

**Memorandum for the  
Office Of the Prosecutor  
International Criminal Tribunal for Rwanda**

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**Issue 7: Can the Prosecutor amend an indictment after a trial has begun?**

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INDEX OF SOURCES.....	iii
I. INTRODUCTION AND SUMMARY OF CONCLUSIONS.....	1
A. Issue.....	1
B. Conclusions.....	1
II. FACTUAL BACKGROUND.....	2
III. LEGAL DISCUSSION.....	2
A. International Tribunals.....	2
1. Amendments to the rules.....	2
2. Judicial Interpretation of Rule 50 of the ICTY and ICTR.....	7
3. Standard of Proof for Amendments in the ICTR.....	9
4. Amendments Made to Indictments After the Beginning of Trial in the ICTR.....	9
5. Current Guidelines on Amending Indictments in the ICTR.....	10
a. Adding a new charge.....	11
b. Expanding upon the factual allegation adduced in support of existing confirmed courts.....	11
c. Making minor changes to the confirmed indictment....	12
6. Duty of the Prosecutor.....	12
B. UNITED STATES.....	13
C. CANADA.....	17
D. ENGLAND.....	22

E. SCOTLAND.....	27
F. SOUTH AFRICA.....	28

## STATUTES AND RULES

1. § 86 Criminal Procedure Act 51 of 1977 (SA)
2. Article 15, Statute of the International Tribunal for Rwanda (annexed to S/RES/955 (1994)).
3. Criminal Code, R.S.C., ch. C-46 § 601 (1985) (Can.).
4. Criminal Procedure Act 1995, c. 46 s.96 (Scot.)
5. Fed. R. Crim. P. 7(e).
6. Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(1) (Eng.).
7. Rule 50, Rules of Procedure and Evidence, IT/32/REV.10, December 1996.
8. Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32, February 1994
9. Rule 85, Rule of Procedure and Evidence, U.N. Doc. IT/32/REV.22, December 2001.
10. Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.12, November 1997.
11. Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.13, July 1998.
12. Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.17, November 1999.
13. Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.18, July 2000.
14. Rule 50, Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev., June 1995.
15. Rule 50, Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev., June 1998.

## CASES

16. *Barkett's Transport (Edms) Bpk* 1988 (1) SA 157 (A).
17. *F* 1975 (3) SA (T) at 170.
18. *Heller* 1971 (2) SA (A) at 53C-D.
19. *Keane v. Her Majesty's Advocate*, 1986 S.C.C.R. 491 (Scot. 1986).
20. *Pillay* 1975 (1) SA 919 (N)

21. *Prosecutor v. Kovačević*, Case No.: IT-97-24-PT, Decision on Prosecutor's Request to file an amended indictment, 5 March 1998, para. 12(a).
22. *Prosecutor v. Kovačević*, Case No.: IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 25.
23. *Prosecutor v. Kovačević*, Case No.: IT-97-24-AR73, Separate Opinion of Judge Mohamed Shahabuddeen on the Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998.
24. *Prosecutor v. Kanyabashi*, Case No.: ICTR-96-15-T, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, 12 August 1999.
25. *Prosecutor v. Musema*, Case No.: ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999.
26. *Prosecutor v. Niyitergeka*, Case No.: ICTR-96-14-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000.
27. *Prosecutor v. Barayagwiza*, Case No.: ICTR-97-19-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000.
28. *R. v. Johal and Ram* [1097] 1 QB 475.
29. *R. v. Cash*, [1985] 1 QB 801.
30. *R. v. Gregory* [1972] 1 WLR 991
31. *Regina v. Cote*, [1977] 33 C.C.C. (2d) 353.
32. *Regina v. Moore*, [1988] S.C.R. 1097.
33. *Regina v. Tremblay*, [1993] 2 S.C.R. 932.
34. *Sarjoo* 1978 (4) SA 520 (N)]
35. *U.S. v. Morrow*, 925 F.2d 779, 781-782 (4<sup>th</sup> Cir. 1991).
36. *U.S. v. Ross*, 210 F.3d 916, 922-23 (8<sup>th</sup> Cir. 2000).
37. *U.S. v. Robles-Vertiz*, 155 F.3d 725, 729 (5<sup>th</sup> Cir. 1998).
38. *U.S. v. Neill*, 166 F.3d 943, 947-48 (9<sup>th</sup> Cir. 1999).
39. *U.S. v. Pina*, 974 F.2d 1241, 1243 (10<sup>th</sup> Cir. 1992)

40. *U.S. v. Collazo-Aponte*, 216 F.3d 163, 191 (1<sup>st</sup> Cir. 2000)
41. *U.S. v. Johnston*, 146 F.3d 785, 791 (10<sup>th</sup> Cir. 1998).
42. *U.S. v. Ferguson*, 211 F.3d 878, 885 (5<sup>th</sup> Cir. 2000)
43. *U.S. v. Teague*, 93 F. 3d 81, 82 (2d Cir. 1996)
44. *U.S. v. Pope*, 132 F.3d 684, 688 (11<sup>th</sup> Cir. 1998)
45. *Walker v. Her Majesty's Advocate* 1999 S.L.T 1388 (Scot. 1999).

## **BOOKS**

46. ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 51-55 (Stephen Mitchel & P.J. Richardson, eds., 43d ed. Sweet & Maxwell)
47. CHRISTOPHER J. EMMINS, A PRACTICE APPROACH TO CRIMINAL PROCEDURE 55-56 (2d ed., 1983)
48. JOHN JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2d ed.2000) [Reproduced in the accompanying notebook at Tab]
49. PEET M. BEKKER, TERTIUS GELDENHUYS, J.J. JOUBER, J.P.SWANPOEL, S.S. TERBLANCHE BIUR, STEP E VAN DER MERWE B IURIS & JAN H VAN ROOYEN, CRIMINAL PROCEDURE HANDBOOK 176-78 (J.J. Joubert ed., 4<sup>th</sup> ed. 1999)
50. RENTON & BROWN'S CRIMINAL PROCEDURE (6<sup>th</sup> ed. 2001)
51. R.E. SALHANY, CANDIAN CRIMINAL PROCEDURE (5<sup>th</sup> ed., 1989)
52. TIM QUIGLEY, PROCEDURE IN CANADIAN CRIMINAL LAW 369-372 (1997), ROGER E. SALHANY, CANADIAN CRIMINAL PROCEDURE 202-207 (1989).
53. VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 202-207 (1998) [Reproduced in the accompanying notebook at Tab]
54. YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, ADVANCE CRIMINAL PROCEDURE, THE COMMENCEMENT OF FORMAL PROCEEDINGS, THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT OR INNOCENCE, APPEAL AND POST-CONVICTION REVIEW, 1058 (1994).

**MISCELLANEOUS**

55. Laura Soroka & Jocelyn Campanaro, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: II. Preliminary Proceedings: Indictments*, 89 GEO. L.J. 1275, 1300 (2001)

56. U.S. CONST.. amend V.

## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. ISSUE**

Can the ICTR Prosecutor amend an indictment after the start of trial and if so, what legal tests should apply taking into consideration the divergence of Rules and practice between ICTR and ICTY?

### **B. CONCLUSIONS**

The United States, Canada, England, Scotland, and South Africa allow prosecutors and courts to amend indictments to some extent after trial has begun. Some nations are much more liberal than others in permitting amendment. All nations do have restrictions on amendments. The main concern of the courts in all jurisdictions is the prejudice to the accused when an amendment may be granted. Each jurisdiction has a different approach to determining whether the accused is prejudiced by such an amendment, how much prejudice can be tolerated by the legal system, and if the injustice of the prejudice can be cured despite the amendment. The jurisdictions examined have evolved from English common law that placed an absolute bar on the amendment of indictments. There is no longer an absolute prohibition on amendments to indictments.

The International Criminal Tribunals for the Former Yugoslavia and Rwanda both permit amendments to indictments. Rule 50 of the Rules of Procedure and Evidence control these amendments in both tribunals. The Rules for the ICTR are modeled after those of the ICTY. Both tribunals have provisions for and allow amendments after the trial has begun. The Prosecutor for the ICTR need not have *prima facie* evidence to support an amendment but rather factual and legal support for the proposed amendment.

The consideration of this amendment must consider the fairness to the accused and her right not be prejudiced.

## **II. FACTUAL BACKGROUND**

During the existence of the ICTR, there have been numerous amendments to indictment. The Tribunal has exercised its power to grant leave to the Prosecutor through Rule 50 of the Rules of Procedure and Evidence.<sup>1</sup>

## **III. LEGAL DISCUSSION**

### **A. International Tribunals**

#### **1. Amendments to the rules**

Amendments of indictments in the International Criminal Tribunal for Yugoslavia (ICTY) are controlled by Rule 50 of the Rules of Procedure and Evidence. Rule 50 reads:

(A) (i) The Prosecutor may amend an indictment:

- (a) at any time before its confirmation, without leave;
- (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
- (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

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<sup>1</sup> *See generally*, VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 202-207 (1998) [Reproduced in the accompanying notebook at Tab 53] *See generally also*, JOHN JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2d ed.2000) [Reproduced in the accompanying notebook at Tab 48]

(ii) After the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed.

(iii) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

There have been several amendments to this rule made since the creation of the tribunal.<sup>2</sup> The first amendment of this rule came in 1996. This amendment added subsection (B) and (C).<sup>3</sup> These two sections provided the prosecutor to amend an indictment to contain a new charge,<sup>4</sup> and for the accused to be re-arraigned on the new charge<sup>5</sup> as well as being given 30 days to file motions on the new charge.<sup>6</sup> Rule 50(C) further provides that the court may postpone the trial date to ensure the accused has adequate opportunity to prepare a defense to the new charges.<sup>7</sup>

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<sup>2</sup> See generally, JOHN JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 271 (2d ed.2000) [Reproduced in the accompanying notebook at Tab 48]

<sup>3</sup> See, Rule 50, Rules of Procedure and Evidence, IT/32/REV.10, December 1996. [Reproduced in the accompanying notebook at Tab 7]

<sup>4</sup> See, *id.* [Reproduced in the accompanying notebook at Tab 7]

<sup>5</sup> See, *id.* [Reproduced in the accompanying notebook at Tab 7]

<sup>6</sup> See, *id.* [Reproduced in the accompanying notebook at Tab 7]

<sup>7</sup> See, *id.* [Reproduced in the accompanying notebook at Tab 7]

The second set of amendments that were made to Rule 50 all pertained to the wording of the time frame after the start of the trial. As initially drafted, Rule 50 used the words “if at trial” were placed in subsection (A)(iii) to describe when the trial chamber had jurisdiction over granting leave for the purposes of amending and confirming the amended indictment.<sup>8</sup> The first change in December of 1996 changed the words to describe this time period. As amended, Rule 50(A)(iii) then read “after the presentation of evidence in terms of Rule 85 has commenced<sup>9</sup>” in place of “if a trial.”<sup>10</sup> These words were replaced by “the initial appearance of the accused before a Trial Chamber pursuant to Rule 62” in November of 1997.<sup>11</sup> This amendment actually did more than change the wording of Rule 50. As amended, the Trial Chamber has jurisdiction to grant leave to amend and confirm such an amended indictment after the initial appearance, instead of after the trial has actually begun. This language was amended in July of 1998 when it was changed back to the “commencement of the presentation of evidence in terms of rule

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<sup>8</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32, February 1994 [Reproduced in the accompanying notebook at Tab 8]

<sup>9</sup> *See*, Rule 85, Rule of Procedure and Evidence, U.N. Doc. IT/32/REV.22, December 2001. [Reproduced in the accompanying notebook at Tab 8] Rule 85 describes the order of the presentation of evidence. In relevant part it states “Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defense...” Given this, the commencement of the presentation of evidence would be when the prosecution begins presenting her evidence. [Reproduced in the accompanying notebook at Tab ]

<sup>10</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32, February 1994 [Reproduced in the accompanying notebook at Tab 8]

<sup>11</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.12, November 1997 [Reproduced in the accompanying notebook at Tab 10]

85.”<sup>12</sup> Also added at this time was a requirement that the amended indictment will be review by the Judge or Trial Chamber that granted the leave to amend. The next change of Rule 50 came in November 1999. This alteration of the Rule made significant changes. These changes outlined when an amended indictment must be confirmed and change the time and authority of those confirming.<sup>13</sup> Most of these amendments were short lived as they were deleted months later.

The most recent amendment, which states the current version of Rule 50 was made in July 2000. The most significant alternation of Rule 50 was that the Trial Chamber now has authority to grant leave to amend and indictment once the case is assigned to that Trial Chambers. This is a change from previously, as the Trial Chamber didn’t have authority to grant leave to amend until the trial began. Another significant alternation was that once the Trial Chamber was granting leave to amend, the amended indictments on longer needed to be confirmed by a judge or that Trial Chamber.<sup>14</sup>

The reason for this is that once an amendment has been confirmed once, at least one judge has decided that there is a prime facie case. When an amendment is made to an already confirmed indictment, there need not be a showing of a prime facie case again because it has already been established and any new allegations or facts will be heard by the Trial Chamber during the trial. To have the Trial Chamber confirm the indictment and then sit as a trier of fact for the same indictment may be a conflict.

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<sup>12</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.13, July 1998. [Reproduced in the accompanying notebook at Tab 11]

<sup>13</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.17, November 1999. [Reproduced in the accompanying notebook at Tab 12]

<sup>14</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.18, July 2000. [Reproduced in the accompanying notebook at Tab 13]

As drafted in the past, the separate confirming judges were meant to resemble common law grand jury system. That is, a different body would decide if the evidence at hand warranted a person being charged with a crime from the body that would actually try the accused of that crime. The change in when the Trial Chamber is permitted to grant leave to amend an indictment does not mean that the rights of the Prosecutor have been limited. As previous versions of the Rule explicitly stated, an amend may be made after the commencement of evidence with leave of the Trial Chamber. They provided not only that the judge may grant leave to amend after the commencement of evidence, but that amendments were permitted after the beginning of the trial. The authority has been given to the Trial Chambers sooner to make such decisions, but the change in wording does not mean that amendments are now not permissible after the beginning of trial. That is a point of reference that has been deleted from Rule 50, but the authority to grant leave to amend, and for the prosecutor to amend, still remains in the time frame that is now provided.

Similarly, Rule 50 of the International Criminal Tribunal for Rwanda (ICTR), which controls amendments to indictment for the Rwanda Tribunal, has gone through changes that have an end result such as that of Rule 50 of the ICTY. Rule 50 of the ICTR was adopted in June of 1995.<sup>15</sup> Rule 50 originally stated that the indictment may be amended at trial with leave of the Trial Chamber. In its first and only alteration, in June of 1998, Rule 50 was changed to transfer the power to grant leave to amend to the Trial

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<sup>15</sup> *See*, Rule 50, Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev., June 1995. [Reproduced in the accompanying notebook at Tab 14]

Chamber after the initial appearance of the accused.<sup>16</sup> As in Rule 50 of the ICTY, the ability to amend after the beginning of trial was not taken away with this amendment, but rather the amendment give the Trial Chamber control over the case as soon the accused has been arraigned. Today, Rule 50 states

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

## 2. Judicial Interpretation of Rule 50 of the ICTY and ICTR

Both the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda have addressed amending indictment in their Trial Chambers and the Appeals Chamber.

The first case worth noting is a decision of the Appeal Chamber that originated in ICTY. This case was an appeal from the Decision on Prosecutor's Request to file an amended indictment in Prosecutor v. Kovačević denying the Prosecutor's request to amend the indictment. The Trial Chamber stated that its

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<sup>16</sup> See, Rule 50, Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev., June 1998. [Reproduced in the accompanying notebook at Tab 15]

reason for denying the request to amend was based on the size of the proposed amendment<sup>17</sup> and the time in which it was filed.<sup>18</sup>

The Appeal Chamber dealt overturned the decision of the Trial chamber and stated that the size of an amendment would not necessarily prohibit an amendment,<sup>19</sup> nor would a time in the proceeding when it wasn't weighed with the fairness to the accused.<sup>20</sup>

In a concurring opinion, the concept of "same transaction" was introduced to Rule 50.<sup>21</sup> This concept asks the question of whether the amendment derives from the same transaction by the same accused. As noted in this opinion was the accused right to be informed of all charges she is facing at the time of the arrest, but that doesn't mean that if there are additional charges in the future, the accused can not be informed of those when the accused when charge for the latter.

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<sup>17</sup> *See, Prosecutor v. Kovačević*, Case No.: IT-97-24-PT, Decision on Prosecutor's Request to file an amended indictment, 5 March 1998, para. 12(a). The proposed amendment consisted of 14 added counts and factual allegations which would increase the size of the Indictment from 8 to 18 pages. The Trial Chamber stated that such an amendment would not actually be an amendment, but rather a substitution of the original amendment. [Reproduced in the accompanying notebook at Tab 21]

<sup>18</sup> *See, id.* The amendment was proposed almost a year after the original confirmation of the indictment and seven months after the arrest of the accused. [Reproduced in the accompanying notebook at Tab 21]

<sup>19</sup> *See, Prosecutor v. Kovačević*, Case No.: IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 25. The Appeal Chamber recognizes that this amendment was due to an "organizational layout of the document" [Reproduced in the accompanying notebook at Tab 22]

<sup>20</sup> *See, id.* para. 31. [Reproduced in the accompanying notebook at Tab 22]

<sup>21</sup> *See, Prosecutor v. Kovačević*, Case No.: IT-97-24-AR73, Separate Opinion of Judge Mohamed Shahabuddeen on the Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998. [Reproduced in the accompanying notebook at Tab 23]

This decision also took away the ability of the Trial Chamber to exercise its discretion in granting leave to amend an indictment, because a prosecutor need only appeal a denial.

### 3. Standard of Proof For Amendments in the ICTR

The standard of proof required to be granted leave to amend an indictment requires that the Prosecutor only need to demonstrate that there are sufficient ground in both law and fact to allow the amendments.<sup>22</sup> On application to amend, the Prosecutor need not produce evidence of a *prime facie* case<sup>23</sup>, as that has already been established on the initial confirmation of the indictment.

### 4. Amendments Made to Indictments After the Beginning of Trial in the ICTR

In *Prosecutor v. Musema*, the Trial Chamber granted the prosecutor to amend the indictment at late stages in the Prosecutors' case.<sup>24</sup> The Trial Chamber considers Rule 50's language concerning when it can consider amendments to indictment. It is found that where the word allow the Trial Chamber "at or after the initial appearance" to consider amendments to indictment, it is competent for the Trial Chamber to entertain the motions and rule thereon, including at trial.<sup>25</sup>

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<sup>22</sup> *Prosecutor v. Kanyabashi*, Case No.: ICTR-96-15-T, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, 12 August 1999. [Reproduced in the accompanying notebook at Tab 24]

<sup>23</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 24]

<sup>24</sup> *See, Prosecutor v. Musema*, Case No.: ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999. [Reproduced in the accompanying notebook at Tab 25]

<sup>25</sup> *See, id.* at para. 13. [Reproduced in the accompanying notebook at Tab 25]

The Trial Chamber further notes that Rule 50 does not explicitly prescribe a time limit within which the Prosecutor may file a request to amend an indictment.<sup>26</sup> Due to the lack of particularity of the Rule, the court must in light of each circumstance, consider the motions in each case.<sup>27</sup> The considerations to be taken by the Trial Chamber should include the unfairness to the accused in conjunction with the dilatory filing of the motion.<sup>28</sup>

The Trial Chamber notes that consideration must also be given to the Prosecutor's responsibility to prosecute the accused to the full extent of law and to present all relevant evidence before the Trial Chamber.<sup>29</sup> The Trial Chamber must finally consider the risk of undue delay that the amendment could bring.<sup>30</sup> Considering the risk of undue delay will be a question of fact in each individual case.<sup>31</sup>

#### 5. Current Guidelines on Amending Indictments in the ICTR

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<sup>26</sup> *See, id* at para. 17. [Reproduced in the accompanying notebook at Tab 25]

<sup>27</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 25]

<sup>28</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 25]

<sup>29</sup> *Id.* [Reproduced in the accompanying notebook at Tab 25]

<sup>30</sup> *See, id.* at para. 18 [Reproduced in the accompanying notebook at Tab 25]

<sup>31</sup> *See, id.* In this case, the Tribunal stated that it “is of the opinion that the amendments sought will not unduly delay the proceedings, considering firstly, that the Prosecutor has already disclosed all her witness statements supporting the additional allegations contained in the proposed amended indictment, and secondly, that all the witness she intended to rely on in respect of the proposed amendment, have already testified in this case.” [Reproduced in the accompanying notebook at Tab 25]

The Trial Chamber has laid out specific guidelines for aspects of amending indictments.<sup>32</sup>

a. Adding a new charge

The first rule that they articulate is that when the prosecutor is “adding of new charges in connection of allegation of new acts should be granted only if the offenses charged, are of the same or similar character or are based on the same transaction.”<sup>33</sup> This is not applicable to a charge in the alternative<sup>34</sup> or an additional legal theory of liability with no new acts.<sup>35</sup> When the same transaction test<sup>36</sup> is met, the Trial Chamber must then “balance the overall interests of justice against an accused’s right for a fair trial without undue delay.”<sup>37</sup>

b. Expanding upon the factual allegation adduced in support of existing confirmed courts.

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<sup>32</sup> See, *Prosecutor v. Niyitergeka*, Case No.: ICTR-96-14-I, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, 21 June 2000. [Reproduced in the accompanying notebook at Tab 26]

<sup>33</sup> *Id.* at para. 33(1)(b). [Reproduced in the accompanying notebook at Tab 26]

<sup>34</sup> See, *Prosecutor v. Niyitergeka*, Case No.: ICTR-96-14-I, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, 21 June 2000, para. 33(1)(a)(i). [Reproduced in the accompanying notebook at Tab 26]

<sup>35</sup> See, *id.* at para. 33(1)(a)(ii). [Reproduced in the accompanying notebook at Tab 26]

<sup>36</sup> See, *id.* at para. 33(c). Same transaction may be established where “two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.” [Reproduced in the accompanying notebook at Tab 26]

<sup>37</sup> See, *id.* at para. 33(1)(c). [Reproduced in the accompanying notebook at Tab 26]

The Trial Chamber addressed the expanding and elaborating upon the factual allegation adduced in support of existing confirmed counts.<sup>38</sup> The Trial Chamber found that an amendment that does the above stated is favorable to the accused and is generally permitted.<sup>39</sup>

c. Making minor changes to the confirmed indictment

The Trial Chamber has stated that minor changes such as corrections of translation, grammar and punctuation are permissible.<sup>40</sup> Any amendment in this category must not “add any substantial matter not fairly included in the indictment and which is not likely mislead the accused as to the confirmation or charges.”<sup>41</sup>

6. Duty of the Prosecutor

In *Prosecutor v. Barayagwiza*, the Trial Chamber recognizes that the “Prosecutor has the responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.”<sup>42</sup> The

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<sup>38</sup> See, *id.* at para. 33(2). [Reproduced in the accompanying notebook at Tab 26]

<sup>39</sup> See, *id.* at para. 33(2)(c). The court stated “that a detailed proposed amended indictment that includes historical background of the offences, and other useful information in connection to the background of the offences, and other useful information in connection to the crimes charged could provide a greater degree of specificity and clarity to the allegations against an accused, and is therefore favorable to the accused.” [Reproduced in the accompanying notebook at Tab 26]

<sup>40</sup> See, *id.* at para. 33(3). [Reproduced in the accompanying notebook at Tab 26]

<sup>41</sup> See, *id.* [Reproduced in the accompanying notebook at Tab ]

<sup>42</sup> See, *Prosecutor v. Barayagwiza*, Case No.: ICTR-97-19-I, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 11 April 2000. [Reproduced in the accompanying notebook at Tab 27]

Prosecutor has an affirmative duty to conduct an ongoing investigation under Article 15 of the Statute of the ICTR.<sup>43</sup>

## **B. UNITED STATES**

The United States, while allowing some types of amendments, is extremely conservative in policies on the permissibility of amendments to indictments. The reason that the policy is strict is because the Fifth Amendment of the Constitution guarantees a defendant the right to be tried only for offenses presented in an indictment returned by a grand jury.<sup>44</sup> This constitutional guarantee allows only for clerical amendments, not substantive amendments.<sup>45</sup> This concept differs greatly from the policy at the ICTR. While the prosecutor at the ICTR has a continuing duty to investigate crimes, a prosecutor in the United States must investigate a crime fully prior to trial and present an indictment returned by the grand jury at trial.

While there is no rule controlling the amendments of indictments, Rule 7(e) of the Federal Rules of Criminal Procedure controls the amendment of informations. When applied to informations, the rule allows for amendments to be made anytime before the verdict, so long as the amendment will not add a new offence or charge a different

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<sup>43</sup> Article 15, Statute of the International Tribunal for Rwanda (annexed to S/RES/955 (1994)). [Reproduced in the accompanying notebook at Tab 2]

<sup>44</sup> U.S. CONST. amend. V. This amendment reads “...No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury...” [Reproduced in the accompanying notebook at Tab 56]

<sup>45</sup> See generally, Laura Soroka & Jocelyn Campanaro, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: II. Preliminary Proceedings: Indictments*, 89 GEO. L.J. 1275, 1300 (2001) [Reproduced in the accompanying notebook at Tab 55]

offence.<sup>46</sup> As Rule 7 as a whole controls indictments and informations, a Rule 7(e) standard is usually applied to indictments.<sup>47</sup> When applied to indictments, Rule 7(e) stands to protect the accused against prejudice by not allow a new or different offense to be inserted that will prejudice the accused in her defense.<sup>48</sup> Also, any amendment will also be subject to a form of the traditional rule that indictments may not be amended.

When assessing the nature of the amendment, the court focuses on if the amendment would change the offence that is charged, and what effect the amendment would have on the defendant.<sup>49</sup> The courts have clearly stated that amendments that will substantively change the amendment are not permissible, but clerical errors, although not truly substantive changes could be also be prejudicial to the defendant.

When assessing whether to allow a clerical amendment the court has examined the effect of the amendment on the accused. The clerical error to be amended must not be prejudicial to the defendant. Many clerical errors may not be prejudicial to the

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<sup>46</sup> See, Fed. R. Crim. P. 7(e). This rule states that “[t]he court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” [Reproduced in the accompanying notebook at Tab 5]

<sup>47</sup> See, YALE KAMISAR, WAYNE R. LAFAYE & JEROLD H. ISRAEL, ADVANCE CRIMINAL PROCEDURE, THE COMMENCEMENT OF FORMAL PROCEEDINGS, THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT OR INNOCENCE, APPEAL AND POST-CONVICTION REVIEW, 1058 (1994). [Reproduced in the accompanying notebook at Tab 54]

<sup>48</sup> See, Fed. R. Crim. P. 7(e). [Reproduced in the accompanying notebook at Tab 5]

<sup>49</sup> See generally, Laura Soroka & Jocelyn Campanaro, *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: II. Preliminary Proceedings: Indictments*, 89 GEO. L.J. 1275, 1300 (2001) [Reproduced in the accompanying notebook at Tab 55]

accused. Typographical errors such as a deleted number from serial number<sup>50</sup>, or an inaccurate dollar amount in a fraud case<sup>51</sup> have found to be permissible amendments. Amendments of identification have also found to be permissible in some cases where the identification of an individual in the indictment is not essential to proving the crime.<sup>52</sup>

An amendment may be “clerical” but still the create prejudice toward the accused in her defense. When the accused has notice of what she is being charged with, but the indictment should be amended to convict upon it to satisfy constitutional requirements, an amendment is permissible.<sup>53</sup> Typographical errors may not be amended when the accused was not on notice of what the charge would be after amendment.<sup>54</sup>

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<sup>50</sup> See, *U.S. v. Morrow*, 925 F.2d 779, 781-782 (4<sup>th</sup> Cir. 1991). There is not an impermissible amendment of indictment when “1” is added as first digit of weapon serial number to correct an obvious typographical error. [Reproduced in the accompanying notebook at Tab 35]

<sup>51</sup> See, *U.S. v. Ross*, 210 F.3d 916, 922-23 (8<sup>th</sup> Cir. 2000). There is no impermissible amendment of the indictment when the dollar value of a scheme to defraud is eliminated because it not an essential element of the crime. [Reproduced in the accompanying notebook at Tab 36]

<sup>52</sup> See, *U.S. v. Robles-Vertiz*, 155 F.3d 725, 729 (5<sup>th</sup> Cir. 1998). There is no impermissible amendment when an indictment for transporting illegal aliens and evidence presented at trial proved different names for the aliens transported because the name of alien is not an essential element of crime and did not reflect a change in alleged conduct. [Reproduced in the accompanying notebook at Tab 37]

<sup>53</sup> See, *U.S. v. Neill*, 166 F.3d 943, 947-48 (9<sup>th</sup> Cir. 1999). There isn’t an impermissible amendment of an indictment alleging robberies of 2 banks that listed money being stolen as being in custody of one bank when the other bank had custody because defendant had notice of being charged with robbing both banks. [Reproduced in the accompanying notebook at Tab 38]

<sup>54</sup> See, *U.S. v. Pina*, 974 F.2d 1241, 1243 (10<sup>th</sup> Cir. 1992) The amendment to change the tax year from 1984 to 1985 in an indictment alleging tax offenses is impermissible despite government’s claim of typographical error because the prosecutor assured the defendant that the 1985 taxes were not at issue. [Reproduced in the accompanying notebook at Tab 39]

The constitutional requirement of grand jury indictment creates a protection against variances. If the evidence at trial proves a crime (that is not a lesser-included charge) which the accused is not indicted on, the jury may not convict on the crime proved. Conversely, variance in non-material matter will likely be viewed as only a minor infringement on the accused constitutional rights, and the court will allow a conviction of such issues. The courts have found that some variances that are non-prejudicial and are allowed. For instance, the number of conspiracies may be changed because an indictment charging a single conspiracy and proof of multiple conspiracies is not fatal because sufficient evidence may exist to uphold jury finding of one conspiracy with common purpose.<sup>55</sup> An amendment may also, concerning conspiracy, when alleged co-conspirators are not proved to be part of the conspiracy, a defendant may still be found guilty of conspiracy as long as the indictment states that she conspired “with others.”<sup>56</sup> An amendment on a variance concerning the time that the alleged event occurred is also permissible.<sup>57</sup>

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<sup>55</sup> See e.g., *U.S. v. Collazo-Aponte*, 216 F.3d 163, 191 (1<sup>st</sup> Cir. 2000) An alleged variance between an indictment charging single conspiracy and proof of multiple conspiracies was not fatal because sufficient evidence existed to uphold jury finding of one conspiracy with a common purpose. [Reproduced in the accompanying notebook at Tab 40]

<sup>56</sup> See, *U.S. v. Johnston*, 146 F.3d 785, 791 (10<sup>th</sup> Cir. 1998). [Reproduced in the accompanying notebook at Tab 41]

<sup>57</sup> See e.g., *U.S. v. Ferguson*, 211 F.3d 878, 885 (5<sup>th</sup> Cir. 2000) There was not a fatal variance because the time of offence was not essential element of the crime. [Reproduced in the accompanying notebook at Tab ] ; *U.S. v. Teague*, 93 F. 3d 81, 82 (2d Cir. 1996) There was no prejudice when an indictment charged drug possession “on June 21, 1994” and evidence at trial proved possession prior to that date. [Reproduced in the accompanying notebook at Tab ] *U.S. v. Pope*, 132 F.3d 684, 688 (11<sup>th</sup> Cir. 1998) There was not a fatal variance because indictment charged “on or about” a particular date and evidence showed possession in the 2 weeks surrounding date. [Reproduced in the accompanying notebook at Tab 42]

Amendments to indictment in the United States are granted conservatively. While the United States is similar to other countries in looking to the unfairness of the amendment to the accused, it only allows amendments to be considered for any mistake that would not have had an impact on the outcome, regardless of the amendment. The amendment is merely permissible because of constitutional requirement.

### **C. CANADA**

Canadian law allows for amendments to indictments after the beginning of trial.<sup>58</sup> Section 601 of the Criminal Code controls the amendment of indictment.<sup>59</sup> The judicial interpretation of this section has preferred amending indictments when they are found defective or the evidence at trial has created a variance.<sup>60</sup> Where there is a variance between the indictment or a count in the indictment, Section 601(2) gives the court authority to amend, “on the trial of an indictment,” the indictment to conform to the evidence presented at trial.<sup>61</sup> Section 601(3) requires that the court amend an indictment when it appears necessary that any part of the indictment is defective.<sup>62</sup>

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<sup>58</sup> See generally, TIM QUIGLEY, *PROCEDURE IN CANADIAN CRIMINAL LAW* 369-372 (1997), ROGER E. SALHANY, *CANADIAN CRIMINAL PROCEDURE* 202-207 (1989). [Reproduced in the accompanying notebook at Tab ] see also, R.E. SALHANY, *CANADIAN CRIMINAL PROCEDURE* (5<sup>th</sup> ed., 1989) [Reproduced in the accompanying notebook at Tab 52]

<sup>59</sup> Criminal Code, R.S.C., ch. C-46 § 601 (1985) (Can.). [Reproduced in the accompanying notebook at Tab 3]

<sup>60</sup> See, *Regina v. Moore*, [1988] S.C.R. 1097. [Reproduced in the accompanying notebook at Tab 32]

<sup>61</sup> Criminal Code, R.S.C., ch. C-46 § 601(2) (1985) (Can.). Section 601(2) reads: Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and (a) a count in the indictment as preferred; or (b) a count in the indictment (i) as

The court is given the power to cure a defect by amendment “at any stage of the proceeding.”<sup>63</sup> While there is a difference in the language between the two sections, both sections provide for the ability to amend after the start of a trial. Section 601(2) provides on the trial of an indictment since the time period during trial is the only time it would be possible to identify a variance. Section 601(3) provides that an amendment can be made at *any* stage of the proceeding to ensure that a defect may be remedied when it is identified regardless of the stage of the proceedings. Using section 601(3) was identified by the courts as the preferred method of remedying a defective indictment.<sup>64</sup>

The Supreme Court has held that when a court is presented with an indictment that is a complete nullity, it can be amended under the authority of section 601.<sup>65</sup> The

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amended, or (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587. [Reproduced in the accompanying notebook at Tab 3]

<sup>62</sup> Criminal Code, R.S.C., ch. C-46 § 601(3) (1985) (Can.). Section 601(3) reads: Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears (a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament; (b) that the indictment or a count thereof (i) fails to state or states defectively anything that is requisite to constitute the offence, (ii) does not negative an exception that should be negated, (iii) is in any way defective in substance, and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or (c) that the indictment or a count thereof is in any way defective in form. [Reproduced in the accompanying notebook at Tab 3]

<sup>63</sup> Criminal Code, R.S.C., ch. C-46 § 601(3) (1985) (Can.). [Reproduced in the accompanying notebook at Tab 3]

<sup>64</sup> *See, Regina v. Moore*, [1988] S.C.R. 1097. [Reproduced in the accompanying notebook at Tab 32]

<sup>65</sup> *See, Regina v. Moore*, [1988] S.C.R. 1097. The court in *Moore* speaks to the language of section 529, which is today section 601. The two sections contain essential all of the

court further states that the option not to amend is only available to the court when the defect has prejudiced the accused in her defense and this injustice cannot be remedied by an adjournment of the trial.<sup>66</sup>

Section 601(4)(d) requires the court to determine if the accused has been misled in her defense by the variance, error, or omission that should be amended.<sup>67</sup> Section 601(4)(e) requires the court to determine if such an amendment can be made without injustice.<sup>68</sup> Section 601(5) provides authority for the court to adjourn the trial if doing so can cure an injustice. The question then for the court, when deciding to either amend or

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same language on the authority to amend indictment. [Reproduced in the accompanying notebook at Tab 32]

<sup>66</sup> *See, Regina v. Moore*, [1988] S.C.R. 1097. The requirement of an amendment becomes more important after this opinion. If an indictment is not amended, because the accused is prejudiced and that prejudice cannot be remedied by an adjournment, the indictment must be quashed. If the accused is re-indicted on the charge that was originally intended in the first indictment, the indictment will probably result in an acquittal. The reason for this is because the accused was already in jeopardy of this charge once, and would be acquitted under the theory of double jeopardy. [Reproduced in the accompanying notebook at Tab 32]

<sup>67</sup> Criminal Code, R.S.C., ch. C-46 § 601(4)(d) (1985) (Can.). Section 601(4)(d) states that “[t]he court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3)” [Reproduced in the accompanying notebook at Tab 3]

<sup>68</sup> Criminal Code, R.S.C., ch. C-46 § 601(4)(e) (1985) (Can.). Section 601(4)(e) states that “[t]he court shall, in considering whether or not an amendment should be made to the indictment or a count in it, whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.” [Reproduced in the accompanying notebook at Tab 3]

quash, is what is an injustice to an accused in her defense, and if such an injustice can be cured by an adjournment.<sup>69</sup>

A prejudice that may not be necessarily cured by an adjournment is one that completely changes the defense of the accused. This prejudice may occur when the prosecutor attempts to amend by replacing words in an indictment. On its face, an amendment such as this may not seem prejudicial, but the amendment may change the nature of the charge and the accused's defense is no longer applicable. An amendment in this case would be equivalent to an entirely new indictment, since it required an entirely new defense. Therefore, such an amendment may not be made.

The court in *R. v. Tremblay* recognized, notwithstanding the powers of amendment granted to the court, this fundamental principle of criminal law for an individual accused of a crime to know what she will be charged with to equip herself with an adequate defense when refusing to amend an indictment.<sup>70</sup>

In *Tremblay*, the prosecution attempted to amend the indictment at the conclusion of the case.<sup>71</sup> This amendment would have allowed the prosecutor to have the court consider a different offense on the evidence.<sup>72</sup> A variance is usually correctable by

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<sup>69</sup> Criminal Code, R.S.C., ch. C-46 § 601(6) (1985) (Can.). The section states that “[t]he question whether an order to amend an indictment or a count thereof should be granted or refuted is a question of law.” [Reproduced in the accompanying notebook at Tab 3]

<sup>70</sup> *See, Regina v. Tremblay*, [1993] 2 S.C.R. 932. [Reproduced in the accompanying notebook at Tab 33]

<sup>71</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 33]

<sup>72</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 33]

amendment.<sup>73</sup> In this case two problems arose with allow the prosecutor to amend for a variance. The first problem was that the accused had defended himself to the charge in the indictment. The prosecutor attempted to change the charge, since not being able to present evidence that could prove the original charge and therefore negating the defense the accused has presented.<sup>74</sup> The second problem was that the evidence at trial did not prove the offense that the prosecutor wished to be inserted into the indictment.<sup>75</sup> Under Section 601, the time in which this amendment was requested was allowed, but not permissible because of prejudice to the accused.

Conversely, the courts have found that an amendment is permissible when it charge is brought under a statute, where the legislature intended either the original charge or the amended charge to be brought under that statute.<sup>76</sup> This was displayed in *Morozuk v. R* where the court found that the defendant would not be prejudiced by amending the indictment from accusing possession for the purpose of trafficking marijuana because the evidence presented at trial displayed the use of marijuana.<sup>77</sup> Even though the charge

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<sup>73</sup> See, Criminal Code, R.S.C., ch. C-46 § 601(2) (1985) (Can.). [Reproduced in the accompanying notebook at Tab 3]

<sup>74</sup> See, *Regina v. Tremblay*, [1993] 2 S.C.R. 932. [Reproduced in the accompanying notebook at Tab 33]

<sup>75</sup> See, *id.*, [1993] 2 S.C.R. 932. The court stated that that a court cannot amend an indictment unless the evidence presented at trial is capable of support such a charge. [Reproduced in the accompanying notebook at Tab 33]

<sup>76</sup> See, R.E. SALHANY, *CANDIAN CRIMINAL PROCEDURE* (5<sup>th</sup> ed., 1989) *citing*, *Morozuk v. Regina*, [1983] 50 C.R. (3d) 179. [Reproduced in the accompanying notebook at Tab 51]

<sup>77</sup> See, *id.* [Reproduced in the accompanying notebook at Tab 51]

evidence at trial showed use of marijuana, not trafficking, both offenses were contained in the same statute, and the amendment was allowed because of legislative intent.<sup>78</sup>

Even when there is a defect in the indictment, the courts will not necessarily amend to correct it. When there is no question as to what the charges are against an individual and the accused does not raise an objection, the indictment need not be amended, and a conviction may be upheld.<sup>79</sup>

When faced with the decision on having to amend, or quash, which will likely result in an acquittal, the courts have looked to the fairness to the accused. To maintain fairness, it is essential that the accused be reasonably informed of the charges against her, so that she may have the opportunity to present a full defense and thus ensuring a fair trial.<sup>80</sup>

#### **D. ENGLAND**

English law allows for the amendment of indictments after the start of trial.<sup>81</sup> Amendments to indictments are controlled by chapter 90, section 5 of the Indictments

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<sup>78</sup> See, *id.* [Reproduced in the accompanying notebook at Tab 51]

<sup>79</sup> See, *Regina v. Cote*, [1977] 33 C.C.C. (2d) 353. In *R. v. Cote*, the Supreme Court found that the language, as contained in the statute criminalizing refusing a breath test to measure blood alcohol content, of “without reasonable excuse” was missing, but not prejudicial to the defendant. Even though the indictment didn’t include these words, which could be construed as essential since they provide for a possible defense to the crime, the accused was reasonable informed. The Supreme Court found that the accused was reasonable informed since he offered a “reasonable excuse,” which was rejected, in the trial court. [Reproduced in the accompanying notebook at Tab 31]

<sup>80</sup> See, *Regina v. Cote*, [1977] 33 C.C.C. (2d) 353. [Reproduced in the accompanying notebook at Tab 31]

<sup>81</sup> See generally, ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 51-55 (Stephen Mitchel & P.J. Richardson, eds., 43d ed. Sweet & Maxwell) [Reproduced in the accompanying notebook at Tab 46]

Act of 1915.<sup>82</sup> This section allows the court to amend an indictment after trial and have it be treated the same as if a grand jury was to return it.<sup>83</sup>

Section 5 states that the court must amend an indictment if it is found to be defective for amendments at any stage of the trial.<sup>84</sup> Amendments can be made for a technical or fundamental defect.<sup>85</sup> Section 5(1) further outlines that such an amendment is conditional on the injustice that the accused will suffer in her defense if the amendment is permitted.<sup>86</sup> When assessing the prejudice to the accused, the court is given options within Section 5 of what it is able to do if it finds that the accused will be prejudice by such and amendment. The first option that the court has is to amend the indictment and

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<sup>82</sup> *See*, Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(1) (Eng.). [Reproduced in the accompanying notebook at Tab 6]

<sup>83</sup> *See*, Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(2) (Eng.). This section reads “[w]here an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been found by the grand jury in the amended form.” Rule 50 of the International Criminal Tribunal for Yugoslavia modeled its method of confirmation similarly to this one. As it has separate confirming judge before the beginning of trial to act as a grand jury, the Trial Chamber in which the case is assigned makes determinations of the amendments after that assignment. [Reproduced in the accompanying notebook at Tab 6]

<sup>84</sup> *See id*, This section reads “[w]here, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, . . .” [Reproduced in the accompanying notebook at Tab 6]

<sup>85</sup> *See*, CHRISTOPHER J. EMMINS, A PRACTICE APPROACH TO CRIMINAL PROCEDURE 55-56 (2d ed., 1983) A technical defect is a trivial one such as the misspelling of a name and a fundamental defect is one such as omitting from the indictment an essential element of the offence charged in the account. [Reproduced in the accompanying notebook at Tab 47]

<sup>86</sup> *See*, Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(2) (Eng.). [Reproduced in the accompanying notebook at Tab 6]

provide a new trial for any of the counts contained in the indictment.<sup>87</sup> The second option is for the court is to postpone either the original trial or a new trial as provided.<sup>88</sup> Furthermore, the court is permitted to, in conjunction with either of these options, may order the jury already in place not to render a judgement on an amendment or allow the jury to render judgement on the amended charges as if the amended charges were originally included in the indictment.<sup>89</sup>

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<sup>87</sup> *See*, Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(3) (Eng.). This section states [w]here, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment. [Reproduced in the accompanying notebook at Tab 6]

<sup>88</sup> *See*, Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(4) (Eng.). This section states [w]here, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary. [Reproduced in the accompanying notebook at Tab 6]

<sup>89</sup> *See*, Indictment Act, 1915, 5 & 6 Geo. 6, c. 90, § 5(5)(a)&(b) (Eng.). Section 5 (a) & (b) state

[w]here an order of the court is made under this section for a separate trial or for the postponement of a trial--

(a) if such an order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and

(b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced... [Reproduced in the accompanying notebook at Tab 6]

The court has recognized its power to amend to the full extent of Section 5.<sup>90</sup> The question remaining for the court is when will an injustice prohibit an amendment to an indictment.

The courts have articulated that regardless of at what stage of the trial the indictment is amended, if there is no *actual* prejudice to the accused in her defense, the amendment is permissible.<sup>91</sup> There is also no prejudice to the accused when an amendment is made at any time during the trial when an amendment does not alter the nature of the accused's defense.<sup>92</sup> When an amendment of an entirely new count is inserted after the beginning of trial, the accused would almost surely be prejudiced. A reorganization of the charges may not be considered a prejudicial amendment if the charges are centered on the original indictment.<sup>93</sup> At this point an amendment is still permissible, but the accused may be granted a separation of the charges or postponement of the trial, consistent with Section 5 to remedy the injustice. A reorganization of the

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<sup>90</sup> See, *R. v. Johal and Ram* [1097] 1 QB 475. In this case, the court recognized the movement of the courts toward amending an indictment to the full extent permitted by Section 5. [Reproduced in the accompanying notebook at Tab 28]

<sup>91</sup> See, *R. v. Cash*, [1985] 1 QB 801. The court in this case found that even when an amendment is made during closing statement of the prosecutor, the amendment is permissible because the accused was not *actually* prejudiced by the amendment. [Reproduced in the accompanying notebook at Tab 29]

<sup>92</sup> See, ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 54 (Stephen Mitchel & P.J. Richardson, eds., 43d ed. Sweet & Maxwell) *citing*, *R v. Collison* [1980] 71 Cr.App.R. 249. An amendment was needed in this case to solve a technical matter. [Reproduced in the accompanying notebook at Tab 46]

<sup>93</sup> See, *R. v. Johal and Ram* [1097] 1 QB 475. is similar to the new test for amendment that the International Criminal Tribunal for Rwanda has implemented. [Reproduced in the accompanying notebook at Tab 28]

charges may not be considered a prejudicial amendment if the charges are centered on the original indictment.

A deletion of particulars from an indictment may also cause injustice and therefore would not be permissible after a trial has begun. In *R. v. Gregory*, the defense had been centered on the lack of the government's ability to prove that an item that was alleged to be stolen was stolen from a certain individual. When the Crown amended the indictment to simply possession of a stolen item from possession of a stolen item that was stolen from a certain person (as originally charged in the indictment), the accused was found to be prejudiced in his defense.<sup>94</sup> This amendment was made at the close of evidence.<sup>95</sup> The remedy for such an inappropriate amendment is the reversal of the conviction found on the amended indictment.

Though the wide powers of Section 5 are available to the court to amend, the prejudice to the accused will restrict these powers considerably. Even when amendments are permitted during the trial, and as late as the closing arguments, the court must grant an adjournment to allow the accused to consider whether she will present further evidence.<sup>96</sup>

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<sup>94</sup> *See, R. v. Gregory* [1972] 1 WLR 991 [Reproduced in the accompanying notebook at Tab 30]

<sup>95</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 30]

<sup>96</sup> *See, ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 51-55* (Stephen Mitchel & P.J. Richardson, eds., 43d ed. Sweet & Maxwell) *citing, R. v. Bonner* [1974] Crim.L.R. 479. [Reproduced in the accompanying notebook at Tab 46]

## E. SCOTLAND

Amendments to indictments are controlled by section 96 of the 1995 Act.<sup>97</sup> Under Scottish law, amendments to indictments are permissible at any time prior to the determination of the case<sup>98</sup> provided that such an amendment does not change the character of the original offence.<sup>99</sup> Amendments are also subject to the scrutiny of the court for the prejudice that they may cause the accused.<sup>100</sup> When an amendment may prejudice the accused, the court has the option to remedy that injustice through adjournment of the trial.

Amendments are authorized when a variance occurs at trial or to cure defects.<sup>101</sup> These amendments, although expressly provided for are still subject to the courts interpretation of the injustice to the accused.

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<sup>97</sup> *See*, Criminal Procedure Act 1995, c. 46 s.96 (Scot.) [Reproduced in the accompanying notebook at Tab] See generally, also, RENTON & BROWN'S CRIMINAL PROCEDURE (6<sup>th</sup> ed. 2001) [Reproduced in the accompanying notebook at Tab 4]

<sup>98</sup> *See, id.* at s.96(2) Section 92(2) reads "It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the indictment by deletion, alteration or addition, so as to (a) cure any error or defect in it; (b) meet any objection to it; or (c) cure any discrepancy or variance between the indictment and the evidence." [Reproduced in the accompanying notebook at Tab 4]

<sup>99</sup> *See, id.* at s.96(3) Section 96(3) reads "Nothing in this section shall authorise an amendment which changes the character of the offence charged, and, if it appears to the court that the accused may in any way be prejudiced in his defence on the merits of the case by any amendment made under this section, the court shall grant such remedy to the accused by adjournment or otherwise as appears to the court to be just. (4) An amendment made under this section shall be sufficiently authenticated by the initials of the clerk of the court." [Reproduced in the accompanying notebook at Tab 4]

<sup>100</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 4]

<sup>101</sup> *See, id.* at s.96(2)(a)&(b). [Reproduced in the accompanying notebook at Tab 4]

Given Section 96(1)<sup>102</sup>, it would seem that the courts would take a liberal view concerning amendment. In a case of discrepancies, it was found that an amendment of such a discrepancy would prejudice the accused. In *Walker v. HM Advocate*, the accused was charge with several crimes including sending threading letters from a prison. The accused was planning on using a defense of alibi, because he was actually in another prison from the one listed. The trial court allowed the amendment at late stages in the proceeding. On appeal the court quashed the conviction stating that if the indictment had originally contained the amendment, the scope of the accused's investigation may have been wider, and therefore it was prejudicial to the accused's defense.<sup>103</sup>

But conversely, an amendment is permitted to correct a name in one count of an indictment where the name is correct in the other counts.<sup>104</sup> It is a matter of fact in any case to determine the prejudice to the accused.

## **F. SOUTH AFRICA**

South Africa, like the United States, has a constitution requirement for a defendant to be informed of and prepare a defense to the charges of which she is accused.<sup>105</sup> Amendments to indictments in South Africa are control by Section 86 of the

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<sup>102</sup> *See, id.* at s.96(1). This section states that “[n]o trial shall fail or the ends of justice be allowed to be defeated by reason of any discrepancy or variance between the indictment and the evidence.” [Reproduced in the accompanying notebook at Tab 4]

<sup>103</sup> *See, Walker v. Her Majesty's Advocate* 1999 S.L.T 1388 (Scot. 1999). [Reproduced in the accompanying notebook at Tab 45]

<sup>104</sup> *See, Keane v. Her Majesty's Advocate*, 1986 S.C.C.R. 491 (Scot. 1986). [Reproduced in the accompanying notebook at Tab 19]

<sup>105</sup> S. AFR. CONST., Section 35(3) (Arrested, detained and accused persons). Section 35(3) states that “[e]very accused person has a right to a fair trial, which includes the

Criminal Procedure Act.<sup>106</sup> Section 86(1) outlines the situation in which amendments are permissible.<sup>107</sup> Amendments are generally admissible in three situations.<sup>108</sup> The first is where there the indictment is defective due to a lack of an essential averment.<sup>109</sup> This is similar to Canadian law which prefers amending an indictment when it is lacking in an essential element, rather than quashing and reindicting an individual. The second situation in which an indictment may be amended is when a variance has occurred.<sup>110</sup> The third situation in which an amendment is permissible is where words have been

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right - (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence[.]”

<sup>106</sup> *See*, § 86 Criminal Procedure Act 51 of 1977. [Reproduced in the accompanying notebook at Tab 1]

<sup>107</sup> *See*, § 86 Criminal Procedure Act 51 of 1977. Section 86(1) states that a Court may order that charge be amended. - (1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend. [Reproduced in the accompanying notebook at Tab 1]

<sup>108</sup> *See*, PEET M. BEKKER, TERTIUS GELDENHUYS, J.J. JOUBER, J.P.SWANPOEL, S.S. TERBLANCHE BIUR, STEP E VAN DER MERWE B IURIS & JAN H VAN ROOYEN, CRIMINAL PROCEDURE HANDBOOK 176-78 (J.J. Joubert ed., 4<sup>th</sup> ed. 1999) [Reproduced in the accompanying notebook at Tab 49]

<sup>109</sup> *See*, § 86(1) Criminal Procedure Act 51 of 1977. [Reproduced in the accompanying notebook at Tab 1]

<sup>110</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 1]

omitted, unnecessarily inserted, or any other error is made.<sup>111</sup> Amendments to indictments can be made at any time before the judgment.<sup>112</sup> A proposed amendment is subject to scrutiny by the court in its effects on the defendant.

Section 86(1) states that it is a requirement that the accused not be prejudiced in her defense as a result of an amendment.<sup>113</sup> Even though Section 86(1) provides for amendment until the judgement in a trial, the prejudice to the accused will naturally increase as the trial nears its end.<sup>114</sup> As found in other countries, when the defense of the accused remains the same as it was prior to the amendment, the courts will find that there is not prejudice to the accused that will make the amendment impermissible.<sup>115</sup> This prejudice must be examined on a case by case basis.<sup>116</sup>

Notwithstanding the prejudice to the accused when an indictment is amended, the courts have recognized that Section 86 provides for amendments to indictment, not for the replacement of a completely new charge. Replacing a charge would surely create an injustice, especially after a trial has begun. Conversely, if a new charge is inserted and

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<sup>111</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 1]

<sup>112</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 1]

<sup>113</sup> *See, id.* [Reproduced in the accompanying notebook at Tab 1]

<sup>114</sup> *See, Heller* 1971 (2) SA (A) at 53C-D. [Reproduced in the accompanying notebook at Tab 18]

<sup>115</sup> *See, F* 1975 (3) SA (T) at 170. [Reproduced in the accompanying notebook at Tab 17]

<sup>116</sup> *See, Pillay* 1975 (1) SA 919 (N) [Reproduced in the accompanying notebook at Tab 20]

there will be no change to the defense of the accused, the amendment will be permitted.<sup>117</sup>

Also mentioned in Section 86(1) is the ability to amend because of a variance.<sup>118</sup> There is not a substantial amount of discussion on amendments made to indictments because of variance. A reason for this may be the presence of Section 88. Section 88 provides that if there is a variance at trial, due to a fundamental defect in an indictment, such as failure to put forth facts that a court could find an individual guilty on in proved, the court is permitted to find the defendant guilty notwithstanding this defect. This makes indictments self-correcting and the court need not address such defects though amendments. This section does not provide for substitution of charges.<sup>119</sup> Section 88 is controversial, as it is directly adverse to the constitutional rights concerning indictments.

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<sup>117</sup> See, *Barkett's Transport (Edms) Bpk* 1988 (1) SA 157 (A). [Reproduced in the accompanying notebook at Tab 16]

<sup>118</sup> See, § 86(1) Criminal Procedure Act 51 of 1977. [Reproduced in the accompanying notebook at Tab 1]

<sup>119</sup> See, *Sarjoo* 1978 (4) SA 520 (N) [Reproduced in the accompanying notebook at Tab 34]