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What course of action may or must the trial chamber take if, at the end of the trial, it is not satisfied that all of the elements of the crime charged have been proven beyond a reasonable doubt but it is satisfied that the evidence proves beyond a reasonable doubt all the elements of a different, but related, crime.

Traci M. Donovan

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: WHAT COURSE OF ACTION MAY OR MUST THE TRIAL CHAMBER TAKE IF, AT THE END OF THE TRIAL, IT IS NOT SATISFIED THAT ALL OF THE ELEMENTS OF THE CRIME CHARGED HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT BUT IT IS SATISFIED THAT THE EVIDENCE PROVES BEYOND A REASONABLE DOUBT ALL THE ELEMENTS OF A DIFFERENT, BUT RELATED, CRIME.

Prepared by Traci M. Donovan
Spring 2006

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUE*

This memorandum addresses what the Trial Chamber of the Special Court for Sierra Leone (the "Special Court") may or must do when the facts proven at trial support a conviction beyond a reasonable doubt for a crime not pled in the indictment that is different or related to the crime charged.

B. SUMMARY OF CONCLUSIONS

Where the principle of *iura juris novit* is recognized, the parties to the proceedings "do not have to provide legal evidence in the process. At the same time the court, in order to reach a final decision, is able to pursue any piece of legal matter which it considers necessary, whether it has been forward by the parties or not."[1] This principle is used in many international proceedings, however, when it is applied in international *criminal* proceedings, it is done so on a very limited basis.

1. International Systems

There is overwhelming support for the application of the principle of *iura novit curia* in international courts. As authority for the application of the principle of *iura*

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* Suppose that at the end of a trial, the trial chamber is not satisfied that all of the elements of the crime charged have been proven beyond a reasonable doubt. Suppose, however, that the trial chamber is satisfied that the evidence does prove beyond a reasonable doubt all of the elements of a different (related) crime, with which the accused has not been charged. What course of action may/must the trial chamber take in these circumstances? Please consider, with reference to both international criminal law and national legal systems.

In answering this question, it may be useful to have regard to paragraph 866 of the Celebici Trial Judgement of 16 November 1998 (Prosecutor v. Delalic et al) (concerning lesser included offences), and the civil law principle of *iura novit curia* (see, for instance, the Kupreskic Trial Judgement of 14 January 2000, paras. 740-748).

[1] Gema Marcilla Cordoba, *Iura Novit Curia, Law Crisis and the European Building Process*, University of Catilla-La Mancha, Spain, *available at* http://www.udg.es/dretprivat/filosofia/Pon%C3%A8ncies_II/Gema_Marcilla.rtf [Reproduced in accompanying notebook, Tab 44].

novit curia, the European Court of Human Rights (the "European Court"), the Inter-American Court of Human Rights (the "Inter-American Court"), and the International Criminal Tribunal for the former Yugoslavia (the "ICTY") cite the Permanent Court of International Justice's use of the principle for its use in international law.

For example, the European Court is permitted to consider legal arguments not raised by the parties[2] but it is not obligated to do so.[3] If the European Commission on Human Rights (the "Commission") found that a particular allegation of a violation of the European Convention on Human Rights (the "European Convention") was inadmissible, the European Court was still able to consider a violation of the European Convention despite the Commission's determination.[4] The Inter-American Court applies the principle of *iura novit curia*; however, this court has consistently held that, in order to fulfill its proper function, it is *obligated* to apply *iura novit curia* and therefore it must consider if there were violations that were not alleged by the parties.[5]

On the other hand, the principle of *iura novit curia* is not often applied in ICTY proceedings. In fact, the ICTY questioned whether the principle should apply to international criminal proceedings at all.[6] This is significant because, while there is

[2] *See Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser B) No. 3 (1961) [Reproduced in accompanying notebook, Tab 24].

[3] *See Contrada v. Italy*, 73 Eur. Ct. H.R. (1998) [Reproduced in accompanying notebook, Tab 17].

[4] *See Handyside v. United Kingdom*, 5 Eur. Ct. H.R. (2003) [Reproduced in accompanying notebook, Tab 22].

[5] *See Durand and Ugarte Case*, Judgment of August 1 6, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 68 (2000) [Reproduced in accompanying notebook, Tab 18].

[6] *Prosecutor v. Kupreskic*, IT-95-16-T, para. 723 (Jan. 14, 2000). [Reproduced in accompanying notebook, Tab 28].

overwhelming support for the use of the principle in the European Court and the Inter-American Court, these courts are not criminal courts.

The most important reason to prohibit criminal courts from finding violations of crimes not pled in the indictment is that a defendant has a right to promptly be informed of the charges against him. If criminal courts permit the prosecutor to allege criminal violations not pled in the original indictment, the defendant may not be able to properly or adequately prepare his defense. The application of the principal of *iura novit curia* in criminal courts poses a serious danger because the defendants are accused of criminal acts which carry penalties of imprisonment. Moreover, in international criminal tribunals like the Special Court, the defendant is charged with violations of international criminal law and/or violations of certain domestic criminal laws.

Finally, the Trial Chamber in *Kupreskic* indicated that an accused may not be convicted of charges not pled in the indictment.[7] Should the prosecutor wish to add a different crime based on the facts of the case, he should request leave to amend the indictment.[8] However, a defendant may be convicted of a lesser included crime that was not formally charged in the indictment because the elements are the same and therefore the defendant was put on notice from the original indictment and he had ample time to prepare his defense.[9]

2. National Systems

[7] Prosecutor v. Kupreskic, IT-95-16-T, para. 748 (Jan. 14, 2000). [Reproduced in accompanying notebook, Tab 28].

[8] *Id*. [Reproduced in accompanying notebook, Tab 28].

[9] *Id*. at 745. [Reproduced in accompanying notebook, Tab 28].

National systems vary on the application of the principle of *iura novit curia*, which is due, in large part, to the differences between the roles of the judiciaries in civil law and common law systems. In civil law countries the judges also play the role of fact-finder. These judges participate in the investigation process. They are responsible for introducing and finding evidence and they decide what evidence should be used for both sides. In most civil law countries, if the judge determines that there is a different crime or more serious crime that should be added to the charges, the prosecutor must give the defendant prompt notice in order to prepare his defense in response to the new charges.[10]

Common law countries do not permit the judges to raise or consider legal arguments that the parties have not brought before the court. In general, judges may give the prosecutors leave to amend the charges and notice must be given to the defendant.[11] The defendant must have sufficient time to answer those charges.[12] An exception to this general rule is found in the United States and the United Kingdom, which permit the conviction of an accused on lesser included offenses even when not charged in the indictment. In such cases, leave to amend is not necessary.[13]

II. BACKGROUND

Formerly a British colony, Sierra Leone gained its independence from the United Kingdom in 1961.[14] Since that time, the government of Sierra Leone was corrupt and

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[10] *See FED. R. CRIM. P.* 3, 7 (2006). [Reproduced in accompanying notebook, Tab 6].

[11] *See FED. R. CRIM. P.* 7(e) (2006). [Reproduced in accompanying notebook, Tab 6].

[12] *See FED. R. CRIM. P.* 31(c). [Reproduced in accompanying notebook, Tab 6]; *See CRIMINAL LAW ACT OF 1967*, SECTION 6(3) (U.K.). [Reproduced in accompanying notebook, Tab 5].

[13] *See Fed. R. Crim. P.* 31(c). [Reproduced in accompanying notebook, Tab 6].

[14] Celina Schocken, Note, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 437 (2002). [Reproduced in accompanying notebook, Tab 41].

mismanaged.[15] In March 1991, the Rebel United Front (the "RUF") entered Sierra Leone and months later, front line soldiers overthrew the president of Sierra Leone, Joseph Momoh.[16] Those former front line soldiers entered into peace talks with the RUF, but they were to no avail.[17] Starting in March 1991, over 400,000 people had limbs amputated and thousands of children were murdered, raped, or forced into service as soldiers.[18] As a response to atrocities committed during the civil war, the Government of Sierra Leone and United Nations jointly established the Special Court for Sierra Leone to punish those responsible for the most egregious human rights violations.[19] The Special Court has jurisdiction to over international humanitarian law violations and certain domestic Sierra Leonean laws.[20]

III. LEGAL DISCUSSION

A. INTERNATIONAL COURTS

1. International Criminal Courts

a. The International Criminal Tribunal for the Former Yugoslavia

Article 14 of the Statute of the Special Court for Sierra Leone states that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (the "ICTR") "shall be applicable *mutatis mutandis* to the conduct of the legal proceedings

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[15] *Id*. at 438. [Reproduced in accompanying notebook, Tab 41].

[16] *Id*. [Reproduced in accompanying notebook, Tab 41].

[17] *Id*. [Reproduced in accompanying notebook, Tab 41].

[18] *Id*. at 436. [Reproduced in accompanying notebook, Tab 41].

[19] *Id*. at 437. [Reproduced in accompanying notebook, Tab 41].

[20] Laura Dickinson, Note, *The Promise of Hybrid Courts*, 97 A.J.I.L. 295, 300 (2003). [Reproduced in accompanying notebook, Tab 42].

before the Special Court."[21] Article 14 of the Statute of the ICTR applies the rules of the ICTY *mutatis mutandis*.[22] Therefore, the judgments of the ICTY concerning the rules of procedure and evidence are crucial to applying and interpreting the rules of procedure and evidence for the Special Court.

The most important case from the ICTY touching this issue is *Prosecutor v. Kupreskic*.[23] In that case, the Trial Chamber specifically stated the steps the prosecutor must take if she failed to allege a crime which, during the course of the trial, she discovers would amount to a violation of a crime over which the Tribunal has jurisdiction.[24] In its discussion, the Trial Chamber noted that the Statute of the ICTY permits cumulative charges and alternative verdicts.[25] For example, while specific acts may constitute more than one crime, the prosecutor should allege violations of all crimes it considers may have been committed even when the facts may only prove that one has actually been violated.[26] Further, this practice is like a "catch all" so that even if a

[21] Statute of Special Court for Sierra Leone, art. 14 [hereinafter referred to as the Statute of the SCSL]. [Reproduced in accompanying notebook, Tab 12].

[22] "The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary." Statute of the International Tribunal for Rwanda, adopted by Security Council on November 8, 1994, U.N. Doc. S/RES/955, art. 14 (1994), *available at* http://www/ictr.org [hereinafter referred to as the ICTR Statute] [Reproduced in accompanying notebook, Tab 10].

[23] Prosecutor v. Kupreskic, IT-95-16-T (Jan. 14, 2000). [Reproduced in accompanying notebook, Tab 28].

[24] *Id*. at 742-743. [Reproduced in accompanying notebook, Tab 28].

[25] *Id*. at 727. [Reproduced in accompanying notebook, Tab 28].

[26] *Id*. [Reproduced in accompanying notebook, Tab 28].

specific crime alleged is not proven, the facts may support a conviction on a different or lesser included offense.[27]

The Trial Chamber specifically noted that "at least for the time being it is questionable that the *iura novit curia* principle . . . fully applies in international criminal proceedings."[28] In assessing whether *iura novit curia* should be applied, the Trial Chamber discussed two competing interests – the right of the accused to be informed of the charges against him so as to prepare his defense and the right of the prosecutor to efficiently fulfill his mission.[29] On the one hand, the ICTY Statute provides the defendant with the right to be apprised of the charges against him and the legal characterization of the facts.[30] On the other hand, the prosecutor is responsible for prosecuting violations of humanitarian law.

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[27] *Id*. [Reproduced in accompanying notebook, Tab 28].

[28] *Id*. at 743. [Reproduced in accompanying notebook, Tab 28].

[29] *Id*. at 724. [Reproduced in accompanying notebook, Tab 28].

[30] "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal." Statute 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, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827, art. 21(4) (1993) [hereinafter referred to as ICTY Statute]. [Reproduced in accompanying notebook, Tab 11].

According to the Trial Chamber, the most appropriate way to reconcile these interests is as follows:[31] If the prosecutor determines that more than one provision of the ICTY Statute is violated by the same facts charged, she may make cumulative charges in the indictment. However it is preferred that, if possible, the prosecutor should charge in the alternative, which may depend on the elements the prosecutor is able to prove. Therefore, the more serious offense should be charged in the indictment and the indictment must also state that if that crime is not proved, the lesser charge may be proved.[32] If the prosecutor charges the accused of a "special" crime, an alternative violation of "broader provision" may also be alleged "so that if the evidence turns out to be insufficient with regard to the special provision (the *lex specialis*) , it may still be found compelling with respect to a violation of the broader provision (the *lex generalis*).[33] The Trial Chamber recommended that the prosecutor "should refrain as much as possible from making charges based on the same facts[.]"[34]

It may turn out that the prosecutor wrongly classified the facts and a crime was not charged but the evidence demonstrates that the uncharged crime was committed.[35] According to the Trial Chamber, to permit a conviction on that basis would not adequately protect the rights of the accused because he "would not be able to prepare his defence with a well-defined charge."[36] The Court stated:

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[31] Kupreskic, at 727. [Reproduced in accompanying notebook, Tab 28].

[32] *Id*. [Reproduced in accompanying notebook, Tab 28].

[33] *Id*. [Reproduced in accompanying notebook, Tab 28].

[34] *Id*. [Reproduced in accompanying notebook, Tab 28].

[35] IId. at 728. [Reproduced in accompanying notebook, Tab 28].

[36] *Id*. at 740. [Reproduced in accompanying notebook, Tab 28].

> even though the *iura novit curia* principle is normally applied in international judicial proceedings, under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of the accused are at stake. It would also violate Article 22(4)(a) of the Statute, which provides that an accused shall be informed "promptly and in detail" of the "nature and cause of the charge against him."[37]

The Statute for the Special Court has an identical provision which provides that the accused is guaranteed the right "to be informed promptly and in detail in a language which he or she understand of the nature and cause of the charge against him or her."[38] If, during the trial, the prosecutor discovers that a different offense (with different elements) not charged in the indictment has been proved, he should request leave to amend the indictment.[39] If the prosecutor concludes that a more serious offense has been committed then he must also request leave to amend the indictment so the defendant may prepare his defense.[40]

If the offense is a lesser included offense not charged in the indictment but the facts during trial support such a charge, the prosecutor is not required to amend the indictment because "the accused has been given the opportunity to contest all the elements of the crime charged. If one of the elements is lacking, this does not entail that the crime has not been committed, provided all the elements of the lesser included offense are proven."[41] The prosecutor should nevertheless "give prompt notice" to the

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[37] *Id*. [Reproduced in accompanying notebook, Tab 28].

[38] Statute of the Special Court for Sierra Leone, art. 17. [Reproduced in accompanying notebook, Tab12].

[39] Kupreskic, at 746. [Reproduced in accompanying notebook, Tab 28].

[40] *Id*. [Reproduced in accompanying notebook, Tab 28].

[41] *Id*. at 743. [Reproduced in accompanying notebook, Tab 28].

defendant that a lesser crime is alleged so "the acused [*sic*] may know the particulars of the case against him or her."[42]

In *Prosecutor v. Delalic*, defendants Delic and Landzo were charged with willful killing and murder.[43] The evidence did not support a conviction on that basis; however, the facts proved at trial established their guilt for "wilfully causing great suffering or serious injury to body or health, a grave breach of the Geneva Conventions of 1949 punishable under Article 2 of the Statute, and cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute."[44] The Trial Chamber stated that "it is a principle of law that a grave offence includes a lesser offence of the same nature."[45]

While the Trial Chamber declared that it is uncertain whether the principle of *iura novit curia* fully applies in the context of international *criminal* proceedings, it is applied by the ICTY in a limited manner. For example, in *Delalic*, the prosecution requested leave to call an additional expert witness after being apprised of new facts.[46] The Trial Chamber ordered that the prosecution give notice to the defendant and an oral hearing on the motion was conducted. In granting the prosecutor's motion, the Trial Chamber stated that the rights of the defendant would not be unduly affected and that notice was

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[42] *Id*. [Reproduced in accompanying notebook, Tab 28].

[43] Case No. IT-96-21-T, Trial Judgment, 16 November 1998. [Reproduced in accompanying notebook, Tab 26].

[44] *Id*. at 866. [Reproduced in accompanying notebook, Tab 26].

[45] *Id*. [Reproduced in accompanying notebook, Tab 26].

[46] Prosecutor v. Delalic, Order on the Prosecution's Motion for Leave to Call Additional Expert Witnesses (Nov. 13, 1997). [Reproduced in accompanying notebook, Tab 27].

advanced enough to give defendants adequate time to prepare their defense.[47] It noted that "the principle of *iura novit curia* does not prevent the Trial Chamber from being addressed on certain matters of law by either of the parties."[48]

b. The International Criminal Court

Under Rule 120 of the Rules of Procedure and Evidence (the "Rules") of the International Criminal Court (the "ICC") the prosecutor must provide the pre-trial chamber with "a detailed description of the charges together with a list of evidence which he or she intends to present at the hearing" no later than 30 days before the confirmation hearing.[49] However, Article 61(4) of the Rome Statute permits the prosecutor to amend or withdraw any charges against the defendant as long as reasonable notice is given.[50] According to the Rules, the defendant must be informed no later than 15 days before the date of the hearing.[51] Notice must include a list of the evidence the prosecutor intends to present at the hearing.[52]

Prior to the trial, if the newly added charges are more "more serious" charges, the pre-trial chamber may hold additional confirmation hearings on the new charges raised.[53] Similar to the ICTY and ICTR, the ICC Statute provides that the defendant is "to be

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[47] *Id*. [Reproduced in accompanying notebook, Tab 27].

[48] *Id*. [Reproduced in accompanying notebook, Tab 27].

[49] U.N. Doc. PCNICC/2000/1/Add.1 (2000) [hereinafter referred to as ICC Rules of Procedure and Evidence]. [Reproduced in accompanying notebook, Tab 7].

[50] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998) [hereinafter referred to as the Rome Statute]. [Reproduced in accompanying notebook, Tab 8].

[51] ICC Rules of Procedure and Evidence, at Rule 120(4). [Reproduced in accompanying notebook, Tab 7].

[52] *Id*. [Reproduced in accompanying notebook, Tab 7].

[53] *Id*. at Rule 128 [Reproduced in accompanying notebook, Tab 7].

informed promptly and in detail of the nature, cause and content of the charge"[54] and that the defendant must be given "adequate time and facilities for the preparation of the defence."[55]

2. Other International Courts

a. The International Court of Justice

The International Court of Justice (the "ICJ") is the earliest authority for the application of the *iura novit curia* principle in international proceedings. It was first used in the *Case of the S.S. Lotus*, which concerned a collision between the Lotus, a French mail steamer, and a Turkish collier on the high seas.[56] As a result of this collision, eight Turkish nationals were killed. The *Lotus* continued on to Constantinople.

Against objections by France, Turkish authorities arrested and charged the French officer with manslaughter. After many demands by France and by special agreement between France and Turkey, the case was referred to the ICJ. The ICJ was asked to decide two issues: 1) Whether Turkey had jurisdiction to prosecute Demons under principles of international law; and 2) Whether a principle of international law existed that would have prohibited Turkey from prosecuting Demons. To both issues, the ICJ answered in the negative.

France advanced three arguments in support of its positions; however, the ICJ looked beyond the arguments raised by France for any other factors to support their

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[54] Rome Statute, art. 62(1)(a). [Reproduced in accompanying notebook, Tab 8].

[55] *Id*., art. 62(1)(b). [Reproduced in accompanying notebook, Tab 8].

[56] P.C.I.J., Series A, No. 10 (1927) [Reproduced in accompanying notebook, Tab 15]. Also note at the time of this case, the ICJ was the Permanent Court of International Justice, which was established by the League of Nations in 1922. It was replaced by the ICJ in 1946 when the United Nations was established. For the purposes of this memorandum, it will be referred to as the ICJ at all times.

contentions. In doing so, the ICJ stated it "has not confined itself to a consideration of the arguments put forward[.]"[57] It also "included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement."[58]

b. The European Court of Human Rights

The European Court of Human Rights applies the civil law principle of *iura novit curia* and has done so on numerous occasions. According to the European Convention, the function of the European Court is to ensure that contracting parties to the Convention observe their commitments under it.[59] Therefore, even if the European Commission on Human Rights (the "Commission") did not bring to the Court's attention a violation of certain provision of the Convention, the ECHR, upon its own initiative, may find violations not brought before it by the parties.

In *Lawless v. Ireland*, the European Court stated that its duties under Article 19 required it to determine whether Ireland violated Article 15 of the Convention even though neither the Commission nor the Irish government made reference to it in their submissions to the European Court.[60] Article 19 states that the function of the European

[57] *Id.* [Reproduced in accompanying notebook, Tab 15].

[58] *Id.* [Reproduced in accompanying notebook, Tab 15].

[59] Convention for the Protection of Human Rights and Fundamental Freedoms, No. 4, 1950, Eur. T.S. No 5, art. 19 (1050) [hereinafter referred to as the European Convention]. [Reproduced in accompanying notebook, Tab 2].

[60] "Whereas, although neither the Commission nor the Irish Government have referred to this provision in the proceedings, the function of the Court, which is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention (Article 19 of the Convention) (art. 19), requires it to determine proprio motu whether this condition has been fulfilled in the present case." 1 Eur. H.R. Rep. 15, 40 (ser. A) (1961). [Reproduced in accompanying notebook, Tab 24].

Court is to ensure that the parties to the European Convention observe their contractual obligations.[61] Article 15 permits states to derogate from specific provisions of the Convention during times of emergency.[62]

Lawless was arrested and charged for being a member of the Irish Republican Army, an unlawful organization, and with illegal possession of incriminating documents in violation of Irish law. He initiated proceedings with the Commission alleging that his detention was in violation of several provisions of the Convention. In order to accurately determine whether Lawless's detention was in violation of the Convention, the European Court examined whether it was justified under Article 15 of the Convention.[63] Based upon the European Court's assessment of Ireland's Article 15 right to derogate from certain provisions, it held that Lawless's detention was justified.[64]

Not only may the European Court review violations of Articles of the Convention that the Commission does not bring to its attention, it may also review provisions that the Commission has deemed inadmissible. According to the ECHR in *Handyside v. United*

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[61] "To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up: (1) A European Commission of Human Rights hereinafter referred to as 'the Commission'; (2) A European Court of Human Rights." European Convention, *supra* note 59, at art. 19. [Reproduced in accompanying notebook, Tab 2].

[62] "(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed." *Id*. at art. 15. [Reproduced in accompanying notebook, Tab 2].

[63] *Lawless*, 1 Eur. Ct. H.R. (ser. B) No. 3, para. 40 (1961). [Reproduced in accompanying notebook, Tab 24].

[64] *Id.* at 38. [Reproduced in accompanying notebook, Tab 24].

Kingdom, the European Court has jurisdiction to examine allegations that arise from the facts of the case referred to it even if they had been previously declared inadmissible by the Commission. [65]

Handyside lodged a complaint with the Commission and argued that his rights under Articles 1, 7, 9, 10, 13, and 13 of the Convention and Article 1 of Protocol No. 1 were violated.[66] The Commission accepted the application regarding Article 10 of the Convention and Article 1 of Protocol No. 1 and specifically denied the admissibility of the remaining Articles under which he alleged violations.[67] The Commission later stated that it would admit Article 18 as well.[68]

The European Court agreed with the Commission that many of the Articles pled in the complaint were not relevant. However, contrary to the Commission's declaration that Article 14 was inadmissible, the European Court held that it was admissible. It stated:

> [T]he provisions of the Convention and of the Protocol form a whole; once a case is duly referred to it, the Court may take congnisance of every question of law arising in the course of the proceedings and concerning facts submitted to its examination by a Contracting State or by the Commission. Master of the characterization to be given in law to these fact, the Court is empowered to examine them, if it deems it necessary and if need be *ex officio*, in light of the Convention and the Protocol as a whole.

[65] *Handyside*, 5 Eur. Ct. H.R. (ser. A) No. 24 (1976) [Reproduced in accompanying notebook, Tab 22].

[66] *Id*. at 36. [Reproduced in accompanying notebook, Tab 22].

[67] *Id*. at 37. [Reproduced in accompanying notebook, Tab 22].

[68] *Id*. at 41. [Reproduced in accompanying notebook, Tab 22].

Ultimately, the European Court did not find a violation of Article 14, yet it considered whether there was a violation despite the Commission's rejection of the application of that Article as "manifestly ill-founded."[69]

The application of the *iura novit curia* principle in the European Court was further explained in *Guerra v. Italy*[70] and *Contrada v. Italy*.[71] Both cases deal specifically with allegations submitted to the European Court that were not alleged in the initial applications, yet they were decided differently. The European Court's determination in these cases is illuminating regarding how and under what circumstances the principle is applied.

In *Guerra*, the Italian government failed to provide the local population with information about risks associated with a nearby chemical plant. This failure to inform was a violation of Article 10 of the Convention, which states that "[e]veryone has the right . . . to receive and impart information and ideas without interference by public authority and regardless of frontiers."[72] The only question presented to the Commission was whether there was violation of Article 2 (dealing with the right to life) and Article 10. Two members of the Commission reasoned that the case could also be analyzed under Article 8 of the Convention, which provides that everyone has the right to respect for his private and family life and home without the interference of public authorities.[73]

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[69] *Id*. at 66. [Reproduced in accompanying notebook, Tab 22].

[70] 7 Eur. Ct. H.R. (1998). [Reproduced in accompanying notebook, Tab 21].

[71] 73 Eur. Ct. H.R. (1998). [Reproduced in accompanying notebook, Tab 17].

[72] European Convention, *supra* note 59, at art. 10. [Reproduced in accompanying notebook, Tab 2].

[73] *Guerra*, at 40. [Reproduced in accompanying notebook, Tab 21].

At the hearing and before the European Court, the applicants relied on Articles 2 and 8 of the Convention.[74] The government argued that the complaints under Articles 2 and 8 fell outside the compass of the case because it was confined to the decision on admissibility given by the Commission.[75] The European Court responded that:

> [the Court] is the master of the characterization to be given in law to the facts of the case, it does not consider itself bound by the characterization given by an applicant, a government or the Commission. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on.[76]

The European Court declared that its jurisdiction is determined by the decision on admissibility of the application, which is determined by the Commission.[77] However, the European Court "may deal with any issue of fact or law that arises during the proceedings before it."[78]

The applicants did not expressly ground their cases in Article 8 and Article 2, nor were they submitted in the proceedings before the Commission.[79] The European Court nevertheless had jurisdiction to considered them because they "were closely connected with the [grounds] pleaded, namely that giving information to the applicants, all of whom

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[74] *Id*. at 41. [Reproduced in accompanying notebook, Tab 21].

[75] *Id*. at 42. [Reproduced in accompanying notebook, Tab 21].

[76] *Id*. at 44 [Reproduced in accompanying notebook, Tab 21]. *See also Powell and Rayner v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) No. 172, para. 29 (1990) [Reproduced in accompanying notebook, Tab 25].

[77] *Guerra*, at para. 44. [Reproduced in accompanying notebook, Tab 21].

[78] *Id*. [Reproduced in accompanying notebook, Tab 21].

[79] *Id*. at 45. [Reproduced in accompanying notebook, Tab 21].

lived barely a kilometre from the factory, could have had a bearing on their private and family life and their physical integrity."[80] The European Court held that the Italian government violated Article 8.[81]

The applicant in *Contrada* was a senior police officer accused of involvement in mafia-type organizations in violation of Italian law. A warrant for his arrest was issued based on the statements of former mafia members who cooperated with the authorities. On November 4, 1994 Contrada submitted an application to the Commission, where he alleged violations of Articles 5(1)(c) claiming that his arrest was unlawful; 5(3) because the length of his detention was too long; 6(1) because the length of the proceedings were too long; 6(2) on the basis that his right to be presumed innocent were violated; and Articles 16 and 17 as a result of the aforementioned Articles. However, in his final submissions to the European Court, Contrada requested it to find violations of Article 3,[82] based on the solitary conditions of his detention, and Article 5(1)(c) and 5(3).

The Commission held the Article 5(1)(c) allegation as inadmissible but noted "that although Mr. Contrada complained from the outset that he been detained for an unreasonable period (Article 5 § 3), the complaint under Article 3 concerns the actual conditions of detention, not its length."[83] Contrada relied on *Guerra* to support his final submission to the European Court of Article 3 although he did not raise the allegation before the Commission. He argued that the European Court could exercise jurisdiction

[80] *Id*. [Reproduced in accompanying notebook, Tab 21].

[81] *Id.* at 60. [Reproduced in accompanying notebook, Tab. 21].

[82] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, *supra* note 59, at art. 3. [Reproduced in accompanying notebook, Tab 2].

[83] *Contrada*, at 49. [Reproduced in accompanying notebook, Tab 17].

over the Article 3 alleged violation because it was closely connected to the alleged violation of Article 5(3) as a result of his long detention period.[84] The European Court disagreed and held that it did not have jurisdiction to consider the Article 3 violation because, even though both Articles concerned Contrada's deprivation of liberty, the Article 3 violation was identical to the one already declared inadmissible by the Commission.[85] Therefore, to consider the Article 3 violation would be tantamount to a new complaint that is unconnected to the Article 5(3) allegation.[86]

The case law of the ECHR demonstrates three ways that it applies the *iura novit curia* principle. First, *Lawless* indicates that the European Court may review possible violations of the Convention *sua sponte*.[87] Second, the ECHR could review alleged violations of articles that were previously deemed inadmissible by the Commission as was done in *Handyside*.[88] Third, according to *Guerra*, the European Court permits the parties to raise additional allegations before it even if they were not submitted to the Commission for review. In *Guerra* the European Court stated that if the newly submitted allegation is not closely connected to those submitted in the complaint to the Commission, the European Court could deem it inadmissible, as it stated in *Contrada*. These cases demonstrate that the European Court is not bound to examine violations not raised by the parties.

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[84] *Id*. at 45. [Reproduced in accompanying notebook, Tab 17].

[85] *Id*. at 50. [Reproduced in accompanying notebook, Tab 17].

[86] *Id*. [Reproduced in accompanying notebook, Tab 17].

[87] *Lawless*, at 40. [Reproduced in accompanying notebook, Tab 24].

[88] "Master of the characterisation to be given in law to these facts, the Court is empowered to examine them, if it deems if necessary and if need be ex officio, in the light of the Convention and the Protocols a whole[.]" *Handyside*, at 41. [Reproduced in accompanying notebook, Tab 22].

c. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights also adheres to the principle of *iura novit curia* to make "use of the powers inherent to its judicial function."[89] The Inter-American Court has stated that under that principle "the Court is not restricted to the legal arguments of the parties, since clarification of the factual aspects often depends on the parties' actions."[90]

Like the European Court, the Inter-American Court is not bound by the findings of the Inter-American Commission. For example, in the *Velasquez Rodriguez Case*,[91] the "Commission did not specifically allege [a] violation of Article 1(1)[92] of the Convention" but the Inter-American Court was not precluded from applying it."[93] According to the Inter-American Court, Article 1(1):

> constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties does not expressly invoke them.[94]

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[89] *Genie Lacayo Case*, Application for Judicial Review of the Judgment of January 29, 1997, Inter-Am. Ct. H.R. (ser. C) No. 45 (1999), dissenting opinion of Judge Antonia A. Cancado Trindade, at para. 7. [Reproduced in accompanying notebook, Tab 20].

[90] *Constitutional Court Case*, Competence, Judgment of September 24, 1999, Inter-Am. Ct. H.R. (ser. C) No. 55, at 58 (1999). [Reproduced in accompanying notebook, Tab 16].

[91] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (ser. C) No. 4 (1988). [Reproduced in accompanying notebook, Tab 36].

[92] "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). [Reproduced in accompanying notebook, Tab 1].

[93] *Velasquez Rodriguez*, at 163. [Reproduced in accompanying notebook, Tab 36].

[94] *Id*. [Reproduced in accompanying notebook, Tab 36].

Similarly, in the *Durand and Ugarte Case* the Inter-American Court was asked to decide whether the petitioners' rights to be free from arbitrary deprivation of life were violated.[95] In its decision, the Inter-American Court also looked into whether petitioners' rights to be free from torture or cruel, inhuman, or degrading punishment or treatement during detention had also been violated even though the issue was not submitted to the court by the Commission or the parties. Although the Inter-American Court ultimately did not find a violation of petitioners' rights during detention, it stated that it was not precluded from examining that issue because of the general principal of *iura novit curia*. The Inter-American Court noted that the principle of *iura novit curia* is "used repeatedly by the international jurisdiction in the sense that a judge is entitled and even has the *obligation* to implement the corresponding legal dispositions in a proceeding, even when the parties are not explicitly invoked."[96]

3. Conclusion

The European Court has explicitly declared that, in its review, it is not bound by the legal arguments put before it. Therefore, if a complainant fails to argue a violation of an article of the Convention, the judges, at their discretion, may review any other articles and find a violation of articles not pled based on the facts presented in the complaint. The European Court is also not bound to the findings of the Commission and has wide discretion whether it will or will not exercise the principle of *iura novit curia*. Though it

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[95] *Durand and Ugarte Case*, Judgment of August 16, 2000, Inter-Am. Ct. H.R. (ser. C) No. 89 (2000). [Reproduced in accompanying notebook, Tab 18].

[96] *Id*. at para. 76. [Reproduced in accompanying notebook, Tab 18].

may advance arguments that neither party has raised based on the facts, it does not feel *bound* to do so.

The Inter-American Court goes further than the European Court regarding the application of the principle of *iura novit curia* in that it is *obligated* to review possible violations of the Inter-American Convention that were not raised by the parties. Further, it may do so even when the Commission has declared a specific provision inadmissible.

B. NATIONAL COURTS

1. Civil Law Systems

Courts in civil law countries have broad powers to determine applicable law in cases due to the role that judges play. The role of judges in civil law countries like France and Germany are similar to that of the "prosecutor or the investigating magistrate during the preliminary investigation, i.e., to investigate and determine the truth."[97] Civil law systems are inquisitorial and therefore it is the duty of the judge to "take all measures which he believes are useful to uncover the truth."[98] Part of the process requires the judge to decide the applicable law that should be applied to the facts. In fact, "in [civil law] countries the principle *iura novit curia* (the court is expected and required to establish the law, while the facts must be proved by the parties) prevails."[99]

a. Germany

In Germany, Section 264 of the Code of Criminal Procedure permits the judge to apply the principle of *iura novit curia*. This section states that "[t]he court is not bound

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[97] STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 179 (2002). [Reproduced in accompanying notebook, Tab 39].

[98] CODE PÉNAL [C. PEN.] art. 310. [Reproduced in accompanying notebook, Tab 3].

[99] Kupreskic, at 733. [Reproduced in accompanying notebook, Tab 28].

by the classification of the act on which the order opening the main proceeding is based."[100] Section 265 elaborates on this principle and provides that the court may change the legal classification of the charges against the accused, but it must first advise the accused of the change so as to properly prepare his defense. [101] The defendant may only be convicted of the crime with which he is charged; however, if the court decides to change the legal classification of the charge he must be given the opportunity to prepare his defense against the changed classification. Section 265(I) states:

> The defendant cannot be convicted on the basis of a criminal law other than the law cited in the judicially admitted public charge without having first been especially advised of the change in the legal classification and without having been afforded an opportunity to defend himself.

If the penalty to which the accused is exposed is greater because of a change in legal classification, the court must first give the accused notice and permit him to prepare his defense accordingly. [102] If the accused finds that more time is needed to prepare his defense for a new and more serious crime, he may make a motion to postpone the trial.[103]

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[100] Strafprozeßordnung, StPO (German Criminal Procedure Code) art. 265. [Reproduced in accompanying notebook, Tab 13].

[101] *Id*. [Reproduced in accompanying notebook, Tab 13].

[102] "The same procedure shall be followed if circumstances, specifically provided by the criminal law, appear first in the trial, which increase the liability to punishment or which warrant the imposition of a measure of prevention and reform." *Id*., art. 265(II). [Reproduced in accompanying notebook, Tab 13].

[103] "The main trial shall be postponed upon the defendant's motion if, claiming to be insufficiently prepared for the defense, he contests newly appearing circumstances which permit the application against him of a more severe criminal law than the law cited in the judicially admitted public charge, or which belong to those mentioned in the second subsection." *Id*., art. 265(III). [Reproduced in accompanying notebook, Tab 13].

The court may postpone the trial *sua sponte* if it believes the defense needs more time to prepare as a result of a recharacterization of the facts.[104]

b. France

The procedure in France is similar to that in Germany. According to Article 283(1) of the French Code of Criminal Procedure, if the president of the assize court – the highest criminal court in France –finds, prior to trial, that the original charges are incomplete or that new elements have been revealed, he may order further investigation into the facts.[105] This is not problematic because the case against the accused has not begun. Once proceedings begin, the competence of the assize court in felony cases is fixed by a decree of remand by the indicting chamber if it is a final decree.[106] The decree of remand, even when final, does not limit the court's power to add aggravating charges or to give a different legal characterization of the facts presented.[107] Article 350 reads:

> If one or more aggravating circumstances not mentioned in the decree of remand appear during the trial the president shall pose one or more special questions.

Article 251 reads:

> If it appears from the trial that the act admits of a legal qualification other than that given it by the decree of remand of the president ought to pose one or more subsidiary questions [to the jury].

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[104] "In other instances the court shall, upon motion or upon its own motion, also postpone the main trial if this appears appropriate for sufficient preparation of the prosecution or the defense because of the changes in the factual situation." *Id*., art. 265(IV). [Reproduced in accompanying notebook, Tab 13].

[105] "The president, if the investigation seems to him to be incomplete or if some new elements have been revealed since its closure, may order any acts of investigation that he deems useful." C. PEN. art. 283(1). [Reproduced in accompanying notebook, Tab 3].

[106] *Id*., art. 594. [Reproduced in accompanying notebook, Tab 3].

[107] *Id*., arts. 350-351 [Reproduced in accompanying notebook, Tab 3].

These two articles indicate that the severity of the crime may be increased by aggravating circumstances and that the court may make a different legal classification at the end of the trial based on the same facts. In that case, there is no notice given to the defendant. Instead, the president of the court submits questions to the jury pertaining to the aggravating circumstances and/or the different legal characterization to determine guilt.

c. Italy

In Italy the court is empowered to give a different legal definition of the facts than those in the original charge as long as the different legal definition of the crime is within the jurisdiction of that court.[108] When the facts at trial remain unchanged, the court is not bound by the legal classification and may find a crime more serious than the one charged. In this situation, the court is not required to advise the accused.[109] Should the court find the facts "are different from those set out in the indictment, or if the Prosecutor sets forth a new charge, the court must return the file to the Prosecutor and enable the accused to prepare his defence."[110]

2. Common Law Systems

a. United Kingdom

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[108] Nella sentenza il giudice puÚ dare al fatto una definizione giuridica diversa da quella enunciata nell'imputazione, purchË il reato non ecceda la sua competenza nË risulti attribuito alla cognizione del tribunale in composizione collegiale anzichË monocratica.(comma sostituito dal D.Lgs. 19.2.1998, n.51)ovvero non risulti tra quelli per i quali Ë prevista l''dienza preliminare questa non si Ë tenuta. CODICE DI PROCEDURA PENALE [C.P.P.] art. 521(1) (Italy). [Reproduced in accompanying notebook, Tab 4]. ("The judge, in his sentence, can give a juridical definition of the fact, different from the one written in the charge, as long as the charge is under his range of power and as long as the charge should not be judged by a court, and only if the charge can't be judged in a preliminary phase.") Translated by Marco Brunnetti.

[109] Kupreskic, at 733. [Reproduced in accompanying notebook, Tab 28].

[110] *Id*., at 737. [Reproduced in accompanying notebook, Tab 28].

In England, Section 6(3) of the Criminal Law Act of 1967 states:

> Where, on a person's trial on indictment for any offence except treason or murder, the jury finds him guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence[111]

Therefore, the jury may convict a suspect of a lesser included offense even if it was not specifically pled in the indictment. It may also convict the defendant of other offenses that were not pled in the indictment. For example, the defendant in *R v. Mandair*[112] was charged with "causing" grievous bodily harm with intent but the jury was instructed that it could find him guilty of the lesser included offense of "inflicting" grievous bodily harm. The defendant was found guilty of the lesser offense.

On appeal Mandair argued that the jury should have been instructed on the elements of the lesser offense because "causing" and "inflicting" are different elements. Writing the opinion for the court, Lord Mackay held that the word "'cause' . . . is wide enough to include any action that could amount to inflicting grievous bodily harm . . . where the word 'inflict' appears as an alternative to 'wound.'"[113] Therefore, no instruction was necessary and an alternative verdict was proper. The language of Section 6(3) of the Criminal Law Act specifically permits a conviction on a lesser included offense even if it was not pled in the indictment and *Mandair* exemplifies this principle.

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[111] Criminal Law Act, 1967, Section 6(3). [Reproduced in accompanying notebook, Tab 5].

[112] [1994] W.L.R. 700 (H.L.). [Reproduced in accompanying notebook, Tab 30].

[113] *Id*. at 214 [Reproduced in accompanying notebook, Tab 30].

More recently, however, it has been held that a defendant may not be charged with a summary offense (an offense considered a "petty" offense) if it was not pled in the indictment. In *R v. Heath*, the defendant was charged with two counts of racially aggravated assault.[114] During jury instructions, the judge instructed the jury on the two counts set in the indictment and also informed the jury they could convict the defendant with an alternative verdict on an offense that was not pled in the indictment.[115] The jury acquitted the defendant of the two counts of racially aggravated assault but found him guilty of common assault.[116] On appeal, the court quashed the conviction and held that a defendant could not be found guilty of a lesser summary offense of common assault unless it was already in the indictment or added to the indictment.[117]

b. United States

In the United States, Rule 3 of the Federal Rules of Criminal Procedure (the "Rules of Criminal Procedure") states that a complaint must include the facts that constitute the offense with which the defendant is charged.[118] Once the defendant is charged, the indictment is presented to the grand jury,[119] which is responsible for examining the evidence and issuing indictments for the crimes alleged.[120] The purpose of

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[114] [2004] E.W.C.A. Crim. 3126 [Reproduced in accompanying notebook, Tab 29].

[115] *Id*. [Reproduced in accompanying notebook, Tab 29].

[116] *Id*. [Reproduced in accompanying notebook, Tab 29].

[117] *Id*. [Reproduced in accompanying notebook, Tab 29].

[118] FED. R. CRIM. P. 3. [Reproduced in accompanying notebook, Tab 6].

[119] FED. R. CRIM. P. 7. [Reproduced in accompanying notebook, Tab6]. The grand jury indictment stems from the guarantee of the Fifth Amendment to the U.S. Constitution, which states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of a grand jury . . . ." U.S. CONST. amend. V.

[120] YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 788 (11th ed. 2005). [Reproduced in accompanying notebook, Tab 40].

the grand jury is to protect the accused from "mistaken and vindictive prosecutions" and to "ensure that no person is charged on evidence insufficient to justify a prosecution."[121] Early U.S. case law on this subject focused on the right of the grand jury to indict; however, implicit is the right of the accused to be informed of all the charges against him. If the grand jury decides that there is enough evidence to indict the accused, in the absence of a guilty plea, the case is set for trial. According to Rule 7(3), the prosecutor may amend the indictment any time before the verdict of the grand jury if there is an addition or different offense charged.[122]

At trial, the prosecutor's case may only be based on the charges that were presented to the grand jury. In delivering a verdict, the jury may only be instructed on the crimes alleged. Rule 31(c) of the Federal Rules of Criminal Procedure states that a defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit the offense the charged.[123] Therefore, if an offense is not charged in the indictment, but it is necessarily included in the crime with which the defendant was charged, the grand jury may convict on a lesser charge without amending the indictment. This is because the defendant had notice of the elements of the crime charged and could properly prepare his defense. Further, a defendant may be convicted of an "attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right."[124] However, a defendant may not be convicted of

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[121] *Id.* [Reproduced in accompanying notebook, Tab 40].

[122] FED. R. CRIM. P. 7(e). [Reproduced in accompanying notebook, Tab 6].

[123] FED. R. CRIM. P. 31(c). [Reproduced in accompanying notebook, Tab 6].

[124] *Id.* [Reproduced in accompanying notebook, Tab 6].

a more serious crime or a crime with different elements after the grand jury indictment, even if the prosecutor were to amend the indictment.

i. Historical Underpinnings

In *Ex Parte Bain*, the U.S. Supreme Court (the "Court") was asked to decide whether, by order of the court or on the request of the prosecuting attorney, an indictment could be amended without resubmitting it to the grand jury for their approval.[125] The Court held that indictments may not be amended without reassembling the grand jury unless a statute permitted otherwise.[126]

The petitioner in *Bain* was charged with violating federal law for making a false report or statement as a cashier of a national bank.[127] The original indictment charged that the false statements made by petitioner were made "'with an intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association . . . [.]'"[128] Thirteen months after presentment to the grand jury, by motion of the United States, the court ordered an amendment to strike out the words "'the Comptroller of the Currency and.'"[129] Bain was found guilty based upon that indictment. The Supreme Court held that was not permissible. It reasoned that:

> if it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches

[125] 121 U.S. 1, 5 (1887). [Reproduced in accompanying notebook, Tab 19].

[126] *Id*. at 8 [Reproduced in accompanying notebook, Tab 19].

[127] *Id*. at 2-4. [Reproduced in accompanying notebook, Tab 19].

[128] *Id*. at 4. [Reproduced in accompanying notebook, Tab 19].

[129] *Id*. at 5. [Reproduced in accompanying notebook, Tab 19].

> to an indictment by a grand jury, as a prerequisite to a prison's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.[130]

The Court set aside the judgment against Bain because he was not actually charged with the crime upon which the grand jury indicted him.

ii. Recent Developments

More recently, in *Stirone v. United States*, the Supreme Court held that a defendant may not be convicted of an offense if it was not charged in the indictment.[131] Petitioner was convicted for interfering with interstate commerce in violation of the Hobbs Act.[132] The indictment alleged that Stirone unlawfully imported sand into Pennsylvania to be used in a steel plant. During the trial, however, the judge permitted the government to introduce evidence that Stirone also interfered with steel shipments from a Pennsylvania plant into Michigan and Kentucky. The jury was instructed that it could convict Stirone if it found that he interfered with the interstate commerce of sand or steel.[133]

The trial court did not permit an amendment to the indictment.[134] However, the Suprem Court held that because the trial court permitted the introduction of evidence steel shipments – which was not pled in the indictment – it was effectively the same as an amendment to the indictment.[135] The essential elements that must be proven for a

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[130] *Id*. at 10. [Reproduced in accompanying notebook, Tab 19].

[131] 361 U.S. 212 (1960). [Reproduced in accompanying notebook, Tab 34].

[132] *Id*. at 213. [Reproduced in accompanying notebook, Tab 34].

[133] *Id*. at 218. [Reproduced in accompanying notebook, Tab 34].

[134] *Id*. at 217. [Reproduced in accompanying notebook, Tab 34].

[135] *Id*. [Reproduced in accompanying notebook, Tab 34].

violation of the Hobbs Act are interference with interstate commerce and extortion.[136] The Court found that interference with interstate commerce – whether by sand or steel – was crucial because it was the element upon which the government's jurisdiction depended.[137] The addition of steel impermissibly broadened the charges mid-trial in violation of *Bain*.[138] According to the Court, *Bain* "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."[139] Since the interference with only one type of commerce was charged – sand – the conviction must be grounded only upon that charge "even though it be [*sic*] assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened."[140]

Amendments to indictments without resubmitting to the grand jury are permitted; however, a change in an indictment must not "'change the crime charged, nor unfairly surprise the defendants, nor create an opportunity for the government to prosecute the defendants again for substantially the same offense.'"[141] An amendment is permitted if there is no change to a material or essential element of the charge so that the defendant is prejudiced.[142] A material or essential element is "one whose specification with precise

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[136] *Id*. at 218. [Reproduced in accompanying notebook, Tab 34].

[137] *Id*. [Reproduced in accompanying notebook, Tab 34].

[138] *Id*. at 215-216. [Reproduced in accompanying notebook, Tab 34].

[139] *Id*. at 217. [Reproduced in accompanying notebook, Tab 34].

[140] *Id*. at 218. [Reproduced in accompanying notebook, Tab 34].

[141] *U.S. v. Cina*, 699 F.2d 853, 858 (7th Cir. 1983), citing *U.S. v. DeCavalcante*, 440 F.2d 1264 (3d Cir. 1971). [Reproduced in accompanying notebook, Tab 33].

[142] *Id*., citing *Berger v. United States*, 295 U.S. 78 (1935). [Reproduced in accompanying notebook, Tab 33].

accuracy is necessary to establish the very illegality of the behavior and thus the court's jurisdiction."[143] Therefore, an indictment may not be amended if it interferes with a defendant's right 1) to be informed of the charges against him so as to prepare his defense and not be taken by surprise, or 2) to be protected against another prosecution for the same offense.[144]

iii. The Greater Includes the Lesser

In *United States v. Miller*, the grand jury indictment alleged violations of mail fraud, claiming that Miller had defrauded his insurance company by lying about the value of his loss in a burglary that he consented to in advance.[145] The trial focused primarily on whether Miller possessed the property he claimed was stolen and whether he inflated the value of his actual loss.[146] Although the government moved to strike the part of the indictment pertaining to prior knowledge of the burglary, Miller objected to the change and the full indictment was submitted to the jury.[147] The jury found Miller guilty of inflating his losses. On appeal, the Court of Appeals vacated his conviction.[148]

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[143] *Id*. at 859. [Reproduced in accompanying notebook, Tab 33].

[144] *Id*. at 857, citing *Berger v. United States*, 295 U.S. 78 (1935). [Reproduced in accompanying notebook, Tab 33].

[145] 471 U.S. 130, 132 (1985). [Reproduced in accompanying notebook, Tab 35].

[146] *Id*. at 132. [Reproduced in accompanying notebook, Tab 35].

[147] *Id*. at 133. [Reproduced in accompanying notebook, Tab 35].

[148] The Court of appeals overturned his conviction because "[t]he grand jury may well have declined to indict Miller simply on the basis of his exaggeration of the amount of his claimed loss. . . . In fact it is quite possible that the grand jury would have been unwilling or unable to return an indictment based solely on Miller's exaggeration of the amount of his claimed loss even though it had concluded that an indictment could be returned based on the overall scheme involving a use of the mail caused by Miller's knowing consent to the burglary." *Id*. at 134, citing *U.S. v. Miller*, 715 U.S. 1360 (9th Cir. 1983). [Reproduced in accompanying notebook, Tab 35].

In overruling the Court of Appeals, the Supreme Court held that the indictment "clearly set forth a number of ways in which the acts alleged constituted [mail fraud] violations."[149] As a result, Miller was given notice that he would have to defend against the allegation that he overinflated his loss to his insurance company; hence, there was no prejudice to him.[150] The Court held:

> As long as the crime and elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime.[151]

The Court reviewed *Bain's* propositions that: 1) A conviction may not stand if it is based on an offense that is different than what was alleged in the grand jury's indictment; and 2) an indictment is invalidated when parts of it are struck out because courts may not speculate on whether the grand jury meant for the remaining offense to stand independently.[152] Upon review, the Court overruled *Bain's* second proposition insofar as an allegation charged in the indictment may not be deleted without invalidating the entire indictment, but upheld *Bain's* general position that additions to offenses alleged in the indictment are impermissible.[153]

iv. Lesser Included Offenses

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[149] *Id*. at 134. [Reproduced in accompanying notebook, Tab 35].

[150] *Id*. [Reproduced in accompanying notebook, Tab 35]. "Competent defense counsel certainly should have been on notice that that offense was charged and would need to be defended against." *Id*. at 135. [Reproduced in accompanying notebook, Tab 35].

[151] *Id*. at 136. [Reproduced in accompanying notebook, Tab 35].

[152] *Id*. at 142. [Reproduced in accompanying notebook, Tab 35].

[153] *Id*. at 144. [Reproduced in accompanying notebook, Tab 35].

The Rules of Criminal Procedure provide that a defendant may be found guilty of (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.[154]

In determining whether an offense is a lesser included offense of the one charged, the Supreme Court has adopted the "elements test."[155] An offense is included in another offense if the elements of the lesser offense are a subset of the elements of the greater offense.[156] In *Schmuck v. United States* the Court stated that if the prosecutor could "request an instruction on an offense whose elements were not charged in the indictment, this right of notice would be placed in jeopardy."[157]

v. Sentencing Factors Versus Elements of a Crime

In *Wooley v. United States*, Wooley was arrested and his indictment charged him with intent to distribute heroin, but the evidence at trial proved that the substance was cocaine.[158] The trial court did not permit a formal amendment to the indictment, but permitted the government to proceed on the indictment as it was "'with the understanding that what is charged is cocaine, not heroin.'"[159] The jury convicted Wooley on the evidence presented and Wooley appealed, claiming that it was an impermissible constructive amendment to the indictment.

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[154] FED. R. CRIM. PRO. 31(c). [Reproduced in accompanying notebook, Tab 6].

[155] *Schmuck v. U.S.*, 489 U.S. 705 (1989). [Reproduced in accompanying notebook, Tab 32].

[156] *Id*. at 716. [Reproduced in accompanying notebook, Tab 32].

[157] *Id*. at 718. [Reproduced in accompanying notebook, Tab 32].

[158] 697 A.2d 777, 778 (1997). [Reproduced in accompanying notebook, Tab 37].

[159] *Id*. at 779. [Reproduced in accompanying notebook, Tab 37].

The issue presented to the court of appeals was whether an element in the indictment was changed to a different element at trial.[160] The court held that:

> a change in characterizing the element from its expression in the indictment to its presentation at trial will be an amendment, not a mere variance, when the court cannot be sure from the indictment that the grand jury received facts – material to conviction on an element of the crime – which the petit jury received and could use to convict.[161]

The court of appeals reversed the trial court's decision because it concluded that 1) a grand jury's decision to indict for heroin and cocaine are different and 2) "a criminal defendant is entitled to be tried for what the grand jury said on the basis of what it was told, not tried for what the grand jury might have done if it had been told something else."[162] Therefore, if the facts proved at trial are different than in the indictment, but the elements are unchanged, the charges may be dismissed if there is prejudice to the defendant.

The case law is unambiguous that the charges against an accused may not be broadened, nor can elements in the indictment be different than those charged at trial. In some instances, however, there has been confusion about whether a fact is an element of an offense which broadens the charge or merely a sentencing factor. In *Jones v. U.S.*[163] the Court held that the difference between an element and a sentencing factor is that former must be charged in the indictment, proven beyond a reasonable doubt, and submitted to the jury and the latter does not. If a fact increases the penalty then it must be considered an element.

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[160] *Id*. at 783. [Reproduced in accompanying notebook, Tab 37].

[161] *Id*. [Reproduced in accompanying notebook, Tab 37].

[162] *Id*. at 784. [Reproduced in accompanying notebook, Tab 37].

[163] 526 U.S. 227 (1999). [Reproduced in accompanying notebook, Tab 23].

Jones was indicted for violation of aiding or abetting the use of a firearm during and in relation to a crime of violence and carjacking or aiding or abetting carjacking.[164] The indictment made a general reference to the statute, which included three subsections,[165] yet did not specifically reference any of the subsections and did not charge any of the facts in the latter two subsections.[166] The jury found Jones found guilty of carjacking. The jury instructions defined the elements by using those in the main paragraph of the statute and did not make reference to the three subsections.[167]

A conviction based upon the main paragraph carried a maximum 15-year sentence.[168] Prior to the sentencing hearing, the government recommended that Jones receive a 25-year sentence for the carjacking because a victim suffered serious bodily injury. Jones objected to the recommendation and argued that "serious bodily injury" was an added element of the offense, which was not pled in the indictment nor submitted to the jury.[169] The subsection not only provided for more severe punishment, but it was conditioned on more facts "that seem[ed] quite as important as the elements in the principal paragraph"[170] and therefore it was not merely a sentencing enhancement.[171]

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[164] *Id*. at 229. [Reproduced in accompanying notebook, Tab 23].

[165] *Id*. The statute read: Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or present of another by force and violence or by intimidation, or attempts to do so, shall – (1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this titled or imprisoned not more than 25 years, or both, and (3)if death results, be fined under this title or imprisoned for any number of years up to life, or both. *Id*.

[166] *Id*. at 231. [Reproduced in accompanying notebook, Tab 23].

[167] *Id*. [Reproduced in accompanying notebook, Tab 23].

[168] *Id*. [Reproduced in accompanying notebook, Tab 23].

[169] *Id*. [Reproduced in accompanying notebook, Tab 23].

[170] *Id*. at 233. [Reproduced in accompanying notebook, Tab 23].

One year later the Supreme Court ruled that any fact that increases the penalty for crimes beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.[172] In *Apprendi*, petitioner was convicted under a New Jersey statute for firing shots into the home of an African American family and found guilty of the crime of possession of a firearm for an unlawful purpose.[173] The statute provided a punishment of 5 to 10 years; however, a hate crimes statute provided that a judge may extend a second-degree offense from 10 to 20 years if the crime was motivated by racial bias.[174] Apprendi was sentenced to a 12-year prison term.[175]

Apprendi argued that he was not motivated by a racial bias but the trial judge found that Apprendi committed his crime with "with a purpose to intimidate' as provided by the statute" and therefore the hate crime sentencing enhancement statute applied.[176] Because the trial judge considered the hate crimes statute as a sentencing enhancement, it was not submitted to a jury and required only that it be proven by a preponderance of the evidence.[177] The New Jersey state supreme court rejected Apprendi's arguments; however, the Supreme Court took note of its decision in *Jones* and held that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum

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[171] *Id*. at 239. [Reproduced in accompanying notebook, Tab 23].

[172] *Apprendi v. N.J.*, 530 U.S. 466 (2000). [Reproduced in accompanying notebook, Tab 14].

[173] *Id*. [Reproduced in accompanying notebook, Tab 14].

[174] *Id*. at 471. [Reproduced in accompanying notebook, Tab 14].

[175] *Id*. [Reproduced in accompanying notebook, Tab 14].

[176] *Id*. [Reproduced in accompanying notebook, Tab 14].

[177] *Id*. [Reproduced in accompanying notebook, Tab 14].

penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'"[178]

III. CONCLUSION

Although the regional systems such as the European Court and the Inter-American Court apply the principle of *iura novit curia* in their proceedings, it should be noted that defendants in these regional systems are states and not individuals. Therefore, should the defendants be found liable of violating their respective conventions, there is no jeopardy of an individual's rights being infringed because defendants under the European Court and Inter-American Court are not individuals. Even if the defendant state is 'caught off guard' by an argument not raised in its application to the court, there is no penalty of imprisonment to an individual found in violation of the European Convention or the Inter-American Convention. A typical 'punishment' for violations of the conventions is damages to the complainant because the state defendants are charged with violating the European Convention on Human Rights or Inter-American Convention on Human Rights. These conventions are incorporated into the national legal systems and are meant to protect the *individuals* within the states. In fact, the Trial Chamber in *Kupreskic* specifically stated that "even though the *iura novit curia* principle is normally applied in international judicial proceedings, under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an individual accused are at stake."[179]

Although the principle of *iura novit curia* is applied in most civil law countries, the judge will typically amend the indictment and give notice to the defendant if the facts

[178] *Id*. at 476, citing *Jones v. US*, 526 U.S. 227 (1999). [Reproduced in accompanying notebook, Tab 14].
[179] Kupreskic, at 740. [Reproduced in accompanying notebook, Tab 28].

are recharacterized in a way that the recharacterization adds a crime or changes the crime with which the defendant was originally charged. In common law countries, the facts may not be recharacterized or an additional crime charged if it was not in the original indictment. A defendant in the United States or the United Kingdom may be convicted of lesser included offenses. Common law systems permit convictions on lesser included offenses even they were not charged because the elements are the same – the greater offense necessarily includes the lesser offense. The greater offense charged in the indictment is typically the same charge as the lesser offense within, except that the greater crime charged has an additional element that may serve as an aggravating factor. In such cases there is no notice problem or fair trial concerns as the defendant presumably prepared his defense to answer to a more serious charge.

Interestingly, the issue presented in this memorandum deals with what the Trial Chamber for the Special Court must or may do if the elements of a crime not charged were satisfied beyond on a reasonable doubt. Most instructive on this issue is the *Kupreskic* judgment because it has greater precedential value for the Special Court. Both the Special Court and the ICTY are international criminal courts and both adhere to principles of international criminal law. Moreover, the statutes and rules for the ICTY, ICTR and Special court are all similar and the Special Court is governed by the Rules of Procedure and Evidence of the ICTR. Since the ICTR also looks to the ICTY for guidance in the interpretation of its own rules, the ICTY is instructive to the Special Court.

Although the Trial Chamber in *Kupreskic* analyzed the application of the principle of *iura novit curia* in domestic criminal proceedings, it concluded that there is

"no general principle of criminal law common to all major legal systems of the world [which] may be found."[180] The Trial Chamber stated that it was hesitant to apply the principle of *iura novit curia* to international criminal proceedings *at this time* because "international criminal rules are still in a rudimentary state."[181] Furthermore, to permit the prosecutor to convict an accused of a crime with which he was not charged would "violate Article 21(4) of the Statute, which provides that an accused shall be informed 'promptly and in detail' of the 'nature and cause of the charge against him.'"[182]

The Trial Chamber specified outlined what it must do when the prosecutor has failed to allege a crime that, at trial, it is demonstrated that the uncharged crime was committed.

[180] *Id*. at 738. [Reproduced in accompanying notebook, Tab 28].

[181] *Id*. at 740. [Reproduced in accompanying notebook, Tab 28].
[182] *Id*. [Reproduced in accompanying notebook, Tab 28].

Type of Crime Not Charged	Action Required by the Prosecutor or Trial Chamber
Different crime with different elements	Prosecutor must request leave to amend
More serious offense	Prosecutor must request leave to amend
Lesser included offenses (same elements)	No amendment necessary but must give notice to defendant

Seemingly, the only time the Trial Chamber may convict the defendant of an offense not charged in the indictment is if it is a lesser included or underlying offense.

There is little support for the application of the principle of *iura novit curia* in international criminal proceedings at this time. The ICTY, ICTR and the Special Court specifically provide fair trial rights and safeguards to the accused and the application of the principle would violate the rights of the accused.