CASE NOTE

‘THE WORDS DON’T FIT YOU’: RECHARACTERISATION OF THE CHARGES, TRIAL FAIRNESS, AND *KATANGA*

CONTENTS

I INTRODUCTION

> ‘Then the words don’t *fit* you,’ said the King, looking round the court with a smile. There was a dead silence. ‘It’s a pun!’ the King added in an offended tone, and everybody laughed. ‘Let the jury consider their verdict,’ the King said, for about the twentieth time that day. ‘No, no!’ said the Queen. ‘Sentence first — verdict afterwards.’
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> ‘Stuff and nonsense!’ said Alice loudly.[1]

In Lewis Carroll’s *Alice in Wonderland*, Alice’s evidence in the case of the stolen tarts comes in the midst of a trial conducted in a round-about, back-to-front manner. The Judge (who is also the King) repeatedly demands a verdict to be entered before the conclusion of evidence, much to Alice’s annoyance. In discussion with the other sovereign in the room, the Queen, the King makes the remarks above. Carroll ridicules court processes that reach convictions prematurely — ‘sentence first, verdict afterwards’ — but the less commonly heard phrase is ‘the words don’t fit you’. In the recent case of *Prosecutor v Katanga*[2] at the International Criminal Court (‘ICC’), a majority of judges in the Trial Chamber fitted the words quite literally to the accused: after the close of the case, the very charges against Germain Katanga were ‘recharacterised’ to make them — and the case that had been concluded on the original wording — into very different things than originally envisaged.

In November 2012, six months after the close of the case against Katanga and Mathieu Ngudjolo Chui, a majority of the Trial Chamber judges announced that

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[1] Lewis Carroll, *Alice’s Adventures in Wonderland* (Lee and Shepard, 1869) 187 (emphasis in original).

[2] *Prosecutor v Katanga (Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012) (‘*Decision on the Implementation of Regulation 55*’). See also *Prosecutor v Katanga (Jugement rendu en application de l’article 74 du* Statut [Judgment pursuant to the Application of art 74 of the *Statute*]*)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436, 7 March 2014) (‘*Katanga Judgment*’).

they were severing the cases against the two co-accused.[3] Shortly after, Ngudjolo was acquitted of all charges[4] but, at the same time as the severance, the judges announced that they were 'recharacterising' the charges against Katanga, pursuant to reg 55 of the ICC's *Regulations*.[5] This regulation allows the Chamber to change the legal characterisation of the facts to accord with the crimes or with the form of participation.[6] Indeed, the Trial Chamber did recharacterise the mode of liability with which Katanga was charged: while the prosecution had charged Katanga under art 25(3)(a) of the *Rome Statute of the International Criminal Court* ('*Rome Statute*') with liability for indirect co-perpetration, the Trial Chamber convicted him on the basis of common-purpose liability pursuant to art 25(3)(d)(ii) of the *Statute*.[7] On 7 March 2014 — more than a year after his previously co-accused was acquitted — Katanga was convicted of one charge of crimes against humanity and four charges of war crimes,[8] under a mode of liability that was never the subject of the trial. He was subsequently sentenced to 12 years in gaol.[9] On 25 June 2014, both Katanga and the prosecution withdrew their notices of appeal.[10] Katanga's withdrawal of his appeal is understandable, given that with seven years of his sentence already served before the final judgment was delivered, his sentence will be eligible for review in a year.[11] It would make little sense for him to prolong proceedings, particularly given earlier decisions by the Appeals Chamber on the issue of the applicability of reg 55.[12] As a result, though, the Appeals Chamber will not examine this verdict on the recharacterised charges and it falls squarely to academics and civil society to analyse the implications of the case.

The recharacterisation and the ultimate judgment on the basis of the changed charges have proved contentious. While civil society actors have generally

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3 *Decision on the Implementation of Regulation 55* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012).

4 *Prosecutor v Ngudjolo (Judgment pursuant to Article 74 of the* Statute*)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012) ('*Ngudjolo Judgment*').

5 *Decision on the Implementation of Regulation 55* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012).

6 International Criminal Court, *Regulations of the Court*, Doc No ICC-BD/01-01-04 (adopted 26 May 2004) r 55(1) ('*ICC Regulations*').

7 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

8 *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).

9 *Prosecutor v Katanga (Décision relative à la peine (article 76 du* Statut [Decision on the Sentence (Article 76 of the *Statute*]*))* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 23 May 2014).

10 International Criminal Court, 'Defence and Prosecution Discontinue Respective Appeals Against Judgment in Katanga Case' (Press Release, Case No ICC-CPI-20140625-PR1021, 25 June 2014) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1021.aspx>.

11 Kevin Heller, 'Why Did Katanga Drop His Appeal? And Why Did the OTP?' on *Opinio Juris* (26 June 2014) <http://opiniojuris.org/2014/06/26/katanga-drop-appeal-otp/>.

12 Ibid.

welcomed the conviction,[13] some academic commentators have expressed deep concern.[14] The judgment — only the third at the ICC — is notable for several reasons, which all demonstrate the challenges of this still novel system of international criminal procedure. The tension between the opinion of the majority and the strong dissent of Judge Christine Van den Wyngaert reveal issues around the standard of proof required for conviction; the nature of fairness in international criminal proceedings; and the role of the judges in these cases. The following analysis does not address the issue of the uncertain nature of the standard of proof in any great detail. This is not to suggest that a thorough examination of this issue is not warranted — indeed, it is a major element of the case, has potentially significant repercussions for international criminal law and thus deserves a detailed analysis.[15] However, here I focus on the implications of the recharacterisation process in the Katanga case; and in particular, what this process demonstrates about the nature of fairness in international criminal trials, and the appropriate roles, rights and responsibilities of trial participants. The *Katanga* case reveals two key areas of uncertainty in this regard. First, there is an uncertainty regarding who fairness considerations should be primarily directed towards in situations where there is a tension between the rights of the accused and the interests of the prosecution — particularly in a legal system that is designed with the explicit aim of 'ending impunity'. Secondly, there is uncertainty around the role of judges in a system that is neither fully adversarial nor fully inquisitorial in its procedure. While fairness in international criminal trials has been frequently examined, it suffers from incoherence around to whom it is owed and how it can be ensured. The *Katanga* case demonstrates starkly this incoherence and makes for a useful tool to examine the broader understandings (and lack thereof) regarding the nature of fairness in these trials.

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13 See, eg, Amnesty International, *DRC/ICC: Katanga Found Guilty of War Crimes and Crimes against Humanity* (7 March 2014) <http://www.amnesty.org/en/news/drcicc-katanga-found-guilty-war-crimes-and-crimes-against-humanity-2014-03-07>; Coalition for the ICC, *ICC Finds Congolese Rebel Katanga Guilty in Third Judgment* (Press Release, 7 March 2014) <http://www.coalitionfortheicc.org/documents/CICC_PR_KantagaVerdict_7March14.pdf>. However, there were organisations who criticised the judgment on the basis of Katanga's acquittal for crimes of sexual violence: see, eg, Women's Initiatives for Gender Justice, *Partial Conviction of Katanga by ICC, Acquittals for Sexual Violence and Use of Child Soldiers* (7 March 2014) <http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>.

14 See, eg, Dov Jacobs, 'The ICC Katanga Judgment: A Commentary (Part 3): Some Final Thoughts on its Legacy' on *Spreading the Jam* (12 March 2014), <http://dovjacobs.com/2014/03/12/the-icc-katanga-judgment-a-commentary-part-3-some-final-thoughts-on-its-legacy/>; Kevin Heller, 'Another Terrible Day for the OTP' on *Opinio Juris* (8 March 2014) <http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>.

15 See, eg, *Prosecutor v Katanga (Minority Opinion of Judge Christine Van den Wyngaert)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014) [133]–[308], [317] ('*Van den Wyngaert Minority Opinion*'); *Prosecutor v Katanga (Concurring Opinion of Judges Fatoumata Diarra and Bruno Cotte)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxII, 13 March 2014) [4]; *Prosecutor v Ngudjolo (Prosecution's Document in Support of Appeal against the 'Jugement rendu en application de l'article 74 du* Statut*'* [Judgment pursuant to the Application of Article 74 of the *Statute*]*)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-02/12 A, 3 April 2013) ('*Prosecutor v Ngudjolo (Prosecution's Appeal of Judgment)*').

II BACKGROUND TO THE CASE

The ICC *Regulations*, including reg 55, were adopted in 2004.[16] The *Regulations* were adopted by a majority of judges rather than being a matter of negotiation and agreement by the states parties under the *Rome Statute* (although the *Regulations* are subject to approval by the states parties, and the process of adopting *Regulations* is permitted under the *Rome Statute*).[17] Regulation 55 was adopted in an attempt to 'promote judicial efficiency and allow the trial chamber to fill any impunity gaps that might arise if the prosecution's charges do not match the facts heard at trial'.[18] It was also intended to avoid any overburdening that might occur from cumulative or alternative charging and to avoid acquittals where there is proof beyond reasonable doubt that the accused has committed a crime within the Court's jurisdiction.[19] The status of reg 55 as judge-made law has been criticised as being ultra vires on the basis

> that the judges lacked the authority to adopt the regulation in the first place, because recharacterisation is not a 'routine function' and cannot be reconciled with the *Rome Statute*'s well-defined procedures for amending the charges against an accused.[20]

Yet since its adoption, reg 55 has been used in multiple ICC cases at both pre-trial and trial stages, including having been used to recharacterise the nature of the relevant conflict from non-international to international in *Prosecutor v Lubanga*;[21] and, in *Prosecutor v Bemba*,[22] to decline to confirm some charges at pre-trial and to recharacterise the mental element of command responsibility, from knowledge to negligence at trial.[23] It is therefore a powerful tool in ICC trials, used frequently and with potentially profound consequences.

Regulation 55 authorises the judges to

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16 *ICC Regulations*; *Prosecutor v Lubanga (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')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 15 OA 16, 8 Dec 2009) [71].

17 *Rome Statute* art 52(3).

18 Jennifer Easterday, 'A Closer Look at Regulation 55 at the ICC' on *International Justice Monitor* (28 May 2013) <http://www.ijmonitor.org/2013/05/a-closer-look-at-regulation-55-at-the-icc/>.

19 Ibid; Carsten Stahn, 'Modification of the Legal Characterisation of Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 *Criminal Law Forum* 1, 3. Stahn provides a comprehensive overview of reg 55, and the history of the drafting process.

20 Kevin Jon Heller, '"A Stick to Hit the Accused With": The Legal Recharacterization of Facts under Regulation 55' in Carsten Stahn et al (eds), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (Oxford University Press, 2014) (forthcoming) 34 <http://ssrn.com/abstract=2370700>.

21 *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the* Statute*)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012).

22 *Prosecutor v Bemba (Decision pursuant to Article 61(7)(a) and (b) of the* Rome Statute *on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [202]–[203]; *Prosecutor v Bemba (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)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 September 2008).

23 Heller, 'A Stick to Hit the Accused With', above n 20, 2.

> 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.[24]

The Chamber 'shall give notice to the participants' of any potential change to the charges, and will 'give the participants the opportunity to make oral or written submissions'.[25] In doing so, the Chamber may suspend the proceedings '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'.[26] Regulation 55 reiterates that the Chamber must ensure that the accused has adequate time and facilities to prepare a defence, as well as the opportunity to re-examine (or have re-examined) a previous witness, to call new witnesses or bring new evidence.[27]

The trial of Katanga and Ngudjolo commenced on 24 November 2009 and the closing statements were given in May 2012.[28] On 21 November 2012, the Trial Chamber issued a decision to separate the joint case against the accused, as the Chamber was considering recharacterising the charges against Katanga.[29] This was a majority decision, with Judge Van den Wyngaert offering a dissent 'in the strongest possible terms'.[30] Ngudjolo was acquitted by a judgment issued on 18 December 2012.[31]

The Katanga defence sought leave to appeal the decision on severance and recharacterisation[32] and leave was granted by the Trial Chamber.[33] The Appeals Chamber issued a decision on 27 March 2013, which addressed the timing of the recharacterisation decision, the scope of the proposed recharacterisation and whether the decision violated the rights of the accused to a fair trial.[34]

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24 *ICC Regulations* r 55(1).

25 Ibid r 55(2).

26 Ibid.

27 Ibid r 55(3).

28 *Decision on the Implementation of Regulation 55* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012). For a more comprehensive examination of the background of the Katanga case, see Susana SáCouto and Katherine Cleary Thompson, 'Regulation 55 and the Rights of the Accused at the International Criminal Court' (Report, War Crimes Research Office, October 2013).

29 *Decision on the Implementation of Regulation 55* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012).

30 *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014) [132].

31 *Ngudjolo Judgment*, (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012).

32 *Prosecutor v Katanga (Defence Request for Leave to Appeal the Decision 3319)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 December 2012).

33 *Prosecutor v Katanga (Decision on the 'Defence Request for Leave to Appeal the Decision 3319')* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 28 December 2012).

34 *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')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA13, 27 March 2013) ('*Appeal Judgment on Regulation 55*').

Significantly for present purposes, the Appeals Chamber 'essentially withheld judgment' on the final of these three issues,[35] as it found that it

> cannot determine conclusively now whether the trial as a whole will remain fair if the re-characterisation proceeds. Whether it will depends to a large extent upon how the Trial Chamber conducts the further proceedings and, in particular, on the measures it will take to protect Mr Katanga's rights.[36]

The Appeals Chamber, by majority, confirmed this Trial Chamber decision on severance and recharacterisation.

In May 2013, the Trial Chamber issued a decision clarifying the factual basis they were now relying upon, in order to assist the defence in their new preparations.[37] In June 2013, the Trial Chamber refused a defence request for an additional six months to conduct investigations but permitted three months for such investigations.[38] The defence was unable to carry out these investigations due in part to the security situation in the Democratic Republic of the Congo.[39] On 19 November 2013, the Trial Chamber stated that it would take into account the challenges faced by the defence in carrying out investigations and noted that should they determine that the recharacterisation process would not guarantee Katanga's rights, it would render its judgment on the original charges.[40] When judgment was delivered on 7 March 2014, the majority reiterated that they considered the rights of the accused had been upheld,[41] recharacterised the charges and entered a finding of guilt in relation to some of them.

Whether the provision of reg 55 was triggered appropriately has been the subject of debate. For example, Dov Jacobs has argued that the November 2012 decision, along with the clarification decision in May 2013, cannot 'decently be called a notice of the charges in any meaningful sense',[42] and in her minority opinions on the recharacterisation decision and the ultimate judgment, Judge Van den Wyngaert argues that the recharacterised charges go beyond the 'nature and

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35 SáCouto and Thompson, above n 28, 34.

36 *Prosecutor v Katanga (Appeal Judgment on Regulation 55)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA13, 27 March 2013) [91].

37 *Prosecutor v Katanga (Decision Transmitting Additional Legal and Factual Material (Regulation 55(2) and 55(3) of the Regulations of the Court))* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07, 15 May 2013).

38 *Prosecutor v Katanga (Decision on the Defence Requests Set Forth in Observations 3379 and 3386 of 3 and 17 June 2013)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 26 June 2013).

39 *Prosecutor v Katanga (Defence Request for a Permanent Stay of Proceedings)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 11 December 2013); *Prosecutor v Katanga (Defence Further Report on the Security Situation in Eastern DRC)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 27 January 2014).

40 *Prosecutor v Katanga (Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l'Ordonnance n° 3412 du 10 octobre 2013* [Decision Recalling the Terms of Decision 3406 of 2 October 2013 and Ordinance 3412 of 10 October 2013]*)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 19 November 2013).

41 See *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1591].

42 Dov Jacobs, 'The ICC *Katanga Judgment*: A Commentary (Part 2): Regulation 55 and the Modes of Liability' on *Spreading the Jam* (11 March 2014) <http://dovjacobs.com/2014/03/11/the-icc-katanga-judgment-a-commentary-part-2-regulation-55-and-the-modes-of-liability/>.

scope' of the original charges and that the rights of the accused have been undermined; therefore, in her view, the regulation should not operate in this case.[43] Nonetheless, in light of the regulation having been implemented and the charges recharacterised, and in light of the fact that there will be no Appeals Chamber consideration of the verdict, it is now important to examine some of the consequences that have emerged. Chief among these are the issues of how to understand fairness and the relationships between the trial participants.

III FAIRNESS IN THE AGE OF ENDING IMPUNITY: THE RIGHTS OF THE ACCUSED VERSUS THE INTERESTS OF THE PROSECUTOR?

Where interests of different trial participants collide, who should be the core focus of fair trial concerns in international criminal trials? Many scholars and practitioners would agree that an international criminal trial must take into account all participants of a trial when considering fairness, but that the rights of the accused must be given particular emphasis. However, the degree to which fairness necessitates consideration of the interests of other participants — including the prosecution and the victims — vis-a-vis the accused, is subject to some debate.[44] Comparing the majority and minority opinions in the Katanga case is a dramatic example of this debate, with the majority favouring a conception of fairness that emphasises participants other than the accused and securing a conviction while the minority opinion places restrictions on this, and reiterates that fairness must be primarily positioned towards the accused, with an emphasis on the protection of the accused's rights. The recharacterisation of charges to ensure conviction in Katanga may be seen as

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[43] *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014) [9].

[44] For example, Yvonne McDermott argues that the accused

> ought to be regarded as the *only* actor that holds enforceable rights related to their status at trial. Other actors such as the prosecutor, witnesses, victims, and the international community may be regarded as interest-holders, and holders of personal rights as human rights but not as rights deriving from their status of actor at trial.

Yvonne McDermott, 'Rights in Reverse' in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2013) 165, 166 (emphasis in original). However, Mirjan Damaška points out that there may come a point 'beyond which the desire to satisfy the victims' interests begins to impinge on considerations of fairness toward the defendants': Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 334. Also illustrative of this debate is the difference between the majority and dissent in the Appeals Chamber decision of *Prosecutor v Haradinaj* at the International Criminal Tribunal for the Former Yugoslavia. There, the majority upheld the Prosecution's ground of appeal that 'the Trial Chamber committed an error of law by violating its right to a fair trial under Article 20(1) of the *Statute*', suggesting that the prosecution holds fair trial 'rights': *Prosecutor v Haradinaj (Judgement)* (*International Criminal Tribunal for the Former Yugoslavia*, Appeals Chamber, Case No IT-04-84-A, 19 July 2010) [14]. In dissent, Judge Patrick Robinson argued that the prosecution and defence are dissimilar and exist in an asymmetrical relationship, as the prosecution bears the burden of proof and therefore 'has duties, which the Defence does not have, and the Defence has rights, which the Prosecution does not have': *Prosecutor v Haradinaj (Partially Dissenting Opinion of Judge Patrick Robinson)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-84-A, 19 July 2010) [17] (Judge Patrick Robinson). Judge Robinson goes on to say that the majority's decision incorrectly arranged fair trial rights into 'a hierarchical structure that finds no support in a proper interpretation and application of the *Statute*': at [15]. For an in-depth analysis of this case, see Yvonne McDermott, 'Rights in Reverse' at 165.

evidence of an increasing tendency to prioritise the interests of the prosecution — even in cases where, as here, the rights of the accused are fundamentally threatened and a conviction is entered in a situation where an acquittal may have otherwise been likely. Katanga can therefore be seen as an ultimate example of a situation where 'fairness' has been divorced from the rights of the accused.

A *Why is Fairness Important?*

Before turning to whom fairness is owed and how it relates to different trial participants, it is worth pausing briefly to examine the question of why fairness is important — beyond the fact that it is stipulated in the *Rome Statute* as being a key responsibility of Trial Chambers.[45] The minority opinion of Judge Van den Wyngaert offers an insight in this regard. Judge Van den Wyngaert articulated the link between the 'moral authority' of an international criminal institution and the fairness of its trials:

> In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential … to scrupulously observe the fairness of the proceedings and to apply the standard of proof consistently and rigorously. It is not good enough that most of the trial has been fair. All of it must be fair.[46]

Under this view, international criminal courts gain moral authority through the fairness of their trials — and fairness is particularly important in these cases, given the seriousness of the crimes alleged.[47] This conception finds support from those who argue that the legitimacy of international criminal institutions comes from the fairness of their procedures and punishments, rather than the authority that creates them.[48] David Luban, for example, argues that '[t]ribunals bootstrap themselves into legitimacy by the quality of the justice they deliver; their rightness depends on their fairness'.[49] This becomes self-reflexive for international criminal courts and tribunals: as Sergey Vasiliev writes, international criminal institutions have

> conceptualized their own legality as institutions and the legitimacy of their proceedings in terms of compliance with the international rule of law, which in turn was interpreted principally as the duty to fully respect some objective and external … international standards of fair trial.[50]

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45 *Rome Statute* art 64(2).

46 *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [311].

47 Similarly, it is worth remembering Gerry Simpson's words: 'in an area of law so thoroughly politicised, culturally freighted and passionately punitive as war crimes there is a need for even greater protections for the accused': Gerry J Simpson, 'War Crimes: A Critical Introduction' in Timothy L H McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer, 1997) 1, 15.

48 David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *Philosophy of International Law* (Oxford University Press, 2010) 569, 579.

49 Ibid.

50 Sergey Vasiliev, 'Fairness and Its Metric in International Criminal Procedure' in *International Criminal Trials: A Normative Theory* (forthcoming) 7 <http://ssrn.com/abstract=2253177>.

The close relationship between legitimacy and fairness has been theorised also in relation to international law more broadly. Thomas Franck argues that legitimacy is 'a key factor in fairness, for it accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied'.[51] Franck links fairness, rights, legitimacy and community, arguing that rights are 'defined, acquired, and protected through the legitimate and legitimating processes of the community'.[52] When all this is considered against the specific backdrop of international criminal justice — a system established in modern times by an explicit belief that '"justice" and "fairness" are too precious to be traded off against vengeance and effective sanction'[53] — fairness takes on a particular resonance.

B *Fairness to Whom?*

The above, however, says little about what fairness is, and to whom it is owed. Although often considered by theorists,[54] the concept of fairness defies easy definition. Indeed, fairness may be said to be subjective and lacking the ability to be quantified or measured: 'there are no clear indicators. The level of "fairness" is predominantly a normative judgement'[55] and it has been described as 'a feeling, the result of participation in a discourse'.[56] Fairness may be integral (for example, Franck sees fairness as the heart of the conversation of international law and as an account of what the international law discourse has truly been concerned with)[57] but despite its importance, in international criminal law fairness suffers from a definitional incoherence. This is, in part, due to a variety of views on what comprises fairness and what should be emphasised as being integral to it. Elements that may be constitutive of fairness include the principle of equality of arms; adversarial procedure;[58] 'the interests of justice', the ability to present your case; or having 'a fair chance of dealing with the allegations'.[59] Fairness can be seen 'predominantly from a "normative" and

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51 Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1998) 7–8.

52 Ibid 27.

53 Carsten Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' (2012) 25 *Leiden Journal of International Law* 251, 267.

54 The international criminal legal theorists who discuss fairness are too numerous to list comprehensively, but include: ibid; Vasiliev, above n 50; Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10 *Journal of International Criminal Justice* 611; Frédéric Mégret, 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 37; Patrick Robinson, 'Fair but Expeditious Trials' in Hirad Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice* (Koninklijke Brill, 2006) 169.

55 Stahn, 'Between Faith and Facts', above n 53, 267. See also Franck, above n 51, 14.

56 David Kennedy, 'Tom Franck and the Manhattan School' (2003) 35 *New York University Journal of International Law and Politics* 397, 433.

57 Ibid 434.

58 See John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' (2009) 7 *Journal of International Criminal Justice* 17.

59 Judge Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 *Berkeley Journal of International Law Publicist* 1, 5.

"procedural" point of view' or as being 'as much about "action" as it is about "perception"'.[60] Fairness may also include the rights of the accused; the safety of victims and witnesses; and the interests of other stakeholders, including the prosecution. This begs the question of what happens in situations where such rights and interests conflict.

Turning to the *Rome Statute* itself for guidance, a Trial Chamber is vested with a duty to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.[61] ICC jurisprudence confirms that fairness is owed to all parties to a proceedings[62] and that fairness is 'a shared rather than exclusive right'.[63] Fairness has been defined as being either 'general' or 'specific', with flow-on implications for the rights of the participants.[64] While the specific component of fairness relates to the rights of the defence, more broadly there is a 'general fairness' to be preserved to the benefit of all participants in the trial process, including the prosecution.[65] Fairness has been said to necessitate respect for 'the procedural rights of the prosecutor, the defence, and the victims'.[66] Yet how should fairness concerns be resolved when the rights of the defence conflict with the interests of other parties, such as the prosecution? Where, for example, the prosecution's case is unlikely to result in a conviction, is it fair for the judges to reorient the case to secure a conviction — even where the rights of the accused are undermined?

The Trial Chamber's obligation under the *Rome Statute* to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused'[67] ties fairness strongly to the rights of the accused. The importance of the rights of the accused is reiterated even within reg 55, which explicitly provides that it should not be invoked in instances where it would violate the rights of the accused.[68] However, it is difficult to reconcile all of this with the

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60 Stahn, 'Between Faith and Facts', above n 53, 268–9.

61 *Rome Statute* art 64(2).

62 *Prosecutor v Kony (Decision on Prosecutor's Applications for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05-90, 10 July 2006) ('*Uganda Decision on Prosecutor's Applications for Leave to Appeal Dated the 15th of March 2006*') [24]; *Prosecutor v Kony (Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/001/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-112, 19 December 2007) [27]; *Prosecutor v Karemera (Decision on Severance of André Rwamakuba and Amendments of the Indictment)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-PT, 7 December 2004) [26].

63 International Bar Association, 'Fairness at the International Criminal Court' (Report, International Bar Association's Human Rights Institute, August 2011) 19.

64 *Uganda Decision on the Prosecutor's Applications for Leave to Appeal Dated the 15th of March 2006* (International Criminal Court, Pre-Trial Chamber II, Case No 1CC-02/04-01/05-90, 10 July 2006) [24].

65 Ibid.

66 *Prosecutor v Katanga (Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-135-tEN, 31 March 2006) [38].

67 *Rome Statute* art 64(2).

68 *ICC Regulations* r 55.

reasoning of the majority in the Katanga case, where the recharacterisation of charges appears to have affected the rights of the accused to know the case against him,[69] to time and facilities to prepare a defence,[70] to be tried without undue delay[71] and the right against self-incrimination.[72] Unsurprisingly, the majority gave rhetorical respect to fairness and its connection with the rights of the accused.[73] It is, of course, almost impossible to imagine the majority suggesting that recharacterisation violated the rights of the accused — this would nullify the operation of reg 55 and place the Chamber in dereliction of their statutory duty to uphold the rights of the accused. However, this rhetorical respect for the connection between fairness and the rights of the accused is in distinction to the actual effect of the recharacterisation of the charges on Katanga's rights. When we examine the rights of the accused in detail, there are obvious problems. In this case, we see a disconnection between the language of the majority and the implications of their decision and, at a conceptual level, an enforced separation between 'fairness' and the rights of the accused.

The right of the accused to have adequate time and facilities for the preparation of the defence is particularly important in a situation where the case has been changed at a late stage. A defendant must be able to prepare a defence for the case he is, in fact, facing. The importance of this right is reiterated in the particular wording of reg 55 itself.[74] Time and facilities to prepare a defence must include the ability to conduct investigations, but as outlined above, this was not possible for the Katanga defence. Rather, they had to address the possible new mode of liability on the evidence as adduced at trial. It is worth reiterating that the presumption of innocence means an accused does not have an obligation to put on an affirmative defence case: they should instead be able to put the

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69 *Rome Statute* art 67(1)(a).

70 Ibid art 67(1)(b).

71 Ibid art 67(1)(c).

72 Ibid art 67(1)(g).

73 *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014). The majority refers to their decision of 21 November 2012 and stipulates:

> Pour ce qui est du déroulement de cette dernière phase procédurale, la Chambre a été soucieuse, comme l'y avait invité la Chambre d'appel, de veiller à ce qu'elle se déroule de façon équitable mais aussi, a fortiori dès lors qu'elle s'engageait à un stade avancé, dans un délai raisonnable … elle s'est assurée que la Défense pouvait jouer son rôle dans les conditions les plus équitables possibles et elle l'a fait en répondant à chacune de ses écritures et en lui précisant la marche qu'elle pourrait suivre tout en encadrant la procédure de requalification dans de strict délais. [In terms of the unfolding of this final procedural phase, the Chamber was concerned, as invited by the Chamber of Appeal, to ensure that it was undertaken in a fair manner but also, a fortiori as it was commencing at an advanced stage, within a reasonable timeframe … it was convinced that the Defence could play its role in the fairest possible conditions and it ensured this in responding to each of the Defence's submissions and in warning him of the path it could follow, all the while keeping the procedure of recharacterisation within a strict timeframe]: at [1590]–[1592].
>
> Pour la Chambre, les exigences de l'article 67–1-c ont donc été pleinement respectées. [For the Chamber, the requirements of article 67(1) have thus plainly been respected]: at [1591].
>
> La Chambre estime dès lors avoir veillé, dans la présente affaire, à ce que le procès soit conduit de façon équitable et diligente, et ceci dans le plein respect des droits de l'accusé.' [The Chamber believes that it has ensured, in the present case, that the process just been conducted in a fair and diligent manner, and with the full respect for the rights of the accused]: at [1592].

74 *ICC Regulations* r 55; *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012) [48].

prosecution case to proof.[75] Thus in reg 55 'time and facilities' to prepare a defence refers to trial readiness. Yet how is it possible to be 'ready' for a case of which you are only notified after the trial has finished?

The clash with the right of the accused to know the case against them is even more obvious. Perhaps if the prosecution was able to charge alternate modes of liability from the commencement of trial, the defence would be on notice that they were facing such charges.[76] Yet this was not the case here and the mere possibility that reg 55 could be invoked to alter the charges cannot be seen as sufficient notice that the accused could be convicted on any of the modes of liability. The case had been clearly delineated (until the Trial Chamber unilaterally raised the question of recharacterisation), and for good reason. In addition to the implications for the accused's right to know the case against them, clearly specifying the mode of liability allows litigation to be targeted. The argument that the mere existence of reg 55 is sufficient to put the defence on notice of being liable for charges not laid undermines trial certainty. The defence would need to defend themselves broadly — potentially lengthening trial time (which is not beneficial for any party), affecting the limited resources of all parties, and more specifically affecting the accused's right to sufficient time and facilities to prepare their defence.

Of particular note is that Katanga had, prior to the notification that the charges were to be recharacterised, testified in his own defence. Admissions were made. This is regular defence strategy, and it is often encouraged by Trial Chambers to ensure that the litigation can focus on matters actually in contention between the parties, thereby streamlining cases. In this case, however, it is those very admissions that were turned against Katanga and used as evidence for his culpability under the new charges. As Kevin Heller has noted, 'the recharacterization undermined the defence's entire trial strategy'.[77] This appears to be in conflict with the right of the accused against self-incrimination. While it is true that recharacterisation was theoretically possible, again, this cannot be seen as sufficient notice for the accused and again, there are potentially wider implications. It is questionable whether any accused would ever make any voluntary admissions or testify in their own defence, knowing that the precedent *Katanga* sets is that this may be used to convict on the basis of a different form of liability. Surely, defence counsel will be less willing to concede any point and will rather focus on putting the prosecution to proof on all issues, conscious that any concession may be used against them. The ramifications of this on the length of future trials and on the resources expended by all parties may prove to be significant.

It is thus clear that the rights of the accused were threatened by this recharacterisation process, which brings us back to the question of how fairness and the rights of the accused are positioned in international criminal trials. In

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75 Colleen Rohan, 'Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?' in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2013) 289, 290–1.

76 Alex Whiting, 'Guest Post: The ICC's Last Days? Not So Fast' on Dov Jacobs, *Spreading the Jam* (20 March 2014) <http://dovjacobs.com/2014/03/20/guest-post-the-iccs-end-days-not-so-fast/>.

77 Heller, 'A Stick to Hit the Accused With', above n 20, 26.

Katanga, the majority redefined the case to favour the prosecution and conviction, at the expense of the rights of the accused. In her minority opinion, Judge Van den Wyngaert questioned the standard by which fairness should be evaluated.[78] She argued that 'the trial must be first and foremost fair towards the accused. Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while certainly relevant, cannot trump the rights of the accused'.[79] Judge Van den Wyngaert's minority opinion represents an approach to fairness that centres on the rights of the accused. This approach advocates that where the rights of an accused are affected, fairness dictates that they must be given pre-eminence over the interests of other stakeholders. However, this is a minority opinion. The majority has favoured an approach which sees the Chamber intervening to 'correct' the course of proceedings, and in so doing, bolstering the prosecution's position. Judicial intervention placed one interpretation of fairness — that is, one closely linked to parties other than the accused and 'ending impunity', or conviction — above another interpretation, an interpretation of fairness being linked to the full respect for the rights of an accused. This can be seen as further evidence of what Yvonne McDermott calls

> a trend in recent years to extend the fair trial rights regime to the prosecution, and to elevate the interests of the prosecution to the status of rights. This elevation, in turn, permits the Chamber to place the rights of the accused in a 'balance' with the prosecution's interests, while the rights of the accused properly belong at the apex of any hierarchy of considerations.[80]

Some may claim that the acquittal of Ngudjolo shows that there is no such increasing trend to place the interests of the prosecution in balance with the rights of the accused. In that case — until after the close of the trial, joined with Katanga — the prosecution have claimed that the Trial Chamber misapplied the standard of proof and acquitted the accused on the basis of 'hypothetically possible contrary inferences, however unrealistic or unsupported', and on the basis of this incorrect standard, acquitted the accused.[81] If this is accurate, it indeed suggests that the balance of the trial was not tipped in support of the prosecution but rather in support of the defence. The argument could cogently be made that the resolution of any doubt in favour of the accused is precisely what the Trial Chamber should do, consistent not only with its obligations under art 64 of the *Rome Statute*, but also with the general principle of *in dubio pro reo*. Regardless of the resolution on these issues, however, the point remains: in Katanga, the rights of the accused were not considered to be integral and the interests of 'correcting' the prosecution's case to ensure conviction were given precedence.

There is another consideration, and another measure for international criminal courts to evaluate their success: the imperative to 'end impunity'. This aim is writ large in international criminal justice, and the *Rome Statute* specifically

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78 See *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).

79 Ibid [311].

80 McDermott, above n 44, 172.

81 *Prosecutor v Ngudjolo (Prosecution's Appeal of Judgment)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-02/12 A, 3 April 2013) [2].

charges the ICC with a mandate of 'ending impunity' as its raison d'être.[82] However, there is a tension between a Trial Chamber's role to 'ensure that a trial is fair … with full respect for the rights of the accused',[83] and a system that 'thrives on conviction'.[84] As Damaška has argued, 'fairness demands tend to erect obstacles to the easy realization of punitive demands',[85] and Damaška has advocated a relaxation of some limited fairness considerations given the unique place and aims of international criminal justice.[86] This is the backdrop against which reg 55 has operated. Regulation 55 was always envisaged as a mechanism to prevent the undesirable 'impunity gap', whereby acquittals are reached as a result of technicalities.[87] It is therefore fundamentally concerned with balancing the fairness of trial with an imperative to see convictions entered. In the *Katanga* case, the 'impunity gap' was filled comprehensively: the acquittal on certain charges and the recharacterisation of others means that Katanga was convicted only of charges that were never laid by the prosecution — and that the charges that the prosecutor did lay were not established. The prosecutor failed to prove any of the charges against Katanga as they were initially characterised.[88] Had the charges not been recharacterised, it is likely that Katanga would have been acquitted alongside his co-accused Ngudjolo. If 'ending impunity' was the aim, this case could be measured as a success. But if the aim was for a 'trial that is fair … with full respect for the rights of the accused', success is far from obvious.

This use of reg 55 raises the question of how fair trial considerations by judges in international criminal trials relate to the rights of the accused, in a system designed to fulfil a lofty goal of 'ending impunity'. When considered with reference to the issue of who should be the primary concern of the concept of 'fairness' — the accused, or the prosecution and the broader 'ending impunity' goals — the difference between the majority and minority opinions in this case are striking. The tension between the two approaches is indicative of a rift between those that favour a conception of fairness that is intimately linked to the rights of the accused, and those that favour a conception of fairness that emphasises other parties to the proceedings. The relationship between the parties — and who will be given precedence in questions of fairness and of procedure — is to be regulated by the judges, who operate as the managers of the

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82 The *Rome Statute* refers to a determination to 'put an end to impunity' through the International Criminal Court: *Rome Statute* Preamble. See also Martti Koskenneimi, *The Politics of International Law* (Hart, 2011) 171–97; Jackson, 'Finding the Best Epistemic Fit', above n 58, 20; Damaška, 'Reflections on Fairness', above n 54, 613.

83 *Rome Statute* art 64(2).

84 William A Schabas, 'Balancing the Rights of the Accused with the Imperatives of Accountability' in Ramesh Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press, 2004) 154, 165.

85 Damaška, 'Reflections on Fairness', above n 54, 614.

86 Ibid; Mirjan Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 365.

87 *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014) [10].

88 See Heller, 'Why Did Katanga Drop His Appeal?', above n 14; *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-343 6-anxI, 7 March 2014) [1].

trial as well as the finders of fact. Yet this case also demonstrates a lack of certainty around the position of the judge, and its possibilities and limitations.

IV JUDGE AS PROSECUTOR?

The recharacterisation of charges and subsequent conviction of Katanga raise the issue of the role of a judge in an evolving system of international criminal procedure which is neither wholly adversarial nor wholly inquisitorial in nature. While the roles and responsibilities of the judge (and the parties) are relatively well-founded in national jurisdictions, the *Katanga* case demonstrates that these are still quite uncertain in international criminal trials.

International criminal procedure is a sui generis system, with both adversarial and inquisitorial elements. Many agree that international criminal procedure has tended to be predominantly based on adversarial understandings but with a gloss of inquisitorial elements;[89] many also posit that this inquisitorial gloss has increased in recent years.[90] Jacobs has argued that reg 55 is itself demonstrative of a shift 'away from an adversarial approach to an inquisitorial approach'.[91] While traditional typologies are not easily transferable to the international criminal justice plane and its unique pressures and goals,[92] they nonetheless remain influential and instructive (both practically and conceptually). This is, in no small part, because practitioners remain educated and socialised in national systems, and bring to their international practice their traditional methods and understandings.[93]

Yet the dangers of merging the two systems include the possibility that this may produce a less satisfactory process — and fact-finding result — than either the adversarial or inquisitorial system may offer.[94] Integral to this is the role of the fact-finder: the judge. Any system of procedure must have a clear role for the judge and a defined relationship between judge and parties. The threat of a hybridised system is that this may be confused. Is the judge meant to be an office independent from the parties (as in the traditional adversarial typology), or are they to take a more 'investigatory' and active role (as in the inquisitorial approach)? Blending the two systems could lead to a lack of certainty or

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89 Jackson refers to an 'attempt to graft "inquisitorial" features on to an adversarial model': Jackson, 'Finding the Best Epistemic Fit', above n 58, 33. See also John Jackson, 'Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries' in John Jackson, Máximo Langer and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (Hart, 2008) 221; Mégret, above n 54.

90 Richard Volger, 'Making International Criminal Procedure Work: From Theory to Practice' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate, 2011) 105.

91 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 (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2013) 205.

92 See, eg, Mirjan Damaška, 'Negotiated Justice in International Criminal Courts' (2004) 2 *Journal of International Criminal Justice* 1018, 1019.

93 See James Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *American Journal of International Law* 404, 408.

94 Jackson, 'Finding the Best Epistemic Fit', above n 58, 33, citing Mirjan Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *American Journal of Comparative Law* 839, 852.

agreement on this role, and may ultimately invite 'the judiciary to take over the job of prosecuting … which is incompatible with the Anglo-American adversarial model upon which the Court is principally based'.[95] It is not that the inquisitorial system is less fair than the adversarial system. Rather, the question is how to ensure fairness where aspects of the inquisitorial system are integrated into a model with strong adversarial elements, but where the corresponding safeguards or limits may not also be adopted. The potential is there for international criminal procedure to be a messy patchwork of approaches, rather than a neat and cohesive sui generis system.

Regulation 55 and its use in various cases show a tendency of ICC judges to increase their 'control over the charges beyond what was initially envisioned by the *Rome Statute*'.[96] Jacobs sees judicial lawmaking in international criminal institutions as raising difficulties with regards to the principle of legality and the rights of the accused, and states that the judges 'still resort to quasi-legislative powers that confuse their role as a judicial organ and continue to affect their authority, due to the perceived arbitrariness of the methodology employed'.[97] Similarly, Heller's critique of reg 55 being ultra vires suggests that, in adopting reg 55, judges have stepped outside their authority in order to further and consolidate their own power.[98] In the absence of a global legislature, and given the 'constructive ambiguities' in the *Rome Statute*, in particular, the role of judges as law-makers is particularly important. Judicial creativity and activism — especially where such activism increases the scope of the judicial role, or changes the role of the judges and participants — requires careful attention.[99] Linked to this question of judicial activism increasing the ambit of the judge's role is the issue of a judge's place as a 'moral teacher'.[100] Damaška points out the socio-pedagogic role of international criminal judges.[101] This links back to the question of the court's legitimacy: the ability of judges to fulfil this role depends upon being 'perceived by their constituencies as having a legitimate authority. Lacking coercive power, their legitimacy hangs almost entirely on the quality of their decisions and their procedures'.[102] Thus, any activism which increases the scope of the judge's role should be grounded in a robust process and decision, if the socio-pedagogic function is to be properly realised.

Nonetheless, Katanga is illustrative of the uncertainty around the role of judges. In recharacterising the charges in this case to ensure conviction, the majority adopted a more active and prosecutorial role. In its decision to recharacterise the charges, the majority determined that

> 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

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95 Geoffrey Robertson, *Crimes against Humanity* (Penguin, 4th ed, 2012) 534.

96 Jacobs, 'A Shifting Scale of Power', above n 91, 220.

97 Ibid 221–2.

98 Heller, 'A Stick to Hit the Accused With', above n 20.

99 For more on the topic of judicial activism in international criminal trials, see Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010).

100 Damaška, 'What is the Point of International Criminal Justice?', above n 44, 345.

101 Ibid 346.

102 Ibid 345.

> restricting themselves to the characterisation employed by the Pre-Trial Chamber and on which the Prosecutor has elaborated during the trial.[103]

The majority relied on its power under art 69(3) of the *Rome Statute*, to call any evidence it deems necessary for the determination of the truth,[104] alongside an Appeals Chamber decision that the 'fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that "must be convinced of the guilt of the accused beyond reasonable doubt" (article 66(3) of the *Statute*)'.[105] It is true that it is for the Trial Chamber to reach a conclusion on the guilt of the accused — but it is also true that the accused must continue to enjoy the presumption of innocence.[106] In this case, it is clear that the majority perceived its role as being closely related to the conviction of the accused.

Additionally, the conviction was based largely on testimony that Katanga himself provided — some of which was in response to the questioning of the bench rather than of the prosecutor or other trial participants.[107] It is hard not to view the judges as essentially doing the job of the prosecution — from laying the charges, to adducing the evidence that lead to conviction (although the evidence effectively came before the charges).

Indicative of a view that the majority adopted a partisan and prosecutorial role to advance a case of their own, Judge Van den Wyngaert's minority opinion repeatedly refers to 'the majority's case'.[108] The majority took the unusual step of issuing a separate opinion 'concurring' with their own majority judgment,[109] in which they address this and attempt to rebut it. They asserted that

> we in no wise [sic] sought to appropriate a 'case', and even less, to take the place of the Prosecution. Indeed, we are fully aware of its role and prerogatives and have no intention of encroaching on its authority. We understand, and have understood for a long time, our own role and the limits in which we must operate. As is the duty of any judge, we merely conducted, with objectivity and without

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103 *Decision on the Implementation of Regulation 55* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 21 November 2012) [8] (emphasis in original) (citations omitted).

104 Ibid [7] n 21.

105 *Prosecutor v Lubanga (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 9 OA 10, 11 July 2008) [95].

106 *Rome Statute* art 66.

107 Katanga's testimony (as Witness D02-300) is cited 354 times in the 711-page judgment: see, eg, *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [314], [360]. Katanga was questioned by the bench on 18 and 19 October 2011: see *Prosecutor v Katanga (Transcript of Proceedings of 18 October 2011)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 18 October 2011); *Prosecutor v Katanga (Transcript of Proceedings of 19 October 2011)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-T-325-ENG, 19 October 2011).

108 *Van den Wyngaert Minority Opinion* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014).

109 *Prosecutor v Katanga (Concurring Opinion of Judges Fatoumata Diarra and Bruno Cotte)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 13 March 2014).

> preconceived ideas, as careful and thorough an examination of the evidence in the record as possible.[110]

This uncertainty about the role of the judge in a sui generis system of procedure is heightened by the challenges that reg 55 places on the roles and responsibilities of the trial participants. It is not just the role of the judge that is confused: Heller makes a comprehensive argument that reg 55 undermines prosecutorial independence.[111] The roles of all stakeholders of the trial are thrown into confusion. Further, when the judges take on a more inquisitorial — even prosecutorial — role, as here, it is difficult to see how they are able to be regulators of the trial process and of the relationships between the parties to trial, as envisaged by the *Rome Statute*. Heller makes the point that a use of reg 55 by the Trial Chamber of their own volition is inconsistent with the guarantee of 'a fair trial conducted impartially',[112] as '[a] Trial Chamber does not act impartially when it intervenes during or after a trial to save the prosecution from itself'.[113] A Trial Chamber that wishes to act more in line with an inquisitorial model should explicitly adopt such a system, under art 64(8)(b) of the *Rome Statute*.[114] Yet without such a clear indication of an inquisitorial system having been adopted, it is incongruous that, after the end of trial, a Trial Chamber can take on a prosecutorial role to adopt a case that will lead to a conviction. This all suggests a lack of clarity around how judges can, and should, act in these trials — and a challenge for the judges in acting as impartial arbiters, managing the relationships between the trial parties.

It is obvious that the question of the role of the judge loops back to the broader question of fairness. Carsten Stahn correctly articulates that a core component of fairness is the 'perception of independence (ie freedom from external interference) and impartiality (ie lack of bias and investigation of all sides to a conflict)' of international courts and tribunals.[115] Judges — as the primary decision-makers and the managers of the trials — must be seen as impartial and independent, in order for the proceedings to be considered fair. Judges are, indeed, the guardians of the trial's fairness.[116] Yet while there is no question that this is their overarching role, Katanga reveals that there is uncertainty about how best to realise this. As long as the position of the judge is unclear, there will be significant implications for how fairness is conceptualised.

V CONCLUSIONS

The Katanga case demonstrates the challenges for a still-nascent system of international criminal procedure. It is a system uncertain of the balance between the accused and the other parties with regards to fairness considerations; caught between imperatives to 'end impunity' and to give 'full respect to the rights of the accused'; and still trying to negotiate how to regulate the roles of, and

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110 Ibid [2].
111 Heller, 'A Stick to Hit the Accused With', above n 20.
112 *Rome Statute* art 67(1), cited in Heller, 'A Stick to Hit the Accused With', above n 20, 33–4.
113 Heller, 'A Stick to Hit the Accused With', above n 20, 34.
114 Ibid.
115 Stahn, 'Between "Faith" and "Facts"', above n 53, 269.
116 *Rome Statute* art 64(2).

relationships between, the trial participants and the judges. This case is indicative of a conception of trial where fairness and the rights of the accused are cleaved apart, and conviction is prioritised. Judges adduce evidence, and only subsequently tell the accused how he is charged, reorienting a prosecution case to ensure a finding of guilt. Words are fashioned to fit the accused. If this were Wonderland, Alice would be likely to object loudly. Yet in a system such as international criminal law, which has based itself on the centrepiece of a trial — and a trial which must be fair, lest it be 'more show than trial' — these questions must not remain unresolved too much longer.

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