cases in 4

¹ See *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 143 (<http://www.legal-tools.org/doc/f74b4f/>). See Melanie Klinkner, "Is all Fair in Love and War Crimes Trials? Regulation 55 and the *Katanga* Case" (<http://www.legal-tools.org/doc/723559/>).

² Dov Jacobs, "The ICC *Katanga* Judgment: A Commentary (part 1): Investigation, Interpretation and The Crimes" (<http://www.legal-tools.org/doc/718551/>). See also Kevin Jon Heller, "Another Terrible Day for the OTP" (<http://www.legal-tools.org/doc/6bb390/>).

³ Kevin Jon Heller, "Regulation 55 and the Irrelevance of the Confirmation Hearing" (<http://www.legal-tools.org/doc/e1ef28/>).

⁴ The current version entered into force on 29 June 2012 (ICC-BD/01-03-11).

⁵ Margaux Dastugue, "The Faults in 'Fair' Trials: An Evaluation of Regulation 55 at the International Criminal Court", in *Vanderbilt Journal of Transnational Law*, 2015, vol. 48, p. 273.

⁶ See Kevin Jon Heller, "'A Stick to Hit the Accused With': The Legal Recharacterization of Facts under Regulation 55", in Carsten Stahn *et al.* (editors): *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements*, Oxford University Press, 20 December 2013, p. 1.

⁷ Washington College of Law, War Crimes Research Office, "Regulation 55 and the Rights of the Accused at the International Criminal Court", *Legal Analysis and Education Project*, October 2013, p. 1.

⁸ See *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013 (<http://www.legal-tools.org/doc/49ec33/>); *Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, Case No. ICC-02/11-01/15, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 19 August 2015 (<http://www.legal-tools.org/doc/984739/>); *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Case No. ICC-01/05-01/13, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55, 15 September 2015 (<http://www.legal-tools.org/doc/ea422e/>); and Decision on the Prosecution's Re-application for Regulation 55(2) Notice, 15 January 2016 (<http://www.legal-tools.org/doc/8ddec3/>).

situations⁹ that had seen Regulation 55 requested by the Prosecutor or applied by a Trial Chamber. It has been triggered by various players including the victims' representatives, the Prosecutor and TCs. The Appeals Chamber ('AC') has addressed the issue. A rough estimate suggests that more than ten ICC judges have engaged in the application of Regulation 55.

3. Challenges in Regulation 55 Practice and Discourse

As the practice of Regulation 55 grows, the procedure becomes steadily less exceptional¹⁰ and its increased penetration rate has led to questions about its impact on the accused's right to an impartial trial. In the *Katanga* case, nearly six months after the end of actual trial proceedings, the TC informed the parties that it would re-characterize the mode of liability for Katanga.¹¹ In the *Bemba* case, almost three years after the confirmation of charges and two years after the commencement of the trial (when the accused had already been in custody for more than four years), the TC gave notice to the parties in accordance with Regulation 55(2).¹²

In summarizing relevant judgments and critical reviews, it has been claimed that late application of Regulation 55¹³ could create tension *vis-à-vis* with several provisions of the ICC Statute, including Article 20(1) on *ne bis in idem*, Article 61(9) on amendment of the charges, Article 64(2) on the duty of the TC to ensure the fairness and expeditiousness of the trial, Article 66 on the right to be presumed innocent, Article 67(1)(a) and (b) on the right to be informed of the charges and to have adequate time and facilities for the preparation of the defence, Article 67(1)(c) on the right to be tried without undue delay, Article 67(1)(g) on the right not to be compelled to testify, and Article 74(2) on the re-

quirements for the decision. The critics do not stop there. They also suggest that Regulation 55 could be at odds with Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(a) of the European Convention on Human Rights.

These views have not yet been properly countered by the other side. For example, the described views seem to ignore the actual jurisprudence of the European Court Human Rights on legal re-characterization of facts. There is considerable case-law by the Court, including the Grand Chamber,¹⁴ clearly stating that such re-characterization, even at the stage of deliberations, is not a violation of Article 6(3)(a) of the European Convention of Human Rights as long as the defence has had the opportunity to present observations. It is important not to confuse international human rights law with common law in this discussion. The fact that such a procedure is not found in common law jurisdictions, does not make it necessarily a violation of human rights.

The critics claim that also an early application of Regulation 55 is questionable. After the *Katanga* case, the Prosecutor adjusted her strategy and started to request the TC to provide notice pursuant to Regulation 55(2) as early as possible. To ensure a fair and expeditious trial, the *Gbagbo* TC followed the approach of the *Ruto* TC and determined that the term "trial" (in the text of Regulation 55(2): "at any time during the trial") is not limited to the hearing of evidence, but also extends to the phase after a TC is seized of a case and before opening statements.¹⁵ But, the *Bemba et al.* TC believed that "granting the request before the commencement of the trial and in the absence of any specific justification would call into question the findings of the Pre-Trial Chamber. It would furthermore provide the Prosecution with an opportunity to *de facto* appeal of the decision on the confirmation of charges".¹⁶ The application of Regulation 55 may therefore also affect the functioning of PTCs. Nevertheless, with a judgment dated 18 December 2015, the AC approved the application of Regulation 55 prior to the opening of trial.¹⁷ As a result, the outer temporal limits of the application of Regulation 55 have now been set.

⁹ Including the situations in the Democratic Republic of the Congo, the Central African Republic, Kenya and Côte d'Ivoire.

¹⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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", Dissenting opinion of Judge Cuno Tarfusser, 27 March 2013, para. 5 (<http://www.legal-tools.org/doc/9d87d9/>).

¹¹ See *Prosecutor v. Germain Katanga and 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, 21 November 2012 (<http://www.legal-tools.org/doc/f5cbd0/>).

¹² *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, 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, 21 September 2012 (<http://www.legal-tools.org/doc/248406/>).

¹³ Triestino Mariniello, "Prosecutor v. Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber", in *International Human Rights Law Review*, 2012, vol. 1, p. 140.

¹⁴ *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment, Grand Chamber, 25 March 1999 (<http://www.legal-tools.org/doc/e092c3/>).

¹⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *supra* note 8, para. 11.

¹⁶ *Prosecutor v. Bemba et al.*, Decision on 15 September 2015, *supra* note 8, para. 10.

¹⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", 18 December 2015 (<http://www.legal-tools.org/doc/f08152/>).

4. Merits of Regulation 55

Three relevant proposals were made at the time of the drafting of the Statute, apart from the available model of the International Tribunal for the Former Yugoslavia ('ICTY'): a French proposal, a Portuguese and Spanish proposal, and a common law counter-proposal. The three proposals split on the powers of the trial chamber, and none was adopted.¹⁸ Neither did the device of legal re-characterization find its way into the ICC Rules of Procedure and Evidence. The later process to develop ICC Regulations of the Court gave a new opportunity to accommodate the legal re-characterization tradition in ICC law. The incentives to adopt Regulation 55 were mainly based on the following two considerations.

4.1. Preventing Impunity Gaps

One primary purpose of Regulation 55 is to fill impunity gaps.¹⁹ If a TC is not in a position to change the legal qualification of crimes after the commencement of the trial, an accused might have to be acquitted on pure technical grounds, even if the evidence presented at trial has clearly demonstrated that he or she was guilty of a crime within the jurisdiction of the Court.²⁰ In a statement in *Lubanga* the AC seems to express the view that acquittal merely because of incorrect legal characterization in the pre-trial phase would be contrary to the aim of the Statute to end impunity.²¹

The critics challenge this by saying that the evidence of the accused's guilt for the uncharged crime may not have been adversarially tested prior to the re-characterization.²² If the closure of an impunity gap justifies changing the legal characterization of facts contained in the charges, then it is only logical that the TC can invoke Regulation 55 on its own motion.²³

4.2. Avoiding Cumulative Charges

Cumulative charges are frequently used in common law jurisdictions, a practice that was blindly copied at the *ad hoc* international criminal jurisdictions. In order to avoid the risk of acquittal, the prosecutor burdens the court with an overload of cumulative charges.²⁴ Having witnessed long procedures involving cumulative charges, some ac-

tors setting up the ICC's legal infrastructure sought to absorb the experience of the *ad hoc* jurisdictions with a view to making the charges clear and targeted rather than lacking in focus. The ICC system appears to aim at an early determination of the boundaries of each case, first and foremost through the pre-trial phase and the decision on the confirmation of the charges, as well as through the prohibition against amending the charges after the commencement of the trial.²⁵ There is nevertheless the possibility that the proposed narrative of the charges may be found to be wrong. As the proceedings progress, more evidence is presented and the picture of crimes and the accused's possible criminal responsibility becomes clearer. Regulation 55 empowers the TC to make up the mistake in the legal classification of the charges, by that facilitating more efficient and timely trials.²⁶

Regulation 55 can be seen as an airbag attached to the reform package against the problems caused by cumulative charges. But if the original intention was to force the ICC Prosecutor to propose less ambiguous characterizations of the facts in the charging document in the first place (which would be confirmed by the PTC), then Regulation 55 should be used restrictively. Not only may increased judicial efficiency not be achieved, but criticism centred on the accused's rights will persist. Allegedly, the traditional common law approach to charging brings some legal certainty for the defendant.

5. Balancing the Common and Civil Law Systems

As we have seen above, Regulation 55 has been criticized, especially by lawyers who have a common law background or orientation. They claim that even when it realizes its promised effect, it may still cause unintended problems. This brief takes the position that to abolish Regulation 55 would be an impulsive move not properly based in analysis of its background and advantages. The existence of Regulation 55 is itself an innovation in international criminal law.²⁷ The legal infrastructure of the ICC is neither purely common nor civil law. It is also not a mere duplication of previous international criminal jurisdictions. Besides, to create a permanent international criminal court is not necessarily a competition or compromise. The ICC Statute is not a 'zero-sum' game. The procedural structure and even each procedural device should be designed and applied pursuant to the nature of the criminal justice process, the reality of the international rule of law, and the core values of international justice.

International criminal procedure is, and should be, a

¹⁸ See Carsten Stahn, "Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55", in *Criminal Law Forum*, 2005, vol. 16, pp. 10, 11.

¹⁹ See Jennifer Easterday, "A Closer Look at Regulation 55 at the ICC" (<http://www.legal-tools.org/doc/6100fb/>).

²⁰ Carsten Stahn, *supra* note 18, p. 3.

²¹ Kevin Jon Heller, *supra* note 6, p. 31.

²² *Ibid.*, p. 32.

²³ Chile Eboe-Osuji, "Introductory Note to International Criminal Court: Prosecutor v. Lubanga, Changing Characterization of Crimes After Commencement of Trials", in *International Legal Materials*, 2010, vol. 49, p. 477.

²⁴ See Carsten Stahn, *supra* note 18, p. 3.

²⁵ See *Prosecutor v. Katanga*, *supra* note 11, p. 48.

²⁶ See Margaux Dastugue, *supra* note 5, p. 288.

²⁷ Judge Joyce Aluoch, "Ten years of Trial Proceedings at the International Criminal Court", in *Washington University Global Studies Law Review*, 2013, vol. 12, p. 440.

sui generis system. Whenever there is no general principle of criminal law common to all major legal systems on an issue,²⁸ an international judge or prosecutor may be put to the test. An easy way out is to choose the solution of one of the two dominant legal traditions. But harmonizing the two systems contains merit in itself. As a permanent international criminal court, the ICC has an important mission to preserve legal pluralism against the backdrop of the two main legal families, making the hybrid nature of the Court truly inclusive. Prior to the development of the ICC's legal infrastructure, international criminal justice was predominantly based on the common law tradition of criminal procedure and evidence.²⁹ The practice of the ICC – in particular as regards Regulation 55 – is a shift “away from an adversarial approach to an inquisitorial approach”.³⁰

In the decisions confirming charges in the *Laurent Gbagbo*, *Ntaganda*, *Blé Goudé* and *Bemba et al.* cases the PTCs allowed the Prosecutor to present alternative and cumulative charges.³¹ This new approach could tilt the balance back in favour of common law. If so, this would be a big departure from the philosophy of the Statute and could entail a reduction in the impact of Regulation 55. In order to preserve its features and 13 years of ICC practice, restraint may be preferable to a distinct common law reorientation.

6. Possible Additional Constraints

The timing of the notification under Regulation 55 holds the key to any consideration of additional procedural constraints in its application. Adding a stop point to its implementation could be one option. It may be possible to add different constraints at various stages. There are many ‘time points’, such as the formal commencement of trial, the presentation of evidence, the calling of wit-

nesses, the closing of the evidentiary stage of the trial, or the final submissions of the parties. Safeguards could be constructed at any of these points, for example, a right to adjourn the trial, time to investigate, or to call new witnesses. The more advanced proceedings have become, the stronger the safeguards should be and as few changes as possible allowed.³²

All in all, to reduce the application of Regulation 55 and make it an exceptional device may be the preferred way to preserve the distinct merits of the regulation. In the recent *Bemba et al.* case, the TC rejected the Prosecutor's application of Regulation 55(2) twice. This may be an indication of a more restrictive practice to come.³³

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PURL: 978-82-8348-034-4.

LTD-PURL: <http://www.legal-tools.org/doc/a7e2ed/>.

²⁸ See *Prosecutor v. Kupreškić et al.*, ICTY Case No. IT-95-16-T, Judgment, 14 January 2000, para. 591 (<http://www.legal-tools.org/doc/5c6a53/>).

²⁹ See Sophie Rigney, “‘The Words Don’t Fit You’: Recharacterisation of the Charges, Trial Fairness, and Katanga”, in *Melbourne Journal of International Law*, 2014, vol. 15, p. 529.

³⁰ Dov Jacobs, “A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?”, in William A. Schabas, Yvonne McDermott and Niamh Hayes (editors): *The Ashgate Research Companion to International Criminal Law*, Ashgate, 2013, p. 205.

³¹ This was later reflected in a “Pre-trial Practice Manual” at the ICC, September 2015, p. 18.

³² Dov Jacobs, *supra* note 30, p. 1.

³³ *Prosecutor v. Bemba et al.*, Decision on 15 September 2015 and Decision on 15 January 2016, *supra* note 8.