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## Ability of Trial Chamber and Pre-Trial Chamber to Use Different Legal Characterizations

Ugochi Madubata

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CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR  
SPECIAL TRIBUNAL FOR LEBANON

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**Ability of Trial Chamber and Pre-Trial Chamber to Use  
Different Legal Characterizations**

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Fall Semester, 2012  
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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS<sup>1\*</sup>**

### **A. SCOPE**

This memo focuses on whether the Trial and Pre-Trial Chambers of the Special Tribunal for Lebanon (“STL”) have the power to impose a different legal characterization on a crime than what was originally used in the indictment and what limits may constrain the ability of the court to do this. This memo draws on international criminal tribunal precedent case law of the European Court of Human Rights (“ECtHR”). It will also briefly look at Lebanese and French law to determine whether there is a customary international law basis for the Trial and Pre-Trial Chambers of the STL to act.

## **II. SUMMARY OF CONCLUSIONS**

### **A. International tribunal statutes, case law, and international law can be used in interpreting authority of the STL Chambers because the STL is an international tribunal.**

In its recent interlocutory opinion, the STL Appeals Chamber ruled on what law applies to the Tribunal and how to interpret Lebanese law. In this decision, the Appeals Chamber held that the STL is an international tribunal and that international law applies to its actions. While the Appeals Chamber limited the use of international law in interpreting the substantive jurisdiction of the STL, the characterization of the tribunal as an international one makes international law not only relevant to procedural rules, but required in their interpretation.

### **B. International criminal tribunals recognize that the Trial Chamber has the ability to use different legal qualifications than those used in the indictments.**

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<sup>1\*</sup> Can the STL Trial Chamber substitute or impose its own legal qualification (criminal characterizations or modes of criminal responsibility) for a criminal offence in a first instance verdict other than that which appears on a confirmed indictment? If so, under what legal provisions? What about the Pre-Trial Judge during the indictment confirmation process?

The Trial Chamber's ability to use different legal qualifications than those used in the indictment is explicitly confirmed in the ICTY *Kupreskic* case, which has been followed by subsequent ad-hoc tribunal cases. This ability has also been supported in European Court of Human Rights (ECtHR) cases. Furthermore, the Statutes and Rules of the International Criminal Court ("ICC") and the Extraordinary Chambers in the Courts of Cambodia ("ECCC") explicitly say that the Trial Chamber has the ability to use a different legal qualification than presented in the indictment.

**C. One could make the argument that the explicit ability to use a different legal characterization in the ICC and ECCC statutes and rules shows that this ability is generally accepted in international criminal practice and therefore, this ability is applicable to the STL. However, in the absence of a similar rule, the STL may not embrace this practice.**

Each ad-hoc tribunal has relied on the precedent set by prior tribunals to determine what they can or cannot do consistent with international law. Additionally, each new tribunal's Statute and Rules of Procedure and Evidence have codified prior case law by including new provisions that were not explicitly mentioned in prior ones. As such, one could assume that developments in newer tribunals confirm a general consensus that something is now accepted as law. However, without the express wording in the STL statute or a ruling which makes procedural rules used in later, different tribunals relevant to the STL, the STL may not necessarily embrace this practice

**D. In any event, the Trial Chamber's ability to use a different legal characterization is limited by whether the defendant has adequate notice of the change in qualification, whether it will cause undue delay to the proceedings, when the Trial Chamber makes the qualification, and what the situation is.**

In changing the legal characterization of the charges, the Trial Chamber must respect the defendant's right to a fair trial. This requires the Trial Chamber to 1) make sure the defendant has adequate notice before changing the legal qualifications of the crime and 2) the make sure that the change in the legal characterization of a crime does not cause undue delay of the proceedings. Additionally, the Trial Chamber may not amend the legal qualification of the crimes when the Pre-Trial Chamber still has control over the charges. Finally, why the legal characterizations need to be change will restrict the Trial Chamber. If the prosecutor proves a different crime than is charged, if a more serious offense is more appropriate, or if a lessor offense should be used, the Prosecutor has to ask the Chamber to amend. The Trial Chamber, in these situations, is not allowed to change the legal qualifications absent the Prosecutor's request.

**E. While the ability of the Pre-Trial Chamber to use differing legal characterizations is not explicitly stated in any statutes, the ability to do this is recognized in case law.**

None of the Statutes or RPEs of the various tribunals gives the Pre-Trial Chamber the ability to change the legal qualifications of the indictment, but comparative Pre-Trial Chamber case law supports the ability of the Chamber to do this, subject to the Trial Chambers right to use a different legal qualification after the Pre-Trial's control over the charges is complete.

**F. Lebanese criminal procedure grants the Trial Chamber the ability to amend the legal characterization of a crime, but may not grant the Pre-Trial Chamber this ability.**

Under Lebanese Code of Criminal Procedure, the STL Trial Chamber would have explicit authority to change the legal characterizations used in the indictment. However, because the Code of Criminal Procedure does not explicitly grant the Indictment Division, who act in a manner similar to the Pre-Trial Chamber, the ability to change the legal characterizations in the indictment, and there is little in the Code of Criminal Procedure from which to imply this power,

the Pre-Trial Chamber may not be able to change the legal characterization of a crime under Lebanese law.

**G. Under French Law, the Trial Chamber can consider different legal characterizations in making their decision, but might not have the power to change the legal characterization of a crime. However, because French Investigating Judges have not parallel actor in the Pre-Trial Chamber, French law cannot be used to grant.**

The Code de Procédure Pénale (French Code of Criminal Procedure) allows the Assizes Court, the court parallel to the role of the Trial Chamber, to consider legal characterizations which were raised in trial, but not in the indictment. However, it offers no explicit ability to change the legal characterizations of the crimes. Therefore, the Trial Chamber, under French law, would have the ability to consider differing legal characterizations, but could not impose their own legal qualifications. The Pre-Trial Chamber does not have this ability under French law because the role of the Investigating Judges in French law is so different from that of the Pre-Trial Chamber that the ability of the Investigating Judges to change the legal characterization cannot be used to support this ability in the STL Pre-Trial Chamber.

### **III. FACTUAL BACKGROUND**

On February 14, 2005, former Lebanese Prime Minister Rafiq Hariri was assassinated<sup>2</sup> by a bomb attack.<sup>3</sup> Following the bombing, the Government of the Republic of Lebanon asked the United Nations (“UN”) to establish a “tribunal of international character”<sup>4</sup> which has jurisdiction over the “persons responsible for the attach on 14 February 2005 resulting in the death of former

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<sup>2</sup> See *About the STL*, STL Website, available at <http://www.stl-tsl.org/section/AbouttheSTL>.

<sup>3</sup> See *UN probe into murder of former Lebanese leader nears sensitive stage – inquiry chief*, UN News Centre, available at <http://www.un.org/apps/news/story.asp?NewsID=21034&Cr=leban&Cr1=>.

<sup>4</sup> See *About the STL*.

Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons.”<sup>5</sup> As of yet, the tribunal, the STL, has not released a public indictment.

#### IV. STL USE OF INTERNATIONAL PRECEDENT

The Statute for the STL expressly limits the applicable criminal law of the tribunal to:

- a) [t]he provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and
- b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil, and interfaith struggle”<sup>6</sup>

However, the Appeals Chamber has recently expanded the STL’s ability to use international law in its “Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging.” In this decision, the Chamber found that the STL is “international in character.”<sup>7</sup> The Chamber then went on to explain that the tribunal’s international character derives from the fact that

the constitutive instruments of the special tribunal in both form and substance evidence its international character. The legal basis for the establishment of the special tribunal is an international agreement between the United Nations and a Member State; its composition is mixed with a substantial international component; its standards of justice, including principles of due process of law, are those applicable in all international or United Nations-based criminal jurisdictions; its rules of procedure and evidence are to be inspired, in part, by reference materials reflecting the highest

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<sup>5</sup> Statute for the Special Tribunal of Lebanon, S/RES/1757 (2007), Art. 1, *established on* Mar. 29, 2006, *available at* <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statute-EN.pdf>.

<sup>6</sup> Statute for the STL, Art. 2.

<sup>7</sup> *Prosecutor v. Unknown*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 15 (Pre-Trial) (Feb. 16, 2011), *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216\\_STL-11-01\\_R176bis\\_F0010\\_AC\\_I\\_interlocutory\\_Decision\\_Filed\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_I_interlocutory_Decision_Filed_EN.pdf).

standards of international criminal procedure; and its success may rely considerably on the cooperation of third States.<sup>8</sup>

Having “international character,” and being created by the UN Security Council in the way that other ad-hoc international tribunals have been created, makes the STL an international tribunal. Consequently, international tribunal precedent and international tribunal procedural rules and interpretations can be used in interpreting what the STL Chambers can do. The Appeals Chamber’s statement that as “an international tribunal in provenance, composition, and regulation, it must abide by ‘the highest international standards of criminal justice’”<sup>9</sup> supports this conclusion. As in international tribunal in composition and regulation, the STL is influenced by the statutory interpretation of previous tribunals which have similar provisions. Additionally, the practice in international tribunals generally has been to cite the cases and statutes of other tribunals in determining issues of both substance and procedural laws. Although the criminal charges are limited to Lebanese law, the Interlocutory Decision by the Appeals Chamber states that the tribunal has an international character, which allows international law to be used for procedural questions and in interpreting Lebanese criminal law.<sup>10</sup> Therefore, international precedent is valid for interpretation of STL rules and regulations.

## **V. THE ABILITY TO USE DIFFERING LEGAL QUALIFICATIONS THAN THOSE USED IN THE INDICTMENT**

### **A. TRIAL CHAMBER**

#### **1. Under International Tribunal Statutes and Rules**

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<sup>8</sup> *Id*, quoting, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), at para. 7. *See also Prosecutor v. Unknown*, Case No. STL-11-01/I, Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, ¶ 7(b) (Pre-Trial) (Jan. 21, 2011), *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/PreTrialChamber/20110121\\_STL-11-01\\_R176bis\\_F0001\\_PTJ\\_Questions\\_Prejudicielles\\_FR-EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/PreTrialChamber/20110121_STL-11-01_R176bis_F0001_PTJ_Questions_Prejudicielles_FR-EN.pdf).

<sup>9</sup> *Id* at ¶ 16.

<sup>10</sup> *See id* at ¶ 41 (“we must still interpret provisions of the Lebanese Criminal Code as they would be interpreted by Lebanese courts, and thus for this purpose we take into account international law that is binding on Lebanon.”)

The RPE of the STL limits the Trial Chamber's actions regarding the indictment to authorizing the Prosecutor to amend the indictment once the case has been assigned to the Trial Chamber<sup>11</sup> and determining whether there is a *prima facie* case for the charges in the indictment.<sup>12</sup> There is no mention anywhere in STL Statute<sup>13</sup> or the RPE that using a differing legal qualification is allowed. The ICTY and ICTR statutes and RPE have similarly restricted the language regarding the power of the the Trial Chamber to do this.<sup>14</sup>

In contrast, the Statutes and Rules of the ECCC and the ICC have provisions which explicitly grant the Trial Chamber the ability to use their own legal determinations in defining the crime before the court. Thus, under the ECCC Internal Rules, Rule 98, "[t]he Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced."<sup>15</sup> Additionally, the ECCC Rules state that "[i]n all cases, the Chamber may change the legal characterisation of the crime adopted by the Trial Chamber."<sup>16</sup> The International Criminal Court ("ICC") has similar provisions that allow the Trial

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<sup>11</sup> Rules of Procedure and Evidence of the Special Tribunal for Lebanon, STL/BD/2009/01/Rev. 2, Rule 71(A)(iii) adopted on March 20, 2009, *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/RPE-09-10-30\\_En.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/RPE-09-10-30_En.pdf).

<sup>12</sup> RPE STL, at Rule 71(B).

<sup>13</sup> See Statute STL, at Art 20(1) and Art. 21.

<sup>14</sup> See Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 19, *adopted on* May 25, 1993, *amended most recently on* July 7, 2009, *available at* [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf). See also Rule of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, IT/32/Rev. 44, Rule 73 *bis*, (D), *adopted on* February 11, 1994, *available at* [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev44\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf); Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 50, *adopted on* January 16, 2002, *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=yNjqn5TIYKs%3d&tabid=176>, *amended on* July 7, 2009, *available at* <http://www.unictf.org/Portals/0/English/Legal/Statute/2010.pdf>; Rome Statute of the International Criminal Court, Art 61(7), *entered into force on* June 1, 2002, *available at* [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

<sup>15</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rule 98(2), *adopted on* June 12, 2007, *available at* <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv6-EN.pdf>.

<sup>16</sup> *Id* at Rule 110(2).

Chamber to “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.”<sup>17</sup>

Both these tribunals existed before the STL, and their provisions giving the court the ability to change the legal qualifications of a crime, indicted that international criminal law has accepted the idea that the trial chambers of international criminal tribunals can change the legal qualifications of cases. While the ICC’s jurisdiction and purpose are different than that of the STL, the ECCC has a similar mandate to the STL. The ECCC focuses on a specific event, using national law, and Cambodia functions under a civil law system just like Lebanon. Because the ECCC and the STL are so similar, one could argue that what is used in the ECCC should be used in the STL since they work the same way.

There is a solid argument for either side. None of the tribunals before the ECCC and ICC had the ability to recharacterize offenses explicitly in their statute, and the STL, which was created after the ECCC and ICC, was not expressly provided this ability either. On the other side, however, one could argue that international law is not static, but evolves over time and what has occurred in both the ECCC and the ICC are evolutions of international criminal law which should be applied to the STL. It is difficult to claim that this is

## **2. Under Lebanese national law**

The STL Pre-Trial Chamber, in their Interlocutory Decision, found that “under Lebanese law, both the investigating Judge and the trial court are empowered to re-classify criminal conduct originally charged by the Prosecution.”<sup>18</sup> When making this assessment, the Pre-Trial

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<sup>17</sup> Regulations of the Court, ICC-BD/01-02-07, Regulation 55(a), *amended on June 14, 2007 and Nov. 14, 2007, entry into force of amendments Dec. 18, 2007, available at* <http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf>.

<sup>18</sup> *Prosecutor v. Unknown*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 281 (Pre-Trial) (Feb. 16, 2011), *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216\\_STL-11-01\\_R176bis\\_F0010\\_AC\\_I\\_nterlocutory\\_Decision\\_Filed\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_I_nterlocutory_Decision_Filed_EN.pdf).



Chamber referred to articles 176 and 233 of the Lebanese Code of Criminal Procedure (“LCCP”).<sup>19</sup> Article 233, which applies to the Criminal Court, states that the Court “may amend the legal definition of the acts described in the indictment.”<sup>20</sup> Because the Criminal Court handles both felonies and misdemeanors,<sup>21</sup> and the STL is prosecuting crimes that have the legal weight of felonies, article 233 gives the STL Trial Chamber the ability to amend the legal characterization of the crimes in the indictment. Article 176, which states that a Single Judge “is not bound by the Legal definition of the offence charged,”<sup>22</sup> does not confer the ability to amend to the STL Trial Chamber because under the LCCP, the Single Judge is limited to misdemeanor cases.<sup>23</sup>

Article 274 of the LCCP is another article that grants the Court the ability to amend the indictment. However, although Article 274 states that the court can amend the legal characterization used in the indictment if the felony should be classified as a misdemeanour,<sup>24</sup> this article has the same problem as article 176; this provision could not apply to the STL because the STL is focusing solely on the assassination of former prime minister Rafiq Hariri and deaths or injuries which are similar to that assassination. Because the STL is not dealing with any misdemeanor level crimes, Article 274 cannot grant the STL Trial Chamber the ability to change the legal characterization of the crime.

Although the STL Pre-Trial Chamber held that the STL Trial Chamber has the ability to change the legal characterization of a crime under the LCCP, and some of the provisions in the

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<sup>19</sup> *Id.*

<sup>20</sup> New Code of Criminal Procedure Act No. 358 of 7 Aug. 2001, Art. 233, *amended by*, Act No. 359 of 16 Aug. 2001 (Leb.), *translated by*, Special Tribunal for Lebanon, *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese\\_Code\\_Criminal\\_Procedure\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese_Code_Criminal_Procedure_EN.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at Art. 176.

<sup>23</sup> *Id.* (“If he considers the offence charged constitutes a felony, he shall declare his lack of jurisdiction to hear the case”).

<sup>24</sup> *Id.* at Art. 274.

LCCP support this claim, one should note that the STL Pre-Trial Chamber made this determination when discussing the ability of the Prosecution to charge the defendant with multiple crimes for a single act of conduct.<sup>25</sup> It is possible that the Pre-Trial Chamber meant to limit this ability to the when multiple charging was involved.

Under the Lebanese Criminal Code (“LCC”) there are no provisions that allow the court to change the legal characterization of a crime; the court is only able to change the penalties for the crime, and this occurs only if the legislature has passed a new law which “amends the legal provisions applicable thereto under the section of this Code concerning penalties.”<sup>26</sup>

### **3. Under French Law**

Under French Criminal Procedure, the Assize Court has the “has full jurisdiction to try at first instance or on appeal those persons committed for trial before it by the indictment judgment.”<sup>27</sup> Since “[a] preliminary judicial investigation is compulsory where a felony has been committed,”<sup>28</sup> for the crimes before the STL Trial Chamber, the Assize Court would only have jurisdiction if the “investigating judge considers that the charges accepted against person under judicial examination constitute an offence qualified as a felony by the law.”<sup>29</sup> In this regard, the Assize Court functions like the Trial Court. The Assize Court involves a jury and when the trial is complete the president of the court must “ [read] out the questions to which the court and jury must answer.”<sup>30</sup> As part of this, if “it appears from the hearing that the offence carries a different

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<sup>25</sup> *Prosecutor v. Unknown*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 280 (Pre-Trial) (Feb. 16, 2011), *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216\\_STL-11-01\\_R176bis\\_F0010\\_AC\\_I](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_I%20Interlocutory_Decision_Filed_EN.pdf) [nterlocutory\\_Decision\\_Filed\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_I%20Interlocutory_Decision_Filed_EN.pdf).

<sup>26</sup> Selected Articles of the Lebanese Criminal Code, STL Official Translation, *translated and compiled by*, Special Tribunal for Lebanon, Art. 10, *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/CHA\\_09\\_0048\\_6July2010](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/CHA_09_0048_6July2010_EN.pdf) [\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/CHA_09_0048_6July2010_EN.pdf).

<sup>27</sup> Code de Procédure Pénale, 2011 C. PR. PÉN. Art. 231 (John Rason Spencer, QC trans., Apr. 14, 2011), *available at*, [http://195.83.177.9/upl/pdf/code\\_34.pdf](http://195.83.177.9/upl/pdf/code_34.pdf).

<sup>28</sup> *Id.* at Art. 79.

<sup>29</sup> *Id.* at Art. 181.

<sup>30</sup> *Id.* at Art. 348.

legal qualification from that given by the ruling indicting the accused, the president must ask one or more subsidiary questions.”<sup>31</sup> The *Code de Procédure Pénale* does not explain whether this ability to ask subsidiary questions allows the Assize Court to change the legal qualification of a crime or not, but it does show that under French law, the Assize court can consider a legal qualification which is proven through the trial, but does not appear in the indictment. As such, under French law, the Trial Chamber has the ability to consider legal qualifications which are not stated in the indictment in making their judgment. It is unclear, however, whether this ability gives the Trial Chamber the power to change the legal qualification of a crime and how much this consideration can affect the ruling.

#### **4. Under Tribunal Case Law**

Tribunal case law supports the ability of the Trial Chamber to change the legal qualifications of the crime. In the *Prosecutor v. Tadic* Appeals Chamber Decision, the prosecution failed to plead in any of their indictments that Tadic was responsible under the common purpose doctrine (joint criminal enterprise); rather the Prosecution listed events where Tadic participated and explained what articles of the Statute the actions violated.<sup>32</sup> However, when the prosecutor argued that Art. 7(1) included the common purpose doctrine on appeal, the Appeals Chamber determined that, “the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.”<sup>33</sup> This was based on a statutory

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<sup>31</sup> *Id.* at Art. 351.

<sup>32</sup> *Prosecutor v. Tadic*, IT-94-1, Indictment (Second Amended Indictment) (Trial), (Dec. 15, 1995), available at <http://www.icty.org/x/cases/tadic/ind/en/tad-2ai951214e.pdf>.

<sup>33</sup> *Prosecutor v. Tadic*, IT-94-1-A, Judgment, ¶ 220 (Appeal), (July 15, 1999), available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

interpretation of Art. 7(1) in the context of customary international law and the law of other nations.<sup>34</sup>

Under *Tadic*, when the prosecution has an indictment which states that the defendant has violated a crime under the Statute of the tribunal, but fails to give details on which aspect of the crime was committed, the Trial Chamber has the ability to fill in the gap. This ability is limited because the *Tadic* Trial Chamber filled in the gap based on an argument by the prosecution and there was customary international law to support this argument. Absent those two factors, it is unclear whether the Trial Chamber could define the crime the defendant committed when neither side argues against or specifies the charge. As such, under *Tadic*, the STL Trial Chamber can clarify a vague legal characterization that does not explicitly state how the defendant is guilty of a crime under the STL Statute if: a) the prosecution or defendants contests whether the crime described in the Article includes the theory the prosecution used to charge the defendant, and b) there is customary international law which supports the prosecution's legal theory.

Additionally, ICTY precedent allows the Trial Chamber to change the legal characterization of a crime when the prosecution changes the legal classification of a crime during the trial.<sup>35</sup> In *Prosecutor v. Kupreskic*, the Trial Chamber ruled on

“how Trial Chambers should act in the case of an erroneous legal classification of facts by the Prosecutor ... [and] ... how a Trial Chamber should proceed when certain legal ingredients of a charge have not been proved but the evidence shows that, if the facts were differently characterised, an international crime under the jurisdiction of the Tribunal would nevertheless have been perpetrated.”<sup>36</sup>

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<sup>34</sup> See *id.* at ¶¶ 189, 194, and 205-218.

<sup>35</sup> See *Prosecutor v. Kupreskic*, IT-95-16-T, § 2(ii), Judgment (Trial) (Jan. 14, 2000), available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> (The title of this section is “The Obligations of the Prosecutor When She Decides to Change the Legal Classification of Facts in the Course of Trial and the Power of a Trial Chamber When it Disagrees with the Prosecutor's Legal Classification of the Facts”).

<sup>36</sup> *Id.* at ¶ 728.

This decision was made in light of the Defence's argument that the Prosecution could not use cumulative charging and that the rules regarding cumulative charging that the court established in the *Akayesu* and *Tadic* decisions did not apply in this case.<sup>37</sup> After determining that the Prosecution can make multiple charges in certain situations, the Trial Chamber held that there were certain situations where the Trial Chamber, in the course of a trial, can recharacterize the crime or mode of participation without the Prosecution making a request to amend the indictment, namely when:

- 1) the Trial Chamber that concludes that the more serious offense has not been proved,<sup>38</sup>
- 2) "the Trial Chamber...conclude[s] that the facts proven by the Prosecutor do not show that the accused is guilty of having perpetrated a war crime; they show instead that he aided and abetted the commission of the crime";<sup>39</sup> or
- 3) "the Trial Chamber...finds that the accused, charged with perpetrating a murder as a crime against humanity, is instead guilty of participating in a common design to commit murder as a crime against humanity"<sup>40</sup>

Under *Kupreskic* the Trial Chamber can impose its own legal qualification in the judgment without ordering the Prosecutor to amend the indictment<sup>41</sup> and in some cases without informing the Prosecution, or the Defence.<sup>42</sup> The Trial Chamber held that, because "the efficient discharge of the Tribunal's functions in the interest of justice warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings,"<sup>43</sup> if the Prosecution

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<sup>37</sup> *Id.* at ¶ 651 - 667.

<sup>38</sup> *Id.* at ¶ 745.

<sup>39</sup> *Id.* at 746.

<sup>40</sup> *Prosecutor v. Kupreskic*, IT-95-16-T, Judgment (Trial) (Jan. 14, 2000), ¶ 746, available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>

<sup>41</sup> *See id.* at 745.

<sup>42</sup> *See id.* at 746.

<sup>43</sup> *Id.* at 741.

has made a case and the action of using different legal characterizations from those in the indictment does not prejudice the defendant, this action is acceptable.

In *Prosecutor v. Kvočka*, the Appeals Chamber reached a similar conclusion as the Trial Chamber in *Kupreskic*. In this case, the defendants appealed the Trial Chamber judgment because the Trial Chamber convicted them of “crimes not properly pleaded in the [i]ndictment for which he therefore lacked notice.”<sup>44</sup> Although the Appeals Chamber held that “the Indictment [was] defective because it fail[ed] to make any specific mention of joint criminal enterprise, although the Prosecution’s case relied on this mode of responsibility,”<sup>45</sup> the Appeals Chamber did not find that the Trial Chamber acted improperly when it convicted defendant Radic under joint criminal enterprise. Rather, the Appeals Chamber focused on whether the defendants received sufficient notice so that they were not prejudiced.<sup>46</sup>

While this does not provide explicit support for the notion of changing the legal characterization, the Chamber’s holding on whether the charge was valid was consonant with the notions that the Trial Chamber could change the legal characterization. If the court were not able to convict the defendants of different modes of participation or crimes than specified in the indictment, whether the defendant received notice would not have mattered since the court would have overstepped their boundaries in the first instance. As such, under *Kvočka*, the STL Trial Chamber would have the ability to use a different legal characterization than used in the indictment when the defendant has adequate and timely notice during the trial.<sup>47</sup>

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<sup>44</sup> *Prosecutor v. Kvočka*, IT-98-30/1-A, ¶ 26, Judgment (Appeal) (Feb. 28, 2005), available at <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf>.

<sup>45</sup> *Id.* at ¶ 42.

<sup>46</sup> *Id.* at ¶ 33 (“If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused has nevertheless been accorded a fair trial”). See also *id.* at ¶ 34, 43-50.

<sup>47</sup> See also *Prosecutor v. Kaing Guek Eav alias Duch*, ¶ 502, 001/18-07-2007/ECCC/TC, Judgment (Trial) (July 26, 2010), available at (the site is down right now, so this will be added later) (“The Accused was repeatedly made aware of, and provided with a timely opportunity to address, the specific possibility that joint criminal enterprise, including its systemic form, might be held applicable to the charges against him. Co-counsel for the Accused also indicated their awareness that the Chamber might apply joint criminal enterprise in the current proceedings”).

In the ECCC, the Trial Chamber can change the legal characterization of a crime.<sup>48</sup> In addition to the powers granted by the Internal Rules, the ECCC Trial Chamber held that the Trial Chamber can change the legal characterizations the Pre-Trial Chamber created. In the *Duch* Judgment, the Trial Chamber dealt with whether they could charge the defendant under joint criminal enterprise notwithstanding the Pre-Trial Chamber's refusal to include the charge.<sup>49</sup> The Trial Chamber ultimately held that "it is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Amended Closing Order,"<sup>50</sup> granting the Trial Chamber to use a different legal characterisation than used by the Pre-Trial Chamber.

As noted in previous sections, the ECCC is different from the STL because the ECCC's Rules explicitly give the Trial Chamber the ability to change the legal characterizations of crimes before it while this language does not appear in the STL's Rules or Statute. However, since the ECCC is similar to the STL in that both were created based on the civil law systems of their respective countries, the procedural aspects of the ECCC best fit the STL, especially when considering that Lebanese law allows the Criminal Court to amend the charges in the indictment<sup>51</sup>, which is created by the Investigating Judge, a judge who examines the charges presented by the Prosecution Office and functions in a capacity similar to the Pre-Trial

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<sup>48</sup> See Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rule 98(2), adopted on June 12, 2007, available at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv6-EN.pdf>.

<sup>49</sup> See *Prosecutor v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Judgment (Trial), ¶¶ 487 - 491 (July 26, 2010), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf) (These paragraphs go through the history of the Pre-Trial's decision not to charge the defendant with under joint criminal enterprise and the issue coming before the Trial Chamber).

<sup>50</sup> *Id.* at ¶ 492.

<sup>51</sup> See New Code of Criminal Procedure Act No. 358 of 7 Aug. 2001, Art. 233, amended by, Act No. 359 of 16 Aug. 2001 (Leb.), translated by, Special Tribunal for Lebanon, available at [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese\\_Code\\_Criminal\\_Procedure\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese_Code_Criminal_Procedure_EN.pdf).

Chamber.<sup>52</sup> As such, the STL Trial Chamber has the ability to change the legal characterization of the crimes from those adopted by the Pre-Trial Chamber.

## 5. Limitations

Although the ability to impose a different legal characterization exists in international tribunal case law, there are limitations to the court's ability to do so. As stated by the ECCC in *Prosecutor v. Kaing Guek Eav alias Duch*, when changing the legal characterization, the Trial Chamber must “ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC.”<sup>53</sup> In international law, what makes a fair trial is the right “[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her,”<sup>54</sup> and the right to “be tried without undue delay.”<sup>55</sup>

### a) Notice

Notice is required for the Appeals Chamber to accept a Trial Chamber's recharacterization of crimes or modes of liability; without it, international and national courts have consistently rejected recharacterization.<sup>56</sup> All the international ad-hoc tribunal Statutes

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<sup>52</sup> See *id.* at Art. 51 and Art. 53-54.

<sup>53</sup> *Id.* at ¶ 496.

<sup>54</sup> STL Statute, at Art 16(4)(a). See also SCSL Statute, at 17(4)(a); ICTR Statute, at Art. 20 (4)(a); ICTY Statute, at Art. 21(4)(a); Rome Statute, at Art. 60(1); International Covenant on Civil and Political Rights, Art. 14(3)(a) adopted on Dec. 16, 1966, entry into force May 23, 1976, available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>.

<sup>55</sup> *Id.* at Art. 16(4)©.

<sup>56</sup> See *Pèlissier v. France*, App. No. 25444/94 (1999), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=P%E8lissier%20%7C%20v.%20%7C%20France%20%7C%20.&sessionId=68109763&skin=hudoc-en>. (“On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late”). See also *Kvocka*, at ¶ 33. (“Where the failure to give sufficient notice of the legal and factual reasons for the charges against him has violated the right to a fair trial, no conviction may result.”)



include a provision requiring the defendant be provided with adequate notice of the crime that they are charged with.<sup>57</sup> While none of the Statutes explain what adequate notice is, precedent from the ICTY holds that in determining whether the defendant was prejudiced by amendment of an indictment, the court must consider “the circumstances of the case as a whole.”<sup>58</sup> In looking at the circumstances of the case as a whole, Trial Chamber will consider whether the amendment to the indictment “clarifies the Prosecution’s case and provides further notice to the Accused of the charges against him”<sup>59</sup> and “the stage of the proceedings at which the motion seeking leave to amend is made.”<sup>60</sup> If the first factor, the clarification of the Prosecution’s case, is met, then the Trial Chamber is more likely to find that amendment of the indictment is not prejudicial to the defendant and allow the prosecution to amend the indictment.<sup>61</sup> However, the closer the amendment comes to trial, the more likely the Trial Chamber will find that amending the indictment will cause unfair prejudice to the defendant and deny the amendment.<sup>62</sup>

Although these rules are for Prosecution amendment of an indictment, the same factors could come into play when the Trial Chamber decides to change the legal characterization of a crime. As stated in *Kupreskic*, one of the reasons a Trial Chamber may change the legal characterization of a crime is that the Prosecution has proved a crime different from the one they

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<sup>57</sup> *Supra* note 48.

<sup>58</sup> *Prosecutor v. Martinovic and Naletilic*, IT-98-34, Decision on Vinko Martinovic’s Objection to the Amended Indictment and Mladen Naletilic’s Preliminary Motion to the Amended Indictment (Trial) (Feb. 14, 2001), available at [http://www.icty.org/x/cases/naletilic\\_martinovic/tdec/en/10214A1114803.htm](http://www.icty.org/x/cases/naletilic_martinovic/tdec/en/10214A1114803.htm).

<sup>59</sup> *Prosecutor v. Karadzic*, IT-95-5/18-PT, Decision on Prosecution Motion to Amend the First Amended Indictment (Trial) (Feb. 16, 2009), ¶ 31, available at, <http://www.icty.org/x/cases/karadzic/tdec/en/090216.pdf>, citing, *Prosecutor v. Popovic et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment (Jul. 13, 2006), ¶ 8 (unable to find the document).

<sup>60</sup> *Prosecutor v. Delic*, IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on the Prosecution Motion to Amend the Indictment (Trial) (Dec. 13, 2005), ¶ 62, available at, <http://www.icty.org/x/cases/delic/tdec/en/051213.htm>.

<sup>61</sup> See *Karadzic* at ¶ 31.

<sup>62</sup> See *Delic* at ¶ 62.

charged the defendant with.<sup>63</sup> This action would clarify the Prosecution's case because it would match the proper crime with the evidence presented and it would inform the defendant of correct charge which the evidence supports. Yet similar to when the Prosecutions decides to amend their indictment, changing the legal characterization of a crime at a late stage of the trial will cause unfair prejudice to the defendant because they will not be able to adequately defend themselves. As such, the Trial Chamber's ability to change the legal characterization is limited by whether this action clarifies the charges for the defendant and when the Trial Chamber decides to change the legal characterization.

Since the Trial Chamber's decision to change the legal characterization will have the effect of clarifying what the charge is and will clarify what the Prosecution's case is<sup>64</sup>, this section will focus on time when the legal characterization is changed. Even though the Trial Chamber's change in the legal characterization of a crime will be more likely to be found invalid the closer it is to trial, if the defendant was "aware of the possibility of the legal re-characterisation and provided with a sufficient opportunity to defend it"<sup>65</sup> the legal characterization will probably be upheld. In *Kvocka* for example, the Appeals Chamber found that the defendant had notice of the possibility of joint criminal enterprise being used through the prosecution's briefs,<sup>66</sup> the prosecution's opening statement,<sup>67</sup> prosecution arguments during a motion to amend their indictment,<sup>68</sup> and Trial Chamber decisions.<sup>69</sup> As such, the Appeals Chamber ruled that, "the Prosecution gave timely, clear and consistent information to the

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<sup>63</sup> See *Prosecutor v. Kupreskic*, IT-95-16-T, § 2(ii), Judgment (Trial) (Jan. 14, 2000), ¶ 728, available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

<sup>64</sup> If the Trial Chamber changes the legal characterization to something that better fits the evidence, the Prosecution's case makes more sense, clarifying the charge for the defendant and clarifying the Prosecution's case.

<sup>65</sup> *Duch* Judgment, at ¶ 498.

<sup>66</sup> *Kvocka*, at ¶¶ 44-45.

<sup>67</sup> *Id.* at ¶¶ 46-47

<sup>68</sup> *Id.* at 48.

<sup>69</sup> *Id.* at 49.

Appellants, which detailed the factual basis of the charges against them.”<sup>70</sup> Because the defendant received notice, the notice “compensated for the Indictment’s failure to give proper notice of the Prosecution’s intent to rely on joint criminal enterprise responsibility.”<sup>71</sup> Based on this ruling, if the Trial Chamber, through their decisions and orders, makes the defendant aware that re-characterization of the crimes in the indictment is possible, then the Trial Chamber can change the legal characterization closer to the start of trial.

### **b) Undue Delay In Trial**

Under Article 16(4)(c) of the STL Statute, the defendant has a right to be “tried without undue delay.”<sup>72</sup> Under international ad-hoc tribunal precedent, when considering whether a defendant has been exposed to undue delay, the court weighs the delay in the proceedings against “the benefits the amendment may bring to both the accused and the Trial Chamber, such as the simplification of proceedings...and the avoidance of possible challenges to the indictment or evidence presented at trial.”<sup>73</sup> The Trial Chamber also considers “the course of the proceedings to date, including ... the timeliness of the [Prosecution’s request to amend the indictment].”<sup>74</sup> There is no definitive test of how these factors should be weighed against each other; the Appeals

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<sup>70</sup> *Id.* at 54.

<sup>71</sup> *Id.*

<sup>72</sup> Statute for the Special Tribunal of Lebanon, S/RES/1757 (2007), *established on* Mar. 29, 2006, Art. 16(4)(c), *available at* <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statute-EN.pdf>.

<sup>73</sup> *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution Motion to Amend the First Amended Indictment (Trial) (Feb. 16, 2009), ¶ 34, *available at*, <http://www.icty.org/x/cases/karadzic/tdec/en/090216.pdf>, *quoting*, *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment (Jul. 13, 2006), ¶ 10 (There is another citation, but the case does not provide a full citation, so I have no idea which decision the Trial Chamber is referring to).

<sup>74</sup> *Id.* at ¶ 32, *quoting*, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (Appeals) (Dec. 19, 2003), ¶ 15, *available at*, <http://www.unict.org/Portals/0/Case/English/Karemera/trail/191203.pdf>. (Brackets in original).

Chamber determines whether the adverse effect to the defendant, shown through these factors, is greater than the positive effect of the amendment.<sup>75</sup>

One factor that could lead to a finding of undue delay is if the Trial Chamber includes a new charge when they change the legal characterization of the crimes. Under the STL RPE, if “the amended indictment includes new charges, and the accused has already appeared before the Trial Chamber in accordance with Rule 98, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.”<sup>76</sup> Additionally, the defendant is granted “a further period of twenty-one days in which to file preliminary motions ... in respect of the new charges...[and] the Pre-Trial Judge or a Chamber may postpone the date for trial to ensure adequate time for the preparation of the defence.”<sup>77</sup> The delay caused by these additional measures, “when considered against the history of the proceedings to date, could amount to undue delay causing unfair prejudice to the accused.”<sup>78</sup> As such, the Trial Chamber will have a harder time including a new crime into the proceedings than amending the legal characterizations already submitted by the Prosecution.

### **c) Other Limitations**

In addition to the limitations imposed on the Trial Chamber’s ability to change the legal characterization of a crime because of the right of the defendant to a fair trial, the Trial Chamber is also limited by why the Trial Chamber is changing the legal characterization of the crime. As explained in a prior section,<sup>79</sup> under *Kupreskic*, the Trial Chamber is limited to changing the

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<sup>75</sup> See *Prosecutor v Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (Appeals) (Dec. 19, 2003), ¶ 13 - 31, available at, <http://www.unict.org/Portals/0/Case/English/Karemera/trail/191203.pdf> (analysis of whether a denial of a motion to amend was properly done).

<sup>76</sup> STL Statute, at Rule 71(E).

<sup>77</sup> *Id.* at Rule 71(F).

<sup>78</sup> *Prosecutor v. Halilovic*, IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment (Trial) (Dec. 17, 2004), ¶ 24, available at, <http://www.icty.org/x/cases/halilovic/tdec/en/041217.htm>.

<sup>79</sup> *Supra* Section V(A)(3).

legal characterization of a crime when: 1) the Trial Chamber concludes a more serious charge has not been proved,<sup>80</sup> 2) the facts show the defendant did not perpetuate a war crime, but rather aided and abetted it,<sup>81</sup> or 3) the defendant is charged with perpetrating a murder as a crime against humanity, but the facts show he is “guilty of participating in a common design to commit murder as a crime against humanity.”<sup>82</sup> If the prosecution realizes that he has proven a different offense,<sup>83</sup> thinks a more serious offense was proved,<sup>84</sup> or that a “lesser included offense” was proven,<sup>85</sup> and none of these types of offenses were mentioned in the indictment, then it is the prosecution who has to petition the Trial Chamber to change it. The Trial Chamber cannot change the legal characterization on its own in these cases.

Finally, the ability to re-characterize the crime is restricted by what stage the proceedings are in. During the *Lubanga* case, the Trial Chamber ruled on the ability of the Trial Chamber to use a different legal characterization, not just from the indictment but from the Pre-Trial Chamber.<sup>86</sup> The Trial Chamber explained that “during the preparation phase of the trial...any application to amend the charges must be made to the Pre-Trial Chamber.”<sup>87</sup> In addition to that, the Trial Chamber noted that “a decision to modify the legal characterisation of facts will only occur at a late rather than an early stage in the trial, because it is provided that notice shall be given to the parties of this possibility once it emerges, and the Court shall hear submissions ‘after

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<sup>80</sup> *Prosecutor v. Kupreskic*, IT-95-16-T, § 2(ii), Judgment (Trial) (Jan. 14, 2000), ¶ 745, available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>

<sup>81</sup> *Id.* at ¶ 746.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*, at ¶ 742(a).

<sup>84</sup> *Id.*, at ¶ 742(b).

<sup>85</sup> *Id.*, at ¶ 742(c).

<sup>86</sup> Although I am hesitant to say the rules in the ICC which give Trial Courts the ability to change the indictment can work for the STL, I think this case is different because it focuses on Art. 61 of the Rome Statute, an article which is similar to provisions written in other tribunal statutes about Pre-Trial Chamber abilities.

<sup>87</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ¶40 (Trial) (Dec. 13, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc394003.PDF>.

having heard the evidence”<sup>88</sup> Although this may vary from case to case,<sup>89</sup> the general rule is that the Trial Chamber can only recharacterize the crime after trial has commenced and when all the evidence is heard.

## **B. PRE-TRIAL CHAMBER**

### **5. International Context**

Some international tribunal statutes give the Pre-Trial Chamber the role of confirming or dismissing counts in the indictment and asking the Prosecution to provide additional material to support one or more of the counts.<sup>90</sup> Outside of that realm, under the various ad-hoc tribunal statutes and RPEs, the Pre-Trial Chamber has no control over the legal characterization of the crimes before it. However, case law supports the notion that the Pre-Trial Chamber has the power to change the legal characterization of the proven conduct. In the *Lubanga* case, the Pre-Trial Chamber accepted that its change of the legal characterization of the crime was not a problem because it “[was] not an issue that would affect the fair and expeditious conduct of the proceedings or the outcome of the trial.”<sup>91</sup> The Trial Chamber supported this idea in its judgment, noting that “[t]he power to frame the charges lies at the heart of the Pre-Trial Chamber's functions, as set out in Article 61 of the Statute.”

With this ruling, Rule 68 (I) in the STL RPE, which mirrors Article 61, gives the Pre-Trial Chamber the ability to change the legal characterization of the indictment when it is

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<sup>88</sup> *Id* at ¶ 48.

<sup>89</sup> *Id*.

<sup>90</sup> See STL RPE, at Rule 68(I). See also SCSL Rule 47(E) - (G); Rome Statute, at Art. 61(7).

<sup>91</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Prosecution and Defense Applications for Leave to Appeal the Decision on the Confirmation of Charges, ¶ 45, (Pre-Trial) (May 24, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc271674.PDF>.

reviewing it. Additionally, the ability was accepted by the ECCC in the *Duch* case. Here, the Trial Chamber, when ruling on whether to change the legal characterization of the crimes presented before it, noted that the Pre-Trial Chamber had refused to use JCE in its closing order<sup>92</sup> but failed to rule on whether the Pre-Trial Chamber could create its own legal characterization. It was implicitly accepted by both the Trial Chamber and the Pre-Trial Court,<sup>93</sup> that the Pre-Trial Chamber had the ability to use a different legal characterization than used by the prosecution. Because the ECCC has similar Pre-Trial Chamber regulations, the fact that the ECCC accepted the Pre-Trial Chamber's ability to do this further suggests that the Pre-Trial Chamber's power to recharacterize the crime is accepted in international jurisprudence.

## **6. National Law**

Under Lebanese Law, there is not Pre-Trial Chamber; however, the Indictment Division of the court is the section of the court which is the most like the Pre-Trial Chamber. Unlike the Investigation Department, whose responsibility is to investigate the charges provided by the prosecutor,<sup>94</sup> the Indictment Division “has sole authority to issue indictments in cases of felonies”<sup>95</sup> and is the place for appeal of actions of the Investigating Judge based on the indictment,<sup>96</sup> a responsibility similar to the Pre-Trial Chambers ability to decide whether to accept the charges in the Prosecution's indictment. “The Indictment Division may, irrespective of the decisions of the Investigating Judge referred to it, examine all the felonies as well as the

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<sup>92</sup> See *Duch* Judgment, at ¶ 488.

<sup>93</sup> *Prosecutor v. Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, ¶ 7 (Trial) (June 8, 2009), available at <http://www.eccc.gov.kh/en/documents/court/judgement-case-001>.

<sup>94</sup> New Code of Criminal Procedure Act No. 358 of 7 Aug. 2001, amended by, Act No. 359 of 16 Aug. 2001 (Leb.), translated by, Special Tribunal for Lebanon, Art. 51, available at [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese\\_Code\\_Criminal\\_Procedure\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese_Code_Criminal_Procedure_EN.pdf).

<sup>95</sup> *Id.* at Art. 53.

<sup>96</sup> See *id.*, *id.* at Art. 64 - 65.

misdemeanors joined thereto, of its own motion or pursuant to a request from the Public Prosecution, and shall take an appropriate decision thereon.”<sup>97</sup>

This provision of the Lebanese Code of Criminal Procedure (“LCCP”) does not explain whether the ability of the Indictment Division to “take an appropriate decision” includes the ability to change the legal characterization of a crime. However, given the fact that the Indictment Division is the sole body that issues indictment,<sup>98</sup> the Indictment Division does not have to respect the decisions of the Investigating Judge,<sup>99</sup> and the Indictment Division may “undertake a supplementary investigation, of its own motion,”<sup>100</sup> with the investigation as a tool to determine the facts and charges of the case,<sup>101</sup> one could assume Lebanese law grants the Indictment Division the ability to change the legal clarification of the indictment.

However, this is just speculation; without more case law, it is unclear whether the Indictment Division’s ability to “take an appropriate decision” includes the ability to change the legal clarification of the indictment. If this phrase does give the Indictment Division the ability to amend the legal clarification of the crimes before it, then the Pre-Trial Chamber, as the body similar to the Indictment Division, would have this ability as well since the STL has to use Lebanese law in trying its defendants.

## **7. French Law**

Under the French legal system, in a felony case, the investigating judge is the party which builds a the case and determines whether or not the defendant has committed a crime; the prosecutor only brings the issue before the Investigating Judge’s attention.<sup>102</sup> As such, it is the

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<sup>97</sup> *Id.* at Art. 134.

<sup>98</sup> *See id.* at Art. 53.

<sup>99</sup> *See id.* at Art. 134.

<sup>100</sup> *Id.* at Art. 135.

<sup>101</sup> *See* Art. 125 (The investigation of the Indictment Division may lead to a decision similar to what the Investigating Judge must write for the Indictment Division).

<sup>102</sup> *See* Code de Procédure Pénale, 2011 C. PR. PÉN. Art. 49, 51 (John Rason Spencer, QC trans., Apr. 14, 2011), available at, [http://195.83.177.9/upl/pdf/code\\_34.pdf](http://195.83.177.9/upl/pdf/code_34.pdf).



“investigating judge examines whether there exist against the person under judicial examination charges which constitute an offence, of which he determines the legal qualification.”<sup>103</sup> Despite their ability to determine the legal qualification, “[t]he investigating judge may only investigate in accordance with a submission made by the district prosecutor.”<sup>104</sup> As such, the Investigating Judge’s ability to determine the legal qualification of crimes is limited to what the prosecution has provided him to investigate. If a new crime is discovered in the course of investigation,

“the investigating judge ... must communicate forthwith to the district prosecutor the complaints or the official records which establish its existence. The district prosecutor may then require the investigating judge, by an additional submission, to investigate the additional facts, or require him to open a separate investigation, or send the case to the trial court, or order an inquiry, or decide to drop the case, or proceed to one of the measures provided for in articles 41-1 to 41-3, or to transfer the complaint or the official reports to the district prosecutor who is territorially competent.”<sup>105</sup>

The Investigating Judge in French Criminal Procedure does not have a counterpart in the STL because the neither the Pre-Trial Chamber nor the Trial Chamber investigate the crimes or determine whether there are charges against the accused; in certain cases, the Pre-Trial Chamber may change the legal characterization of crimes, but other than that, the Pre-Trial Chamber only decides on the motions of the parties and reviews the indictment. Additionally, there are two tiers of investigating judges under the French system; the investigating judge who initially decides whether there is a crime or not, and the investigating judge who makes a decision based on an appeal from the first investigating judge’s decision.<sup>106</sup> This further distances the French legal system from the procedure in the STL. As such, the ability of the Investigating Judge to

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<sup>103</sup> *Id.* at Art. 176.

<sup>104</sup> *Id.* at Art. 80.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 185.

characterize the crimes of the case cannot be relate to the STL Pre-Trial Chamber's ability to do so.

## **VI. CONCLUSION**

While there are statutes that could be interpreted to give the STL Trial and Pre-Trial Chambers the ability to recharacterize the charges, the statutory evidence is overwhelmingly strong. The STL is a unique tribunal and its mandate is quite different from that of the ICC, whose statute has text explicitly giving the Trial Chamber this ability. While the ECCC has a closer structure to the STL, the STL has differently worded rules with respect to the ability of the Trial Chamber to recharacterize the charges. Furthermore, most international criminal tribunal statutes are similar to the STL and do not allow the Chambers to impose their own legal characterizations. As such, the ability of the ECCC and ICC statutes and RPE's to give the STL Chambers the ability to recharacterize the charges seems limited. At the same time, one can argue that because the ICTY gave the Trial Chamber the ability to change the legal characterization through their case law, the STL's Trial Chamber has the same ability irrespective of the wording of its Statute and RPE, because the ICTY's Statute and RPE did not include this ability either.

International tribunal case law on the other hand, supports the notion that the Pre-Trial and Trial Chambers have the ability to recharacterize the charges but this is limited to certain situations. If the indictment lists which provisions of the Statute the defendant violated, but fails to provide details on how their actions violated the Statute, the Trial Chamber can apply their own legal characterization to explain this, but only if there is contention over the theory the Prosecution is arguing and there is customary international law to support the Prosecutions theory. The Trial Chamber may also change the legal characterization of a crime if the Trial

Chamber concludes that 1) a more serious offense has not been proven,<sup>107</sup> 2) the facts show that the defendant aided and abetted a war crime but did not perpetuate it,<sup>108</sup> or 3) the defendant is guilty of participating in a common design to commit murder rather than perpetuating a murder as a crime against humanity.<sup>109</sup>

There are limitations to the Trial Chamber's ability to change legal characterizations. The first is notice; under the STL Statute, the defendant must be informed promptly of the charges against him and have adequate time to prepare his defence against the charges. As such, the Trial Chamber might not be able to change the legal characterization if this prevents the defendant from gaining adequate notice. Additionally, the legal qualification has a better chance of being accepted if it clarifies the Prosecution's case and better explains what the defendant is charged with. The Trial Chamber must also be aware of whether changing the legal characterization will cause undue delay to the defendant, especially if this characterization creates a new crime in the case. If a new crime is added to the case, there are additional procedures to go through which may delay the trial, resulting in undue delay. As such, the Trial Chamber should avoid changing legal characterizations if they involve creating a new crime, although they are not barred from doing so.

Additionally, the Trial Chamber is limited by the reason why the legal characterization must be changed. If prosecution proves a different offense,<sup>110</sup> thinks a more serious offense was proved,<sup>111</sup> or that a "lesser included offense" was proven,<sup>112</sup> and none of these types of offenses were mentioned in the indictment, the Prosecutor must petition the Trial Chamber to change the

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<sup>107</sup> See *Prosecutor v. Kupreskic*, IT-95-16-T, Judgment (Trial) (Jan. 14, 2000), ¶ 745, available at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

<sup>108</sup> See *id.* at 746.

<sup>109</sup> See *id.*

<sup>110</sup> *Id.*, at ¶ 742(a).

<sup>111</sup> *Id.*, at ¶ 742(b).

<sup>112</sup> *Id.*, at ¶ 742(c).

indictment; the Trial Chamber may not act on its own. Lebanese criminal procedure allows the Trial Chamber to change the legal qualifications but only in cases where misdemeanours are involved, which does not fit the nature of the STL. Finally, the Trial Chamber may only recharacterize the indictment after the trial begins and all the evidence is heard.

International ad-hoc tribunal statutes and RPE's do not mention the ability of the Pre-Trial Chamber to change the legal characterizations of a crime, but ICC case law supports this ability under Article 61. Because Article 61 mirrors STL Rule 68(I), the STL Pre-Trial Chamber would have this ability as well. Additionally, ECCC case law implicitly accepts the ability of the Pre-Trial Chamber to change the legal characterization of crimes. Because the ECCC is similar to the STL in function and has similar Pre-Trial regulations, acceptance by the ECCC means that the STL Pre-Trial Chamber has the ability to change the legal characterization of the crimes.

Under Lebanese criminal law, the STL has the ability to change the indictment because the Criminal Court explicitly has the ability to change the legal characterizations of a crime. However, this ability may be limited because the STL Pre-Trial Chamber made this determination in the context of multiple charging. The Pre-Trial Chamber may have the ability to change the legal characterization, but without more case law into what “take an appropriate decision”<sup>113</sup> means, it is unclear whether this ability exists under Lebanese law. Finally, under French law, the Trial Chamber can consider different legal characterizations in making their decision, but cannot change the legal characterization. It is unclear how much the considered legal characterizations should effect the ruling of the Trial Chamber; the number of questions the

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<sup>113</sup> New Code of Criminal Procedure Act No. 358 of 7 Aug. 2001, *amended by*, Act No. 359 of 16 Aug. 2001 (Leb.), *translated by*, Special Tribunal for Lebanon, Art. 134, *available at* [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese\\_Code\\_Criminal\\_Procedure\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ApplicableLaw/Lebanese_Code_Criminal_Procedure_EN.pdf).

judge asks in French law does not lead to any clear answers because it is unknown how many questions are generally asked and whether different amounts of weight attach to certain questions. Finally, French law does not support the ability of the Pre-Trial Chamber to change the indictment because the Investigating Judges of the French legal system cannot be compared to the STL Pre-Trial Chamber because the Investigating Judges do too many things outside of the Pre-Trial Chamber's powers.