SÄRTRYCK

Recharacterisation of Charges in International Criminal Trials

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Ur **Festskrift till *Christian Diesen***

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1. Introduction

Fundamental principles in criminal trials provide that: the accused 1) shall be informed of the nature and cause of the charge against him or her, and 2) have the right to examine and question incriminatory evidence and to introduce exculpatory evidence under the same conditions as in the case against him or her. In order for this right to be respected the charges (or similar devices described under other terms, such as indictment) need to be concrete and precise. The charges have at least two purposes: 1) to inform the accused what he or she is accused of and 2) set the boundary of the trial in terms of the factual circumstances to be adjudicated.

Why is the issue of recharacterisation important? System where charges cannot be corrected during trial will arguably have consequences for the prosecutor's charging policy. Without the possibility of recharacterisation there is a risk that the Prosecutor will compensate for the possibility of acquittal on formal grounds with an excess of alternative or cumulative charges.

The present text examines under what circumstances judges during trial may deviate from and recharacterize the charges. Depending on the legal tradition of a given country, the answer to these questions may vary. Accordingly, I will study different traditions and procedural models. It is also of interest to examine what is required under human rights law, as defined and interpreted in regional regimes and UN bodies. Finally, I will discuss and critically analyze decisions and judgments from the International Criminal Tribunal for Yugoslavia (ICTY) and the International

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Criminal Court (ICC) where the judges have recharacterized the charges during trial.

Existing international surveys in this area has omitted Sweden, an example of a mixed system in the same way as the ICC. For that reason I will cover the Swedish system a bit more extensively and use it as model of a comparison vis-à-vis the ICC. In this exercise I will use some of the methods and concepts elaborated upon by Professor Christian Diesen: The alternative hypothesis approach and the concept of robustness.

2. Approaches to Criminal Trials and Legal Cultures

There are two main approaches or models for criminal trials. The adversarial model is "party-driven" with a "two-case" approach where the primary role of the Judge is the "finder of justice" between the parties. In contrast, the inquisitorial model may be described as "judge-driven" with an "one-case" approach and the role of the Judge is the "truth-finder". Common law countries are often associated with adversarial trials while civil law countries are associated with inquisitorial trials. This is a distortion because all procedural systems are mixed to a greater or lesser extent. Sweden is a civil law country but its criminal procedure is adversarial with some distinctive civil law elements, for example on victim participation. The last elements of inquisitorial procedure, in practice already repressed or abandoned, were formally abolished in 1948 when the "new" code of criminal procedure (Rättegångsbalken) was introduced.

As indicated, in an adversarial setting the parties set the frame of proceedings, in a criminal trial context, through the charges presented by the prosecutor prior to the commencement of the trial. This is a prerequisite for making the trial adversarial upholding the principle of equality of arms. However, the rights and duties of the parties are not totally symmetrical even in an adversarial trial. The prosecutor sets the frame of the trial but also carries the burden of proving the guilt of the accused beyond reasonable doubt. Further, the accused can remain silent and if he or she introduces evidence, the defence case comes after the prosecution case. This is a balance between combatting impunity and fair trial considerations where the different elements together create an equality of arms. If

one element is radically adjusted or if new actors are introduced, such as an active judge who is examining witnesses and changing the procedural frame, there is a risk that balance is upset. A different logic applies in an inquisitorial setting where the judge may intervene if it serves the purpose of establishing the truth (and offer justice to the victims). The *iura novit curia* principle can, when applied properly, be an important tool to close accountability gaps (*Lubanga*, ICC Appeals Chamber, 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, 8 December 2009, para. 77).

Common law systems, associated with adversarial trials, are typically based on the premise that courts are bound by the legal characterisation of a type of crime submitted by the Prosecutor in the charges. If the evidence suggests that accused is guilty of an offence not specially charged in the indictment, the Court should either seek a formal alteration of the charge at the trial stage or dismiss the charge. However, the "principle of a lesser included offence" or "consumption" may still be applied. Many civil law systems grant judges greater discretion in recharacterizing the charges. Pursuant to *iura novit curia* principle the judge is both entitled and required to establish the law, while the parties are only expected to deliver and prove the facts underlying the act committed. See Friman, Håkan, 'The Rules of Procedure and Evidence in the Investigative Stage' in Fischer, Horst, Kreß, Claus and Lüder, Sascha Rolf (eds), *International and national prosecution of crimes under International Law, 191-217* (Second Edition, Berlin: Berliner Wissenschafts-Verlag, 2004), p. 209 and Stahn, Carsten, *Modification of the Legal Characterization of the Facts in the ICC System: A Portrayal of Regulation 55*, 16 Criminal Law Forum, 2005, pp. 4–5.

3. Human Rights Requirements

The principles relating to the accused's right to be informed of the charges and contradiction has solid support in regional and international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), Article 14(3)(a) and (e); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article

6(3)(a) and (d); American Convention on Human Rights (AmCHR), Article 8(2)(b) and (f).

The European Court of Human Rights (ECtHR) has given states a margin of appreciation in relation to the *iura novit curia* principle. In *Dallos v. Hungary* (Application no. 29082/95), 1 March 2001, the applicant alleged that criminal proceedings against him had been unfair, in breach of Article 6 of the Convention, in that – since he had been prosecuted for, and at first instance convicted of, embezzlement – the appeal court's reclassification of the offence as fraud had prevented him from exercising his defence rights properly. The Supreme Court of Hungaria observed that, while it was true that courts were bound by the factual contents of the bill of indictment, this did not apply to the legal classification of the offences. It held that the elements of fact, which – in the second-instance proceedings – had warranted the reclassification of the offence, had already been contained in substance in the bill of indictment. The ECtHR noted that in criminal matters the provision in article 6 of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. In this respect it observed that Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. The Court recalled that the fairness of proceedings must be assessed with regard to the proceedings as a whole. The Court observed that the applicant was indeed not aware that the Regional Court might reclassify his offence as fraud. This circumstance certainly impaired his chances to defend himself in respect of the charges he was eventually convicted of. However, the ECtHR attributed in this respect decisive importance to the subsequent proceedings before the Supreme Court where the applicant's case was entirely reviewed, both from a procedural and a substantive-law point of view. The ECtHR therefore considered that the applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge. Assessing the fairness of the proceedings as a whole – and in view of the nature of the examination of the case before the Supreme Court – the ECtHR was satisfied that any defects in the proceedings before the Regional Court were cured before the Supreme Court. The ECtHR made a similar finding in *Sipavičius v. Lithuania*,

(Application no. 49093/99), 21 February 2002 where the Court was satisfied that any defects in the proceedings before the Regional Court were cured by way of the review procedures before the Court of Appeal and the Supreme Court of Lithuania. This may be contrasted with the findings of the ECtHR in *Abramyan v. Russia* ((Application no. 10709/02), 9 October 2008 and *Pélissier and Sassi v. France* (Application no. 25444/94), 25 March 1999.

In *Abramyan v. Russia* the applicant learned about the new legal classification of the charges against him when the trial court pronounced its judgment at the end of the hearing. The applicant had no opportunity to react to that change in the proceedings before the trial court. The Supreme Court, which had the power to exercise a full review of the case, examined and dismissed the applicant's appeal at an oral hearing having heard the submissions by the prosecution. However, the applicant and his counsel were not present at the hearing before it which in the opinion of the ECtHR deprived the applicant of the possibility to exercise his defence rights in respect of the reclassified charge in a practical and effective manner. Accordingly, the Court found that there had been a violation of Article 6(1) and (3)(a)–(b). In *Pélissier and Sassi v. France*, the Court of Appeal held that the applicants were guilty, not of the offences charged, but of the separate offence of aiding and abetting criminal bankruptcy through the concealment of assets. The applicants appealed against that decision to the Court of Cassation on points of law. In their pleadings they denied the offence and contended on the basis of Article 6 of the Convention that the Court of Appeal's decision to convict them of an offence different from that charged had not been the subject of adversarial argument and had infringed the rights of the defence. The ECtHR did not accept the submission of France that aiding and abetting differs from the principal offence only as to the degree of participation. The Court considered that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. As a consequence the ECtHR found that France had violated Article 6(1) and (3)(a)–(b). In both cases, the Court recalled that the fairness of proceedings must be assessed with regard to the proceedings as a whole.

The representatives of the alleged victim in *Ramirez v. Guatemala* (20 June 2005) raised the lacking correlation between the indictment and the judgment. The inconsistency occurred when the Trial Court changed the legal classification of the crime and considered as proven new facts and circumstances that were not considered in the indictment or the order for trial to commence. The Inter-American Court of Human Rights (IACtHR) noted that the AmCHR does not endorse any specific criminal procedural system. It went on to state that the defendant has the right to know, through a clear, detailed, and precise description, the facts he is being charged with. The legal classification of the charges may be varied during the process by the prosecutor or the judge, without this violating the right to a defense, when the facts themselves are maintained invariable and the procedural guarantees included in the law for the change to the new classification are observed. The so-called "principle of coherence or correlation between the indictment and the conviction" implies that the judgment may fall only upon the facts or circumstances included in the indictment. The IACtHR noted that in the Trial Court judgment of March 6, 1998, the Trial Court did not limit itself to changing the legal classification of the previously imputed acts, but instead it modified the factual basis of the accusation, not observing the principle of consistency. It went from the classification of aggravated rape to the classification of murder. The Court found that Guatemala violated the guarantees of the due process, especially the right to a defense.

For comments on human rights case law, see Friman, Håkan, Brady, Helen, Guariglia, Fabricio, Stuckenberg, Carl-Friedrich, *Charges* in Sluiter, Göran and others (eds), International Criminal Procedure: Principles and Rules (Oxford University Press, 2013), pp. 458–460. Consistent with their findings, it is possible to conclude the following based on the case law. There is no endorsement for a particular criminal procedural system. Trial Courts and Appeals Courts may recharacterize charges under certain conditions. The recharacterized charge should not differ significantly from the original charge. The defence must have adequate time and possibility to react on the recharacterized charges. The fairness of proceedings must be assessed with regard to the proceedings as a whole, including appeal proceedings.

4. Domestic regimes

Section 45(4)(3) of the Swedish code of judicial procedure provides that in the indictment the prosecutor "shall identify the criminal act, specifying the time and place of its commission and the other circumstances required for its identification, and the applicable statutory Section or Sections", often summarized in the phrase "statement of the criminal act as charged" (gärningsbeskrivning). Section 30(3) of the same statute provides that the judgment may relate only to an act for which a prosecution was properly instituted or to a matter referred by statute to the court's criminal jurisdiction. This means that criminal act pursuant to section 45(4)(3) must be individualized. The statement of the criminal act as charged must be concrete and precise. Section 30(3) also provides that the court is not bound by the legal characterisation of the offence or applicable provisions of law. This means that the court can convict the accused for a crime different from that charged if the crime is covered by the statement of the criminal act as charged (i.e. the factual circumstances described in the summons).

Case law suggests that there is some room for exceptions which allows deviations from the statement of the criminal act as charged when the implications for the defendant is harmless. For example, in the case NJA 1956 s. 700 the defendant had accepted a summary imposition of a parking fine. Later it was discovered that the summary imposition indicated the wrong address. The defendant applied for revision of the sentence which was denied by the Supreme Court. In RH 2000:33 the defendant had acquired gasoline paid by other customers. The Appeals Court for Skåne and Blekinge found in conformity with the district court that the defendant was guilty of fraudulent behavior but not in relation to the customers as described in the statement of the criminal act as charged but in relation to the gasoline station. The Appeals Court stated that as soon a court considers to deviate from the prosecutor's statement of the criminal act as charged, it must consider whether the deviation at hand would induce the defendant to raise other objections or argumentation. The Appeals Court found that in the case at hand it could be ruled out that the defendant would raise other objections and thus he was convicted. These are examples of harmless deviations.

NJA 2001 C 47 is an example of case that was not harmless. It concerned a violation of traffic rules which resulted in a collision. The statement of the criminal act as charged described the route in a wrong way which had consequences for the relevant traffic rule. The Appeal Court denied leave of appeal. The Supreme Court found that the defendant might have arised a different defense and directed the Appeals Court to try the case on its merits.

The issue of legal recharacterisation was considered in NJA 2004 s. 757. The defendant had publicly distributed pornographic pictures of the injured person (the victim). The initial charge concerned sexual molestation. The Appeals Court found that the charged act could also qualify as defamation. After been asked by the judges, the prosecutor found reasons to prosecute for defamation and the defendant was convicted for gross defamation. The Supreme Court considered whether legal recharacterisation was allowed. In this context it explicitly considered the requirements under article 6 of the ECHR and that the Appeals had given the defendant the opportunity to raise a defence against the charge of defamation. The Supreme Court upheld the conviction. Even though, the Supreme Court does not mention any specific ECtHR cases it appears evident that it has considered the relevant case law, i.e. the defence must have adequate time and possibility to react on the recharacterized charges and the fairness of proceedings must be assessed with regard to the proceedings as a whole, including appeal proceedings.

German criminal procedure appears to be similar. The defendant may not be convicted for another crime than the described in the indictment. However, the court may recharacterize it if the defendant is notified and given the opportunity to defend him- or herself accordingly (StPO, section 265). The judicial power to recharacterize exists in other civil law systems: Austria (StPO, section 262), Italy (CPP, article 521(1)), Japan (article 312) and Netherlands (Wetboek van Strafvordering, article 350). Section 401 in the Code of Criminal Procedure (Argentina) provides that the court may in the judgment give the act a different legal classification to that contained in the charges. In France, the courts are entirely free to change a charge brought by a prosecutor. The rational is that a legal characterisation is not binding on a court, see further Friman, Brady, Costi, Guariglia and Stuckenberg, *Charges*, 2013, p. 468 and Stahn, 2005, pp. 5–6.

5. International Criminal Trials

When confronted with the issue the ICTY Trial Chamber in *Kupreškić et al.* rejected the civil law approach of *iura novit curia.* The Trial Chamber stated that it in state of flux of international law at the time "the rights of the accused would not be satisfactorily safeguard were one to adopt an approach akin to that of civil law countries…The task of the defence would become exceedingly onerous, given the aforementioned uncertainties which still exist in international criminal law… [if the prosecutor wants to substitute a charge with a different one,] the Prosecutor must request the Trial Chamber to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge." (*Kupreškić et al.*, ICTY T. Ch., 14 January 2000, paras. 740–742.)

Considering the extensive statutory framework at the ICC, the argument of legal uncertainty invoked in *Kupreškić et al.*, arguably is less relevant for the ICC. Article 74(2) of the Rome Statute states that "[t]he Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial." Thus, Article 74 of the Rome Statute distinguishes between "charges" and "facts and circumstances in the charges".

The framework for amendments, recharacterisation and withdrawal of the charges at the ICC distinguishes between the pre-trial phase and the trial. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges (article 61(4)). During the confirmation of charges proceedings the Pre-Trial Chamber has the option to adjourn the hearing and request the Prosecutor to consider amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court (article 61(7)(c)(ii) of the Rome Statute).

Article 61(9) provides that after commencement of the trial, the only permissible change to the charges is withdrawal of the charges with leave of the Trial Chamber. While there was a consensuses during the negotiations of the Rome Statute that the Trial Chamber should not exceed the facts and circumstances in the charges there was disagreement whether the Trial Chamber had the authority to modify the legal characterisation.

It was a clash where the main dividing line was between delegations from civil law jurisdictions on the one side and delegations from common law jurisdiction on the other. The expectation was that a solution would gradually develop through the Court's jurisprudence. However, the judges with backgrounds in different traditions, managed to reach a consensus as manifested in the Regulations of the Court (adopted 26 May 2004). See Bitti, *Two bones of Contention between Civil and Common Law: The Record of the Proceedings and the Treatment of the Concursus Delictorum*, in Fischer, Horst, Kreß, Claus and Lüder, Sascha Rolf (eds), International and national prosecution of crimes under International Law, 273-288 (Second Edition, Berlin: Berliner Wissenschafts-Verlag, 2004), p. 286, Friman, 2004, p. 209, Stahn, 2005, pp. 10–12 and Friman, Brady, Costi, Guariglia and Stuckenberg, *Charges*, 2013, pp. 431–432. ICC Regulation 55 on the "Authority of the Chamber to modify the legal characterisation of facts" provides the following:

> 1. In its decision under article 74, 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, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
>
> 2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, 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).

To summarize the main building blocks of regulation 55, the control over the initiation of a legal re-characterisation is split between the Trial Chamber and the parties. It reserves the decision to initiate a change in legal characterisation for the Trial Chamber. However, the parties may

under ICC RPE rule 132(2) bring to the attention of the chamber a proposal for re-characterisation. The procedure for legal re-characterisation is designed to offer all participants notice, adequate time and facilities to present views on the change and prepare. Ultimately, regulation 55 attempts to serves the dual purpose of facilitating judicial economy, avoiding excess charging, and closing impunity gaps (Stahn, 2005, pp. 26–28).

Regulation 55 has been criticized. Jacobs argues that regulation 55 was adopted contrary to the clear content of the Statute, in his view illustrating the fact that international criminal judges confuse their judicial role with a legislative one. The argument that regulation 55 encourages a precise charging practice from the very beginning of the proceedings can be countered with the argument that "the prosecutor could rely on the fact that Regulation 55 might be used as a justification for imprecision in his charging policy, because any 'mistake' in the legal characterisation could be 'corrected' at trial." Jacobs argues that the Prosecutor has the burden of correctly preparing his case and bears the full responsibility for the results of the choices made in the charges, therefore leading to the result that any mistake in that respect profits the accused. (Jacobs, Dov, *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the uses of Regulation 55*, Grotius Centre Working Paper 2013/004-ICL, 2013.)

Regulation 55 may be contrasted with framework and practice of the *ad hoc* tribunals. As the Trial Chamber in *Bemba* noted, since the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber, see Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 203–205.

The first example of recharacterisation was in *Lubanga* concerning the nature of the conflict. The Prosecutor had initially charged Lubanga with three counts of war crimes in the context of an armed conflict not of an international character (Document Containing the Charges, 28 August 2006). During the confirmation charges proceedings, the defence and the victims' representative asserted that the involvement of foreign Elements (including Uganda and Rwanda) in the Congolese conflict could interna-

tionalize the armed conflict in Ituri. The Pre-Trial Chamber noted that the Chamber is required under article 61(7)(c)(ii) of the Rome Statute to adjourn the hearing and request the Prosecutor to consider amending the charges if it finds that the evidence before it appears to establish that a crime other than those detailed in the Document Containing the Charges has been committed. The Pre-Trial Chamber considered the purpose of this provision is to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing. In this case, the Chamber considered that the change only concerned the contextual element and that it is not necessary to adjourn the hearing and request the Prosecutor to amend the charges (Decision on the confirmation of charges, 29 January 2007, para. 200–204). In other words, the Pre-Trial Chamber decided with teleological reasoning not to the follow the procedure set out in article 61(7)(c)(ii) which also upsets the division of work between the Chamber and the Prosecutor.

In *Lubanga* the defence submitted that the provisions of Regulation 55 were contrary to the Rome Statute and the Rules of Procedure and Evidence. The Trial Chamber considered that "the terms of Regulation 55 do not involve any conflict with the main relevant provision, Article 74(2), because they allow for a modification of the legal characterisation of the facts rather than an alteration or amendment to the facts and circumstances described in the charges" (Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, para 47). At a later point of time, the victim's legal representative requested the Trial Chamber to consider a legal recharacterisation of the facts which had previously been confirmed by the Pre-Trial Chamber. This would make it possible for the Trial Chamber to consider whether Lubanga was responsible for sexual slavery as a crime against humanity or war crime even though allegations of sexual slavery were not explicitly included in the charges. The majority of the Trial Chamber considered, Judge Fulford dissenting, that regulation 55 contained two distinct procedures: One applicable at deliberations (paragraph 1 of the provision), and another one, applicable at trial (paragraph 2). The limitation to "the facts and circumstances" as pro-

vided for in Article 74(2) of the Rome Statute would limit the first but not the second procedure. This meant that Regulation 55(2) and (3) do not require that the modifications are done "without exceeding the facts and circumstances described in the charges and any amendments to the charges" (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, 14 July 1999, paras 27–35). The Appeals Chamber first rejected the defence submission that the judges acted *ultra vires* when adopting Regulation 55. Turning to the Trial Chamber's application of Regulation 55, the Appeals Chamber held that the Trial Chamber majority's interpretation of the provision was erroneous because Regulation 55(2) and (3) may not be used to exceed the facts and circumstance described in the charges or any amendments thereto (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, 8 December 2009). In footnote 163 of the same decision the Appeals Chamber clarified the difference between legal elements, factual allegations and evidence.

The main controversy relating to regulation 55 to this date has occurred in *Katanga.* Two separate proceedings were 10th March 2008 initially joined against the two defendants Katanga and Ngudjolo. The presentation of evidence began on 25th November 2009 and ended on 11th November 2011. The two Accused gave evidence as witnesses in their turn. The presentation of evidence was declared officially closed on 7th February 2012. Upon examining the evidence, it appeared to the Majority of the Chamber, Judge Van den Wyngaert dissenting on this point, that Katanga's mode of participation could be considered from a different perspective from that underlying the Confirmation Decision and it was therefore appropriate to implement regulation 55. In this context the Trial Chamber noted the case law mentioned above (including *Dallos v. Hungary* and *Sipavičius v. Lithuania*) from the ECHR. The case was thus severed, Ngudjolo was acquitted and Katanga notified that the mode of liability is subject to legal recharacterisation. (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, paras. 3–6, 16, 37). On appeal, Katanga argued that notice under regulation 55(2)

could not be given after the closure of the evidence and several months into the deliberations of the Chamber. The majority of the Appeals Chamber was not persuaded that there is a temporal limitation when notice of a possible recharacterisation can be given by a Trial Chamber under regulation 55(2). As a consequence the Appeals Chamber approved that possible modification of the legal characterisation of facts under regulation 55(2) may be given at the deliberations. (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", 27 March 2013, paras. 12 and 18). On 7th March 2014 the majority of the Trial Chamber, (henceforth *Katanga* Trial Judgment), Judge Van den Wyngaert dissenting, convicted Katanga as an accomplice for war crimes and crimes against humanity. Judge Van den Wyngaert raises in her dissent several issues, including the right not to be compelled to testify, the right to be informed of the charges, to have adequate time and facilities for the preparation of the defence and timing of notice under regulation 55 (paras. 50–67). Based on the *Katanga* Trial Judgment I will focus on three matters: 1) the meaning of beyond reasonable doubt and recharacterisation, 2) facts and circumstances in the charges 3) the defence's right to investigate the new charges and robustness.

5.1 The Beyond Reasonable Doubt Standard and Recharacterisation

The standard of proof for conviction in international criminal trials is beyond a reasonable doubt. This means that judges can only convict when every rational explanation compatible with innocence of the defendant, has been dismissed. The required standard of proof is arguably interrelated with the method of evaluating evidence (Diesen, Christian, *Utevarohandläggning och bevisprövning i brottmål*, Stockholm: Juristförlaget, 1993, p. 515). Cohen proposes an inductive method whereby alternative hypotheses may be graded ordinally in accordance with the fact-finders conclusions as to how well each hypothesis is accounted for by the evidence; how well each hypothesis withstands attempts to eliminate it based on the evidence; and the extent to which any given hypothesis shows itself evidentially superior to the others in terms of completeness

and quality of the evidence (Cohen, L.J., *An Introduction to the Philosophy of Induction and Probability*, Oxford: Clarendon Press, 1989, pp. 146–147, see also Murphy, Peter, *Evidence, Proof, and Facts*, Oxford: Oxford University Press, 2003, pp. 13–14; Anderson, Terence, Schum, David A. and Twining, William, *Analysis of Evidence*, Second Edition, Cambridge: Cambridge University Press, 2005, pp. 257–258; Redmayne, Mike, *The Structure of Evidence Law*, 26, Oxford Journal of Legal Studies, 2006, p. 806). Diesen suggests that alternative hypotheses should be tested when they are reasonable in the sense that they are not pure scepticism or speculation. More specifically, a reasonable hypothesis is 1) compatible with at least some of the facts in the case, and 2) commensurable with the indictment, i.e. the alternative hypothesis should be possible to formulate as a legal and evidential theme. If the truth is sought, the judges should not only rely on the prosecutor's indictment and the defendant's account, but *ex officio* consider all plausible alternatives that may explain the evidence submitted. A hypothesis that raises sufficient reasonable doubt to acquit the defendant should be compatible with the defendant's own version or with an explanation of why the defendant has not presented such an alternative in his or her testimony (Diesen, Christian, *Bevisprövning i brottmål*, Stockholm: Norstedts Juridik, 1994, pp. 132 and 148). This alternative hypothesis approach is only one part of evaluation of evidence during the final deliberations of a case when all evidence has been presented (Klamberg, Mark, *Evidence in International Criminal Trials*, Leiden: Martinus Nijhoff Publishers, 2013, pp. 124, 134, 139, 143, 164–168, 183–196, 200, 506–508, 511). This method is arguably similar to narrative evidence theory where story construction is a central cognitive process in evaluation of evidence (Allen, R.J., *Reconceptualization of Civil Trials*, 66 Boston University Law Review, 1986; Allen, R.J., *The Nature of Juridicial Proof*, 13 Cardozo Law Review, 1991; Allen, R.J., *Factual Ambiguity and a Theory of Evidence*, 88 Northwestern University Law Review, 1993).

It has previously been concluded that when judges in international criminal proceedings evaluate whether evidence meets the "beyond a reasonable doubt" standard, they are acting according to the approach whereby alternative hypothesis are eliminated (Klamberg, 2013, pp. 188–196). For example, in *Mrkšić et al.* the ICTY Appeals Chamber stated the following.

> The test for establishing proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt". The standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused. (5 May 2009, para. 220; see also *Lubanga*, ICC T. Ch., 14 March 2012, para. 111).

In the section on evaluation of evidence of the *Katanga* Judgment (paras. 68–81) there is no indication that the majority of Trial Chamber acted according to the approach whereby alternative hypothesis are eliminated. This may be contrasted with the dissenting opinion of Judge Van den Wyngaert who explicitly states that "charges must represent a coherent description of how certain individuals are linked to certain events", that charges "constitute a narrative", that "alternative explanations can be rejected for being unreasonable" and that "the Chamber must convincingly explain why the alternative explanation is considered to be unreasonable… The Defence does not shoulder any burden of proof in this regard. Yet, this is very often the attitude taken by the Majority" (paras. 32–33, 145–146). In essence, Judge Van den Wyngaert, knowingly or not, adopts the alternative hypothesis approach and narrative evidence theory as elaborated upon by scholars such as Cohen, Allen and Diesen. This has consequences in the context of recharacterisation of charges because this entails a change of story. If the defence has already presented its story prior to recharacterisation it will become difficult to present a new story if the recharacterisation happens during deliberation, after the closure of the defence case. This also means that the defence should have ample opportunity to react to any recharacterisation, a matter to be discussed in the next section.

5.2 Facts and Circumstances in the Charges

As indicated above article 74(2) of the Rome Statute provides that judgment shall not exceed the facts and circumstances described in the charges. This is similar to the approach in domestic systems, including the Swedish approach where the court can convict the accused for a crime different from that charged if the crime is covered by the statement of the criminal act as charged (gärningsbeskrivning).

A problem in the reasoning of the majority in *Katanga* is that they appear to consider that the material elements of participation as an accomplice in crime within the meaning of section 25(3(d)(ii) are part of the material elements characteriszing the commission of a crime within the meaning of Article 25(3)(a) (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, para. 33).

However, under *Katanga* Pre-Trial Chamber theory, co-perpetration under article 25(3)(a) requires contribution to a common plan whereas article 25(3)(d)(ii) requires a contribution to a specific crime (Decision on the confirmation of charges, 30 September 2008, paras. 522–525). However, contribution to a plan (article 25(3)(a)) does not necessarily mean proof of a contribution to a specific crime (article 25(3)(d)(ii)). Accordingly, article 25(3)(a) liability can be proven without proving article 25(3)(d)(ii) liability. Thus, I argue that the Trial Chamber erred when it assumed that the facts and circumstances relevant for charges article 25(3)(a)) liability cover article 25(3)(d)(ii) liability. (Judgment, 7 March 2014, dissenting opinion of Judge Van den Wyngaert, para. 38.)

As Judge Van den Wyngaert argues, even if the charges under article 25(3)(d)(ii) could be considered as lesser included offences under article 25(3)(a), the fairness in convicting someone of a lesser included offence fundamentally depends on the defence having had sufficient certainty of this possibility. 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. There is arguably nothing "lesser" about any of this; the Chamber is coopting a valid defence and turning it against the accused (para. 40)

5.3 The Defence's Right to Investigate, Robustness and Recharacterisation

The choice of method for evaluating evidence has consequences for other evidentiary matters. Cohen's method rests on the assumption that the more variables, hypotheses are tested and discarded; the more correct is the decision because the evidential hypothesis becomes less exposed to doubt (Cohen, L.J., *The Probable and the Provable*, Oxford: Clarendon

Press, 1977, pp. 130 and 254; Eggleston, Richard, *Evidence, Proof and Probability*, Second Edition, London: Weidenfeld and Nicolson, 1983, p. 34; Diesen, 1994, pp. 29–30 and 101). Who is responsible for ensuring that enough variables and hypotheses are presented? What is an adequate investigation?

In an adversarial trial, the parties are responsible for collecting evidence, including the defence. This may be nuanced in inquisitorial or mixed systems where the prosecutor and/or the judges may collect evidence (or order to do so) in favor of the defence. This may also be warranted in an adversarial system where the defence is denied access to territory where evidence may be found. An adequate investigation must be robust in the sense that additional evidence will not change the probative value. The standard of an adequate investigation, and thus robustness, relates to the amount of evidence that should be collected before an evaluation of evidence is possible (Diesen, 1993, pp. 552–553, Strandberg, Magne, *Beviskrav i sivile saker*, Oslo: University of Bergen, 2010, pp. 404–406, Klamberg, 2013, pp. 153–156). This also applies in the context of recharacterisation of charges.

Considering that legal recharacterisation may change the focus of the trial, new investigations may be warranted, although not unlimited. First, the Majority in *Katanga* argues that the Defence did not prove that conducting an investigation was an absolute necessity in the case and that there were other means by which the accused could defend himself (Judgment, 7 March 2014, para. 1538). Second, the Majority seems to suggest that it offered the Defence a number of meaningful alternatives, short of fresh investigations, to defend itself, but that the latter failed to seize them (para. 1574) and third, the Majority clearly accuses the Defence of not having been sufficiently diligent and for having squandered the opportunity to investigate when it presented itself (para. 1568). Van den Wyngaert argues that the mere existence of regulation 55 cannot impose a burden upon the Defence to investigate all possible facts and circumstances contained in the Confirmation Decision, just in order to be prepared for the eventuality that the Chamber might at some point decide to recharacterise the charges. She found the fundamental flaw in the Majority's reasoning lies in the fact that they seem to argue that further investigations are only "necessary" under regulation 55(3) when they will result in new information that may have an impact on the outcome of the proceedings.

(Judgment, 7 March 2014, dissenting opinion of Judge Van den Wyngaert, paras. 86–98.)

In essence, Judge Van den Wyngaert is arguing that the investigation is not robust and thus it is impossible to determine the guilt of the defendant. One could add that the ICC Prosecutor has an explicit obligation under article 54(1)(a) of the Rome Statute to investigate incriminating and exonerating circumstances equally. This suggests that if the Katanga defence team had difficulties to access certain territories in order to obtain new evidence, the prosecutor should have used its resources to compensate.

6. Conclusion

The right for the defendant to know the facts he or she is being charged with is a fundamental part of a fair trial. Judges should as a rule of thumb not allow prosecution to present a moving target for the defence. There may be good reasons to recharacterize charges: The later such an issue arises during trial, the more reason exists for the judges to apply a restrictive approach towards recharacterisation. If the matter comes into question after the closure of the defence case, it is relevant to ask whether any changes would be consistent with the fair trial rights of the accused. In this regard, the approach of the Trial Chamber majority (with the permission of the Appeals Chamber) has arguably been too permissive in allowing recharacterisation after the closure of the defence case. Nevertheless, if recharacterisation is done at this late stage, the defence should be afforded the right to conduct new investigations in order to make them robust. The judges should always place the burden of eliminating alternative hypothesis on the prosecution.