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What may/must the trial chamber do if all of the elements of the charged offense are not proven beyond a reasonable doubt but all of the elements of an uncharged, but related, offense are proven beyond a reasonable doubt?

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MEMORANDUM FOR THE
SPECIAL COURT OF SIERRA LEONE

Issue:

WHAT MAY/MUST THE TRIAL CHAMBER DO IF ALL OF THE ELEMENTS OF THE CHARGED OFFENSE ARE NOT PROVEN BEYOND A REASONABLE DOUBT BUT ALL OF THE ELEMENTS OF AN UNCHARGED, BUT RELATED, OFFENSE ARE PROVEN BEYOND A REASONABLE DOUBT?

Prepared by Christopher Kringel
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I. Introduction and Summary of Conclusions

A. Issue*

What may/must the Trial Chamber do if, at the end of a trial, the Trial Chamber is not satisfied that all of the elements of the charged crime have been proven beyond a reasonable doubt; but, the Trial Chamber is satisfied that the evidence does prove beyond a reasonable doubt, all elements of a different (related) crime that the accused was not charged with? The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) put it more succinctly by asking: "with what powers is a Trial Chamber vested when faced with a charge that has been wrongly formulated by the Prosecutor?"[1] Does exercising that power to convict a defendant of an uncharged crime violate any of the defendant's rights?

B. Summary of Conclusions

When faced with the decision to find a defendant guilty of an uncharged crime, the Chamber must carefully balance the interests of justice with the rights of the accused to a fair trial. Although the evidence may establish his guilt, no justice is done when a man is convicted of a crime for which he has not been fairly tried. To adequately protect both interests, a three-part conjunctive test (the "Test") is advocated that requires that all of the elements of the uncharged offense are included in the charged offense, that there are no defenses available to the uncharged offense that are not available to the charged offense, and that the facts upon which the

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* Issue No. 2 for the Special Court of Sierra Leone – 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 Čelebići Trial Judgment of 16 November 1998 (Prosecutor v. Delalić et al) (concerning lesser included offences), and the civil law principle of iura novit curia (see, for instance, the Kupreškić Trial Judgment of 14 January 2000, paras. 740-748).

[1] *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 670 (Jan. 14, 2000) [reproduced in the accompanying notebook at Tab 14].

conviction is based are included in the indictment (as amended if necessary). The Trial Chamber may convict the accused of the uncharged offense if it is satisfied that all elements of that offense have been proven beyond a reasonable doubt, and:

(1) All of the elements of the uncharged offense are included in the charged offense, and
(2) There are no defenses available to the uncharged offense that are not available to the charged offense, and
(3) The facts upon which the conviction is based are included in the indictment

1. All elements of the uncharged offense must be included in the charged offense.

It is a necessity of a fair trial that all elements of the crime that the accused is convicted of be fully litigated during the trial. If the uncharged crime that the accused is eventually convicted of contains an additional element that is absent from the charged crime contained in the indictment, then it stands to reason that the additional element was never contemplated by the defense and therefore, that element was never fully explored by the Chamber. If, on the other hand, the charged crime has an additional element that is not contained within the elements of the uncharged crime that the accused is convicted of (e.g. – lesser included offenses), this has no bearing on the legitimacy of the conviction as all of the elements of the crime upon which the accused is convicted have been litigated at trial and the defense was on notice that they had to prepare a defense to all elements, including all the elements that comprise the uncharged crime.

2. There must be no defenses available to the uncharged offense that are not available to the charged offense.

One of the primary purposes of the indictment is to give the accused notice of what charge(s) he is accused of and the underlying facts related to the charge(s) so that he may prepare a defense to refute the prosecution's claims and to demonstrate his innocence. If an accused were to be convicted of an uncharged crime that had available a defense that was not explored at trial because the defense was not available to the charged crime, and therefore not relevant to the

trial, this purpose of the indictment would be thwarted as well as the purpose of allowing the accused to present a defense.

3. The facts upon which the conviction is based must be included in the indictment.

Aside from the specific charges, the facts asserted in the indictment underlying the charge are the most important component of the indictment. Presumably, the Prosecutor has diligently investigated the facts and those that he believes to be accurate are used to form the basis of the charges levied against the accused in the indictment. The close relationship between the facts alleged and the elements of the charged crime is often the vulnerability at which the defense launches its attack, for if it can disprove or at the very least, cast doubt in the mind of the fact-finder as to the accuracy of the underlying facts, that element of the crime cannot be proven and the defendant must be acquitted or convicted of a lesser offense that does not include that element.

II. Background Discussion

The International Criminal Tribunals ("Tribunals") as a collective do not exist entirely in either the realm of the common law or civil law systems. Instead, the Tribunals' various practices and procedures reflect elements of both legal traditions and as such, when a gap exists in the rules and statutes of the Tribunals, the solution must take into consideration these two primary legal systems, the methods they each use to address the concerns raised by the situation, and the reasons behind those methods so that the solution chosen is the most appropriate for the Tribunal.[2] While the Tribunals' early trials adhered more closely to common law proceedings, recent trials more closely resemble the civil law inquisitorial approach.[3] Although the Tribunals on the whole appear to favor proceedings that more closely resemble those of civil law trials, provisions in their statutes prevent the Tribunals from completely adopting a civil law approach.[4] It is therefore important to "bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of international criminal law as applied"[5] by the Tribunals.

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[2] *See generally id.* at ¶ 677 (stating that "it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world.") *and id.* at ¶ 679(b) (stating that "it is possible to deduce from a survey of national law and jurisprudence some principles of criminal law common to the major legal systems of the world.").

[3] Daryl A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367, 368 (2001) (discussing the evolution of the Tribunals legal character as a "truly mixed jurisdiction [that contains] elements of both the common law and the civil law") [reproduced in the accompanying notebook at Tab 36]. *See also* GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 89-91 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2003) [reproduced in the accompanying notebook at Tab 29].

[4] Mundis, *supra* note 3, at n.4 ("For example, Art. 16(1) of the ICTY Statute vests in the prosecutor, rather than the judges, the responsibility for investigation and prosecution functions, which ensures that the judges will never fully control the presentation of the cases that they hear. Other examples include Art. 21(4)(e), which guarantees the accused the right to cross-examine the witnesses against him.") [reproduced in the accompanying notebook at Tab 36]. *See also* KNOOPS, *supra* note 3, at 89-90 (discussing the ICTY Statute's adversarial elements) [reproduced in the accompanying notebook at Tab 29].

[5] *Kupreškić*, *supra* note 1 at ¶ 677 [reproduced in the accompanying notebook at Tab 14].

This dichotomy necessitates the examination of how both legal systems[6] address the roles of judge, prosecutor, and accused as well as what the purpose of the indictment is and how it limits, if it does indeed limit, the ability of the trier of fact to convict the accused.

The question at issue goes to the very core of criminal proceedings and how to define the roles of the players in criminal trials as well as how to balance protecting the rights of the accused and the rights of the victims and society. Because the accused is presumed innocent until proven guilty,[7] it is a requirement that judicial proceedings protect the rights of the accused[8]. Fundamental among the rights of the accused are to know of what crimes the accused has been charged with so that he may understand the proceedings and prepare a defense. Fundamental among the rights of the victims and of society are that those who commit crimes and harm others should not avoid punishment entirely because of a technicality that does not infringe on the right of the accused to a fair trial. The difficulty then, as it pertains to the issue, is how do the Tribunals protect the rights of the victims and society without acquitting the guilty based on a technicality in the indictment that never affected the ability of the accused to mount a defense? Specifically, how do the Tribunals put the defendant sufficiently on notice of what

[6] *See generally Kupreškić*, *supra* note 1 at ¶ 668-69 (stating that when "delving into [a] new area of international criminal law, the Trial Chamber will rely on general principles of international criminal law and, if no such principle is found, on the principles common to the various legal systems of the world, in particular those shared by most civil law and common law criminal systems.") [reproduced in the accompanying notebook at Tab 14].

[7] Statute of the Special Court for Sierra Leone, annex to Agreement on the Establishment of the Special Court for Sierra Leone, Jan. 16, 2002, UN-Sierra Leone, Art. 17(3), *available at* http://www.sc-sl.org/scsl-statute.html (hereinafter SCSL Statute) [reproduced in the accompanying notebook at Tab 2].

[8] *See* Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347, 360 (1998) (noting that "Article 14 of the ICCPR articulates those human rights that concern the proper administration of justice, and it is undisputed that these rights must be respected by the International Tribunal.") [reproduced in the accompanying notebook at Tab 33].

crimes he has been accused of while still maintaining the freedom to convict or acquit based on the evidence presented during the trial?[9]

This question has been faced by all jurisdictions in their legal history at one point or another and their answer has been dependent on the purpose that the indictment serves and the roles of the prosecutor and judge within that particular legal system.[10] In common law systems, the judge acts as neutral referee whereas in civil law systems, the judges are more involved in the trial.[11] In the adversarial system, it is the defendant's lawyer that is to be the strongest voice protecting the rights of the accused. In the inquisitorial system, however, the court takes a more active role in protecting the rights of accused. Although the Tribunals have been founded with many features from the common law system, the current trend of the Tribunals to conduct their proceedings more like those of the civil law system requires us to recognize that the Tribunals can act throughout the trial to protect the rights of the accused alleviating the need for the strict adherence that the common law places on procedural compliance, especially as it relates to the rigid structure of the indictment.

As the issue presented is largely unsettled, this article will look to national legal systems as well as the decisions and statutes of the Tribunals for guidance. While the SCSL "shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former

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[9] *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1 (Aspen Publishers, 7th ed. 2001) (commenting on the U.S. criminal justice system by noting that it "deliberately sacrifices much in efficiency and even in effectiveness in order to preserve local autonomy and to protect the individual.") [reproduced in the accompanying notebook at Tab 27]

[10] *See id.* (noting that "[w]hat most significantly distinguishes the system of one country from that of another is the extent and the form of the protections it offers individuals in the process of determining guilt and imposing punishment.").

[11] *See* RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 14 (West Publishing Co., 3rd ed.2000) (1989) (observing that "[w]hile the English judge is an umpire sitting at the sidelines watching the lawyers fight it out and afterwards declaring one of them the winner, the German judge is the director of an improvised play, the outcome of which is not known to him at first but depends heavily on his mode of directing.") (quoting Zeidler, *Evaluation of the Adversary System*, 55 AUSTRALIAN L.J. 390, 394-97 (1981)) [reproduced in the accompanying notebook at Tab 30].

Yugoslavia and for Rwarnda,"[12] that does not "mandate 'a slavish and uncritical emulation either precedentially or persuasively, of the principles and doctrines enunciated by…" the other tribunals.[13] These sources do not explicitly answer the question but provide useful guidance in the form of general legal principles of national and international criminal law.

[12] SCSL Statute, art. 20(3) [reproduced in the accompanying notebook at Tab 2].

[13] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 108 (Cambridge University Press 2006) (quoting *Sesay*, SCSL-03-05-PT, Decision, ¶ 11 (May 23, 2003)) [reproduced in the accompanying notebook at Tab 32].

III. Legal Discussion

A. Introduction

Criminal trials are an exercise in strategy, choreography, and the delicate balancing of competing interests with stakes at the highest level and no room for error. Trying to define the boundaries and rules of criminal trials is further complicated by the existence of disparate legal systems that necessitate different approaches to how to conduct and prepare for the search for the truth; the conviction of the guilty, and the acquittal of the innocent. This article deals with the heart of the criminal trial – the indictment and how it affects the judgment of the court, specifically as it pertains to the proceedings of the Tribunals.

The issue presented forces us to confront the fundamentals of criminal trials and how we can best protect the rights of the accused without preventing those guilty of committing heinous crimes from escaping punishment on what are popularly referred to as "technicalities." The rights of the accused must be carefully defined and considered so it is understood what constitutes a fair trial and how to go about protecting those rights. At the same time, however, the rights of the accused must be balanced with other interests, such as the right of society to see justice done, to ensure that the trial is fair for all parties. An essential component of a fair trial is that the accused has both knowledge of that which he is accused and provided an opportunity to present a defense. As the charging instrument, the indictment (sometimes referred to as a pleading) sets out the crimes of which the accused is charged and the facts underlying those accusations[14] to place the accused on notice of why he is standing trial and why his liberty (or his life in the case of courts such as the Iraqi High Tribunal) may be taken from him. The

[14] Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57, 72 (1999) (stating that the "indictment sets forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime for which the suspect is charged.") [reproduced in the accompanying notebook at Tab 37].

indictment is therefore a fundamental tool for protecting the rights of the accused and its content should be held to the highest standards of accuracy; however that doesn't necessarily mean that an immaterial flaw in the indictment impairs the legitimacy of the trial, so long as the rights of the accused have been protected throughout the proceedings and he has been made aware of the crime of which he is accused.

Although neither the Statutes nor the Rules of Procedure and Evidence (RPE) of the Tribunals provide a specific answer,[15] they do provide some guidance to resolving the issue. Article 17 of the Statute (the "Statute") for the Special Court of Sierra Leone (SCSL) contains the rights of the accused.[16] In pertinent part it provides minimum guarantees that the accused is entitled to, such as "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her"[17] and "[t]o have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing."[18] Nearly identical provisions exist in the Constitution of Sierra Leone[19] and the statutes of the ICTY,[20] the International Criminal Tribunal for Rwanda

[15] *See Kupreskic*, *supra* note 1, at ¶ 728 (recognizing that "[n]either the statute nor the Rules establish how Trial Chambers should act in the case of an erroneous legal classification of facts by the Prosecutor. In particular, no guidance is offered on how a Trial Chamber should proceed when certain legal ingredients of a charge have not been proved but the evidence shows that, if the facts were differently characterized, an international crime under the jurisdiction of the Tribunal would nevertheless have been perpetrated.") [reproduced in the accompanying notebook at Tab 14].

[16] SCSL Statute, art. 17. [reproduced in the accompanying notebook at Tab 2].

[17] *Id.* at art. 17(4)(a).

[18] *Id.* at art. 17(4)(b).

[19] *See id.* at art. 23(1), (5).

[20] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 21, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (hereinafter ICTY Statute) [reproduced in the accompanying notebook at Tab 3].

(ICTR),[21] the International Criminal Court (ICC),[22] the Iraqi High Tribunal,[23] and the European Court of Human Rights (ECHR).[24]

Additionally, "[t]he judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation,"[25] as is the case here. "In so doing, they *may* be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone [the "Act"],"[26] which provides some guidance on the issue presented in the section titled "Conviction for Offence Other Than Charged."[27]

The Act provides for an accused to be convicted of an attempt to commit the charged crime, even if the accused has not been charged with attempt, if the evidence indicates that the defendant did not complete the charged offense but did attempt to commit the offense.[28] This provision specifically states that "such defendant or accused shall not be acquitted, but a verdict may be returned of not guilty of the offence charged, but guilty of an attempt to commit the same, and thereupon the defendant or accused shall be punished as if convicted on an

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[21] *See* Statute of the International Criminal Tribunal for Rwanda, art. 20, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (hereinafter ICTR Statute) [reproduced in the accompanying notebook at Tab 4].

[22] *See* Rome Statute of the International Criminal Court, art. 67, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) (hereinafter Rome Statute) [reproduced in the accompanying notebook at Tab 5]

[23] *See* Statute of the Iraqi High Tribunal, art. 19, Dec. 10, 2003, 43 I.L.M. 231 (2004) (hereinafter IHT Statute) [reproduced in the accompanying notebook at Tab 6].

[24] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(2)-(3), (2003) [reproduced in the accompanying notebook at Tab 7]

[25] SCSL Statute, art. 14(2) [reproduced in the accompanying notebook at Tab 2].

[26] *Id.* (emphasis added).

[27] The Criminal Procedure Act, 1965 of Sierra Leone (as amended) [reproduced in the accompanying notebook at Tab 9].

[28] *Id.* at § 81(1).

information or indictment for attempting to commit such offence."[29] If the accused is charged with attempt, however, "and the evidence establishes the commission of the full offence, the accused or defendant may not be convicted of the full offence but may nevertheless be convicted of the attempt."[30] The Act goes on further to provide for convictions of uncharged offenses, specifically offenses that are referred to as lesser included offenses.[31]

B. Rights of the Accused

Convicting a defendant of a crime with which he has not been charged violates our intuitive sense of fairness and instinctively conflicts with our notion of what it means to receive a fair trial. It is well settled that a person who stands accused of committing a crime, even the most heinous in nature, has a right to a fair trial.[32] For a trial to be fair, the accused must have rights and those rights must be protected. What those rights are and how to best protect them is a question answered differently by the various legal systems of world history, although this article is limited to only the common law adversarial and the civil law inquisitorial systems. The issue presented requires us to review the intertwined rights of the accused to a fair trial, to be informed of the charges, and the principle of equality of arms.

1. The Accused has a right to a Fair Trial

As long as people have come together to form societies, those societies have had to determine how to deal with those who break the rules of the society. As societies have

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[29] *Id.* (stating furthermore that "no person so tried … shall be afterwards prosecuted for an attempt to commit the offence for which he was so tried" thereby protecting the guilty from being retried for the same crime in line with the principles of double jeopardy and *non bis in idem*).

[30] *Id.* at § 81(2).

[31] *Id.* at §§ 82-84 (providing for the conviction of manslaughter when the charge was murder, assault with intent to rob when the charge was robbery, and kindred offences when the charge was burglary).

[32] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 395 (Oxford University Press 2003) (asserting the maxim "[t]hat trials must be fair is now a universally accepted principle of international law.") [reproduced in the accompanying notebook at Tab 26].

advanced, many have developed intricate criminal justice systems "to enforce the standards of conduct necessary to protect individuals and the community … by apprehending, prosecuting, convicting, and sentencing those members of the community who violate the basic rules of group existence."[33] Without going through an extensive history of the evolution of national and international criminal justice systems, we can recognize that there exist different definitions of what exactly it means to have a fair trial, and sometimes, whether the accused even has a right to a fair trial.[34] Although "[a] myriad of factors make up the package of a fair trial,"[35] civilized societies have in recent years espoused that one of the hallmarks of a fair and just society is that it conducts fair trials for those accused of criminal acts and that the accused are afforded certain rights which must be protected, regardless of how heinous the acts they are accused of committing. "Fairness is the overarching requirement of criminal proceedings. This is as true of the common law adversarial system as it is of the civil law inquisitorial system."[36] "Common article 3 of the Geneva Conventions, adopted in 1949, refers to 'the judicial guarantees which are recognized as indispensable by civilized peoples' and prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted

[33] *See* KADISH & SCHULHOFER, *supra* note 9, at 1 [reproduced in the accompanying notebook at Tab 27].

[34] *See* SCHABAS, *supra* note 13, at 501 (noting that "[d]uring the Second World War, Churchill, Roosevelt and Stalin all entertained – it is difficult to determine how seriously – the idea of some form of summary justice for major war criminals. The concept is now unthinkable.") [reproduced in the accompanying notebook at Tab 32].

[35] Gideon Boas, *The Right to Self-Representation in International and Domestic Criminal Law – Limitations and Qualifications on that Right*, *in* The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May 39, 39 (Hirad Abtahi & Gideon Boas, eds., 2006) [reproduced in the accompanying notebook at Tab 25].

[36] Patrick L. Robinson, *Fair but Expeditious Trials*, *in* The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May 169, 170 (Hirad Abtahi & Gideon Boas, eds., 2006) [reproduced in the accompanying notebook at Tab 31].

court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[37]

The "right to a fair trial is the cornerstone of any legitimate judicial process"[38] for "[i]t is a universally recognized fundamental principle that no person accused of a crime should be convicted without trial. It is equally fundamental that the trial should be fair. This is as true of the common law adversarial system as it is of the civil law inquisitorial system."[39] It is also important to note that while it is clear that the "right to a fair trial, which is not only a fundamental right of the accused, [is] also a fundamental interest of the Tribunal related to its own legitimacy."[40] One of the Nuremburg tribunals went so far as to say that "prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held responsible for crimes against humanity."[41]

The right to a fair trial has been codified in many places, but article 14 of the International Covenant on Civil and Political Rights (ICCPR) is referred to as "the gold standard in terms of codification of the right to a fair trial in international human rights law."[42] Most notably, "[t]he ICTY Appeals Chamber has held that at a minimum, 'a fair trial must entitle the

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[37] SCHABAS, *supra* note 13, at 501 [reproduced in the accompanying notebook at Tab 32].

[38] *Id.* at 44.

[39] *Prosecutor v. Milošević*, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶ 29 (Sept. 22, 2004) [reproduced in the accompanying notebook at Tab 10].

[40] *Prosecutor v. Šešlj*, Case No. IT-03-67-T, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešlj with his Defence, ¶ 21 (May 9, 2003) (discussing the scope of the phrase "in the interests of justice") [reproduced in the accompanying notebook at Tab 12].

[41] SCHABAS, *supra* note 13, at 501 [reproduced in the accompanying notebook at Tab 32].

[42] *Id.* at 501-02 (noting further that "[a] slightly modified version of article 14 appears in the statutes of the three tribunals" in the ICTY Statute, article 21; the ICTR Statute, article 20; and the SCSL Statute, article 17). *See also* International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S 171 [reproduced in the accompanying notebook at Tab 1]; ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 241 (Cambridge University Press, 2005) (discussing the right to a fair trial as codified in the European Court of Human Rights Article 6 and Protocol No. 7 and the ICCPR Article 14) [reproduced in the accompanying notebook at Tab 24].

accused to adequate time and facilities for his or her defence' under conditions that do not place him or her at a substantial disadvantage as regards his or her opponent."[43] "International criminal law tribunals that fall short of international standards of due process are deemed contrary to the very existence of international criminal trials."[44]

There can be no doubt that all criminal trials must be fair. "That trials must be fair is by now a universally accepted principle of international law. It was laid down in human rights treaties (for instance, the UN Covenant on Civil and Political Rights (Articles 14(1) and 26) and in the European Convention on Human Rights and the American Convention on Human Rights), with regard to national trials."[45]

2. The Accused has the Right to be Informed of the Charge

One of the minimum guarantees which the accused is entitled to is "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her."[46] The right to be informed of the charge is virtually universal in civilized nations and throughout the Tribunals.[47] To be informed of the charge is to be informed of the elements of the crime of which the defendant is accused and of the facts on which the charges are based.[48] "[T]he accused is entitled to know the specifics of the charges against him,

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[43] SCHABAS, *supra* note 13, at 514 (quoting from *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 47 (July 15, 1999)) [reproduced in the accompanying notebook at Tab 32].

[44] KNOOPS, *supra* note 3, at 157 [reproduced in the accompanying notebook at Tab 29].

[45] SCHABAS, *supra* note 13, at 501-02 [reproduced in the accompanying notebook at Tab 32].

[46] SCSL Statute art. 17(4)(a).

[47] *See* ICTY Statute, art. 21(4)(a); ICTR Statute, art. 20(4)(a).

[48] *See Prosecutor v. Simić*, Case No. IT095-9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, (Mar. 11, 2003) (stating that the right to be informed under Article 21(4)(a) of the ICTY Statute "not only means that he shall be informed about the legal qualification of the charges against him, but also about the facts underlying the charge in order to prepare adequately his defence.") [reproduced in the accompanying notebook at Tab 13].

namely the facts of which he is accused and the legal classification of these facts. In particular, as far as this legal element is concerned, he must be put in a position to know the legal ingredients of the offence charges."[49]

Several rules from the RPE for the SCSL also provide some guidance on the issue by framing the rights of the accused with the conduct permissible, and sometimes required, by the court. The Rules, when taken as a whole, make it clear that the accused has rights pertaining to the charges that he is confronted with and it can be inferred from that how it is critical to the legitimacy of the court that the accused be aware of those charges and their underlying facts and thereby be able to make any defense to refute those charges.

The indictment is the means with which the Tribunals and the Prosecutors make the accused aware of the charges against him[50] and Rule 47 establishes what is required in an indictment: "[t]he indictment shall contain and be sufficient if it contains, the name and particulars of the suspect, *a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence*."[51] It can be inferred from this rule that as a component of a fair trial, the accused must know with some specificity what it is he has been accused of doing so that he may mount a defense. It is also a general principle of evidence that evidence is only admissible if it is relevant to the trial, and the court can only

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[49] *Kupreškić*, *supra* note 1, at ¶ 725 [reproduced in the accompanying notebook at Tab 14].

[50] *See* SCHABAS, *supra* note 13, at 520 (recognizing that the "right of the accused to be informed in detail of the charge is respected in the preparation of a clear and informative indictment.") [reproduced in the accompanying notebook at Tab 32].

[51] Rules of Procedure and Evidence of the Special Court for Sierra Leone, R. 47(C), (May 13, 2006) (emphasis added) (hereinafter SCSL RPE) [reproduced in the accompanying notebook at Tab 44]. *See also id.* at Rule 52 (requiring service of the indictment be personal and understandable by the accused) and Rule 61 (requiring that the Judge "[r]ead or have the indictment read to the accused in a language he speaks and understands, and satisfy himself that the accused understands the indictment.") [reproduced in the accompanying notebook at Tab 44].

determine if evidence is relevant based on the charges that the accused is confronted with as stated in the indictment[52].

3. The Principle of Equality of Arms Applies

The principle of 'equality of arms' has both a common law and a civil law aspect. The common law aspect of the principle recognizes that "equality of the parties is an essential ingredient of the adversarial structure of proceedings, based on the notion of the trial as a contest between two parties."[53] The civil law aspect of the principle "implies that the accused may not be put at a serious procedural disadvantage with respect to the prosecutor."[54] This principle perfectly captures the balance that the Tribunals must find between protecting the rights of the accused and the interests of society in punishing criminal acts. The "principle means that the Prosecution and the Defence must be equal before the Trial Chamber"[55] and has been used "to refer to a range of fair trial rights."[56] As the Prosecution has a decided advantage, the principle attempts to rectify that advantage, within reason, by placing the defense on as equal footing with the prosecution as possible.

The application of this principle reflects an understanding of the fact that "the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the

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[52] *See id.* at Rule 89(C) ("[a] Chamber may admit any relevant evidence."). *But cf. id.* at Rule 95 (stating that "[n]o evidence shall be admitted if its admission would bring the administration of justice into serious disrepute.").

[53] CASSESE, *supra* note 32, at 396 (commenting further that "[u]nder this approach, it is indispensable for both parties to the proceedings to have the same rights; otherwise there is no fair fight between the two 'contestants', and the spectators will not be convinced by the outcome.") [reproduced in the accompanying notebook at Tab 26].

[54] *Id.* at 395.

[55] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 52 (July 15, 1999) [reproduced in the accompanying notebook at Tab 45].

[56] SCHABAS, *supra* note 13, at 513 [reproduced in the accompanying notebook at Tab 32].

international community."[57] Applying this concept to the issue presented, the accused must not be placed at a disadvantage as compared to the prosecution by not having all of the information necessary to understand the charges against him and to know the facts that the prosecution will present to establish the guilt of the accused.

The concept of equality of arms provides "a 'fair balance' between the parties and [implies] that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[58] To ensure that neither party is placed at a substantial advantage, especially the accused, "the defendant [therefore] has the right to know full particulars specifying the charges preferred against him in the indictment."[59] It would not be possible for the defendant to be on equal footing with the prosecution nor to engage sufficiently in the adversarial or inquisitorial processes if he were able to be convicted of any crime whatsoever, regardless of whether it were included in the indictment.

C. Balancing the Rights of the Accused with the Interests of Justice

By their very nature, criminal trials pit the accused against society, whether it is in the guise of the prosecutor as in the adversarial system or that of the court as in the inquisitorial system. Because the accused is presumed innocent until proven guilty and is at a disadvantage (for he has fewer resources than the people), it is imperative that his rights be protected during the proceedings while ensuring that the court can still find the truth and protect the rights of society to seek out and punish the guilty. "A court confronting such a scenario must balance

[57] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 25 (Feb. 16, 1999) [reproduced in the accompanying notebook at Tab 15].

[58] *Id.* at ¶ 24.

[59] CASSESE, *supra* note 32, at 396 [reproduced in the accompanying notebook at Tab 26].

what are often described as an accused's minimum guarantees with the overall requirements that a trial be fair and, as either as a separate or composite part of that paradigm, that the interests of justice be served."[60] Balancing these interests can be difficult because they are very often in direct conflict.

When determining how to strike this balance, "two basic requirements [of international criminal law] … acquire paramount importance."[61] They are: "the requirement that the rights of the accused be fully safeguarded" and "that the Prosecutor, and more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfill their mission efficiently and in the interests of justice."[62] We must be careful, however, in our zealousness to ensure that the accused receives a fair trial that we do not neglect the position and rights of the people to convict the guilty and to protect society for "[w]hat is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading."[63] It is imperative that we not go so far in protecting the rights of the accused from the perceived but highly improbable violation of his rights that could occur under the remotest of circumstances. The rights of society through the Prosecutor must weigh equally on the scale or we risk giving the accused so much power that he can cripple the system by turning the letter of the law against the Tribunals. If the accused is innocent, they should be acquitted on the evidence, not on a technicality of the pleading just as the guilty should only be convicted on the evidence and not through trickery or deception on the part of the government.

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[60] Boas, *supra* note 35, at 40 [reproduced in the accompanying notebook at Tab 25].

[61] *Kupreškić*, *supra* note 1, at ¶ 739 [reproduced in the accompanying notebook at Tab 14].

[62] *Id.*

[63] *Tadic*, *supra* note 55 [reproduced in the accompanying notebook at Tab 45].

The Kupreškić Chamber recognized that with regard to fully safeguarding the rights of the accused, "international criminal rules are still in a rudimentary state" and that "[t]hey need to be elaborated and rendered more specific either by international lawmaking bodies or by international case law so as to gradually give rise to general rules."[64] Specifically, the Chamber feared that

> "the rights of the accused would not be satisfactorily safeguarded were one to adopt an approach akin to that of some civil law countries. Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge. The task of the defence would become exceedingly onerous, given the aforementioned uncertainties which still exist in international criminal law. Hence, 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. It would also violate Article 21(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.'"[65]

The Kupreškić Chamber also correctly noted that the second requirement "warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution and its possible flaws in the formulation of the charge are not such as to impair or curtail the rights of the Defence."[66] It can therefore be inferred that an immaterial technical flaw in the indictment for which the accused should not escape punishment is one that does not "impair or curtail"[67] his rights.

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[64] *Kupreškić*, *supra* note 1, at 740 [reproduced in the accompanying notebook at Tab 14].

[65] *Id.*

[66] *Id.* at ¶ 741.

[67] *Id.*

Although it's imperative that the Chamber fully safeguard the rights of the accused, its procedures must also allow for and require that "the Prosecutor be granted all the powers consistent with the Statute to enable her to fulfill her mission efficiently and in the interests of justice."[68] It is therefore in the interests of justice and consistent with the obligations of the office of the Prosecutor "that legal technicalities concerning classification of international offences should not be allowed to thwart the mission of the Prosecutor" and that the "efficient fulfillment of the Prosecution's mission favours a system that is not hidebound by formal requirements of pleading in the indictment."[69]

The very nature of the Tribunals further complicates the task of balancing these rights because they are, "in certain respects, comparable to a military tribunal, which often has limited rights of due process'. Some of the weaknesses in this respect are attributable to the special circumstances that exist in international criminal prosecution, and may be unavaoidable under the circumstances. The inherently political dimension of the process, the pressures from governments as well as from civil society, and the impetus to complete the process and shut down the tribunals are all factors that contribute to this difficult environment."[70] (Schabas 503).

D. The Indictment Must Inform the Accused of the Charges and the Underlying Facts

The indictment "as first developed in the common law system"[71] evolved from the simplest of statements to the most technical and intricate of documents.[72] "ICTY and ICTR

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[68] *Id.* at ¶ 724.

[69] *Id.* at ¶ 726.

[70] SCHABAS, *supra* note 13, at 503 [reproduced in the accompanying notebook at Tab 32].

[71] YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE 1035-38 (West Publishing Co., 8th ed. 1994) (1965) [reproduced in the accompanying notebook at Tab 28].

[72] *See generally id.* at 1035-38.

indictments are different from indictments in civil law systems in that they involve rather extensive details regarding the background of a case, the person of the accused, the various modes of criminal liability applicable, the facts and the charges."[73] Of course, "neither the Statute nor the Rules establish how the charges must be brought by the Prosecutor."[74] Selecting the appropriate charge is not always as easy as it sounds. Prosecutors are just as human as the rest of us and they may be swayed by personal opinion, misleading facts, or strategic goals. Interestingly, "the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge."[75]

Under the common law system, "the accusatory instrument must be tested by the basic functions that a pleading should fulfill rather than be technical pleading requirements."[76] The five basic functions of the indictment are: "(1) providing protection against twice being put in jeopardy; (2) providing notice; (3) facilitating judicial review of the legal sufficiency of the prosecution's case; (4) providing a formal basis for the judgment; and (5) keeping the prosecution within the charge issued by the grand jury."[77] The most relevant function to the

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[73] KNOOPS, *supra* note 3, at 103-04 [reproduced in the accompanying notebook at Tab 29].

[74] *Kupreškić*, *supra* note 1, at ¶ 722 [reproduced in the accompanying notebook at Tab 14].

[75] *Id.* at ¶ 723.

[76] *Id.* at 1038.

[77] *Id.* at 1038-41 (providing a thorough explanation of each function).

issue, and what is considered to be the primary function of the indictment, is the second function – providing notice.[78]

While there is some disagreement about "the amount of detail that must be provided to adequately serve this function," it is well accepted "that the pleading should give the defendant 'factual notice.'"[79] This principle is embodied in the Sixth Amendment of the United States Constitution, which ensures the right "to be informed of the nature and cause of the accusation."[80] The ICTY has provided some guidance on how international criminal tribunals interpret this function by recognizing that "the Defence is made cognizant of the various classifications of the facts propounded by the Prosecution and is thus enabled to make its case."[81] As international criminal tribunals are different in nature than their national counterparts, so too are their indictments. By their very nature, the crimes that the Tribunals prosecute do not easily fit into well-defined and clearly articulated statutes; they often overlap and intertwine making the same underlying facts violations of more than one crime.[82] As the Kupreškić court noted, "Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallized in the relevant case-law or found in statutory enactments, each Article of the Statute does not confine itself to indicating a single category of well-defined acts …. Instead the Articles embrace broad clusters of offences sharing certain general legal ingredients."[83]

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[78] *Id.* at 1039.

[79] *Id.*

[80] U.S. CONST. amend. VI. *Compare id.* with SCSL Statute, art. 17(4)(a).

[81] *Kupreškić*, *supra* note 1, at ¶ 721 [reproduced in the accompanying notebook at Tab 14].

[82] *See generally* Brown, *supra* note 8, at 361-63 (discussing the difficulty of specifying the specific elements of international crimes) [reproduced in the accompanying notebook at Tab 33].

[83] *Id.* at 697.

E. Amending the Indictment is Preferable to Convicting the Accused of an Uncharged Crime

If during the Trial, it becomes apparent that the evidence indicates that the Prosecutor has charged the defendant with a crime not supported by the facts, "[t]he Prosecutor may amend the indictment at any stage of the proceedings."[84] The RPE also addresses amendment of the indictment, including amendment after the initial appearance of the accused in which the rule recognizes the need of the accused to have time to adjust to a change in the charges he is facing should new facts come to light.[85] If necessary or appropriate, the trial can adjourn for a period of time to give the prosecution time to investigate new evidence or for the accused to prepare a defense to new charges.[86] This process of "warning the accused and enabling him to prepare his defence" reflects the more limited version of the principle of iura novit curia like that of Germany and Spain.[87] Relying on the more limited version iura novit curia more closely comports with the hybrid nature of the Tribunals.

The power to amend the indictment, however, is not without its limitations. "In the *Kovacevic* case, the chamber ruled that allowing the prosecutor to amend the indictment in a broad and substantial way, almost a year after the original indictment had been confirmed and seven months after the arrest of the accused, would serve to deny him access to a fair and speedy trial."[88] The proposed amendment in the *Kovacevic* case [89]would have added "fourteen counts

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[84] SCHABAS, *supra* note 13, at 371 [reproduced in the accompanying notebook at Tab 32].

[85] SCSL RPE, R. 50 [reproduced in the accompanying notebook at Tab 44].

[86] *See* Judge Ines Monica Weinberg De Roca, *Ten Years and Counting: The Development of International Law at the ICTR*, 12 NEW ENG. J. INT'L & COMP. L. 69, 73 (2005) (discussing the adjournment of the *Akayesu* case after "several femal witnesses spontaneously during the trial proceedings testified about incidents of rape") [reproduced in the accompanying notebook at Tab 41].

[87] *Kupreškić*, *supra* note 1, at ¶ 733 [reproduced in the accompanying notebook at Tab 14].

[88] Murphy, *supra* note 14, at 73 [reproduced in the accompanying notebook at Tab 37].

and factual allegations that would increase the size of the indictment from eight to eighteen pages."[90]

F. Lesser Included Offenses Already Allow Courts to Convict the Accused of an Uncharged Crime

A lesser included offense, as defined by Black's Law Dictionary, is "[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime."[91] The concept is most eloquently and persuasively explained by Judge Nieto-Navia of the Inter-American Court of Human Rights: "In criminal law, if a person is killed by a dagger it is obvious that he was also the victim of lesions. However, the crime that was committed is murder, and no judge will interpret the norms in such a way that the dead person was the victim of 'murder and lesions.'"[92] (Caballero Delgado p. 6 dissent)

In the United States, a defendant is deemed to have sufficient notice that he has been charged with a lesser offense if he has been charged with a major offense which includes all of the essential elements of the lesser.[93] The doctrine of lesser included offenses was originally a common law rule designed to prevent an acquittal when the evidence failed to support a conviction on the charged offense but established guilt on a lesser, uncharged offense.[94]

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[89] *See Prosecutor v. Kovacevic*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 (July 2, 1998) [reproduced in the accompanying notebook at Tab 18].

[90] Murphy, *supra* note 14, at 73 [reproduced in the accompanying notebook at Tab 37].

[91] Black's Law Dictionary 496 (2nd pocket ed. 2001) [reproduced in the accompanying notebook at Tab 43].

[92] Caballero Delgado and Santana Case, Inter-American Court of Human Rights, Judgment, 6 (Dec. 8, 1955) (Nieto-Navia, J., dissenting) [reproduced in the accompanying notebook at Tab 23].

[93] *See Thomas v. State*, 342 So. 2d 405, 406 (Ala. Crim. App. 1976) [reproduced in the accompanying notebook at Tab 22].

[94] *See* Colonel James A. Young III, USAF, *Multiplicity and Lesser-Included Offenses*, 39 A.F.L. Rev. 159, 161 (1996) (noting also that the doctrine of lesser included offenses is used to the benefit of the accused as well by

Allowing for convictions on lesser included offenses can make the process more efficient and prevent a criminal from being acquitted due to prosecutorial err or evidentiary issues. These problems are more symptomatic to the common law system, however, than to the civil law system.

The practical use of lesser included offenses is not quite so glamorous. Prosecutors often have to make the difficult decision of not only what the evidence proves but what crimes the finder of fact (most often the jury in the United States) will be willing to convict him of. This dilemma can be muddied by personal feelings and non-legal considerations such as the defendant's charm and charisma and the make-up of the jury or the predisposition of the judge. Allowing for convictions on lesser included offenses may allow a defendant, who is in fact guilty of the major offense, to be convicted of the lesser offense and thereby receive a lighter punishment.[95] As an alternative, the all-or-nothing doctrine "permits parties in a criminal trial to forego instructions on provable lesser-included offenses, thereby forcing the jury to choose between conviction and acquittal on the greater charge."[96] The all-or-nothing doctrine may sound appealing at first blush, however, forcing a judge or jury to choose between convicting a man of a crime he did not commit or acquitting a man who is guilty of a crime, just not the one he was charged with. Such a dilemma would surely force any trier of fact to weigh the person and not the crime. Those defendants who are unpopular or disliked would be convicted and

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providing an alternative to a guilty plea to the charged offense) [reproduced in the accompanying notebook at Tab 42].

[95] *See generally* Michael G. Pattillo, *When "Lesser is More: The Case for Reviving the Constitutional Right to a Lesser Included Offense*, 77 Tex. L. Rev. 429, 429-32 (1998) (discussing the convictions on lesser included offenses of Oklahoma City Bomber Terry Nichols and the Massachusetts au pair, Louise Woodward, who had a child die while in her care) [reproduced in the accompanying notebook at Tab 38].

[96] Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 Am. J. Crim. L. 257, 258 (1999) [reproduced in the accompanying notebook at Tab 34].

those who are more appealing would likely go free. Considering the serious nature of the crimes that come before the Tribunals, such a doctrine has no place there.[97]

G. Efficiency is an Important Factor when the Tribunals must make Procedural Decisions

The Tribunals have limited resources and their slow pace and high cost has prompted many to look for ways to make the Tribunals more efficient.[98] The problem is easily illustrated when we consider that "after almost seven years and expenditures totaling $400 million, only 15 ICTY and ICTR trials have been completed."[99] The work of the Tribunals is incredibly important and every effort should be made to see that it is completed and done well. The rigidity that the common law system emphasizes has placed an enormous burden on the system. The U.S. legal system is overworked and lengthy waits to have a case heard are the norm. The Tribunals do not have the luxury of time that national legal systems enjoy. Where national legal systems can look to long-term, permanent solutions such as adding more staff or commissioning studies to consider procedural changes, the Tribunals must act swiftly.

One solution to the problem of inefficiency is to be more flexible. By focusing on the formalities that matter, it frees up the courts' time to focus on hearing cases as opposed to dealing with time-consuming motions where the defendant's rights were never in jeopardy. Many defendants take advantage of the system to tie up the court for as long as possible, especially those who are not being detained during trial or those with a political agenda. A defendant may submit many motions merely to annoy the court or to drag out the proceedings for

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[97] *See generally* Patrick D. Pflaum, *Justice is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctirne*, 73 U. Colo. L. Rev. 289 (2002) (discussing the doctrine in-depth) [reproduced in the accompanying notebook at Tab 39].

[98] *See generally* Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 Am. J. Comp. L. 835, 869-74 (2005) [reproduced in the accompanying notebook at Tab 35].

[99] *Id.* at 870.

his own personal gain. Recognizing that the nature of the Tribunals' work, the current stage of development of international law, and the difficulty of conducting these proceedings and responding by protecting the rights of the accused without compromising the legitimacy, integrity, and efficiency of the Tribunals necessitates a flexible approach to the formalities of normal court procedures. When the Tribunals can do away with formalities without harming the rights of the accused or the work of the Tribunals while advancing the interests of justice it is obligated to do so. To not do so would squander the resources of the Tribunals and would hinder their work in pursuing justice.

H. The Kupreškić Trial Judgment Provides Significant Guidance on the Issue

In the case of Prosecutor v. Kupreškić in the Trial Chamber of the ICTY, the Prosecutor took the position that "a person may be charged with, and convicted of, various crimes even when that person has only engaged in one criminal action against the same victim or victims."[100] The Prosecutor's position and the Trial Chamber's analysis revolve around the Akayesu Judgment[101] of the International Criminal Tribunal for Rwanda (ICTR), the Tadic Judgment[102] of the ICTY, and an interlocutory decision[103] issued in the Kupreškić case.[104] Although these

[100] *Kupreškić*, *supra* note 1, at ¶ 637 (rephrasing by stating that "according to the Prosecutor the same act or transaction against one or more victims may simultaneously infringe several criminal rules and can consequently be classified as a multiple crime.") [reproduced in the accompanying notebook at Tab 14].

[101] *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 468 (Sept. 2, 1998) (arguing that a disjunctive three part test should be used to determine when more than one offence may be charged separately concerning a single set of facts) [reproduced in the accompanying notebook at Tab 17].

[102] *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on a Preliminary Motion on the Form of the Indictment, ¶ 17 (T.Ch.II. Nov. 14, 1995) (stating the oft-quoted "[w]hat is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.") [reproduced in the accompanying notebook at Tab 21].

[103] *See Kupreškić*, Decision on Defence Challenges to the Form of the Indictment, (May 15, 1998) [reproduced in the accompanying notebook at Tab 19].

[104] *See Kupreškić*, *supra* note 1, at ¶¶ 638-40 [reproduced in the accompanying notebook at Tab 14].

sources are primarily concerned with cumulative charging, they provide an excellent starting point for the analysis of the issue presented here.

The Trial Chamber requested that briefs be submitted from both parties on the issue and subsequently conducted a thorough analysis of the relationship between the charges stated in the indictment and what affect it has on the court's ability to convict the accused as this was an important and undefined area of international criminal law.[105] The Trial Chamber also provides a helpful survey of national legal systems and how other courts and legislatures deal with the relationships between indictment and decision and between the court and prosecutor.[106] It's important to note, however, that the Trial Chamber concludes this survey by noting that "[i]t is apparent … that no general principle of criminal law common to all major legal systems of the world may be found."[107]

I. The Test Applied to the Čelebići Trial Judgment

The ICTY trial of *Prosecutor v. Delalić*[108] is referred to as the Čelebići case, as the "events alleged in the indictment occurred at a detention facility in the village of Čelebići" known as the Čelebići prison-camp.[109] The only portion of this decision that is relevant to the issue is the charges in counts eleven and twelve of the indictment and the Trial Chamber's holding as to those counts. In counts eleven and twelve of the indictment, Hazim Delić and Esad

[105] *See id.* at ¶ 668 (stating that "[t]he Trial Chamber considers that this issue has a broad import and great relevance, all the more so because it has not been dealt with in depth by an international criminal court. The Trial Chamber shall therefore consider it in its general dimension, so as to set out what it considers to be the correct legal standards on the basis of which the question must be decided in casu.").

[106] *See generally id.* at ¶¶ 728-37.

[107] *Id.* at ¶ 738.

[108] *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, (Nov. 16, 1998) [reproduced in the accompanying notebook at Tab 16].

[109] *Id.* at ¶ 3.

Landžo were charged with the willful killing and murder of Slavko Šušić, a detainee who was repeatedly subjected to severe beatings and torture by Delić and Landžo; Šušić later "died from his injuries."[110] The Trial Chamber found that because it was "not absolutely clear who inflicted the fatal injuries upon him … the Trial Chamber cannot be certain that the direct cause of the death of Slavko Šušić was the beating and mistreatment given to him by these two accused."[111] The Trial Chamber, having not been satisfied beyond a reasonable doubt that the death of Šušić was the "direct consequence of the beatings and mistreatment by Delić and Landžo" found the accused not guilty of willful killing and murder but instead convicted them on the lesser offense of willfully causing great suffering or serious injury to body or health; a charge which was absent from the indictment.[112]

Applying the Test to the Čelebići case and with a cursory look at the charge of willful killing and murder as compared to the conviction of willfully causing great suffering or serious injury to body or health, the Chamber reached the proper conclusion. The convicted crime appears to be what would be normally be considered as a lesser included offense of the charged crime. The facts on which the Prosecutor based the charges were included in the indictment and fully litigated at trial, providing the accused a chance to refute the evidence presented and to ensure that his rights were protected. Assuming that there all of the elements of the convicted crime that were also elements of the charged crime and that there were no other defenses available to the convicted crime that were not available to the charged crime, the trial was fair

[110] *Id.* at ¶ 857.

[111] *Id.* at 865.

[112] *Prosecutor v. Mucić*, Case No. IT-96-21-A*bis*, Judgment, ¶ 40(2) (Apr. 8, 2003) [reproduced in the accompanying notebook at Tab 11]. *See also Delalić* at ¶ 866 (holding that "it is clear that Mr. Delić and Mr. Landžo were, at the very least, the perpetrators of heinous acts which caused great physical suffering to the victim and, while they are not charged in this manner, it is a principle of law that a grave offence includes a lesser offence of the same nature.").

because the rights of the accused were protected as each element of the convicted crime was litigated as were the defenses available to it. This finding also supports the Tribunals' goal of efficiency and protecting the rights of the victims by not requiring that the trial begin anew, relitigating the same facts and hearing the same testimony again, simply because the label of the crime charged was incorrect while the content of what comprises that crime was completely sufficient and identical to the convicted crime.

J. The Test Applied to the Case of Prosecutor v. Tadic

In *Prosecutor v. Tadic*,[113] "Tadic was acquitted of all specific murder charges contained in the indictment. He was, however, found guilty of stabbing and cutting the throats of two Muslim policemen …. The only charge relating to this killing was the general persecution charge contained in … the indictment."[114] Although the defense objected to the lack of specificity in the relevant count of the indictment and the Trial Chamber permitted an amendment to the indictment, "the Prosecution never inserted a specific reference to the stabbing and throat-slitting incident of which Tadic was eventually convicted."[115]

Applying the Test to the *Tadic* decision, it is easy to see that the rights of the accused were violated when he was convicted of a crime which he was not charged with and whose facts he was not put on notice of. Although the defendant was on trial for the murder of other victims, the people whose death for which he was eventually convicted were not mentioned in the indictment. Tadic never had an opportunity to investigate the facts underlying the crime he was convicted of and this is a violation of his rights as the accused and a violation of the right to a

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[113] *Prosecutor v. Tadic*, No. IT-94-1-T, Judgment, (May 7, 1997) (hereinafter Tadic) [reproduced in the accompanying notebook at Tab 20].

[114] Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L L. & POL. 167, 183-84 (1997) [reproduced in the accompanying notebook at Tab 40].

[115] *Id.* at 185.

fair trial. Tadic was never put on notice as to what specific acts he had to defend against and therefore had no opportunity to refute the evidence and to assert his innocence by presenting credible evidence that contradicted the testimony of the witness who testified against him.

IV. Conclusion

In international law, it is well settled that the accused has the right to a fair trial. This right has been codified in every tribunal's statute. In order for an accused to receive a fair trial, he must be made aware of the charges against him and the facts on which they are based. The indictment, which is drafted by the Prosecutor and approved by the Tribunal, is designed to make the defendant aware of the accusations against him, and specifically what crimes he is charged with. The Tribunals, however, should not feel so confined by the charge(s) in the indictment that they acquit the guilty simply because the Prosecutor selected the wrong charge or evidence later develops that suggests a different charge would have been more appropriate. Tribunals should not be careless when convicting a defendant of an uncharged crime as this action is only warranted in unusual circumstances.

Before finding an accused guilty of an uncharged crime, the Trial Chamber should be convinced that the evidence has proven beyond a reasonable doubt all of the elements of the crime of which the defendant is to be convicted. The Trial Chamber should then examine the charged crime and the uncharged crime and be certain that all of the elements of the uncharged offense are included in the charged offense, that there are no defenses available to the uncharged offense that are not available to the charged offense, and that the facts upon which the conviction is based are included in the indictment (as amended if necessary).

This three-prong, conjunctive test recognizes both the rights of the accused and the interests of justice for which the Tribunals were established. It is flexible enough to allow the

guilty to be convicted despite the inherent uncertainties that are part of the work of the Tribunals as well as addressing the efficiency concerns that the Tribunals have experienced. It is also rigid enough to ensure that the Tribunals provide fair trials and do not denigrate their own legitimacy by convicting defendants without ensuring that their rights are protected and that they have a full and fair opportunity to refute the facts offered by the prosecution and present any defenses that are available to them. Given the magnitude and the nature of the alleged crimes, the constraints on the resources of the investigating bodies, the willingness of the victims and witnesses to cooperate, and the difficulty in obtaining information, it is imperative that that the Tribunals embrace a more flexible approach when possible. This principle is reflected in the trend witnessed by commentators of the Tribunals shifting towards conducting their proceedings more like those in the civil law inquisitorial system.