

Title: Is all Fair in Love and War Crimes Trials?

Regulation 55 and the *Katanga* Case

Melanie Klinkner

Senior Lecturer in International Law, Bournemouth University, United Kingdom

Abstract

The use of Regulation 55 and the recent *Katanga* judgment at the International Criminal Court have attracted criticism – not just from outside commentators but most notably from within the Chamber through the dissenting opinion of Judge Van den Wyngaert. This commentary reflects on the re-characterisation of charges in the *Katanga* case and the resultant judgment, in particular with reference to fair trial requirements. It argues that fundamental discrepancies between the judges' interpretation of their fact-finding and truth-seeking remit exist and suggests that there is a need for coherent jurisprudence and clarification on the way the International Criminal Court tackles such essential disagreements.

Keywords

International Criminal Court; Regulation 55; Article 69(3); Fair Trial Requirements

Rarely is a dissent made clearer or stronger than in Judge Van den Wyngaert's opinion on the re-characterisation of charges in the *Katanga* case¹ and her dissent against the majority judgment.² In the ICC's third verdict on alleged Democratic Republic of Congo warlord Germain Katanga she distanced herself on a number of points from the concurring opinion of the other judges, thus suggesting that a closer look at the *Katanga* judgment and the use of Regulation 55 is warranted. Whilst the judgment itself expressed renewed criticism of the Office of the Prosecutor and its investigations,³ this will not be discussed, though arguably therein may lie the cause for the re-characterisation of charges on behalf of the judges. Nor will the paper offer a discussion on the structure and entire judgment itself, which in turn has attracted criticism.⁴ Instead, this paper will concentrate on the issues surrounding the use of Regulation 55 in re-characterising the charges with particular reference to the fairness for the accused. Neither the *Katanga* trial itself nor the creation, use and interpretation of Regulation 55 have been without controversy. Therefore, after a brief outline of the factual elements

¹ See *Prosecutor v. Katanga and Ngudjolo Chui*, 21 November 2012, ICC-01/04-01/07-3319, *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 Christine van den Wyngaert*, as opposed to the Majority's views expressed therein.

² *Prosecutor v. Germain Katanga*, 7 March 2014, ICC-01/04-01/07-3436, *Jugement rendu en application de l'article 74 du Statut (Judgment pursuant to Article 74 of the Statute), Minority Opinion of Judge Christine Van den Wyngaert*.

³ *Ibid. Majority Decision*, at pp. 37-40 for criticism of the Office of the Prosecutor. See also Kevin Heller, *Another Terrible Day for the OTP* <opiniojuris.org/2014/03/08/another-terrible-day-otp/>, 6 June 2014; and Dov Jacobs, *The ICC Katanga Judgment: A Commentary (part 1); Investigation, Interpretation and The Crimes* <dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/>, 6 June 2014 for commentary.

⁴ Jacobs, *ibid.*

surrounding the case and an overview of Regulation 55, this commentary will examine the particular issues the latter presents for the defendant Katanga. It will argue that these concerns, though framed by the conflict between the use of Regulation 55 and statutory provisions contained in Articles 67(1), 61(9) and 74(2), point to a key ambiguity at the court: the differing judicial interpretation and consequent use of Article 69(3) and the judges' role in determining the truth.

1 *Prosecutor v. Germain Katanga*

Germain Katanga's case came before the ICC as he was believed to be the leader of the Force de Résistance Patriotique en Ituri (FRPI) in the DRC. An attack on the village of Bogoro on 24 February 2003 was the focus of the charges. His case was joined with that of Mathieu Ngudjolo Chui (since acquitted) who was allegedly the leader of the rebel force Front Nationalistes et Intégrationnistes (FNI) that, together with the FRPI, was carrying out the attack on Bogoro. Both defendants were charged with war crimes and crimes against humanity under Article 25(3)(a). Under Article 25(3)(a) they were deemed responsible for the commission of these crimes since they committed them "as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible". Three forms of principal liability under Article 25(3)(a) were identified, namely that the

principal is one who: a) physically carries out all elements of the offence (commission of the crime as an individual); b) has, together with others, control over the offence by reason of the essential tasks assigned to him (commission of the crime jointly with others); or c) has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).⁵

Both Katanga and Ngudjolo were believed to have been indirect co-perpetrators within the meaning of 25(3)(a). In other words, they committed the alleged crimes jointly through other persons.⁶ Following the confirmation of charges, therefore, the joint case proceeded to trial, opening in November 2009 with closing arguments being presented in May 2012. In November of 2012, however, the trial chamber issued their decision on the implementation of regulation 55 and the severance of charges against the two accused persons.⁷ On 18 December 2012 Ngudjolo was acquitted. On the other hand, pursuant to Regulation 55, Katanga's mode of liability – the majority reasoned – should not be limited to indirect co-perpetration under Article 25(3)(a) of the Statute but also include 25(3)(d). Article 25(3)(d) suggests individual criminal responsibility if the person

⁵ *Prosecutor v. Katanga and Ngudjolo Chui*, 30 September 2008, ICC-01/04-01/07-717, *Decision on the Confirmation of Charges*, para. 488.

⁶ *Ibid.* The trial chamber went on to discuss the objective elements of joint commission of a crime that is an agreement or a common plan existed, each perpetrator made a coordinate and essential contribution to the realisation of the objective element of the crime; with the objective element consisting of the principals having control of the organisation, the organisation is hierarchical in structure and compliance on behalf of member assures the realisation of the crime. For a discussion see also The War Crimes Research Office, *Regulation 55 and the Rights of the Accused at the International Criminal Court* (Report), October 2013, pp.25-26 <www.wcl.american.edu/warcrimes/icc/documents/Report17.pdf>, 12 May 2014.

⁷ See *Prosecutor v. Katanga and Ngudjolo Chui*, *supra* note 1, *Majority's Decision*.

[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal purpose of the group, where such activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.⁸

Judge van den Wyngaert, however, as will be discussed below, dissented from this decision, contending that it violated Regulation 55 and the accused's right to a fair trial. Following an appeal, the Decision of the Trial Chamber was upheld, though there were some expressions of caution, with the Appeals Chamber stating that it would be "preferable that notice on regulation 55(2) [...] should be given as early as possible".⁹ Furthermore, the majority held that it appeared that a re-characterisation would not exceed the facts and circumstances described in the charges, though the actual change in characterisation had not taken place yet.¹⁰ Similarly, the majority of the Appeals Chamber found they could not rule on the hypothetical detrimental impact on the defence given that the Trial Chamber had not implemented any changes yet.¹¹ Notably, though, Judge Tarfusser in his separate opinion suggested that Regulation 55 should be narrowly interpreted and that shifts from one form of participation to another contained in the same provision may, through the use of Regulation 55, cause uncertainty and unpredictability in the proceedings which would be incompatible with fair trial requirements.¹² In response to the Appeals Chamber decision, the majority of Trial Chamber II (with Judge Van den Wyngaert dissenting once more) delivered a decision to provide "additional legal and factual material" in an attempt to help the defence in its preparation.¹³ The defence contended that they were still lacking the necessary knowledge of evidence and facts that the Chamber wished to rely on, and demanded six months to conduct investigations so they could respond to the potential charges under Article 25(3)(d)(ii).¹⁴ They were granted three months to pursue continuing investigations.¹⁵

⁸ Rome Statute of the International Criminal Court (A/CONF.183/9), Art. 25(3)(d) (hereinafter Rome Statute).

⁹ *Prosecutor v. Katanga*, 27 March 2013, ICC-01/04-01/07-3363, *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"*, para. 24.

¹⁰ *Ibid.*, paras. 45-58.

¹¹ *Ibid.*, para 95. For a full discussion of the matter see The War Crimes Research Office, *supra* note 6, pp. 33-36.

¹² *Prosecutor v. Katanga*, *Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons"*, *supra* note 9, *Dissent Judge Cuno Tarfusser*, paras. 22-27.

¹³ *Prosecutor v. Katanga*, 15 May 2013, ICC-01/04-01/07-3371-tENG, *Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulation of the Court)*, para. 11.

¹⁴ *Prosecutor v. Katanga*, 3 June 2013, ICC-01/04-01/07-4479-Red, *Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)*.

¹⁵ *Prosecutor v. Katanga*, 26 June 2013, ICC-01/04-01/07-3388-tENG, *Decision on the Defence requests set forth in observations 3379 and 3386 of 3 and 17 June 2013*. Though note the dissent by Judge Van den

On 7 March 2014 Trial Chamber II found Germain Katanga guilty, as an accessory, of one count of crimes against humanity and four counts of war crimes.¹⁶ Whilst Judge Van den Wyngaert agrees with the Majority that the charges brought under article 25(3)(a) of the Rome Statute have not been proven beyond reasonable doubt, she disagrees with substantial amounts of the majority opinion, finding herself

in disagreement with almost every aspect of it. Not only do I believe that the timing and manner in which the recharacterisation has been implemented is fundamentally unfair and has violated several of the accused's most fundamental rights, I am also of the view that the evidence in this case simply does not support the charges against him.¹⁷

As a consequence, she has also distanced herself from the sentencing decision rendered on 23 May 2014.¹⁸ Initially, both the defence and the prosecution filed their notice of appeals against the judgment of 7 March 2014. Whilst the defence sought that the conviction of Katanga be reversed on each charge¹⁹, the prosecutor appealed 'the acquittals of Germain Katanga for rape and sexual slavery as a crime against humanity and as a war crime under Articles 7(1)(g) and 8(2)(e)(vi), including legal, procedural and factual findings that led to those acquittals.'²⁰ Surprisingly, however, and to the disappointment of the legal representative of victims, on 25 June 2014 both the defence and prosecution discontinued their respective appeals against the judgment.²¹ The defendant accepted the judgment and offered his sincere regrets to those who suffered from his actions. This, in turn, fuelled the discontinuation of the prosecution's appeal. The judgment, therefore, is now final.

2 Regulation 55

Wyngaert: *ibid.*, 26 June 2013, ICC-01/04-01/07-3388-Anx, *Dissenting opinion of Judge Christine Van den Wyngaert*.

¹⁶ *Prosecutor v. Katanga, Jugement rendu en application de l'article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2. Specifically, the Majority convicted Katanga of (a) the crime against humanity of murder (Article 7(1)(a)); (b) the war crime of murder (Article 8(2)(c)(i)); (c) the war crime of intentionally directing attacks against a civilian population (Article 8(2)(e)(i)); (d) the war crime of destroying the enemy's property (Article 8(2)(e)(xii)); (e) the war crime of pillaging (Article 8(2)(e)(v)). Under Article 25(3)(d), Germain Katanga was acquitted of: (a) the crimes against humanity of rape and sexual slavery (Article 7(1)(g)); (b) the war crime of rape and sexual slavery (Article 8(2)(e)(vi)). Germain Katanga was also acquitted of the war crime of conscripting or enlisting children under the age of fifteen and using them to participate actively in hostilities (Article 8(2)(e)(vii)).

¹⁷ *Prosecutor v. Katanga, ibid.*, *Minority Opinion of Judge Christine Van den Wyngaert*, para. 1.

¹⁸ Katanga is to serve 12 years in prison; *see Prosecutor v. Katanga*, 23 May 2014, ICC-01/04-01/07-3484, *Décision relative à la peine (article 76 du Statut) (Decision on Sentence pursuant to Article 76 of the Statute)*, and 23 May 2014, ICC-01/04-01/07-3484-Anx1, *Dissenting opinion of Judge Christine Van den Wyngaert.*

¹⁹ *Prosecutor v. Katanga*, 9 April 2014, ICC-01/04-01/07-3459, *Defence Notice of Appeal against the decision of conviction 'Jugement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II, 7th March 2014*.

²⁰ *Prosecutor v. Katanga*, 9 April 2014, ICC-01/04-01/07-3462, *Prosecution's Appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 du Statut"*, para. 3.

²¹ *Prosecutor v. Katanga*, 25 June 2014, ICC-01/04-01/07-3497, *Defence Notice of Discontinuance of Appeal against the 'Jugement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II on 7 April 2014*; *Prosecutor v. Katanga*, 25 June 2014, ICC-01/04-01/07-3498, *Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga*, and *Prosecutor v. Katanga*, 26 June 2014, ICC-01/04-01/07-3499, *Observations des victimes sur le désistement d'appel du Procureur contre le jugement concernant G. Katanga*.

Regulation 55 of the ICC's Regulations provides the Trial Chamber with the possibility to modify the legal characterisation of facts to accord with the crimes (under Rome Statute Articles 6, 7 or 8²²) or to accord with the mode of liability (under Articles 25 and 28²³) other than what was initially charged by the Prosecution. Though, of course, there are limits to this judicial discretion as they are not permitted to exceed "the facts and circumstances described in the charges and any amendments to the charges."²⁴ And there are important safeguards for the accused in that he or she 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).²⁵

Regulation 55 has been described as a "unique and case-specific procedural device"²⁶ expressing the *sui generis* procedural system of the ICC.²⁷ The task to draft the Court Regulation was assigned to the judges, and the purpose of the regulations is to ensure "routine functioning"²⁸ of the Court. One rationale for this judge-made regulation, and in line with the requirements of Article 74(2)²⁹, is to render trials more efficient by averting the need on behalf of the Prosecutor to charge alternative or cumulative charges at the beginning of the case;³⁰ though there are those that contend that, rather than aiding efficiency, it has consumed time and litigation.³¹ However, judges taking the initiative through the use of Regulation 55 can be highly problematic, firstly as a re-characterisation of charges at the pre-trial stage may result in the prosecutor not having the relevant evidence to support those charges during the subsequent trials and secondly, whilst a re-characterisation as late as in the Katanga case may reflect what the judges believe to facilitate a closer account of the truth, it inevitably poses challenges for the defence.

²² Regulation of the Court, Reg. 55 (1)

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*, Reg. 55 (3).

²⁶ Carsten Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55', 16 *Criminal Law Forum* (2005) 1-31, at p. 29.

²⁷ See Hans-Peter Kaul, 'Developments at the International Criminal Court', 99 *The American Journal of International Law* (2005) 370-384.

²⁸ Rome Statute, Art. 52 (1)

²⁹ Article 74(2) of the Rome Statute states: The 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.

³⁰ Stahn claims increased efficiency with regards to closing impunity gaps (Stahn, *supra* note 26, p. 25).

³¹ The War Crimes Research Office, *supra* note 6. In fact, litigation on the use of Regulation 55 can also be found in the *Lubanga, Gombo, Ruto and Sang* as well as the *Kenyatta* case (*ibid.*).

Furthermore, some view the Regulation as a means to grant more law-making powers to the judges, though an increase in judicial discretion may infringe legal certainty.³² In fact, Dov Jacobs goes so far to suggest that the Regulation (despite being influenced by *ad hoc* tribunal jurisprudence³³) should not exist at all.³⁴ Having said that, it is in use at the ICC and, most pertinent to the discussion here, clear charges are of great significance to the accused to avoid uncertainty and multiple amendments which would otherwise infringe his or her rights.

3 Katanga and Regulation 55

In the *Katanga* case particularly, there seem to be substantial disagreements on a number of points arising from invoking Regulation 55. First and foremost though, one must remember Article 67(1)(a) clearly articulates the right “to be informed promptly and in detail of the nature, cause and contents of the charge, in a language which the accused fully understands and speaks”. Cassese describes this right as “a precondition for all the other principles governing the conduct of proceedings.”³⁵ And Judge Van den Wyngaert reiterates this in her dissent: “the purpose of formulating charges is precisely to make clear which inferences are being alleged, so that the accused knows against what he has to defend himself.”³⁶ This view is expressed with regards to the first of two rather fundamental points of dissent which exist between the judges and which will be discussed in turn; the first relates to the requirement of not exceeding the facts and circumstances of the charges; the second is whether fair trial concerns have arisen, most notably matters of timing, notification, delay, adequate time and possibility to prepare. Both points then lead to the examination whether the judges implicitly are moulding the case against the accused or instead are acting within their judicial remit of independent fact-finders.

3.1 *Bring to the Fore or Alteration of Facts?*

³² Jacobs also speaks of “judicial creativity” in this context (Dov Jacobs, *A shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55*, Grotius Centre Working Paper 2013/004-ICL, p.22 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971821>, 23 May 2014).

³³ For a discussion on this see Stahn, *supra* note 26, pps. 7-12. Stahn refers to the ICTY’s *Kupreškić* case as having heavily influenced the creation of Regulation 55. During the case the Trial Chamber decided that there was limited possibility to legally reclassify an offence without amending the charges. Whilst a Chamber may apply lesser offences than contained in the original indictment and reclassify, for example from perpetration to participation, an amendment of charges on behalf of the Prosecutor was necessary for more serious crimes or different offences (*ibid.*, p. 7; see also *Prosecutor v. Kupreškić*, 14 January 2000, IT-95-16-T, *Judgment*).

³⁴ Jacobs comments on an “intolerable act of judicial law-making” (Dov Jacobs, *The ICC Katanga Judgment: A Commentary (part 2); Regulation 55 and the modes of liability* <dovjacobs.com/2014/03/11/the-icc-katanga-judgment-a-commentary-part-2-regulation-55-and-the-modes-of-liability/>, 6 June 2014).

³⁵ Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2013) p. 352

³⁶ *Prosecutor v. Katanga, Jugement rendu en application de l’article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2, *Minority Opinion of Judge Christine Van den Wyngaert*, p. 21

As expressed by Regulation 55 and further clarified by the Appeals Chamber in the *Lubanga* case,³⁷ the Trial Chamber is “bound to the factual allegations contained within the charges and any application of Regulation 55 must be confined to those facts,”³⁸ emphasising that Regulation 55 refers only to “a change in the legal characterisation of the facts but not to a change in the statement of the facts.”³⁹ The provision thus echoes Article 74(2) of the Statute. In the *Katanga* case, however, Judge Van den Wyngaert contends that the Majority “substantially transforms the facts and circumstances described in the charges.”⁴⁰ Her dissent is voiced with regards to the *mens rea* of the physical perpetrators⁴¹ and the accused’s knowledge of the group’s common purpose.⁴² She also contends that, in their judgement, the Majority has “changed the narrative of the charges to such an extent that the accused has to adjust his or her line of defence”⁴³ and that some facts have been taken out of context.⁴⁴ The Majority, on the other hand, argues that all it has done is merely “*mettre en relief*”⁴⁵ the facts. It has to be remembered the Appeals Chamber did not consider the application of Regulation 55 as *ultra vires* in this regard – though one has to note the cautious wording used by the Appeals Chamber: it was not “immediately apparent” that re-characterising would result in exceeding the facts.⁴⁶ Sadly this point as to whether, in light of the subsequent proceedings and the judgment itself, the facts were exceeded, will not be re-examined at an Appeal.

3.2 Fair Trial Concerns: Timing, Delay and Adequate Preparation

Much attention is also devoted by Judge Van den Wyngaert on the way in which the application of regulation 55 has violated the accused’s right to a fair trial. The decision to re-characterise the mode of responsibility⁴⁷ was made some seven months after the presentation of evidence was officially closed on the 7 February 2012.⁴⁸ This would indicate that the trial

³⁷ *Prosecutor v. Lubanga Dyilo*, 8 December 2009, ICC-01/04-01/06-2205, *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"*.

³⁸ *Prosecutor v. Katanga*, *Jugement rendu en application de l'article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2, *Minority Opinion of Judge Christine Van den Wyngaert*, para. 16.

³⁹ *Prosecutor v. Lubanga Dyilo*, *Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, *supra* note 37, para. 97.

⁴⁰ *Prosecutor v. Katanga*, *Jugement rendu en application de l'article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2, *Minority Opinion of Judge Christine Van den Wyngaert*, p. 13.

⁴¹ *Ibid.*, paras. 21-24

⁴² *Ibid.*, paras. 25-26.

⁴³ *Ibid.*, p. 22.

⁴⁴ *Ibid.*, para. 41.

⁴⁵ *Ibid.*, *Majority Opinion*, para. 1477, translated as ‘bring to the fore’.

⁴⁶ *Prosecutor v. Katanga*, *Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons"*, *supra* note 9, para. 45

⁴⁷ See *Prosecutor v. Katanga and Ngudjolo Chui*, *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, *supra* note 1.

⁴⁸ *Prosecutor v. Katanga*, *Jugement rendu en application de l'article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2.

was ultimately at its end and that the Judges ought to have been deciding upon the guilt or innocence of the defendant, not reordering the facts of the charges. Though, again, it is worth recalling the Appeals Chamber's decision that a late decision was not incompatible with the regulation *per se*.⁴⁹

In order to protect the rights of the defendant to be informed promptly of the charges against him and to have adequate time and facilities for the preparation of the Defence,⁵⁰ Regulation 55(2) of the Court requires the Chamber to give notice to the defendant of any proposed change. Judge Van den Wyngaert suggests that the ruling is contrary to the statutory provisions contained in 67(1)(a), (b), (e), and 64(2):⁵¹ she takes issues with the timing of the re-characterisation: "the timing of the notice was anything but prompt in the sense of Article 67(1)(a)"⁵² of the Rome Statute as "the Majority had two and a half years of trial during which they could have provided Germain Katanga with reasonable notice that the charges may be subject to change."⁵³ The timing of the modification of the mode of responsibility was therefore, in her mind, an infringement of the rights of the accused. Moreover, she argues that it was "entirely unforeseeable to the Defence and rendered at a point in the proceedings when the Defence was unable to effectively respond to it."⁵⁴ Therefore, she believes it to be contrary to Article 67(1)(a) which provides for the right of the accused to be informed promptly and in detail. Furthermore, she also contends that insufficient time was afforded to the defence to investigate (thus breaching Article 67(1)(b) and (e)) and lastly that the expediency of the proceedings, and with it the right to be tried without undue delay, were adversely affected.⁵⁵ Whilst the Chamber states that it has rendered its judgment in the spirit of the Statute in aiming to end impunity ("la nécessité de mettre un terme à l'impunité"),⁵⁶ Judge Van den Wyngaert does not perceive this to provide an acceptable rationale for infringing the rights of an accused.⁵⁷

3.3 Moulding the Case against the Accused or Judicial Independence

The point likely to be most controversial in her minority opinion is the explicit allegation that the Majority has created its own case.⁵⁸ She contends that

⁴⁹ *Prosecutor v. Katanga, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons"*, *supra* note 9.

⁵⁰ Article 67(1)(a) Rome Statute and Article 67(1)(b) Rome Statute.

⁵¹ She also suggests that the right not to be compelled to testify under Article 67(1)(g) is also at issue, as is her view that the majority was not willing to rule on a number of Defence requests (*Prosecutor v. Katanga, Jugement rendu en application de l'article 74 du Statut, supra* note 2, Minority Opinion of Judge Christine Van den Wyngaert, pp. 34-39 and pp. 67-71).

⁵² *Ibid.*, p. 39.

⁵³ *Ibid.*, p. 40.

⁵⁴ *Ibid.*, p. 43.

⁵⁵ *Ibid.*, p. 71.

⁵⁶ *Prosecutor v. Katanga, Jugement rendu en application de l'article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2, Majority Opinion, paras. 54 and 55.

⁵⁷ *Ibid.*, Minority Opinion of Judge Christine Van den Wyngaert, para. 55.

⁵⁸ She says "As the charges under article 25(3)(d)(ii) were formulated by the Majority instead of the Prosecutor, it is only appropriate to speak of the "Majority's case" in this section" (*ibid.*, para. 143).

[t]hrough the invocation of regulation 55 at this late stage, the Majority has “mould[ed] the case against the accused” in order to reach a conviction on the basis of a form of criminal responsibility that was never charged by the Prosecution. In doing so, and contrary to article 74 and regulation 55(1), the Majority has substantially exceeded the scope of the facts and circumstances as confirmed by the Pre-Trial Chamber. For this reason alone, I consider the judgment to be invalid as a matter of law.⁵⁹

This allegation of assuming the role of the prosecutor, in part, compelled Judges Fatoumata Diarra and Bruno Cotte to issue a joint opinion in which they express in turn their

astonishment at reading in the conclusion of the dissenting opinion [by Judge Van den Wyngaert] that the charges against Germain Katanga under article 25(3)(d) of the Statute are a creation of the Majority alone for the probable purpose of arriving at a conviction not possible under article 25(3)(a).⁶⁰

Judges Diarra and Cotte stress that they have observed the factual allegations originally brought by the prosecution and continue to clarify that they “understand the principle of legality as well as that of fair and impartial proceedings”⁶¹ which informed their approach to the case. Whilst therefore they are, like Judge Van den Wyngaert, concerned with fair trial requirements, it suggests a disagreement as to the statutory interpretation that frames the role of the judges within proceedings at the Court. Given the composition of the Chamber, this may not simply be the result of judges pertaining to differing legal traditions such as the common or civil law ones⁶² but rather issues with the system and what it tries to achieve. Judge Kaul described the judges’ role as follows:

The trial judges are thus endowed with a large measure of influence and investigative autonomy during the trial, without it amounting to an inquisitorial system. This special position of the judges helps to increase the chambers’ control of the proceedings and at the same time to establish a trial system in which various judicial traditions complement each other. It therefore cannot be said that the criminal procedure of the ICC is either inquisitorial or adversarial. Rather, it is a system *sui generis*, which will be feinted further by the jurisprudence.⁶³

However, it seems difficult to make this new *sui generis* system work in a coherent manner and balance the fair trial requirements with the judges’ truth-finding mandate. The

⁵⁹ *Ibid.*, para 12 (footnotes omitted). The quotation within the citation comes from ICTY, *Prosecutor v. Simić, Tadić and Zarić*, IT-95-9-T, Judgment, 17 October 2003, 7 March 2014, para. 110).

⁶⁰ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-AnnXII-tENG, *Jugement rendu en application de l’article 74 du Statut (Judgment pursuant to Article 74 of the Statute)*, *supra* note 2, *Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte*, para 3.

⁶¹ *Ibid.*

⁶² Stahn pursues the argument that the differing approaches to the treatment of change in the qualification of crimes at the trial stage are rooted in the different legal methodological approaches adopted by the common law and civil law jurisdictions (Stahn, *supra* note 26, p. 4).

⁶³ Kaul, *supra* note 27, p. 376.

interpretation and use of Regulation 55 can be seen as an example of how challenging it is to strike this balance, in an attempt to render justice for defendant and victims.

4 The Real Crux: Article 69(3) as the Anchor for the Decision

Whilst criticism of Regulation 55 has included the increase of law-making powers on behalf of the judges, tempting them to broaden judicial discretion, the issue, perhaps is rooted deeper than that. In fact, the causes may be traced back to two fundamental questions: firstly, what is an international criminal trial for; in other words, what does it need to achieve? And secondly, allied to the understanding of the first question, what is the truth-finding remit of the judges in accordance with Article 69(3)? It seems that the differing views offered by the judges evidence a divide of the fact-finders' truth finding remit. Evidence to that effect can be found in the initial re-characterisation decision by the Majority where, at the beginning of their decision, they make the following statement:

As the Appeals Chamber has suggested, it is for the chambers, guided by the sole concern of determining the truth of the charges referred to them, having considered the evidence admitted into the record of the case, to reach a decision on the *guilt* of the accused, without necessarily restricting themselves to the characterisation employed by the Pre-Trial Chamber and on which the Prosecutor has elaborated during the trial.⁶⁴

The Appeal Chamber decision referred to is a 2008 decision in the *Lubanga* case where the Appeals Chamber clarifies the position of judges and prosecutors, stating that whilst the judges should not encroach on the role of the prosecutor in proving the guilt of the accused, this is not to exclude the truth finding powers vested in the judges by virtue of the Statute, in particular Article 69(3).⁶⁵ Further support for the Majority's rationale underlying their decision is given in a footnote where they refer to a document prepared for the purposes of Katanga's defence, which in turn cites a Trial Chamber II decision:

It has been held that article 69(3) gives the Court a general right that is not dependent on the cooperation or the consent of the parties to request the presentation of all evidence necessary for the determination of the truth. This is so because the Trial Chamber is viewed as a 'truth-finder' invested with the difficult task of ascertaining the truth in relation to the guilt of the defendant for which it is believed that the greatest accessibility to the evidence is necessary. [...] The accurate determination of

⁶⁴ *Prosecutor v. Katanga and Ngudjolo Chui, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, supra note 1, Majority's Decision*, para. 8 (footnotes omitted).

⁶⁵ *Prosecutor v. Lubanga Dyilo*, 11 July 2008, ICC-01/04-01/06-1432, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, para. 95.

the guilt or innocence of persons prosecuted before the ICC is important, not only for the accused who has the presumption of innocence, but also for the wider audience, in particular for victim participants “insofar as this issue is inherently linked to the satisfaction of their right to the truth”⁶⁶

The Majority therefore views it as their duty under Art 69(3) to seek the truth to the extent permissible under the statutory provisions whilst being mindful of and safeguarding the defendant’s fair trial. And as such, they would argue, have assumed the intended and legitimate active role of running the trial and seeking the truth – including their use of regulation 55. Judge Van den Wyngaert, on the other hand, seems to be of the view that the Majority has exceeded its powers. She has assumed, perhaps, a narrower interpretation of the Court’s provision focusing on the guilt or innocence of the accused within the fair trial framework provided, without taking express recourse to the teleological rationale cited by the Majority: to close the impunity gap. As there will not be an Appeal, the wait for coherent jurisprudence and clarity on the way the International Criminal Court tackles such fundamental discrepancies continues. For now though, Judge Van den Wyngaert is in the minority.

⁶⁶ *Prosecutor v. Katanga*, 10 November 2009, ICC-01/04-01/07-1618, *Defence for Germain Katanga’s additional Observations on Victims’ Participation and scope thereof*, paras. 10 and 11 citing *Prosecutor v. Katanga and Ngudjolo*, 13 May 2008, ICC-01/04-01/07-474, *Public Urgent Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case*, para. 35.