2010

Can the trial chamber add charges to the indictment based on the discovery of evidence at trial?

DanaMarie Pannella

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE OFFICE OF THE CO-PROSECUTORS EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: CAN THE TRIAL CHAMBER ADD CHARGES TO THE INDICTMENT BASED ON THE DISCOVERY OF EVIDENCE AT TRIAL?

Prepared By DanaMarie Pannella
J.D. Candidate, May 2011
Fall Semester, 2010

TABLE OF CONTENTS

BIBLIOGRAPHY OF SOURCES

Statutes and Rules

Extraordinary Chambers in the Courts of Cambodia

1. Extraordinary Chambers in the Courts of Cambodia, Internal Rule 77(13) (2007).
2. Extraordinary Chambers in the Courts of Cambodia, Internal Rule 87(2) (2007).
3. Extraordinary Chambers in the Courts of Cambodia, Internal Rule 92 (2007).
4. Extraordinary Chambers in the Courts of Cambodia, Internal Rule 93 (2007).
5. Extraordinary Chambers in the Courts of Cambodia, Internal Rule 98 (2007).

French Code of Criminal Procedure (Code de Procedure Criminelle)

6. French Code of Criminal Procedure (Code de Procedure Criminelle), Article 190 (2005).
7. French Code of Criminal Procedure (Code de Procedure Criminelle), Article 231 (2005).
8. French Code of Criminal Procedure (Code de Procedure Criminelle), Article 313 (2005).
9. French Code of Criminal Procedure (Code de Procedure Criminelle), Article 315 (2005).
10. French Code of Criminal Procedure (Code de Procedure Criminelle), Article 318 (2005).

International Criminal Court

11. International Criminal Court Regulations of the Court, CC-BD/01-02-07, Regulation 55.

International Criminal Tribunal for the Former Yugoslavia

12. International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44 (2009) at Rule 50.

The Rome Statute

13. Rome Statute of the International Criminal Court, adopted by the Security Council on 17 July 1998, U.N. Doc A/CONF.183/9 (1998), Article 61(9).

Cases

Extraordinary Chambers in the Courts of Cambodia

14. Co-Prosecutors v. Duch, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise (8 June 2009).

15. Co-Prosecutors v. Duch, 001/18-07-2007/ECCC/TC, Summary of Judgment (26 July 2010).

International Criminal Court

16. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (22 May 2009).

17. Prosecutor v. Lubanga, ICC-01/04-01/06, 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, paras. 28-30 (14 July 2009).

18. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Minority Opinion on the Decision Giving Notice to the Parties and Participants that the Legal Characterisation of Facts may be subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court (17 July 2009).

19. Prosecutor v. Lubanga, ICC-01/04-01/06, Clarification and further guidance to parties and participants in relation to the "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" (27 Aug. 2009).

20. Prosecutor v. Lubanga, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (8 Dec. 2009).

International Criminal Tribunal for the Former Yugoslavia

21. Prosecutor v. Brdanin and Talic, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (26 June 2001).

22. Prosecutor v. Halilović, IT-08-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment (17 Dec. 2004).

23. Prosecutor v. Lukić & Lukić, Decision Granting Prosecution's Motion to Amend Indictment and Scheduling Further Appearance (1 Feb. 2006).

24. Prosecutor v. Kovačević, IT-97-24-I, Decision on the Prosecutor's Request to File an Amended Indictment (5 Mar. 1998).

25. Prosecutor v. Kovačević, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 (2 July 1998).

International Criminal Tribunal for Rwanda

26. Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (2 Sept. 1998).

27. Prosecutor v. Akayesu, ICTR-96-4-A, Judgment (1 June 2001).

28. 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 (19 Dec. 2003).

29. Prosecutor v. Mpambara, ICTR-2001-65-1, Decision on the Prosecution's Request for Leave to File an Amended Indictment (4 Mar. 2005).

30. Prosecutor v. Musema, ICTR-96-13-A, Judgment (16 Nov. 2001).

United States

31. State ex rel. Board of Ethics for Elected Officials v. Duke, 658 So. 2d 1276 (La.App. 1 Cir. 1995).

32. United States v. Miller, 471 U.S. 130 (1985).

33. United States v. Young, 730 F.2d 221 (5th Cir. Tex. 1984)

Law Reviews and Articles

34. Amy Senier, *The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga*, Jan. 8, 2010.

35. Douglas Brooker, *Va Savoir! - The Adage "Jura Novit Curia" in Contemporary France*, BEPRESS LEGAL SERIES, 2005, at 8.

36. James G. Apple & Robert P. Deyling, *A Primer on the Civil-Law System*, Federal Judicial Center, 1995.

37. Jessica A. Levenberg, *Material Facts not Pleaded in the Indictment*, 2002.

38. Michael A. Kertesz, *Corrupt Conditions Surrounding the ECCC and Their Effect of Judicial Decision-Making and the Appearance of Fairness*, 2009.

39. Michelle Staggs Kelsall, Mary Kristerie A. Baleva, Aviva Nababan, Vineath Chou, Rachel Guo, Caroline Ehlert, Sovannith Nget & Savornt Pheak, *Lessons Learned from the 'Duch' Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia*, 2009.

40. Olympia Bekou, *Pre-trial Procedures before the International Criminal Court*, 2006.

41. Rachel Irwin, *Latest News: Lubanga Trial Transformed By Victims*, OPEN SOCIETY JUSTICE INITIATIVE, Sep. 4, 2009.

42. Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. U. J. INT'L HUM. RTS. 165, 2010.

43. Sarah Steinfeld, *Impact of Regulation 55 on ICC Proceedings*, Nov. 5, 2009.

44. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57, 1999.

45. Sophie M. Clavier, *Perspectives on French Criminal Law*, 1997.

Books

46. KARIM A. A. KHAN & RODNEY DIXON, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE, & EVIDENCE (3rd ed. 2009).

47. ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2nd ed. 2010).

48. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER RWANDA, YUGOSLAVIA AND SIERRA LEONE (2006).

Press Releases

49. ICTY Press Release, Blaskic Indictment Amended, CC/PIO/135-E, 4 Dec. 1996.

50. ICC Press Release, ICC-CPI-20070129-196, Pre-Trial Chamber I commits Thomas Lubanga Dyilo for trial, 29 Jan. 2007.

51. ICC Press Release, ICC-CPI-20090113-MA30, Confirmation of the Beginning of the Lubanga Dyilo Trial, 26 January 2009, 13 Jan. 2009.

I. INTRODUCTION

A. Scope

This memorandum discusses the ability of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") Trial Chamber to amend an indictment to add new charges based on the discovery of new evidence during trial.* It will examine the limited case law at the ECCC, as well as case law at other international tribunals, including the International Criminal Court ("ICC"), International Criminal Tribunal for the Former Yugoslavia ("ICTY"), and International Criminal Tribunal for Rwanda ("ICTR"). Further, this memorandum takes into consideration the rules of other international tribunals and comparable national civil law jurisdictions to interpret the Internal Rules of the ECCC pertaining to the amendment of the indictment and the roles of the Prosecutor and Trial Chamber.

B. Summary of Conclusions

i. Once proceedings have commenced in the International Tribunals, the Prosecution ordinarily makes a request that the Trial Chamber allow amendment of the indictment.

Generally, amongst the international tribunals, the Prosecutor has discretion to amend the indictment without leave of the Trial Chamber prior to the beginning of the trial. Once the proceedings have commenced, if the Prosecution wishes to amend the indictment for any reason, it must request that the Trial Chamber allow an amendment.

---

* Can the Trial Chamber add charges to the indictment based on the discovery of evidence at trial?

ii. It is common practice amongst the International Tribunals that the Trial Chamber may order the Prosecution to submit an amended indictment for review.

Tribunal Trial Chambers have ordered the Prosecution to submit an amended indictment for review during multiple trials. This order can be for a simple re-characterization of the charges, withdrawal of charges, or to add new charges.

iii. The International Tribunal Trial Chambers use several balancing tests when determining whether to approve an amended indictment. All balancing tests are relevant no matter who has introduced the amendment.

The international tribunals have developed balancing tests to determine whether to approve an amended indictment. An international tribunal Trial Chamber must carefully consider these tests whether it has ordered the Prosecution to request permission to amend the indictment or the Prosecution has made the request of its own volition. Most importantly, the Trial Chamber must weigh the Prosecution's obligation to prosecute serious crimes against the fairness of the trial and the court's ability to uphold the defendant's rights.

iv. The ECCC Trial Chamber does not have an explicit right to amend the indictment during trial to add new charges without a request to do so by the Prosecution.

It appears that the ECCC Trial Chamber does not have an explicit right to amend the indictment during trial to add new charges without a request to do so by the Prosecution. This conclusion is based on three sources: (1) The ECCC Internal Rules, which stipulate that "[t]he [Trial] Chamber may . . . change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced"; (2) the recent *Lubanga* case which held that adding new charges does not amount to a mere changing of the legal characterization of the crime; and (3) the principles of the civil law system.

II. BACKGROUND

The ECCC's procedure reflects the Cambodian model of criminal procedure, which is based on France's inquisitorial model due to their colonial connection.[1] The Tribunal's procedure and Internal Rules reflect this in that

> Special features characterize this system includ[ing] (1) the provision for judicial investigation by "impartial" Co-Investigating Judges,(2) participation of the defendants throughout the judicial investigation,(3) substantive rights of victims to participate throughout the proceedings as "civil parties", (4) wider appellate powers, including the right to hear fresh evidence at appeal, (5) discovery of evidence being court-driven rather than party-driven, (6) liberal rules of evidence, and (7) creation of a *dossier* (a Case File).[2]

Though the Tribunal draws its procedure from Cambodian law and is very adamant about doing so,[3] there could be instances in which Cambodian law does not deal with the matter at hand. Thus,

> [W]here (1) Cambodian law does not deal with a particular matter, (2) there is uncertainty in Cambodian law, and (3) Cambodian law is inconsistent with international standards, the Agreement provides that 'guidance may be sought [from] procedural rules established at the international level.' The applicable procedural law at the ECCC must, therefore, be consistent with 'international standards of justice, fairness and due process of law.'[4]

While the Internal Rules were developed to resolve any conflict, absence of rule, or uncertainty in Cambodian Law, the ECCC has routinely looked to the jurisprudence of other international tribunals and comparable national jurisdictions to interpret the Internal Rules.[5] This

---

[1] Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 Nw. U. J. Int'l Hum. Rts. 165, 2010 at 169 [reproduced in accompanying notebook at Tab 42].

[2] *Id.*

[3] *Id.* at 166.

[4] *Id.* at 168.

[5] *Id.* at 168-69.

memorandum will discuss the amendment of an indictment to add new charges based on the discovery of evidence at trial, an issue that the ECCC's Internal Rules do not explicitly address. Amendment of the indictment is a critical procedural process because an investigation is never static. When further crimes are uncovered, it is ordinarily the Prosecution's duty to request that relevant charges be added to the indictment.[6] Similarly, the Prosecution may also seek permission to withdraw or expand on charges originally included in the indictment.[7] The ECCC, operating pursuant to the civil law system, using the inquisitorial process, elevates the role of the judge. It is proper, then, that the Trial Chamber may order the Prosecution to submit an amended indictment request. However, the ECCC Internal Rules, the recent *Lubanga* case, and the civil law system that the ECCC is based upon do not suggest that the Trial Chamber has an explicit right to amend the indictment during trial to add new charges without a request to do so by the Prosecution.

III. ADDING NEW CHARGES TO AN INDICTMENT AT A PROSECUTOR'S REQUEST

A. Requests Submitted by a Prosecutor's own Volition

At any stage of the proceedings, the Prosecutor of an international tribunal may seek to amend the indictment, though procedure varies amongst the tribunals.[8] Prosecutors often seek amendments to remove co-accused, join additional accused, or to add, re-characterize, or withdraw charges.[9] However, when it comes to adding new charges, it is a much simpler process

[6] KARIM A. A. KHAN & RODNEY DIXON, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE, & EVIDENCE (3rd ed. 2009) at 234 [reproduced in accompanying notebook at Tab 46].

[7] *Id.*

[8] *Id.* at 242.

[9] Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57, 1999 at 73 ("withdraw certain counts against the accused (e.g., Jelisic, May 12, 1998), or to take certain administrative steps, such as removing an accused who is deceased from a joint indictment (e.g., Kovačević,

to request an amendment prior to the beginning of the trial, between the time the indictment is issued and when the indictee goes to trial, than to wait until the trial begins. For example, adding charges prior to trial under ICTY Rule 50 is commonplace and seemingly unlimited in scope.[10] In *Blaskic*, the Prosecutor amended the indictment not only to make it more specific, but also added six new counts prior to trial.[11] Blaskic was charged with thirteen counts in the original indictment; the Prosector's amended indictment expanded the scope of Blaskic's culpability in both temporal and geographical terms.[12] In *Kupreskic*, a nineteen-count amended indictment included charges for crimes against humanity and violations of the laws or customs of war.

May 12, 1998) or severing cases against persons in custody from those still at large (e.g., Kunarac)") [reproduced in accompanying notebook at Tab 44].

[10] International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 44 (2009) at Rule 50 [hereinafter ICTY Rule 50] [reproduced in accompanying notebook at Tab 12]. The relevant portion of Rule 50 reads:

> (A) (i) The Prosecutor may amend an indictment:
>
> (a) at any time before its confirmation, without leave;
>
> (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
>
> (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

[11] ICTY Press Release, CC/PIO/135-E, Blaskic Indictment Amended, 4 Dec. 1996 [reproduced in accompanying notebook at Tab 49].

[12] *Id.* Blaskic's amended indictment contained charges for:

> (1) persecution of Bosnian Muslims on political, racial or religious grounds (count 1, crime against humanity);
>
> (2) attacks on towns and villages inhabited by Bosnian Muslims (counts 2-3);
>
> (3) killing and, intending to cause great suffering, injuring, both physically and mentally of Bosnian Muslims civilian including women, children, the elderly and the infirm (counts 4-9);
>
> (4) destruction and plunder of Bosnian Muslim property (dwellings, businesses, institutions dedicated to religion or education, personal property, livestock) (counts 10-13);
>
> (5) selection and detention on political, racial or religious ground of hundreds of Bosnian Muslims, and inhuman treatment of the detainees: many of them were killed, beaten, forced to dig trenches near or at the front line; subjected to physical or psychological abuse and intimidation; confined in cramped or overcrowded facilities; deprived of adequate food, water and adequate medical treatment

Even if the accused has already entered a plea at the time of the request, a further *inter partes* appearance to address the new charges may be all that is required to have the amendment confirmed.[13] Further, Rule 50 stipulates that "the accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence."[14]

Once the trial begins, a Prosecutor must seek leave of the Trial Chamber or a Judge of that Chamber to amend the indictment.[15] Tribunal Trial Chambers have allowed amendments during trial. In *Akayesu*, for example, the Prosecutor requested that the ICTR Trial Chamber allow an amendment of the indictment to address evidence of sexual violence after Jean-Paul Akayesu was originally charged with twelve counts of genocide and crimes against humanity.[16] The Prosecution argued that this evidence had come forward only during trial perhaps due to the "shame that accompanies acts of sexual violence."[17] The ICTR Trial Chamber approved the

---

(counts 14-15);
(6) taking of Bosnian Muslims hostages and their use in prisoner exchanges, and the halting of Bosnian military operations against the HVO (counts 16-17); and
(7) use of Bosnian Muslims as human shields in order to prevent the Bosnian army from firing on HVO positions or to force Bosnian Muslims combatants to surrender (counts 18-19).

Id.

[13] ICTY Rule 50, *supra* note 10, at (B) [reproduced in accompanying notebook at Tab 12].

[14] *Id.* at (C).

[15] *Id.* at (A)(1)(c).

[16] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER RWANDA, YUGOSLAVIA AND SIERRA LEONE 372 (2006) [reproduced in accompanying notebook at Tab 48]; Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (2 Sept. 1998), paras. 23, 417 [reproduced in accompanying notebook at Tab 26].

[17] *Id.*

amended indictment despite the protests of the Defence.[18] The Appeals Chamber also dismissed Akayesu's argument against the new charges.[19]

More rarely, the international tribunal Trial Chambers have rejected amendments proposed by the Prosecution during trial. The ICTY Trial Chamber, in *Kovačević*, refused the Prosecutor's request to amend the indictment that included charges for genocide and crimes against humanity by adding fourteen new charges, increasing the size of the indictment by ten pages.[20] In rejecting the indictment, the Trial Chamber noted that "[t]he amendment sought [was] not the result of the subsequent acquisition of materials unavailable at the time of the confirmation of the Indictment"[21] and that, if approved, the amended indictment would serve to deny Kovačević access to a fair and speedy trial. The Prosecutor brought this decision to the Appeals Chamber, which ordered that the amendment be allowed.[22] The Appeals Chamber found that no delay would result from the amendment, nor would it damage Kovačević's ability to prepare a defense because the Prosecution had indicated an intention to amend the indictment early in the proceedings and the defense failed to object.[23] The Appeals Chamber also noted that

[18] *Id.*

[19] SCHABAS, *supra* note 16 [reproduced in accompanying notebook at Tab 48]; Prosecutor v. Akayesu (ICTR-96-4-A), Judgment (1 June 2001) [reproduced in accompanying notebook at Tab 27].

[20] SCHABAS, *supra* note 16, at 373 [reproduced in accompanying notebook at Tab 48]; Prosecutor v. Kovačević, IT-97-24-I, Decision on the Prosecutor's Request to File an Amended Indictment (5 Mar. 1998) at para. 12 [reproduced in accompanying notebook at Tab 24].

[21] *Id.*

[22] Murphy, *supra* note 9 [reproduced in accompanying notebook at Tab 44]; *See also* Prosecutor v. Kovačević, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 (2 July 1998) [reproduced in accompanying notebook at Tab 25].

[23] *Id.*

"there is no rule of customary international law, outside the field of extradition, prohibiting the prosecution from . . . developing further charges."[24]

B. Requests Submitted Pursuant to the Order of a Trial Chamber

In some instances, a tribunal Prosecutor has not requested an amendment to the indictment despite the discovery of new evidence. The Trial Chambers of several tribunals have taken it upon themselves in these situations to invite or even order the Prosecutor to request an amendment.[25] For example, one judge of the ICTY Trial Chamber in *Nikolic* publicly suggested that the Prosecutor allege counts of genocide and rape. Nikolic's original indictment included charges for crimes against humanity and breaches of the Geneva Convention, none of which covered sexual violence charges.[26] With the consensus of the other Trial Chamber judges, the Chamber then declared that "the prosecutor may well be advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rapes and other forms of sexual assault, either a crime against humanity or as grave breach or war crimes."[27] Though some international scholars, including Sean D. Murphy, associate professor of law at George Washington University, question the propriety of a Trial Chamber that will sit in judgment on the case ordering an amendment, the international tribunal Appeals Chambers have upheld these requests.[28]

---

[24] *Id.*

[25] SCHABAS, *supra* note 16, at 373 [reproduced in accompanying notebook at Tab 48].

[26] *Id.*

[27] *Id.*

[28] Murphy, *supra* note 9 [reproduced in accompanying notebook at Tab 44].

C. Principles Weighed by a Trial Chamber when Considering a Prosecutor's Request

When the Prosecutor requests an amendment of the indictment during trial, the Tribunal Trial Chambers have a special obligation to consider several factors when deciding whether to allow the amendment. First, a Trial Chamber must ascertain the scope of the amendment. An amendment that adds news charges, rather than making minor changes such as correcting errors or wording, is subject to heightened judicial scrutiny. The ICTY Trial Chamber in *Halilović* stipulated that "the 'key question' in determining whether an amended indictment contains new charges . . . is whether it introduces a basis for conviction that is factually and/or legally distinct from any alleged in the unamended indictment."[29] "Charges" can include either new counts or mere allegations.[30] The ICTY Trial Chamber in *Lukić* suggested that a factual case-by-case evaluation is appropriate and necessary when determining if a modification constitutes adding further details or adding a new charge.[31]

If an amendment proposes new charges, a Trial Chamber must then consider multiple factors in an attempt to balance the Prosecution's obligation to prosecute serious crimes with the fairness of the trial and the ability of the Court to uphold the defendant's rights.[32] The point at which a Prosecutor introduces amendment strongly influences the impact of an amendment on the defendant.[33]

---

[29] KHAN & DIXON, *supra* note 6, at 241 [reproduced in accompanying notebook at Tab 46]; *See also* Prosecutor v. Halilović, IT-08-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment (17 Dec. 2004), para. 30 [reproduced in accompanying notebook at Tab 22].

[30] KHAN & DIXON, *supra* note 6, at 242 [reproduced in accompanying notebook at Tab 46].

[31] *Id.*; Prosecutor v. Lukić & Lukić, Decision Granting Prosecution's Motion to Amend Indictment and Scheduling Further Appearance (1 Feb. 2006), paras. 17-18 [reproduced in accompanying notebook at Tab 23].

[32] KHAN & DIXON, *supra* note 6, at 234-42 [reproduced in accompanying notebook at Tab 46].

[33] *Id.* at 234.

With this in mind, tribunal Trial Chambers must consider what many tribunal decisions have indicated to be the fundamental issue in whether to allow an amendment: avoiding unfair prejudice to the defendant. The ICTR Appeals Chamber in *Musema* indicated that the later in the proceedings the amendment is requested, the more likely that the defendant will suffer prejudice if it the amendment is allowed.[34] The ICTY Trial Chamber in *Brdanin and Talić* defined unfair prejudice as follows:

> The word 'unfairly' is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.[35]

The Trial Chamber also held that tribunal Trial Chambers, when assessing unfair prejudice, should consider: "(1) the potential of the amended indictment to improve clarity and precision of the case . . . ; (2) the diligence of the prosecution in amending the indictment; and (3) any undue delay or prejudice imposed on the defence by adopting the amendment."[36] The ICTY Trial Chamber in *Halilović* concluded, based on this definition and ruling, that two factors are especially important when determining whether to amend an indictment, namely (1) whether the Accused has been given an adequate opportunity to prepare an effective defence; and (2)

---

[34] Prosecutor v. Musema, ICTR-96-13-A, Judgment (16 Nov. 2001), para. 343 [reproduced in accompanying notebook at Tab 30].

[35] Prosecutor v. Brdanin and Talić, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (26 June 2001) [reproduced in accompanying notebook at Tab 21].

[36] KHAN & DIXON, *supra* note 6, at 235-36 [reproduced in accompanying notebook at Tab 46].

whether the Accused's right under Article 21 (4)(c) of the Statute to be "tried without undue delay" will be adversely affected.[37]

The Trial Chamber in *Halilović* further held that tribunal Trial Chambers should "weigh the likelihood of delay in the proceedings against the advantages to the Accused and the Chamber of an improved indictment."[38] Citing the ICTR Appeals Chamber in *Karemera,* the Trial Chamber noted that

> Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings . . . by improving the Accused's and Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused . . . because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.[39]

The ICTR Trial Chamber in *Karemera* further explained the principle, indicating that the right of the Accused to be tried without delay is one of the factors to be taken into consideration, while still being weighed with the amendment's effect on the rest of the proceedings.[40] Tribunal Trial Chambers must take into consideration the delay that adding new charges will inevitably cause, such as the loss of time due to the defendant entering new pleas and possibly filing preliminary motions in opposition of the amendment.[41] The ICTY Trial Chamber in *Halilović*

---

[37] Prosecutor v. Halilović, IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment (17 Dec. 2004), para. 23 [reproduced in accompanying notebook at Tab 22], citing 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 (19 Dec. 2003) [hereinafter Karemera Appeal Decision), para. 13 [reproduced in accompanying notebook at Tab 28].

[38] Prosecutor v. Halilović, IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, para. 23 [reproduced in accompanying notebook at Tab 22].

[39] *Id.* at para. 15.

[40] Karemera Appeal Decision, *supra* note 36, at para. 24 [reproduced in accompanying notebook at Tab 28].

[41] *Id.* at paras. 24-25.

exercised this balancing test by deciding that even if an amendment would cause an initial delay, if the amendment would serve to streamline the case overall, it should be allowed.[42]

Further, the ICTR Trial Chamber in *Karemera* indicated, in accordance with *Brdanin and Talić*, that tribunal Trial Chambers should take into consideration the Prosecution's due diligence, or lack thereof, in regard to new charges and their timely introduction.[43] United States case law has defined "due diligence" as "that measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances."[44] Thus, in keeping with this definition, the Prosecution should not hold an amendment request as a means of gaining a tactical advantage over the Defence, nor should it attempt to include "new" allegations in an amendment that could, with the exercise of due diligence, have been charged in the original confirmed indictment.[45] Like the other factors, due diligence is subject to balancing tests. However, the ICTR Trial Chamber in *Mpambara* has indicated that if lack of due diligence is the sole issue at hand, it will not in all circumstances result in a rejection of leave to amend an indictment.[46] In *Mpambara*, the Trial Chamber held that so long as the amendment would enhance the overall fairness of the trial, due diligence could be outweighed.[47]

---

[42] Prosecutor v. Halilović, *supra* note 36, at para. 40 [reproduced in accompanying notebook at Tab 22].

[43] Karemera Appeal Decision, *supra* note 36, at para. 15 [reproduced in accompanying notebook at Tab 28].

[44] State ex rel. Board of Ethics for Elected Officials v. Duke, 658 So. 2d 1276 (La.App. 1 Cir. 1995) [reproduced in accompanying notebook at Tab 31].

[45] Karemera Appeal Decision, *supra* note 36, at para. 25 [reproduced in accompanying notebook at Tab 28]; KHAN & DIXON, *supra* note 6, at 238 [reproduced in accompanying notebook at Tab 46].

[46] Prosecutor v. Mpambara, ICTR-2001-65-1, Decision on the Prosecution's Request for Leave to File an Amended Indictment (4 Mar. 2005), para 8 [reproduced in accompanying notebook at Tab 29].

[47] *Id.*

It is of supreme importance for any tribunal Trial Chamber to balance these elements when considering whether to allow the Prosecution to amend an indictment, even if the Trial Chamber itself ordered the Prosecution to submit the amendment. The form of the indictment is critical in upholding the rights of the accused when it comes to a fair hearing. This process will help tribunal Trial Chambers avoid decisions being overturned on appeal for unfairly prejudicing the defendant or failing to correct a fundamental defect. Further, tribunal Trial Chambers must be careful to avoid the appearance of impropriety. With corruption being a highly scrutinized issue at the ECCC, it is especially important to avoid the appearance of a corrupt judicial institution or a miscarriage of justice.[48] This is also an appealable issue, with the "typical remedy against suspected corruption [consisting of]: 1) applying for the disqualification of a judge from his case (pre- or post-conviction); 2) moving that the tribunal inherently lacks jurisdiction because of corruption and bias; or 3) moving for a reversal of conviction on grounds of an unfair judicial process."[49] Proceedings such as these not only extend the delay created by the request to amend the indictment, but also continue to perpetuate negative connotations about the tribunal's propriety.

IV. ADDING NEW CHARGES TO AN INDICTMENT BY THE TRIAL CHAMBER'S OWN VOLITION WITHOUT THE PROSECUTOR'S REQUEST

Based on the ECCC Internal Rules, which stipulate that "[t]he [Trial] Chamber may . . . change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced," the recent *Lubanga* case which held that adding new charges does not amount to a mere changing of the legal characterization of the crime, and the

[48] *See e.g.* Michael A. Kertesz, *Corrupt Conditions Surrounding the ECCC and Their Effect of Judicial Decision-Making and the Appearance of Fairness*, 2009 [reproduced in accompanying notebook at Tab 38].

[49] *Id.* at 8.

principles of the French civil law system, it appears that the Trial Chamber does not have an explicit right to amend the indictment during trial to add new charges without a request to do so by the Prosecution.

A. The French Civil Code

The ECCC bases its Internal Rules on the French Civil Code due to its colonial connection with France.[50] French criminal law, based on the Napoleonic Code of 1810, codifies its basis of criminal proceedings in the 1808 Code of Criminal Instruction (Code d'Instruction Criminelle), its successor, the 1959 Code of Penal Procedure (Code de Procédure Pénale), and revisions of 1992, 1993, and 1995.[51] The French Civil Code, and as most civil law jurisdictions also follow, describes the phases of criminal procedure to be the investigative phase, the examining phase, and the trial.[52] Further, there are sentencing and appeal phases if so required.[53]

i. Role of the Prosecutor

Traditionally, the Prosecutor, called the Ministère Public or the Parquet, plays a dual role in French civil law.[54] The Prosecutor not only prepares the government's criminal cases, but also represents the public's interest in civil cases.[55] According to the French Civil Code, the

[50] Petit & Ahmed, *supra* note 1 [reproduced in accompanying notebook at Tab 42].

[51] Sophie M. Clavier, *Perspectives on French Criminal Law*, 1997, at 7 [reproduced in accompanying notebook at Tab 45].

[52] James G. Apple & Robert P. Deyling, *A Primer on the Civil-Law System*, Federal Judicial Center, 1995, at 28 [reproduced in accompanying notebook at Tab 36].

[53] *Id.*

[54] Clavier, *supra* note 50, at 8 [reproduced in accompanying notebook at Tab 45].

[55] Apple & Deyling, *supra* note 51, at 31 (stating this occurs "[o]n the theory that the parties to a civil case will not provide the judge with a full picture of the facts and law, the prosecutor may intervene to assert the public interest, as opposed to the interest of the state") [reproduced in accompanying notebook at Tab 36].

Prosecutor's role begins in the investigative phase when the public Prosecutor collects evidence and decides whether that evidence is sufficient to warrant formal charges.[56]

From this point, the examining phase begins. The formal judicial investigation is conducted by an examining judge, the Juge d'Instruction or the Chambre d'Accusation. The Juge d'Instruction or the Chambre d'Accusation is the equivalent of the tribunal Co-Investigating Judges. The investigation is primarily conducted in writing and consists of a review of the written record that the prosecutor has produced.[57] The examining judge has the broadest investigating powers and can collect further evidence and interrogate witnesses, including the defendant, during this process.[58] After the gathering of evidence is completed, the examining judge will decide whether the case should proceed to trial.[59] If so, the examining judge will render a judgment of indictment, called an Arrêt de Miise en Accusation.[60]

Though the French Civil Code does not directly address the amendment of the indictment, Article 190 indicates that "[i]t is for the public prosecutor alone to decide whether there is a case for the resumption of the investigation on new charges."[61] The Code indicates that the Prosecutor "makes any submission it deems appropriate in the name of the law."[62] Article 313 also indicates that "[t]he court must acknowledge these submissions and rule upon them."[63]

---

[56] *Id.* at 28.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Clavier, *supra* note 50, at 9 [reproduced in accompanying notebook at Tab 45].

[61] French Code of Criminal Procedure (Code de Procedure Criminelle), Article 190 (2005) [reproduced in accompanying notebook at Tab 6].

[62] *Id.* at Article 313 [reproduced in accompanying notebook at Tab 8].

[63] *Id.*

ii. Role of the Trial Chamber

Once the examining judge has issued an indictment, the formal trial will be handled by a group of judges, the Cour d'Assises, who essentially "assess" the crimes.[64] The Cour d'Assises is equivalent to the tribunal Trial Chamber. In the French Civil Code, the Cour d'Assises has jurisdiction to judge individuals assigned to it by the judgment of indictment from the examining judge.[65] Article 231 reads: "[t]he assize court has full jurisdiction to try at first instance or on appeal those persons committed for trial before it by the indictment judgment. / It may not try any other accusation."[66] Thus, under Article 231, the Cour d'Assises "cannot take cognizance of any other accusation."[67]

Despite this, in the civil law system the role of the judge is elevated compared to their role in common law systems, where judges assume the role of an impartial party—acting essentially as a "manager."[68] In contrast, the civil law judge "assumes the role of principal interrogator of witnesses, resulting in a concomitant derogation of the role of lawyers during the trial."[69] Though under the French Civil Code the Cour d'Assises does not have the ability to try accusations that it has not been seized with through the indictment judgment, the Cour d'Assises has the ability to modify the indictment should the prosecutor so desire under Article 190 and Chapter VI Section I.[70] It does not appear that the Cour d'Assises has the ability to bring their

[64] Clavier, *supra* note 50, at 9 [reproduced in accompanying notebook at Tab 45].

[65] *Id.*

[66] French Code of Criminal Procedure (Code de Procedure Criminelle), Article 231 (2005). [reproduced in accompanying notebook at Tab 7].

[67] Clavier, *supra* note 50, at 9 [reproduced in accompanying notebook at Tab 45].

[68] Apple & Deyling, *supra* note 51, at 37 [reproduced in accompanying notebook at Tab 36].

[69] *Id.*

[70] Article 190 and Chapter VI Section I govern the general procedure of the hearing.

own pleading to amend the indictment, as the French Civil Code only mentions in Article 318 that the Prosecutor has the ability and in Article 315 that "[t]he accused, the civil party and their advocates may file pleadings upon which the court must rule."[71]

The role of the Cour d'Assises is not to bring its own pleadings, which might give the appearance of impropriety. However, Cour d'Assises has the power to amend the legal characterization of facts in an indictment. This power is derived from the civil law principle *iura novit curia*, meaning "the court knows the law."[72] This principle generally allows a chamber to modify the legal characterization of the facts, essentially to "determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or different form of participation than that which the Prosecutor has chosen."[73]

International courts widely accept *iura novit curia* as a general principle of law. Regulation 55 of the ICC now explicitly provides for its recognition[74] and the concept is also recognized by the International Court of Justice ("ICJ").[75] Further, the ECCC also allows for the exercise of *iura novit curia* in the Internal Rules via Rule 98, which reads: "[t]he [Trial] Chamber may . . . change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced."[76]

---

[71] French Code of Criminal Procedure (Code de Procedure Criminelle), Articles 315, 318 (2005). [reproduced in accompanying notebook at Tabs 10 and 9, respectively].

[72] ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 457 (2nd ed. 2010) [reproduced in accompanying notebook at Tab 47].

[73] *Id.* at 458.

[74] *Id.*; *See also* International Criminal Court Regulations of the Court, CC-BD/01-02-07 at Regulation 55 [reproduced in accompanying notebook at Tab 11].

[75] *Id.*

[76] Extraordinary Chambers in the Courts of Cambodia, Internal Rule 98 (2007) [reproduced in accompanying notebook at Tab 5].

Iura novit curia, at its broadest, allows the court to base its decision on a legal theory that has not been the subject of argument by the parties.[77] However, a wide application of *iura novit curia* has the potential to conflict with the parties' authority to control the subject of the litigation.[78] Courts in most civil law jurisdictions stay within the pleadings and arguments of the parties, typically within the legal characterization of the alleged facts in the indictment.[79] Though its use can be limited by this practice, *iura novit curia* can help to prevent indictments with an unnecessarily large amount of counts and, when used properly, can lessen the chance of an acquittal on technical grounds.[80]

B. The Tribunals

The majority of international tribunals have never addressed the issue of a Trial Chamber adding charges to the indictment of its own volition during trial. Most have addressed the issue of *iura novit curia* to distinguish how far the principle extends. From these discussions and rules of law, it is possible to ascertain a better understanding of how far a Trial Chamber's power to amend an indictment extends.

i. The ECCC and the Extent of Amendment Allowed by the Trial Chamber's Own Volition

a. The Indictment Process

In keeping with the French Civil Code, the procedure of the ECCC tribunal grants the Prosecution the power to initiate the trial process. At the ECCC, because of its hybrid structure,

[77] Douglas Brooker, *Va Savoir! - The Adage "Jura Novit Curia" in Contemporary France*, BEPRESS LEGAL SERIES, 2005, at 8 [reproduced in accompanying notebook at Tab 35].

[78] *Id.* at 11.

[79] *Id.*

[80] CRYER, FRIMAN, ROBINSON, & WILMSHURST, *supra* note 71, at 458 [reproduced in accompanying notebook at Tab 47].

the Prosecution is referred to as the Co-Prosecution.[81] The Co-Prosecutors conduct a "preliminary investigation" as a means of determining "whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses."[82] The Co-Prosecutors may then submit a request for judicial investigation to the Co-Investigating Judges.[83] The Co-Investigating Judges serve the same purpose as the examining judges in the French Civil Code. The Co-Investigating Judges exercise investigative powers to collect further evidence and interrogate witnesses.[84] If the Judges find "sufficient evidence" of a crime or crimes at the conclusion of this investigation, they will issue an indictment.[85] If the Co-Prosecutors and Co-Investigating Judges disagree, the issue is submitted to the Pre-Trial Chamber for a judicial determination.[86]

The evidence collected by the Co-Investigating Judges and their indictment are the foundation of the Trial Chamber's case file.[87] Before using this evidence at trial and as a basis to make a judgment, the evidence must be "subjected to examination" by the Trial Chamber, essentially a second investigation.[88]

b. Civil law and Rule 98

[81] Petit & Ahmed, *supra* note 1, at 170 [reproduced in accompanying notebook at Tab 42].

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at171.

[87] *Id.* at 170.

[88] *Id.*; *See also* Extraordinary Chambers in the Courts of Cambodia, Internal Rule 87(2) (2007) [reproduced in accompanying notebook at Tab 2].

Similar to the ICC and ICY, the ECCC recognizes the principle of *iura novit curia*. As discussed above in Section IV(A)(ii), the ECCC's Rule 98(2) reads:

> The judgment shall be limited to the facts set out in the Indictment. The 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. The Chamber shall only pass judgment on the Accused. If another person, appearing as a witness during the trial is suspected of committing a crime or conspiring with someone to commit a crime, the Chamber shall only try such person after he or she has been charged and indicted in accordance with these [Internal Rules].[89]

The ECCC's only decision to date, *Duch*, addresses the issue of "legal characterization" and how far the Trial Chamber may impinge on Duch's right to be informed of the nature and cause of the charges against him. Joint criminal enterprise, a somewhat controversial theory in the international spectrum, became contentious in the *Duch* trial when the Co-Investigating Judges did not include reference to it in the Closing Order indicting Kaing Guek Eav, also known as "Duch."[90] Appealing to the Pre-Trial Chamber, the Co-Prosecutors argued that Duch is liable under all three categories of joint criminal enterprise.[91] The Co-Prosecutors further argued to include the domestic crimes of homicide and torture in the Closing Order.[92] The Pre-trial Chamber granted the Co-Prosecutor's appeal to include homicide and torture, but rejected the

[89] Extraordinary Chambers in the Courts of Cambodia, Internal Rule 98 (2007), sub-section (2) [reproduced in accompanying notebook at Tab 2].

[90] Michelle Staggs Kelsall, Mary Kristerie A. Baleva, Aviva Nababan, Vineath Chou, Rachel Guo, Caroline Ehlert, Sovannith Nget & Savornt Pheak, *Lessons Learned from the 'Duch' Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia*, 2009, at 19 [reproduced in accompanying notebook at Tab 39].

[91] *Id.* ("Namely, JCE I or the 'basic' form of JCE, where Duch is considered a co-perpetrator of criminal acts committed throughout the DK era; JCE II or its 'systemic' form, under which Duch is alleged to have implemented a system of repression that pervaded S-21; and JCE III, or the extended form of liability, under which crimes committed outside the collective criminal purpose as carried out at S-21 are nevertheless considered a natural and foreseeable consequence of the establishment of the system for which Duch can be held liable.")

[92] *Id.*; Co-Prosecutors v. Duch, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise (8 June 2009), at para. 4 [reproduced in accompanying notebook at Tab 14].

inclusion of joint criminal enterprise as a mode of liability.[93] The Pre-trial Chamber cited procedural grounds, ruling that Duch had not been adequately informed of the allegations of his participation in a joint criminal enterprise prior to the Co-Prosecutors' issuance of their final submission in the case.[94]

ECCC Internal Rule 77(13) indicates that Pre-Trial Chamber decisions are not subject to appeal.[95] However, the Co-Prosecutors framed a request under Rules 92 and 98(2) and submitted it to the Trial Chamber at the start of Duch's trial, requesting the Trial Chamber to amend the legal characterization of the crimes stipulated in the Closing Order.[96] Specifically, this request asked the Trial Chamber to "exercise its authority under Rule 98(2) to 'change the legal characterisation' of the crimes set out in the Indictment so that the charges match the evidence collected during the judicial investigation and described in the Indictment."[97] The Co-Prosecutors opined that because they supported the counts of joint criminal enterprise with proper pleadings and sufficient particularity, any change in the legal characterization of the crimes would not impinge on Duch's right to be informed of the nature and cause of the charges he faces.[98] Further, the Co-Prosecutors noted the Pre-Trial Chamber acknowledged that the Trial Chamber has the power to decide whether or not to apply joint criminal enterprise after deciding

---

[93] Kelsall, Baleva, Nababan, Chou, Guo, Ehlert, Nget & Pheak, *supra* note 89, at 19 [reproduced in accompanying notebook at Tab 39].

[94] *Id.*; Co-Prosecutors v. Duch, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise (8 June 2009), para. 28 [reproduced in accompanying notebook at Tab 14].

[95] Extraordinary Chambers in the Courts of Cambodia, Internal Rule 77(13) (2007) [reproduced in accompanying notebook at Tab 1].

[96] Extraordinary Chambers in the Courts of Cambodia, Internal Rules 92 and 98(2) (2007) [reproduced in accompanying notebook at Tabs 3 and 5, respectively].

[97] Co-Prosecutors v. Duch, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise (8 June 2009), para. 9 [reproduced in accompanying notebook at Tab 14].

[98] *Id.*

that it would not add the charge to the Closing Order "at this stage" of the proceedings.[99] Despite this, the Trial Chamber declined to issue judgment and stipulated that it will do so after the case has closed.[100]

In its Judgment on the case, the Trial Chamber "determined, however, that commission through participation in a joint criminal enterprise is an applicable mode of responsibility both before the ECCC and in the present case, at least in its basic and so-called systemic forms"[101] and "[a]ccordingly, the Chamber . . . found that, as a result of his participation in the systemic joint criminal enterprise at S-21, the accused bears individual criminal responsibility for the offences committed at S-21."[102] This positive ruling on the existence of joint criminal enterprise in *Duch* allows for an expansion of the extent of all the Accused's culpability for crimes committed during the Democratic Kampuchea era.[103] This decision also implies that regardless of what is pled in the Closing Order, the Trial Chamber may be able to characterize the facts pled as amounting to joint criminal enterprise at the close of trial.[104]

Unfortunately, this decision defines only the scope of the Trial Chamber's ability to exercise its authority under Rule 98(2) to "change the legal characterization" of the crimes set out in the Indictment so that the charges match the evidence collected during the judicial investigation and described in the Indictment. It does not look to the Trial Chamber's ability to

---

[99] *Id.* at para. 12.

[100] Kelsall, Baleva, Nababan, Chou, Guo, Ehlert, Nget & Pheak, *supra* note 80, at 20 [reproduced in accompanying notebook at Tab 39].

[101] Co-Prosecutors v. Duch, 001/18-07-2007/ECCC/TC, Summary of Judgment (26 July 2010), para. 29. [reproduced in accompanying notebook at Tab 15].

[102] *Id.*

[103] Kelsall, Baleva, Nababan, Chou, Guo, Ehlert, Nget & Pheak, *supra* note 80, at 20 [reproduced in accompanying notebook at Tab 39].

[104] *Id.*

"change the legal characterization" of crimes set out in the Indictment based on the discovery of evidence at trial, evidence which was not collected during the judicial investigation or described in the Indictment.

c. Civil law and Rule 93

ECCC Internal Rule 93, setting out the ability of the Trial Chamber to conduct additional investigations stipulates that "[w]here the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations."[105] These investigations may consist of going anywhere within the territorial jurisdiction of the ECCC, interviewing witnesses, conducting searches, seizing any evidence, or ordering expert opinions, under the same conditions as the Co-Investigating Judges.[106] Though Rule 93 is useful for gathering additional evidence that may support an amendment to the indictment to add a new charge, it still does not indicate that the Trial Chamber may take action and amend the indictment by its own volition based on the investigation's findings.

ii. The ICC and the Extent of Amendment Allowed by the Trial Chamber's Own Volition

a. Regulation 55 and the Rome Statute

The ICC was created by the Rome Statute, which entered into force on July 1, 2002.[107] The operation of the ICC is governed by its Statute and the Rules of Procedure and Evidence.[108]

[105] Extraordinary Chambers in the Courts of Cambodia, Internal Rule 93 (2007) [reproduced in accompanying notebook at Tab 4].

[106] *Id.*

[107] Olympia Bekou, *Pre-trial Procedures before the International Criminal Court*, 2006, at 1 [reproduced in accompanying notebook at Tab 40].

[108] *Id.*

The ICC follows neither civil nor common law; it is a distinct international criminal law procedure.[109] However, as discussed previously, the ICC recognizes the principle of *iura novit curia*. ICC's Regulation 55 addresses this principle and its scope. Under Regulation 55(1), regarding legal characterization in a final decision, the Trial Chamber

> In its decision under article 74, may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.[110]

Before the final decision, "at any time during the trial," Regulation 55(2) permits the Trial Chamber to change the legal characterisation of the facts.[111] Pursuant to this Regulation, the Chamber must, prior to any re-characterisation, notify the parties of such a possibility and allow them an opportunity to make written or oral submissions on the matter.[112] Sub-regulation 3 also requires that the Chamber "shall ensure" that the Defence be afforded "adequate time and facilities" to prepare a defence to any re-characterisation attempt, including the ability to re-examine witnesses, call new witnesses, or present other admissible evidence.[113] Regulation 55 and the ECCC's Internal Rule 98(2) are similar in that a Trial Chamber may change the legal characterisation of the crime as set out in the Indictment pursuant to the principle *of iura novit curia*. Thus, at the very least, Regulation 55 permits the ICC Trial Chamber to change the legal characterisation of the facts in the same manner that the ECCC authorizes in Internal Rule 98 and the *Duch* case, without exceeding the facts and circumstances described in the original charges.

---

[109] *Id.*

[110] International Criminal Court Regulations of the Court, CC-BD/01-02-07 at Regulation 55(1) [reproduced in accompanying notebook at Tab 11].

[111] *Id.* at Regulation 55(2).

[112] *Id.*

[113] *Id.* at Regulation 55(3).

b. The Lubanga case

On July 14, 2009, the ICC Trial Chamber attempted to expand Regulation 55(2)'s scope during the Thomas Lubanga Dyilo ("Lubanga") trial.[114] Lubanga, founder of the *Forces patriotiques pour la libération du Congo* ("FPLC"), was charged in August 2006 with three counts of war crimes for conscripting and using child soldiers to further the war in the Democratic Republic of Congo.[115] In January 2009, the ICC Trial Chamber heard opening arguments in *Prosecutor v. Lubanga*, its first case.[116] For six months, the Prosecution presented evidence of Lubanga's role in the FPLC and the conscription and use of child soldiers.

In May 2009, before the Prosecution rested its case, the victims filed a request before the Trial Chamber seeking a change in the legal characterisation of the facts in Lubanga's indictment.[117] The victims sought to add new charges of sexual slavery and inhuman and/or cruel treatment.[118] Their request was based on new evidence discovered during trial—namely the testimony of prosecution witnesses who indicated that the child conscripts were subject to hard labor, food rations, grueling punishment, and that girls, in particular, were subjected to sexual violence and recruited by the militia as sex slaves.[119] The victims were essentially asking the Trial Chamber to conclude that the facts presented during the Prosecution's case in chief

[114] Sarah Steinfeld, *Impact of Regulation 55 on ICC Proceedings*, Nov. 5, 2009 [reproduced in accompanying notebook at Tab 43]; Amy Senier, *The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga*, Jan. 8, 2010 [reproduced in accompanying notebook at Tab 34].

[115] ICC Press Release, ICC-CPI-20070129-196, Pre-Trial Chamber I Commits Thomas Lubanga Dyilo for Trial, 29 Jan. 2007 [reproduced in accompanying notebook at Tab 50].

[116] ICC Press Release, ICC-CPI-20090113-MA30, Confirmation of the Beginning of the Lubanga Dyilo Trial, 26 January 2009, 13 Jan. 2009 [reproduced in accompanying notebook at Tab 51].

[117] Prosecutor v. Lubanga, ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (22 May 2009) [reproduced in accompanying notebook at Tab 16].

[118] *Id.* at para. 42.

[119] Steinfeld, *supra* note 113 [reproduced in accompanying notebook at Tab 43].

supported convicting Lubanga of charges that not originally confirmed by the Pre-Trial Chamber.

1. The Trial Chamber's decision

Over a strong dissent by Trial Chamber Judge Fulford, the majority of the Trial Chamber responded by giving notice to the parties and participants in the trial "that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court."[120] In particular, the Trial Chamber wanted to hear arguments concerning whether the facts presented in the case should be "re-characterised" to support five new charges against Lubanga, including: (1) sexual slavery as a crime against humanity; (2) sexual slavery as a war crime in international armed conflict; (3) sexual slavery as a war crime in non-international armed conflict; (4) inhuman treatment as a war crime; and (5) cruel treatment as a war crime in non-international armed conflict.[121] This controversial ruling held that the Trial Court could base new charges on new evidence discovered during trial, not only on existing facts, and modify the Indictment during the trial to include those new charges. Further, those charges could be added without a request by the Prosecutor.

The majority of the Trial Chamber reasoned that it could change the legal characterisation of the facts because of the differences between Regulation 55(1) and sub-regulations (2) and (3).[122] It reasoned that Regulation 55(1) allows for substantive legal re-

[120] Prosecutor v. Lubanga, ICC-01/04-01/06, 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, paras. 28-30 (14 July 2009) [reproduced in accompanying notebook at Tab 17]. *See also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Minority Opinion on the Decision Giving Notice to the Parties and Participants that the Legal Characterisation of Facts may be subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court (17 July 2009) [reproduced in accompanying notebook at Tab 18].

[121] *Id.*

[122] *Id.*

characterisations of facts at the final decision stage so long as the factual basis for such re-characterisations does not extend beyond the facts set forth in the charges.[123] In contrast, the majority noted, sub-regulation (2), which allows for re-characterisation during trial, does not expressly limit a legal characterisation to the facts and circumstances described in the charges.[124] Thus, any re-characterisation under Regulation 55(2) can exceed the factual scope of the charges.[125] The majority also held that the Regulation drafters must have envisioned that re-characterisation could exceed the factual scope of the charges because the drafters included due process procedures in sub-regulation (3).[126]

The majority held that the evidence put forth by the Prosecution and the victims' request supported a possibility that such a re-characterization would occur.[127] Both the Prosecution and Defence disagreed and asked for leave to appeal the Trial Chamber's decision.[128] While the appeal was pending, the Trial Chamber attempted to clarify its position on August 12, 2009.[129] The clarification explained the scope of legal re-characterisation by stating that any additional facts and circumstances "must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges."[130]

---

[123] *Id.* at para. 31.

[124] *Id.* at paras. 29-31.

[125] *Id.* at para. 31.

[126] *Id.* at paras. 29-31.

[127] *Id.* at para. 33.

[128] Steinfeld, *supra* note 113 [reproduced in accompanying notebook at Tab 43].

[129] Prosecutor v. Lubanga, ICC-01/04-01/06, Clarification and further guidance to parties and participants in relation to the "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" (27 Aug. 2009) [reproduced in accompanying notebook at Tab 19].

[130] *Id*. at para. 8.

2. The Appeals Chamber's decision

On December 8, 2009, the ICC Appeals Chamber reversed the Trial Chamber's decision.[131] The Appeals Chamber considered two issues in its judgment. First, whether the Regulation 55 subsections can be read separately and, if so, whether subsections (2) and (3) permit a change in the legal characterisation beyond the charges. Second, whether the Trial Chamber erred in holding that the victims could request legal re-characterisation.[132]

In deciding the first issue, the Chamber addressed what the Defence considered incompatibilities between Regulation 55, the Rome Statute, and international law. After reviewing international jurisprudence, the Appeals Chamber found that the possibility for a Trial Chamber to modify the legal characterisation of the facts is compatible with the Rome Statute and international law principles.[133] The Appeals Chamber also found that modification is compatible with the rights of the accused as long as he is given an adequate opportunity to prepare an effective defence to the new legal characterisation.[134] However, the Appeals Chamber held that when using Regulation 55, including all of its subsections, a Trial Chamber should not exceed the facts and circumstances described in the charges.[135] Thus, the Appeals Chamber found that the Trial Chamber improperly divided Regulation 55 (1) from sub-regulations (2) and (3).[136]

---

[131] Prosecutor v. Lubanga, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (8 Dec. 2009) [reproduced in accompanying notebook at Tab 20].

[132] *Id.*

[133] *Id.* at paras. 70-76.

[134] *Id.*

[135] *Id.*

[136] *Id.* at paras. 89-91.

Further, the Appeals Chamber held that the Trial Chamber's reading of Regulation 55 conflicted with Article 61(9) of the Rome Statute.[137] Article 61(9) reads:

> After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.[138]

Thus, re-characterisation according to the Trial Chamber's reading of Regulation 55(2) would give the Trial Chamber the power to extend the charges beyond the facts alleged by the Prosecutor and be "contrary to the distribution of powers under the Statute."[139] Once the trial has commenced, the Trial Chamber is limited to granting or rejecting a motion by the Prosecutor to withdraw charges and cannot amend the confirmed charges to add new charges.[140]

Concerning the second issue considered by the Appeals Chamber, it was determined that although victims are granted a role in trial proceedings at the ICC, they do not assume the role of the Prosecutor.[141] As Kevin Jon Heller, senior lecturer at Melbourne Law School, explains: "[v]ictims have an absolute right to lobby, submit briefs, [and] argue in the court of public opinion, but it is the [P]rosecutor's final decision to bring charges."[142]

---

[137] *Id.* at para. 94-95.

[138] Rome Statute of the International Criminal Court, adopted by the Security Council on 17 July 1998, U.N. Doc A/CONF.183/9 (1998) at Article 61(9) [reproduced in accompanying notebook at Tab 13].

[139] Prosecutor v. Lubanga, ICC-01/04-01/06-2205, at para. 94 [reproduced in accompanying notebook at Tab 20].

[140] Rome Statute, *supra* note 137, at Article 61(9) [reproduced in accompanying notebook at Tab 13].

[141] Rachel Irwin, *Latest News: Lubanga Trial Transformed By Victims*, OPEN SOCIETY JUSTICE INITIATIVE, Sep. 4, 2009 [reproduced in accompanying notebook at Tab 41].

[142] *Id.*

3. The decision's impact

The Appeals Chamber's reversal of the Trial Chamber's decision was a clear victory for the Defence, but also a victory for the Prosecutor. The Appeals Chamber reiterated the Prosecutor's powers under Article 61(9) of the Statute to define the charges, whether it be through the original Indictment or amendments thereto. The decision ensured that the Trial Chamber must defer to the Prosecutor's ability to request the charges it so desires. The Appeals Chamber clearly stipulated that Regulation 55 is not an avenue for circumventing the Indictment for either the Trial Chamber or the victims who do not agree with the content of the proceedings.

Further, the Appeals Chamber refused to expand the principle of *iura novit curia*, under which a judge may re-characterize the charges. Though the ICC adheres to neither common nor civil law, this decision again defined the scope of the principle for all systems of law. A judge, or in the case of the international tribunals—a Trial Chamber—may not re-characterize the charges beyond facts already included in the indictment.

C. United States Civil Law

In United States courts, "[a]n amendment to an indictment is considered per se prejudicial . . . because 'it directly infringes the defendant's right to know of the charges against him by effectively allowing the jury to convict the defendant of a different crime than that for which he was charged.'"[143] The United States, with the exception of Louisiana, operates primarily on the theory of common law. Like the ECCC, Louisiana law is based on the French Civil Code, though to a much lesser degree. The court system itself is not at all similar to that of the tribunals in that it is not composed of various Chambers.

[143] Jessica A. Levenberg, *Material Facts not Pleaded in the Indictment*, 2002, at 7 [reproduced in accompanying notebook at Tab 37].

The case law in Louisiana on the subject of amendment during trial is in line with the rest of the United States. In *United States v. Young*, the Court held that "[a]fter an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself."[144] To amend the indictment otherwise, beyond a "variance," results in reversible error in keeping with the principle of *iura novit curia*.[145] Thus, in the United States, adding new charges to an indictment during trial would almost certainly result in a mistrial, no matter if the judge or prosecution initiated the amendment.

V. CONCLUSION

The ECCC Trial Chamber may amend the indictment during trial to add new charges based on the discovery of new evidence, but only if the Prosecutor submits a request to amend to the Trial Chamber. This conclusion is based on three sources: (1) The ECCC Internal Rules, specifically Rule 98, which stipulates that "[t]he [Trial] Chamber may . . . change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced"; (2) the recent *Lubanga* case which held that adding new charges does not amount to a mere changing of the legal characterization of the crime; and (3) the principles of the civil law system.

So long as the Trial Chamber does not base an amendment on new facts or elements not originally included in the Indictment, an amendment by the Trial Chamber's own volition is proper under the civil law principle *iura novit curia*. Thus, if the Trial Chamber seeks to amend an indictment to add new charges and does not wish to defer to the Co-Prosecutors' authority to

[144] United States v. Young, 730 F.2d 221 (5th Cir. Tex. 1984) [reproduced in accompanying notebook at Tab 33]; *See e.g.* United States v. Miller, 471 U.S. 130 (1985) [reproduced in accompanying notebook at Tab 32]; *See also* Levenberg, supra note 143, at 7 and 8 [reproduced in accompanying notebook at Tab 37].

[145] *Id.*; *See also* Levenberg, supra note 143, at footnote 13 [reproduced in accompanying notebook at Tab 37].

request an amendment, it may order the Co-Prosecutors to submit a request as other tribunals have done.

However, though ordering the Co-Prosecutors to request an amendment is technically proper, it does not mean the Chamber should exercise this tactic frivolously. The propriety of a Trial Chamber that will sit in judgment on the case ordering an amendment, especially in light of Cambodia's corruption issues, will likely be questioned. Further, the Trial Chamber should generally avoid amending an indictment if possible. The Trial Chamber has a duty to weigh the Prosecution's obligation to prosecute serious crimes against the fairness of the trial and the Chamber's ability to uphold the defendant's rights. When weighing a request to amend, the Chamber should take into account not only the tests proscribed by various tribunals, but consider strongly the economic and societal cost of amendment. For example, it would be sensible for the Chamber to consider the economic cost of prolonging the trial and the societal impact on the victims and community of either adding or refusing to add new charges.

The ECCC Trial Chamber—and international tribunals as a whole—is in a unique position compared to other civil law jurisdictions in that its costs are higher and it is generally more eminent. Whereas some civil law jurisdictions, such as Louisiana, have the benefit of calling a mistrial and postponing the case when new charges should be added, the ECCC Trial Chamber must take into account that a mistrial is not ideal in all situations, especially considering that the tribunals spend years preparing a case for trial. There are certainly benefits to amending an indictment during trial to add new charges based on the discovery of evidence, and, accordingly, the tribunal Trial Chambers have approved amendments more often than not. Regardless, it is prudent for both the ECCC Trial Chamber and Co-Prosecutors to weigh those benefits against their obligations, duties, and other relevant criteria *before* ordering or requesting

an amendment as a matter of general good preparation and to prevent unnecessary delay in the trial or creating the appearance of impropriety.