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**COMPARATIVE RESEARCH ON PROCEDURAL ISSUES CONCERNING
THE CLOSING ORDER AND INDICTMENT**

Briefing for DC-CAM

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Executive Summary

This research was conducted by the International Human Rights Clinic at the School of Oriental and African Studies to address the procedural practice of three international courts (ICC, ICTY, and ICTR) and five domestic civil-law systems (France, Germany, Egypt, Japan and Greece) in relation to the following issues:

- The nature and role of the closing order;
- The right of the accused to appeal the closing order; and,
- The discretion of the Co-Investigating Judges and the Trial Chamber to cut crime scenes, redefine or exclude charges requested by the prosecutors.

The aim of this research is to provide a comprehensive database on the aforementioned procedural issues in an attempt to identify and recommend the parameters of best practice, which could be incorporated into the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The main findings of the research are:

- Though the term “closing order” does not necessarily exist under these jurisdictions, there is usually an equivalent mechanism whereby the competent body issues a decision ending the investigation and either dismissing or confirming the charges. On the whole, the order to commit the accused to court is called an “indictment;”
- The general practice of the civil-law systems which we reviewed is to deny the accused the right to appeal the closing order or its variations (except Greece); and,
- The general legal norm is to vest in entities equivalent to the Co-Investigating Judges and the Trial Chamber the discretion to reduce crime scenes, re-classify, re-characterise or cut down charges requested by the prosecutors.

Considering the gravity of the offences adjudicated by the ECCC, the authors of this research recommend the adoption of a cumulative charging approach to ensure the prosecution of all possible charges. In addition, in order to avoid the miscarriage of justice, the authors recommend the adoption of a provision allowing the accused a right of appeal against the closing order or the provision of a second stage of scrutiny to confirm the charges.

Section A: Introductory remarks

1. Background of the project

The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) are currently dealing with the prosecution of crimes perpetrated by the Khmer Rouge regime. Thirty years after the fall of Pol Pot, Kaing Guek Eav, accused of being the chief torturer of the ultra-Maoist regime in his capacity as Chairman of the notorious Tuol Sleng Prison, was recently the first to stand trial for crimes against humanity.¹ He is generally known as Duch. According to Rule 66 of the Internal Rules of the ECCC (“Internal Rules”), when the Co-Prosecutors have concluded an investigation, they must issue a written, reasoned final submission and return the case file to the Co-Investigating Judges. Under Rule 67 of the Internal Rules, the Co-Investigating Judges must then issue a closing order in order to either indict and send the accused to trial (“indictment”) or to dismiss the charges. The Co-Investigating Judges are not bound by the Co-Prosecutors’ submissions and may redefine or omit charges.

However, in the case of Duch, the legal and factual scope of the Indictment was far narrower than the Co-Prosecutors’ final submissions. The Co-Investigating Judges considered crimes against humanity and grave breaches of the Geneva Conventions of 1949 as the highest available legal classifications and therefore rejected the Co-Prosecutors’ domestic law charges of torture and murder. Controversy has arisen with respect to the Closing Order due to the decision of Co-Investigating Judge not to include charges requested by the Co-Prosecutors. The Co-Prosecutors consider that the decision of the Co-Investigating lacked sufficient reasoning and sought to appeal the Closing Order. This controversy is not clarified by the criminal procedural rules included either in the internal rules of the ECCC drafted by the Judges themselves or the Cambodia Code of Criminal Procedure (“Cambodian Code”) which came into force later. The Pre-Trial Chamber has consistently found that the Internal Rules are applied first and then the Cambodian Code.

2. Aim and Scope of the Research

¹ See generally Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, <http://www.eccc.gov.kh/english/default.aspx> (last accessed March 15, 2009).

The questions referred to the Clinic for research include: the nature and role of the Closing Order and how it differs from an Indictment; the right of the accused to appeal the closing order; and the discretion of the Co-Investigating Judges and the Trial Chamber to cut crime scenes, redefine or exclude charges requested by the Co-Investigating Prosecutors.

The Cambodian Code adheres to a civil law system and is based in particular on the French legal system. Therefore, we decided to research civil law countries, specifically France, Germany, Egypt, Japan, and Greece. The French Napoleonic Code was the first example of modern civil law practice of codification, and was enacted in 1804. It has been the main influence in the 19th-century civil codes of several countries around the world.² German law was influenced by the French system but is renowned as a different model of civil law codification and has separately affected the development of other civil law systems. Egypt is an example of a modified civil law system based on the French model. Japan and Greece on the other hand seem to follow mainly the German model.

Moreover, as the trial of Khmer Rouge's crimes involves international crimes, such as crimes against humanity, we considered it appropriate to research international criminal tribunals, namely, the International Criminal Court ("ICC"), the International Criminal Tribunal for Former Yugoslavia ("ICTY"), and the International Criminal Tribunal for Rwanda ("ICTR").

3. Methodology

We decided to review the procedural rules of international courts and civil law jurisdictions through individual research. This individual research was country-focused but was complemented with constant collaboration of findings through frequent meetings and emails. The international research was also conducted in this way. A number of resources in English, Greek, French, German, Japanese and Arabic were used. Finally, we have collectively worked on analysis and compiled our conclusions relevant to the controversial issues which arose as a result to the Duch Case.

² Napoleonic Code, Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/403196/Napoleonic-Code> (last visited March 16, 2009).

4. Definitions and Terminology

The term “closing order” is not widely used in civil law jurisdictions. Apart from French criminal procedural law, it is difficult to discern a single term that correlates exactly to the meaning of the term “closing order.” As mentioned above, for the purposes of this report, we shall consider a “closing order” to be the decision that ends the investigation, either by referring the case to the competent court or dismissing it. Consequently, a number of procedural acts that operate in a similar way within the various systems shall be identified.

As far as the term “indictment” is concerned, the difficulties in defining its meaning are more apparent, taking into account the different meaning it bears in common and civil law systems. In this report, the term “indictment” shall refer to the order or decision that commits a suspect/accused to trial.

The meaning of the term “crime scenes” is rather obscure. However for the purposes of this research, we shall consider “crimes scenes” to be equivalent to locations relevant to the commission of the crime. The discretion to cut crime scenes shall refer to the power to exclude particular locations. Redefining charges involves the reclassification or the penal re-characterization of the material act *per se* without changing the existence of the act in place, time, and historical context.

Section B: Research on criminal procedure at the international level: International Criminal Court (ICC), International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

1. General Introduction

There is a significant difference between the criminal proceedings of the common law and the civil law traditions. The common law tradition is said to be adversarial or accusatorial and the civil model inquisitorial. The fundamental difference between the two is the role of the parties and the judges. In the adversarial system, two adversarial parties bring their case to court and perform their own investigations. The role of the judge is to act as referee, mainly deciding on procedural issues raised by the parties and making any necessary legal rulings. The trial judge or the jury, depending on the case, decides on the accused's guilt or innocence.

In the inquisitorial model, on the other hand, State agencies are obliged to carry out objective investigations and prosecutions and essentially only one case is presented to the court. Defence interests are looked after by the investigation and by the examining magistrate (*juge d'instruction*). The Prosecutor and the examining magistrate instruct the police and a dossier is assembled. The trial judge is different from the examining magistrate. A judge plays a much more active and intervening role at trial in order to discover the truth.³

Since the Nuremberg Trials, the need to develop a new procedural system for any new international criminal court has continually been acknowledged. Such a procedural system would be *sui generis* in the sense that it would depart from any single domestic legal tradition of the world. Inevitably, it would contain elements from the major domestic legal systems of the world. This would also enhance the perceived legitimacy of the tribunal and its proceedings.⁴

2. Introduction to the ICC, ICTY and ICTR

The horrors of the Second World War prompted the initial desire among the international community to establish a permanent international criminal court. The

³ Cryer, Friman, Robinson, Wilmschurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2007) at 350.

⁴ *Ibid.* at 349.

Genocide Convention of 1948 mirrored this concern for the first time but the idea was shelved in the post War period and throughout the duration of the Cold War. In the 1990s the idea again took central stage on the international scene. The ICTR was established in 1994 by the United Nations Security Council (“UN Security Council”) in order to judge those people responsible for the Rwandan genocide and other serious violations of international law performed in the territory of Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994. The ICTY was established in 1993 by the UN Security Council to prosecute serious crimes committed during the wars in the former Yugoslavia, and to try their alleged perpetrators. The work of these two ad hoc tribunals represented the most serious effort since Nuremberg to bring the perpetrators of the most serious crimes to justice. Thereafter, the permanent ICC was established under the Rome Statute⁵ in 1998 which came into force on 1 July 2002. For our purposes, the ICC model corresponds to more features of the inquisitorial model used by Cambodia than the ICTY/R. Therefore, we propose to use it as the principal model in our discussion of international criminal procedure.

The Rome Statute is a treaty negotiated by States. The International Law Commission’s (“ILC”) draft Statute contained elements of procedural law similar to the ICTY and ICTR and reflected a rather adversarial approach. During negotiations prior to adoption, more inquisitorial features were proposed as a reaction to the ICTY and ICTR experiences.⁶ Huge efforts were made to find solutions to combine different legal traditions, such as whether or not to have a pre-trial chamber. Unlike the ICTY and ICTR, where judges drafted procedural and evidence rules themselves, States reserved for themselves the right to negotiate their own Rules of Procedure and Evidence (“RPE”).⁷ The ICC judges were given the power to adopt Regulations of the Court,⁸ which in practice also regulate procedural matters of substantive importance.

On the whole, the ICTY and the ICTR systems follow the common law system (adversarial system). This may be due to the fact that both tribunals follow the

⁵ Rome Statute of the International Criminal Court, 1 July 2002, 21 U.N.T.S. 90 [hereinafter Rome Statute].

⁶ Cryer, *supra* note 3, at 352.

⁷ Rome Statute, *supra* note 5, at art. 51.

⁸ *Ibid.* at art. 52.

American Federal Rules of Evidence. However, some of the rules have been amended to pursue the inquisitorial approach, thus adapting strengths of both approaches.⁹ For instance, the Prosecutor is assigned to collect evidence whether in favour or against the suspects. Moreover, it is the duty of the parties to submit documents such as the list of witnesses, their testimonies and the facts of the case, which may accelerate the trial before the beginning of the actual court.¹⁰

3. The Nature and role of the “closing order” and “indictment”

The term “Closing Order” does not exist in the procedure of the ICTY and ICTR. Under the tribunal Statutes, the Trial Chamber judge who receives the indictment, from the prosecutor reviews the indictment and confirms the indictment if satisfied that a *prima facie* case has been established.¹¹ The judge has the competence to direct the prosecution to present additional evidence, or the judge may take the following actions: dismiss or confirm each count, or grant the Prosecution the opportunity to amend the indictment. A dismissed count can only be presented in an amended indictment if the Prosecution finds additional evidence supporting this count.¹²

Moreover, the Prosecutor may amend or withdraw the indictment without leave before its confirmation by the judge.¹³ After confirmation and before assigning the case to the Trial Chamber, the prosecutor may amend or withdraw the indictment through a judicial leave. However, after assignment, only the Trial Chamber (or a judge of this chamber) may withdraw or amend the indictment upon the request of the prosecution.¹⁴

⁹ Jones, J. and S. Powles, *International Criminal Practice*, third edition, (Oxford: Oxford University Press, 2003) at 466.

¹⁰ Knoops, G. J., *Theory and Practice of International and Internationalized Criminal Proceedings, European and International Law Series* (Deventer: Kluwer BV, 2005) at 7.

¹¹ Statute of the International Tribunal for the former Yugoslavia art. 18 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 18 [hereinafter ICTR Statute].

¹² *Ibid.*

¹³ Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/REV.1(1995) at rules 50-51 [hereinafter ICTR RPE]; Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/32/Rev. 7 (1996) at rules 50-51 [hereinafter ICTY RPE].

¹⁴ *Ibid.*

The term “closing order” does not exist in the Rome Statute either. There is a similar procedural decision to a “closing order” however which determines whether there is sufficient evidence against the accused to proceed to trial or not. This is done at the pre-trial stage when the suspect appears formally for the first time at Court.¹⁵ The main purpose of the first hearing is to set a date for the confirmation of charges but the Pre-Trial Chamber also ensures that the person has been served with an arrest warrant and that certain rights are respected. The indictment is the primary accusatory instrument prepared by the Prosecutor and establishes the frame of the trial; only what is charged can lead to a conviction. The ICC is required to identify, assess and pronounce on each charge (or count) of the indictment and the Rome Statute clarifies that the judgment “shall not exceed the facts and circumstances described in the charges and any amendment to the charges.”¹⁶ Judicial confirmation of the charges against the suspect is required by the Rome Statute.¹⁷ It is designed to protect the suspect from unsubstantiated prosecutions, which is particularly important when the crimes are inherently very serious. This is done by the Pre-Trial Chamber in the Rome Statute.¹⁸ The ICC system provides for an adversarial process whereby a confirmation hearing is conducted in the presence of the prosecution and defence.¹⁹ The Prosecutor must support the charges with sufficient evidence, which at this pre-trial stage is normally documentary or summary evidence.²⁰ The Rome Statute requires that there must be “substantial grounds to believe” that the person committed the crime charged.²¹ The purpose is to consider each charge and test whether the evidentiary requirements to commit the case for trial are met. The Chamber is to consider each charge and either confirm or dismiss it. Upon confirmation, the case is transferred from the Pre-Trial Chamber to the Trial Chamber. The confirmation of charges hearing is comparable to the French procedure in the case of felonies (*crimes*) before the Pre-Trial Chamber (*Chambre de l’Instruction*).

¹⁵ Rome Statute, *supra* note 5, at art. 60(1); International Criminal Court Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), rule 121 [hereinafter ICC RPE].

¹⁶ Rome Statute, *supra* note 5, at art. 74(2).

¹⁷ *Ibid.* at art. 61.

¹⁸ *Ibid.* at art. 57(2)(a).

¹⁹ *Ibid.* at art. 61; *See also* ICC RPE, *supra* note 15, at rule 121.

²⁰ Cryer, *supra* note 3, at 379.

²¹ Rome Statute, *supra* note 5, at art. 61(6)-(7).

If the ICC Prosecution wishes to amend the charges after the confirmation hearing in accordance with Article 61 of the Rome Statute, the Prosecutor must make a written request to the Pre-Trial Chamber and that Chamber shall so notify the accused. In deciding whether to authorize the amendment the Chamber may request the Prosecutor and the accused to submit written observations. A new confirmation procedure is required if the Prosecutor seeks to add additional charges or substitute more serious charges.²² There is no hierarchy of crimes, however, so the notion of more serious crimes could cause difficulties in practice for the ICC. Therefore it is not clear which crimes would require a new confirmation hearing and which crimes may simply be amended. Article 61 of the Rome Statute only refers to amendments before trial and thus do not address the question whether amendments can be made during trial. A complete ban could result in acquittals on technical grounds but this could be counteracted by the Trial Chamber's own power to 'modify the legal characterization of the facts,' discussed below (section 50) regarding the discretion to cut crime scenes and redefine charges.

4. The Right of the Accused to Appeal the Closing Order

The Rules of Procedure of the ICTY and the ICTR do not provide for the right of the accused to appeal the indictment.

Under the Rome Statute, there does not appear to be a right of appeal per se by the accused against the charges either. The accused can challenge the Prosecutor's evidence and present evidence at the confirmation hearing. This has prompted concerns that the proceedings could lead to an additional 'mini trial' without sufficient control by the Pre-Trial Chamber.²³ When drafting the RPE, a number of proposed rules touched on the question of appeals at the pre-trial phase but were rejected early on. It was decided that all issues concerning appeals should be dealt with in the rules pertaining to Part 8 of the RPE which are of a general nature.²⁴ This is a separate avenue of appeal for the accused against conviction or sentence after the trial itself is concluded.²⁵ In addition to decisions of the Trial Chamber on questions of

²² *Ibid.* at art. 64(1) and (9).

²³ Cryer, *supra* note 3, at 379.

²⁴ Lee (Ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001) at 534.

²⁵ Rome Statute, *supra* note 5, at art. 81.

guilt or innocence, and on the sentence, appeals regarding specific or interlocutory issues that are decided in the course of prosecution are allowed in certain cases²⁶ Appeal is also permitted regarding decisions dealing with admissibility and jurisdiction, those granting or denying release of a person being investigated or prosecuted, certain decisions of the Pre-Trial Chamber and any ruling that would significantly affect the fair and expeditious outcome of the proceedings or the outcome of the trial.

5. The Discretion of the Pre-Trial and Trial Chambers to cut crime scenes, redefine or not include charges requested by the Prosecution

As discussed above, the designated judge in both the ICTY and ICTR may dismiss or confirm each of the counts presented by the prosecution. In relation to the Trial Chamber, Rule 73 of the Rules of Procedure and Evidence of the ICTY explicitly states that:

After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges²⁷

The thirteenth annual report of the International Criminal Tribunal clarifies the significance of the recent amendment of rule 73 bis. The report states that:

Rule 73 bis allows Chamber at the pretrial conference to order the Prosecution to limit the presentation of its evidence and to fix the number of crime sites or incidents contained in one or more of the charges. Calls for cooperation from the Prosecution to reduce its lengthy cases have been less than satisfactory. Aware that the length of trials begins with the breadth of the Prosecution's indictments, the judges adopted an amendment to rule 73 bis to allow a Trial Chamber to invite and/or direct the prosecution to select those counts in the indictment on which to proceed. *This amendment is necessary to ensure respect for an accused's right to a fair and expeditious trial*

²⁶ Rome Statute, *supra* note 5, at art. 82. On the distinction between appeal on the merits and appeals, based on Art.81, and on interlocutory issues based on Art.82, see *Lubanga* (ICC-01/04-01/06), Judgment on the Prosecutors Appeal Against the Decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, paras. 12-19

²⁷ Rule 73 was amended May 30, 2006.

*and to prevent unduly lengthy periods of pretrial detention.*²⁸(emphasis added)

In contrast, the counterpart Rule under the ICTR differs. It stipulates that the Trial Chamber may grant the prosecution fixed period of time to provide evidence. The prosecution is required to submit, *inter alia*, the factual and legal aspects, statement of contested and uncontested matters and list of witnesses) if this is in the interests of justice.²⁹ It is to be noted that the wording of the Rule “may order the Prosecutor”³⁰ implies that the prosecution is under legal obligation to provide those elements whether in support or against the charge.

Unlike the ICTY and the ICTR, under the Rome Statute the determination of whether or not to prosecute is in the realm of the prosecutor. The jurisdiction of the Court can be triggered by one of three sources: a State Party, the Security Council or the Prosecutor.³¹ Following on from this once the jurisdiction has been triggered, the Prosecutor analyses the information in order to determine whether or not to ‘initiate an investigation’. When the Prosecutor is acting pursuant to his *proprio motu* powers, as set out in Article 15, he is to determine whether or not a ‘reasonable basis’ exists for proceedings and then seek the authorization of the Pre-Trial Chamber in order to ‘initiate an investigation’. He is not required to obtain an authorization to initiate an investigation when a State Party or the Security Council is the trigger, although he still determines at a preliminary stage whether there is a reasonable basis to proceed. Therefore whether it is the case of a preliminary examination when the Prosecutor is acting pursuant to his *proprio motu* powers³² or a pre-investigative phase when the matter is as a result of a referral by the Security Council or a State Party³³ no prosecution can result if certain conditions are not filled.³⁴ These relate to the

²⁸ The thirteenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia outlines the activities of the Tribunal for the period from 1 August 2005 to 31 July 2006.

²⁹ ICTR RPE, *supra* note 13, at rule 73.

³⁰ *Ibid.*

³¹ Rome Statute, *supra* note 5, at art.13

³² Rome Statute, *supra* note 5, at art.15(6)

³³ Office of the Prosecutor, ‘Annex to the “Paper on some Policy Issues before the Office of the Prosecutor; Referrals and Communications”’, undated (made public on 21 April 2004)

³⁴ Rome Statute, *supra* note 5, at art. 53(2).

suspicion of a crime sufficient for an arrest warrant, the admissibility of the case and an assessment of the “the interests of justice.” When the Prosecutor is acting *proprio motu* he is to base himself upon information obtained from various resources. If there is a reasonable basis to proceed he seeks authorization from the Pre-Trial Chamber to initiate an investigation.³⁵ He is simply required to inform those who provided him with information under Rule 49 if he decides not to seek permission to initiate an investigation.

A decision not to prosecute is subject to judicial review by the Pre-Trial Chamber under the same terms as a decision not to commence an investigation when the Prosecutor acts in response to a referral from the Security Council or from a State Party.³⁶ The terms of the Rome Statute are mandatory. According to Article 53(1) the Prosecutor shall initiate an investigation after evaluating information submitted to him unless he determines that there is no reasonable basis to proceed under the Statute. The decision by the Prosecutor not to proceed is reviewable by the Pre-Trial Chamber at the request of the State making a referral under Article 14 of the Rome Statute or the Security Council under Article 13(b).³⁷ The Court may even review the decision not to prosecute of its own initiative if the Prosecutor alleges that to proceed is not in the best interests of justice.³⁸ The Prosecutor may reconsider a decision not to prosecute.³⁹

The ICC Trial Chamber is required to identify, assess and pronounce on each charge (or count) of the indictment and the ICC Statute stipulates that the judgment “shall not exceed the facts and circumstances described in the charges and any amendment to the charges.”⁴⁰ In the ICC, the principle ‘*iura novit curia*’ (the court knows the law) has been established in the Regulations of the Court allowing a Chamber to “modify the legal characterization” of the facts;⁴¹ that is, to determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or a different form of participation than that which the Prosecutor has

³⁵ *Ibid* at art. 15(3)

³⁶ *Ibid.* at art. 53(3).

³⁷ *Ibid.* at art. 53(2)(a).

³⁸ *Ibid.* at art. 53(2)(b).

³⁹ *Ibid.* at art. 53(4).

⁴⁰ Rome Statute, *supra* note 5, at art. 74(2).

⁴¹ Regulations of the International Criminal Court, ICC-BD/01-01-04, at reg. 55.

chosen. Indictments with a large number of counts and acquittals on technical grounds could thus be avoided due to the power of the court to select the most appropriate charge arising out of the facts of the crime as the trial goes on.⁴² The Prosecutor would not need to be over-inclusive in submitting long lists of counts with a view to covering every variation of charge to the Court and a conviction for the most suitable level of participation in the crime could be assured upon thorough examination of the evidence. Charges brought by the Prosecution but rejected by the Pre-Trial Chamber may be brought again in a subsequent confirmation hearing by the Prosecution if supported by sufficient evidence.⁴³

International crimes are often complex and may comprise multiple acts committed by many perpetrators over a long period of time. Overlapping crimes are also common whereby the same killing or rape, depending on the facts, could simultaneously be considered as genocide, crimes against humanity and/or war crimes. The various Statutes and RPEs give little guidance regarding best practice in charging these crimes.

The practice of the ICTY and ICTR is to accept cumulative charges as the Trial Chambers believe that the concurrence of offences and the difficulties raised by such offences are issues to be resolved at trial when it comes to sentencing.⁴⁴ This triggers the question of cumulative convictions. After some initial uncertainty consistent principles now apply in both Tribunals.

The ICTY Appeals Chamber in *Prosecutor v. Delalic* concluded that only distinct crimes justify multiple convictions.⁴⁵ Cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if both statutory provisions involved have a materially distinct element not contained within the other. An element which is materially distinct from another requires proof of a fact not required by the other element.⁴⁶ If this test is not met a single conviction must be entered into and the *lex specialis* principle applies whereby the specific

⁴² Cryer, *supra* note 3, at 377.

⁴³ Rome Statute, *supra* note 5, at art. 61(8).

⁴⁴ See, e.g., *Prosecutor v. Delalic and others*, Case No. ICTY-96-21-T, Judgment, ¶ 24 (Nov. 16, 1998); *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-17, Judgment, ¶ 5.5-5.7 (Oct. 29, 1997).

⁴⁵ *Prosecutor v. Delalic and others*, Case No. ICTY-96-21-T, ¶ 412-413.

⁴⁶ *Prosecutor v. Kordic and Cerkez*, Case No. ICTY-95-14/2, Judgment, ¶ 1033 (Feb. 26, 2001).

offence takes precedence over the general one. A concrete example of this occurs in the time of armed conflict when specific provisions of international humanitarian law and issues pertaining to human rights law apply. Accordingly, contradictory provisions should be regulated according to the principle of *lex specialis*. As international humanitarian law was specially designed to be applied in armed conflicts it represents the specific law that should prevail over certain other general rules.⁴⁷ This does not appear to be the case however in Cambodia as the underlying crimes of torture and murder in the Cambodian code may have different elements not required under international law. It appears that there are materially distinct elements between the crimes. Under Cambodian law, to prove torture it is necessary to present evidence of an affirmative act, a purpose to obtain information and a spirit of retaliation or cruelty. Under international law evidence of an omission may suffice to prove the act necessary for torture, also evidence of a purpose of discrimination may be introduced. It therefore appears that the international crimes do not simply represent higher legal classifications of the national crimes. Instead they have materially distinct elements and should be charged cumulatively in accordance with the ICTY jurisprudence.

The contextual elements for different crimes must also be taken into account. This means that cumulative convictions for the same conduct are permissible for different crimes charged under different articles of the Statute. The test is more difficult for different charges for the same conduct under the same article e.g. cumulative convictions are not permitted for persecution as a crime against humanity and other underlying crimes against humanity unless each crime has a materially distinct element. The ICTY Chamber has ruled that many of these crimes meet this requirement.⁴⁸

As cumulative charges and convictions are permitted, there is little room for alternative charges. Cumulative charges arise when a person is charged cumulatively with more than one crime in relation to the same set of facts. Charging in the alternative leaves the decision up to the Trial Chamber to decide for itself of which charge the accused should be found guilty. However, different forms of criminal responsibility cannot be imposed for the same conduct and thus these forms may be

⁴⁷ The 2004 ICJ Wall Advisory Opinion at ¶ 106.

⁴⁸ Prosecutor v. Kordic and Cerkez, *supra* note 40, at ¶¶ 1039-44.

pleaded in the alternative in the ICTY and ICTR.⁴⁹ For example superior responsibility is subsidiary to other forms of liability, and commission excludes a conviction for also planning the crime although this may be taken account of as a factor in sentencing.⁵⁰

The practice of the ICC with regard to alternative or cumulative charges is in its infancy but one could expect that it will be influenced by the provisions allowing the trial chamber to “modify the legal characterization of the facts.”⁵¹

It appears however that the judges may still be intrusive at pre-trial stage in the selection of charges in the ICC system also. For example Thomas Lubanga Dyilo, the first accused person to appear before the Court, was charged with offences relating to the recruitment of child soldiers. There are two very similar provisions in the ICC Statute, one applicable to international armed conflict and the other to non-international armed conflict. In the Lubanga arrest warrant, the charges were phrased in the alternative, making a determination of whether the conflict in the Democratic Republic of Congo was international or non-international of little importance in the prosecution.⁵² Months after the arrest when it issued the document containing the charges the Office of the Prosecutor took the position that the conflict was purely non-international in nature and withdrew the charge based on Article 8(2)(b) ICC Statute.⁵³ At the confirmation hearing the Pre-Trial Chamber disagreed and reinstated the charge concerning enlistment, conscription and active use of child soldiers in an international law conflict.⁵⁴ The Prosecutor was incensed that the Pre-Trial Chamber had in his opinion exceeded the terms of Article 61(1) ICC Statute. This is another example of prosecutorial discretion being directly confronted with judicial activism.⁵⁵ The Prosecutor sought leave to appeal arguing that the Pre-Trial Chamber’s decision to substitute a crime charged by the Prosecution exceeded its

⁴⁹ See, e.g., Prosecutor v. Stanisić and Simatović, Case No. ICTY-03-69-PT, Judgment, ¶ 6 (July 19, 2005).

⁵⁰ See, e.g., Prosecutor v. Blaskić, Case No. ICTY- 95-14-T, Judgment, ¶ 81 (May 23, 2005).

⁵¹ Cryer, *supra* note 3, at 378.

⁵² Decision on the Prosecutor’s Application for a Warrant of Arrest, *Prosecutor v Lubanga* (ICC-01/04-01/06-08, Pre-Trial Chamber I, 10 February 2006)

⁵³ Document Containing the Charges, Art 61(3)(a), *Prosecutor v Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 28 August 2006 at para 7

⁵⁴ Decision sur la confirmation des charges, *Prosecutor v Lubanga* (ICC 01/04 01/06) 29 January 2007

⁵⁵ Schabas ‘Prosecutorial Discretion v Judicial Activism at the International Criminal Court (Journal of International Criminal Justice) 6 4 (731)

authority under Article 61(7) for the purposes of conducting its scrutiny of the charges brought before it. It is a power of the Trial Chamber not the Pre-Trial Chamber to modify the legal characterization of charges according to the Prosecutor. The Pre-Trial Chamber is merely left with three options: to confirm, reject or refer the charges back to the Prosecutor to be amended. Leave to Appeal was however denied. The Pre-Trial Chamber pointed to Regulation 55 of the ICC Regulations which allows the Trial Chamber to change the legal characterization of facts. According to the Pre-Trial Chamber ‘there is nothing to prevent the prosecution or defence from requesting that the Trial Chamber to reconsider the legal characterization of the facts in the charges as confirmed by the Chamber’.⁵⁶ In any event, even if the Pre-Trial Chamber can impose additional charges on the Prosecutor, the latter need only fail to adduce relevant evidence on the unwanted charges.

The difficulty with this is that despite the black letter of the law the Pre-Trial Chamber still feels at liberty as is the case in Cambodia to amend the charges requested by the Prosecutor. This furthermore represents a sticky situation for the Prosecutor as he must appeal via the Pre-Trial Chamber-the very organ that made the decision in the first place. It is difficult however to assess the actual impact this assumed power by the Pre-Trial Chamber would have on the outcome of a trial taking into account the practical use of statutory power of the Trial Chamber in modifying the legal characterization of the facts.

Section C: Research on criminal procedure at the domestic level: France, Germany, Egypt, Japan, Greece.

1. General Introduction

The examination of criminal procedures of civil law systems reveals that there are distinct differences among different civil law criminal jurisdictions. Such differences are apparent even among systems that seem to follow the same pattern. Taking into account this consideration, as well as the subsequent difficulties in discerning identical terms to describe particular procedural acts, there is the added difficulty of finding specific terms that correspond to the terms “closing order” and “indictment” should be acknowledged.

⁵⁶ Decision on the Prosecution and the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, *Prosecution v Lubanga* (ICC-01/04-01/06) Pre-Trial Chamber I, 24 May 2007 at para 44

Bearing in mind these initial considerations, we refer to the “closing order” as the decision to end the investigation, and to refer the case to the competent court or to dismiss it. Consequently, it is similar to the proceeding of indictment under the common law system, where the prosecutor presents a bill of charges to the grand jury which may uphold the charges and indict, or reject the bill and thus terminate the criminal proceedings. In countries where the grand jury system has been abolished (e.g. England and Wales) the prosecution presents the bill of indictment to the court instead to consider the sufficiency of evidence.⁵⁷

On the whole, civil law systems provide three different stages with different officials involved for each different stage of the procedure:⁵⁸ the primary investigation and prosecution, judicial investigation and the criminal trial. The rationale behind this division is to avoid concentrating powers in one authority.

The Cambodian law of criminal procedure is based on the civil law conceptions, in particular the French system. Therefore, we decided to research civil law countries, specifically France, Germany, Egypt, Japan and Greece on the basis of the language skills and background of individual members of the group.

In addition, these countries were chosen on the basis of the development of the civil law system worldwide. The French Code was the first example of civil law codification. Modified systems of the French model were adopted in several countries including Egypt. Although, the German system has adopted many elements of the French model, it nevertheless represents its own model and has influenced other systems such as those of Greece and Japan.

2. Introduction to the criminal procedure systems of France, Germany, Egypt, Japan and Greece.

2.1 France

The nature of the first two stages of French criminal procedure (the police investigation and judicial investigation) is inquisitorial in nature and the emphasis is very much on the compilation of a written file of the case. This is a process which is

⁵⁷Indictment, Encyclopædia Britannica Online,

<http://www.britannica.com/EBchecked/topic/286131/indictment> (last accessed Feb. 28, 2009).

⁵⁸ Elliott, C., *French Criminal Law* (Devon: Willan Publishing, 2001) at 12.

not open to the public, the parties do not automatically have a right to be heard and the judges play an important and active role in collecting evidence.⁵⁹ In France, the rules of criminal procedure are developed around the distinction between three classes of offences; felonies (*les crimes*), misdemeanors (*les délits*) and petty offences (*les contraventions*).

A formal judicial investigation conducted by the examining magistrate (*juge d'instruction*) is mandatory when the prosecution wishes to charge a felony (an offence punishable by a maximum sentence of life imprisonment or by a prison term of five years or more).⁶⁰ In such a case, the examining magistrate is requested at any stage in the prosecution to open a dossier or a file. The examining magistrate constitutes the first filter stage of judicial investigation (*la juridiction d'instruction du premier degré*).⁶¹ This is an optional stage when less serious charges are filed. However, this optional instruction phase is very rarely invoked in misdemeanours and petty offences cases.⁶² A second level of instruction (*le deuxième degré de juridiction*) is intended as an extra filter before the case gets to trial. This step is carried out by the '*Chambre de l'Instruction*' which is a Division of the Court of Appeal and is mandatory in the case of felonies.⁶³ This Chamber, which is the second tier investigating authority, conducts a new examination of the charges in the matter of felonies and decides if the evidence is sufficient to commit someone to trial.⁶⁴ The Chamber also acts as judge in the case of appeals against an order of the examining magistrate,⁶⁵ as explained in the section on the accused's right of appeal.⁶⁶ This Chamber also has the task of monitoring the regularity of the procedures used in judicial investigation generally.⁶⁷

⁵⁹ *Ibid.* at 13.

⁶⁰ French Code of Criminal Procedure, at arts. 1, 6, 7, 18, 19 [hereinafter French Code].

⁶¹ Bouloc B, *Procédure Penale*, 20 edn (Paris: Précis Dalloz, 2006) at 429.

⁶² Kock and Frase (Eds.), *The French Code of Criminal Procedure* (Littleton, Colorado: FB Rothman, 1988) at 12.

⁶³ Volger, *France-A Guide to the French Criminal Justice System* 1989 (London: Number 2 in the Prisoners Abroad Handbook Series, 1989) at 45.

⁶⁴ French Code, at art. 211.

⁶⁵ *Ibid.* at arts. 185-187, 207.

⁶⁶ *See infra* Section 4.2.

⁶⁷ French Code, *supra* note 60, at arts. 173 and 206.

2.2 Germany

The German criminal procedure system contains several features of an adversarial process and therefore may not be described as a pure inquisitorial system but rather as a mixed or “hybrid” system.⁶⁸ Most significantly, the separation of roles among the prosecution, the judge and the defence counsel depicts characteristics of an adversarial process. The procedure may generally be divided into three different stages: the pre-trial or investigatory procedure,⁶⁹ the court procedure consisting of an intermediate stage,⁷⁰ and the trial⁷¹ and the execution procedure.⁷² The pre-trial procedure, with which we are mainly concerned, is conducted in private.

Fundamental principles of the procedure involve the principles of officiliaty, of obligatory prosecution (the legality principle), and of accusation.⁷³ The first means that the state and not the individual citizen has the power to prosecute. There is however a right to bring a private accusation regarding certain minor offences such as slander, simple assault, trespass, and destruction of private property.⁷⁴ In these instances, the victim can go forward with the criminal case even without the state prosecutor's consent, but the public prosecutor can take over if the public interest so requires.⁷⁵ The principle of accusation however suggests that the opening of the trial requires the issuing of an indictment where the defendant is named and the scope of the charge defined.⁷⁶

The principle of obligatory prosecution signifies that the state prosecution authority has the sole right to prosecute and is under the duty to commence

⁶⁸ Hatchard J, Huber B., & Vogler R. (eds.) *Comparative Criminal Procedure* (London: B.I.I.C.L., 1996) at 100.

⁶⁹ German Code of Criminal Procedure at sect. 158 ff. [hereinafter German Code].

⁷⁰ *Ibid.* at sect. 199.

⁷¹ *Ibid.* at sect. 213.

⁷² *Ibid.* at sect. 449.

⁷³ Hatchard, *supra* note 68 at 108.

⁷⁴ German Code, *supra* note 69, at sect. 374.

⁷⁵ *Ibid.* at sects. 376-77. *See also*, Criminal Procedure: Comparative Aspects-Prosecution, Law Library - American Law and Legal Information, <http://law.jrank.org/pages/900/Criminal-Procedure-Comparative-Aspects-Prosecution.html> (last accessed March 30, 2009) [hereinafter Criminal Procedure]

⁷⁶ German Code, *supra* note 69, at sect. 151.

investigation if there is evidence that an offence has been committed.⁷⁷ Except for cases provided by law,⁷⁸ the prosecutor must not refuse to prosecute a case if there is enough evidence to convict. Observers report, however, that prosecutors claim insufficiency of the evidence even where there is sufficient evidence to convict.⁷⁹ This is due to the perception by most prosecutors that their role involves a gate-keeping function whereby cases should be eliminated if, in their view, a conviction would do more harm than good.⁸⁰ In cases of misdemeanors and less serious felonies, the prosecutor can offer to dismiss case where the suspect fulfills obligations imposed on him.⁸¹ In practice, such obligations almost invariably involve payments to be made to the State, a charitable organization, or the victim. The suspect can refuse to enter into this arrangement, but risks prosecution and eventual conviction. On the other hand, if suspects make the required "penance payment," they avoid the publicity of a trial as well as having a criminal record.⁸²

According to German law, the state prosecutor carries out the pretrial investigation.⁸³ Yet in practice it is the police who undertake investigations, acting mainly on their own authority and independently.⁸⁴ The state prosecutor investigates only the most exceptional cases. As a rule the state prosecutor is informed only after the police report is issued at the conclusion of a police investigation. Yet despite the *de facto* independence of the police, the ultimate responsibility for the investigation remains with the state prosecution. At the end of the investigation the evidence is collected by the prosecutor who decides whether to drop the case or to proceed to

⁷⁷ *Ibid.* at 152, 160; *See also* Hatchard, *supra* note 68, at 108.

⁷⁸ Cases provided by law include trivial offences, where the culpability of the offender is minimal and there is no interest in prosecution, or when the public interest in a prosecution may be satisfied in another way, such as through compensation. German Code, *supra* note 69, at sects. 152, 160, 170, 153.

⁷⁹ Criminal Procedure, *supra* note 75.

⁸⁰ *Ibid.*

⁸¹ Feeney F. & Herrmann J., *One Case--Two Systems: A Comparative View of American and German Criminal Justice* (New York : Ardsley Transnational Publishers, 2005) at 371.

⁸² Criminal Procedure, *supra* note 75.

⁸³ German Code, *supra* note 69, at sect. 160. *See also*, Andrews, J.A. (eds) *Human Rights in Criminal Procedure: A Comparative Study* (The Hague: Kluwer, 1982) at 240.

⁸⁴ Hatchard, *supra* note 68, at 100, 116.

trial. The state prosecutor's main role is therefore prosecutorial rather than investigatory.⁸⁵

The state prosecutor is not a party to the process but an objective participant collecting evidence for both sides and seeking justice by enforcement of criminal law.⁸⁶ Under the law, the prosecution is an independent arm of the administration of justice, belonging neither to the executive nor forming part of the judiciary.⁸⁷ The state prosecution performs functions that appear to be judicial in nature when, for instance, deciding to discontinue the case, so reflecting the shift of decision making and sentencing to the pretrial stage. Nevertheless, judges still have an important role to play during the pre-trial process, as the pre-trial judge exercises a control function over the investigative authorities and the prosecutor may not order some coercive measures without obtaining authorization by the pre-trial judge⁸⁸. The judge is incompetent to undertake investigations.

2.3 Egypt

The Egyptian criminal system (penal and procedural) is substantially based on the French paradigm.⁸⁹ Consequently, Egypt has adopted a civil law system (inquisitorial approach).⁹⁰ The power to prosecute is exclusive to the General Prosecution which possesses both investigatory and prosecutorial competence. Offences are classified into three types: contraventions (minor offences, punishable by fines), misdemeanours (punishable by detention or fines), and felonies (imprisonment or execution).⁹¹

Whereas the term “detention” covers the deprivation of liberty ranging from 24 hours to three years, “imprisonment” is the term used for any sentence depriving

⁸⁵ Ibid. at 116; Feest J. and Murayama M., “Protecting the Innocent through Criminal Justice: A Case Study from Spain virtually compared to Germany and Japan,” in Nelken D., *Contrasting Criminal Justice: Getting from Here to There* (Aldershot: Ashgate, 2000) at 55.

⁸⁶ Hatchard, *supra* note 68, at 138; Feeney, *supra* note 81, at 370-71.

⁸⁷ Hatchard, *supra* note 68, at 138; Feeney, *supra* note 81, at 370.

⁸⁸ Hatchard J, *supra* note 68, at 143.

⁸⁹ Tollefson, H. *Policing Islam: The British occupation of Egypt and the Anglo-Egyptian struggle over control of the police, 1882 – 1914* (Westport, CT: Greenwood Press, 1999) at 54.

⁹⁰ Niyaba (Egyptian Law), Encyclopædia Britannica Online, <http://www.britannica.com/EBchecked/topic/416520/Niyaba>, (last accessed on March 12, 2009).

⁹¹ Egyptian Penal Code, at arts. 10-12.

the convicted of his liberty from between three years to a life sentence.⁹² Detention and imprisonment may seem to overlap if the sentence is 3 years. However, when the maximum punishment for an offence is 3 years then the crime is legally classified as misdemeanour and the punishment as detention. In the meanwhile, if the minimum period starts from 3 years then the offence is classified as a felony and the punishment as felony.

2.4 Japan

Japan is a civil law country and influenced by the German system. Prosecution in Japan is based on principles of “Offizialprinzip” (officiality) and “Anklage-Monopol” (prosecution-monopoly). “Offizialprinzip” is the concept that only a national institution is allowed to issue an indictment. “Anklage-Monopol” is the concept that the public prosecutor is recognised as the only prosecuting institution among national institutions. In other words, the public prosecutor monopolises the right to prosecute in Japan. This authority is based on the role of the public prosecutor as one representing the public interest: they must consider all aspects of a case such as the social impacts of a case, the feelings of the victims, and the conditions of accused. For instance, they must consider the background of the accused, including family history as well as the victim’s motivations.⁹³ The public prosecution can also decide to suspend the indictment if this is seen as necessary in terms of (1) the suspect’s personality, age and circumstances; (2) the degree of seriousness and circumstances of the crime; and (3) circumstances after the commission of the crime. This is called ‘Opportunitätsprinzip’ (the principle of opportunity) in contrast to ‘Legalitätsprinzip’ (the principle of legality), where the indictment must be served when there is enough suspicion as long as there is sufficient evidence.⁹⁴

2.5 Greece

Similarly to the German criminal procedure the Greek criminal procedure follows a mixed procedural law system. It is based on the adversarial system where

⁹² *Ibid.* at art. 14.

⁹³ Dando, *New Law of Criminal Procedure*, 7th edn (Tokyo: Soubunsha, 1979) at 365.

⁹⁴ *Ibid.* at 368-69.

each of the basic functions of the criminal trial, namely the prosecution, defence, and decision-making, are exercised by different bodies.⁹⁵ There are also elements from the inquisitorial system such as the principle of *ex proprio motu*,⁹⁶ the principle of written and secret procedure. In particular, according to Greek criminal procedure, the responsibility for prosecution lies with the Public Prosecutor, who initiates criminal proceedings⁹⁷ so that the criminal courts are able to address the case. Consequently, there is a difference in the roles of the prosecutor and the judge. In addition, the right of the accused to appoint a defence counsel ensures that prosecution, defence and decision-making are exercised by different persons, aiming to achieve an even, unbiased and neutral judgment.⁹⁸ While it is the role of the Public Prosecutor to initiate proceedings,⁹⁹ the investigation/examination is conducted by the inquisitor/interrogator, who is always a judge, or by investigative personnel, which includes both lower court judges and police officers of a specific rank.¹⁰⁰ The Public Prosecutor of the Court of Appeal, however, decides the general direction of the investigation.¹⁰¹ While there are a few exceptions to this general responsibility for prosecution by the Public Prosecutor,¹⁰² the independence of the prosecuting authority is guaranteed and is distinct from any other authority and the courts, which the prosecuting authority serves.¹⁰³

⁹⁵ Karras A., *Criminal Procedural Law* (Athens-Komotini: Ant. N. Sakkoulas, 2nd ed, 1998), at 43.

⁹⁶ The principle of *ex proprio motu* criminal proceedings means that the institution and termination of criminal proceedings is under the exclusive competence of the state criminal authorities and in particular the prosecutor, the judicial councils and the court.

⁹⁷ Greek Code of Criminal Procedure, at art. 27 [hereinafter Greek Code].

⁹⁸ Karras, *supra* note 95, at 44-45.

⁹⁹ Greek Code, at art. 27.

¹⁰⁰ *Ibid.* at art. 33. The investigative personnel include the magistrate, the Justice of the Peace, non-commissioned officers of gendarmerie or police officers of at least under-sergeant grade.

¹⁰¹ Greek Code, at art. 35.

¹⁰² Under the Greek Code, proceedings for misdemeanors and felonies are initiated by the Public Prosecutor while the prosecution of petty offences is undertaken by the public accusant. The public accusant is the individual who undertakes the task of prosecution in the lower courts. The prosecution of offences committed by military personnel is undertaken by the Prosecutor of the military courts. Finally, Parliament is responsible for proceedings against offences allegedly committed by the President of the State, of the government and under-secretary ministers. German Code, at art. 27.

¹⁰³ Greek Code, at art. 28.

Proceedings refer to a punishable act and not to the person, thus, unlike German law, proceedings take place *in rem*¹⁰⁴ and not *in personam*.¹⁰⁵ Consequently, even if the perpetrator is not known, the prosecutor may initiate proceedings. The proceedings must be directed against an identified person by the end of the preliminary procedure in order for the case to proceed to trial.¹⁰⁶ The initiation of the proceedings by the Public Prosecutor defines the maximum extent to which the examination may be extended and thus the limitations within which the interrogators, the judicial councils and the court as well must act.¹⁰⁷ Although further evidence may be collected after the initiation of the process, this “improvement” of the initial charges should not extend to another factual situation, apart from the one for which proceedings have already been instituted, as this would absolutely void the proceedings.¹⁰⁸ The legal characterization of the act may be changed at any time, providing that there is no change in the material existence of the act in place, time and historical context, as this would constitute another reason for the nullity of the procedure.¹⁰⁹

3. Nature and role of closing order and indictment

The criminal procedural law systems of France, Germany, Egypt, Japan and Greece will be examined in light of the definition of the terms “closing order” and “indictment” presented in Section A.

3.1 France

The term “closing order” is a direct translation of the French term “*des ordonnances de règlement*.”¹¹⁰ Once the examining magistrate (*juge d’instruction*)

¹⁰⁴ The term *in personam* derives from Latin and means “directed toward a particular person.”, while the term *in rem* (also in Latin) refers to property or “all the world” instead of a specific person.

¹⁰⁵ Karras, *supra* note 95, at 288.

¹⁰⁷ *Ibid.* at p. 309.

¹⁰⁸ Greek Code, at art. 171.1b. The only individual responsible for the proceedings is the Public Prosecutor.

¹⁰⁹ *Ibid.* at art. 171.1b; See also Karras *supra* note 95, at 309-10.

¹¹⁰ See Code de Procédure Pénal, Legifrance, at <http://www.legifrance.gouv.fr/affichCode.do;jsessionid=34C6B698C09F8402DF6E24D4C02B2A07.tp>

has carried out all acts of investigation that are useful in revealing the truth, he or she issues a closing order (*règlement des ordonnances*) which brings the investigation to an end.¹¹¹ The examining magistrate effectively moves from his investigative function and performs a jurisdictional act (*oeuvre juridictionnelle*).¹¹² This takes the form of an order which states either that the case should be transferred for trial (*ordonnance de renvoi*) or that there is no case to answer and the examining magistrate feels it is inappropriate to proceed with the investigation (*ordonnance de non lieu*).¹¹³ The examining magistrate can issue a series of orders concerning detention of the suspect or the admissibility of evidence but these are subordinate to the closing order itself. If the case concerns a serious offence (*crime*) then it goes through a second filter stage, which is carried out by the *Chambre de l'Instruction*, which decides whether to go ahead with the transfer for trial or to dismiss the charges.¹¹⁴ After this stage, the defendant ceases to be referred to as the suspect (*l'inculpé*) and becomes the accused (*l'accusé*).

3.2 Germany

As “closing order” is a notion derived from French Law it is difficult to discern an identical notion in other jurisdictions following the German system. Yet, bearing in mind the definitions of the “closing order” as the order that terminates the investigational stage and either commits the suspect to trial or dismisses the case, and the “indictment” as the order that commits the suspect to trial, we will now discern various procedural motions that operate similarly.

In the German system, procedures similar to an “indictment” exist at various stages. One stage is at the preferment of public charges by the Public Prosecution against the accused.¹¹⁵ Sections 153 and 170 of the German Code provide that the opening of the judicial investigation be conditional upon preferment of charges and that the office of the Public Prosecution shall prefer charges in cases of sufficient

djo10v.1?idSectionTA=LEGISCTA000006167431&cidTexte=LEGITEXT000006071154&dateTexte=20090304 (last accessed March 31, 2009).

¹¹¹ French Code of Criminal Procedure, at art. 175 [hereinafter French Code]

¹¹² Bouloc, *supra* note 61, at 433.

¹¹³ French Code, at art. 177.

¹¹⁴ *Ibid.* at art. 181.

¹¹⁵ The German Code defines this person as the “indicted accused.” German Code, at sect. 157.

suspicion by submitting the bill of indictment. The Prosecutor's decision to prefer public charges and proceed to trial occurs at the conclusion of the investigation after an evaluation of the evidence. If the investigation offers sufficient reason to prefer public charges, the Public Prosecutor makes a formal note in the file and requests that the judge send the case to trial by drafting and submitting the official charge or indictment.¹¹⁶

The second stage where an act can be seen as analogous to the "indictment" involves the decision made by the judge during the "intermediate" stage. The "intermediate" stage is used as a filter before proceeding with the main trial.¹¹⁷ At this stage, the court, having read the files completed by the police and passed on by the public prosecutor, decides whether there is a *prima facie* case against the accused and either accepts the case for trial or alternatively declines to proceed, thus providing another opportunity for a trial to be avoided.¹¹⁸ This intermediate decision (*Eröffnungsbeschluss*) that sets the case down for trial (where there is sufficiently strong evidence¹¹⁹) may be considered similar to an "indictment" as it is at this point when the accused is sent to trial and when a dismissal cannot be made without a trial to discontinue the proceedings.

In addition to submitting an indictment, the Prosecutor may also decide to dispose of the case either by using a penal order (*Strafbefehl*) or an expedited procedure (*beschleunigtes Verfahren*). In practice, there is a tendency to use penal order procedures not only for trivial but also for offences that are likely to attract a fine.¹²⁰ In expedited proceedings, which are used in straightforward cases where the sentence does not exceed 1 year imprisonment,¹²¹ the intermediate stage is omitted¹²² and the trial follows immediately after the investigation. In such circumstances, the written accusation, which constitutes the official charge of the Prosecutor, could also be considered an "indictment."

¹¹⁶ *Ibid.* at sect. 170; Feeney, *supra* note 81, at 372; Hatchard, *supra* note 68, at 100, 126-27.

¹¹⁷ Hatchard, *supra* note 68, at 100; Feeney, *supra* note 81, at 271.

¹¹⁸ Hatchard, *supra* note 68, at 129.

¹¹⁹ German Code, at sect. 203.

¹²⁰ Hatchard, *supra* note 68, at 127.

¹²¹ For example, petty theft or some drug related offences.

¹²² German Code, at sect. 417-20.

The penal order procedure is a fast and inexpensive summary procedure designed to handle less serious cases. It is used in all cases of misdemeanours (*Vergehen*) when, in the opinion of the Public Prosecutor, a trial is not necessary and allows unilateral disposal of a case without trial and formal judgment. The court need not be convinced of the defendant's guilt but need only have a reasonable suspicion that the defendant has committed the offence.¹²³ The Public Prosecutor applies to the judge for a penal order when there is sufficient evidence of the accused's guilt and the judge is not likely to object.¹²⁴ From a legal point of view, the Public Prosecutor's application for a penal order is considered equivalent to an official charge.¹²⁵ Interestingly, even the text that the Public Prosecutor prepares looks similar to the charging document. Instead of asking the case to be brought to trial, the Public Prosecutor requests that the judge impose a specific sanction, which may involve a fine, a suspended prison term of up to 1 year, or, in traffic cases, a revocation of a driver's license for no more than 2 years. In practice, the judge routinely signs the draft of the penal order sent by the Public Prosecutor after having skimmed through the dossier. If the accused objects to the penal order then it becomes a charging document and the case is set for trial.¹²⁶ In this way, the application for penal order operates resembles the role of the official charge, constituting another form of an "indictment."

Two procedures equivalent to a dismissing closing order may be identified in German criminal procedure. The first is the decision by the prosecutor not to proceed with the case but to terminate the proceedings when there are not sufficient reasons for preferring public charges¹²⁷ or in cases of minor offences.¹²⁸ which are dispensed of unconditionally or after imposing conditions such as paying a sum of money to a charitable institution or making restitution to the victim.¹²⁹ The second is the decision by the intermediate court not to proceed when there is no sufficient suspicion that the

¹²³ Hatchard, *supra* note 68, at 158.

¹²⁴ Feeney, *supra* note 81, at 272-73.

¹²⁵ *Ibid.* at 273.

¹²⁶ *Ibid.*

¹²⁷ German Code, at sect. 170.

¹²⁸ *Ibid.* at sect. 153.

¹²⁹ Feeney, *supra* note 81, at 373; Hatchard, *supra* note 68, at 126.

accused committed the offence,¹³⁰ or the decision to discontinue the prosecution temporarily or permanently with the consent of the Public Prosecution if the offence is too trivial to merit a trial or where certain conditions are accepted by the accused as an alternative to continue prosecution.¹³¹

3.3 Egypt

Within the Egyptian system, the notion of a closing order is similar to the one used by the ECCC. The closing order refers to the decision to end the investigation, and to refer the case to the competent court or dismiss it. Under the Egyptian system, such an order could be issued either from the designated investigating judge or the prosecution.

Since the enactment of Law no. 170 of 1981 which abolished the post of “chancellor of reference,” “prosecutors possess both investigatory and prosecutorial powers.”¹³² Nevertheless, this law maintained the role of the investigating judge who conducts investigation only in the following cases:

- Upon the request of the minister of justice or the prosecution to delegate a trial judge to investigate a felony or a misdemeanour;¹³³
or,
- Upon the request of the suspect, victim or those who have the right to bring a civil action for damages.¹³⁴

In these cases, the chief justice of the competent court, after listening to the argument by the prosecution, has the authority to decide whether to delegate an investigation to an investigating judge. The chief justice’s decision is irrevocable.¹³⁵ If the chief justice does delegate to an investigating judge, the investigating judge would be the only authority entitled to investigate.

In practice, the delegation of an investigating judge is a very rare occasion. The Egyptian prosecution investigates and issues the closing order in the overwhelming majority of cases.

¹³⁰ German Code, at sects. 199, 203.

¹³¹ *Ibid.* at sect. 153.

¹³² Brown N. J., H. Nasr, and J. Crystal, *Criminal Justice and Prosecution in the Arab World*, UNDP-POGAR. Report 2004. at 4.

¹³³ Egyptian Code, at arts. 64(1) and 65.

¹³⁴ *Ibid.* at art. 64(2).

¹³⁵ *Ibid.* at art. 64(2).

3.4 Japan

The Japanese code of criminal procedure does not use the term “closing order.” However, an equivalent procedure may be the public prosecutor’s decision to indict or dismiss. The police usually conduct the initial investigation, and then file cases with the public prosecutor including all necessary documents and evidence.¹³⁶ Subsequently, the public prosecutor decides whether to prosecute. . In this regard, it is important to note that the prosecution’s decision is not subject to any review from any pre-trial authority.

3.5 Greece

Unlike the ECCC’s “closing order” and the very similar equivalents in the Egyptian and French system the “closing order” in the Greek criminal system may take various forms. There are several procedural acts in Greek Criminal Procedure that may be considered “closing orders.” These include a procedural act, order or judgment and might be carried out or issued by a single body, the Prosecutor or by multi-member body, the judicial council.

Greek Code of Criminal Procedure explicitly refers to the term “indictment” only twice. Article 101 states that when the accused is called to give his own version of the alleged events, the examiner (interrogator) shall inform the defendant about the content of the indictment and the other documents of the investigation. Article 443 provides that the indictment, among other documents, should be attached to an application for extradition. The use of the term on both occasions suggests that the term “indictment” refers to the acts by which the defendant is officially charged. Yet, taking into account the meaning of “indictment” in the internal rules of the ECCC, namely the closing order that commits a person to trial and ends the investigative procedure, we can identify two occasions within Greek criminal procedure where the order of the prosecutors or the judgment of the judicial council have the same function.

First, according to Greek criminal procedure, the Public Prosecutor has the power in particular cases to send the accused directly to trial by issuing a direct

¹³⁶ Japanese Code, at art. 248.

summons. In these occasions, the case is sent to court without going through the procedure before judicial councils. This direct summons appears to have the same function as an “indictment” according to ECCC rules. It might be issued in the following cases:

- in cases of petty offences and misdemeanors which fall under the jurisdiction of the Single Judge First Instance Court¹³⁷ where the preliminary investigation may be omitted;¹³⁸
- in cases of misdemeanors which fall under the jurisdiction of the Three-Judge First Instance Court, if a preliminary examination has taken place;¹³⁹ and,
- in cases of serious misdemeanours for which detention under remand or other restrictive conditions shall be imposed (and the likely sentence is at least 3 months) after the conclusion of the main investigation¹⁴⁰ and only if the interrogator consents to the direct summons.

Secondly, the defendant may be sent to trial by a bill of indictment/ruling of the competent judicial council. The judicial council is the competent body that decides after the end of the main investigation how to proceed with the case.¹⁴¹ A main investigation is conducted only for felonies and serious misdemeanours for which detention under remand or other restrictive conditions can be imposed.¹⁴² After the conclusion of the investigation and submission of the prosecutor, if the competent judicial council ascertains that there is sufficient evidence to support the charge against the defendant, they shall commit the accused to trial.

The other way to terminate an investigation is through the use of a dismissal order. This may again be seen as a form of a closing order, which under Greek criminal procedural system is of two kinds. It might take the form of a procedural act by Public Prosecutors to abandon an case. Such a decision may occur when, after the

¹³⁷ That is mainly reserved for misdemeanors for which the minimum sentence provided is less than 3 months or fine. Greek Code, at art. 114.

¹³⁸ *Ibid.* at arts. 31, 244-45.

¹³⁹ *Ibid.* at arts. 244-45.

¹⁴⁰ *Ibid.* at arts. 246, 308.3.

¹⁴¹ *Ibid.* at arts. 308-09.

¹⁴² *Ibid.* at art. 246.3.

preliminary examination or the main examination, the perpetrator is still unknown,¹⁴³ or, in cases of misdemeanors which fall under the jurisdiction of the Single Judge First Instance Court if there is not sufficient evidence to send the accused to trial or the charge was found to be implausible.¹⁴⁴ The second form of dismissal order could not be described as an order but rather as a judgment. It refers to the exculpatory judgment of the judicial council, which may take various forms. After the submission of the Public Prosecutor upon the conclusion of the investigation the competent judicial council may issue the following:

- a ruling to discontinue with the proceedings temporarily;¹⁴⁵
- a ruling to discontinue with the proceedings permanently;¹⁴⁶ or,
- a ruling not to proceed with indictment.¹⁴⁷

To sum up the possible forms which a closing order might take within the Greek system are: a direct summons to trial by the prosecutor, a bill of indictment by the judicial council, the abandoning of the case by the prosecutor, or an exculpatory ruling of the judicial council under the three forms just mentioned. It involves both orders and judgments.

4. The Right of the Accused to Appeal the Closing Order

The above overview of the role of the “closing order” in the different legal systems shows that “closing orders” may take various forms, varying from a prosecutorial decision to proceed with or dismiss the case (France, Egypt, Japan) to decisions of different bodies (Germany, Greece). The right of the accused to appeal the Closing Order will be examined in relation to the forms of closing orders that have been mentioned for every individual country. Apart from Greece, it is generally observed that there is no right of the accused to appeal the closing order and in particular the decision that commits the accused to trial.

4.1 France

¹⁴³ *Ibid.* at arts. 245.3, 308.5.

¹⁴⁴ *Ibid.* at art. 245.4.

¹⁴⁵ *Ibid.* at arts. 309.1.c, 310.1.a, 311.1.

¹⁴⁶ *Ibid.* at arts. 309.1.b, 310.1.b.

¹⁴⁷ *Ibid.* at arts. 309.1.a, 310.1.a.

In the French criminal system, all decisions made within the jurisdiction of the examining magistrate may be appealed as set out in the Code of Criminal Procedure at the second stage of judicial investigation (*la Chambre de l'Instruction*).¹⁴⁸ For this purpose, the Chamber holds a private hearing at which the lawyers, but not usually the parties or witnesses, attend and present their oral or written arguments.¹⁴⁹

This is a more limited right of appeal for the accused than for the Prosecution as the accused may not appeal against the order of the examining magistrate to commit him/her for trial. There is, however, a limited right of appeal to the chamber against a decision of the examining magistrate relating to issues such as pre-trial detention or supervision, those assuming jurisdiction, permitting civil claims to be filed or denying a request for expert evidence.¹⁵⁰

In contrast, the Prosecution may appeal against any order of the examining magistrate. The Prosecutor may for example ask for the decision of the examining magistrate to be nullified and the relevant parts removed from the file.¹⁵¹

An appeal may temporarily suspend the order complained of depending on its nature. For example more complicated appeals that cannot simply be answered in the affirmative or the negative (such as issues more complicated than bail) are either filed with another examining magistrate by the chamber or else it takes control of the appeal itself.¹⁵² This differs from the automatic review conducted by the Chamber in the case of felonies.¹⁵³

4.2 Germany

Regarding the German system the possibilities of the accused to appeal against any order or ruling that commits him to trial or dismisses the case are explored with respect to all the procedural notions found to be equivalent to the “closing order” in the German system. Like the French system, within the German Code of Criminal Procedure, there is no right of appeal of the accused against the indictment or the

¹⁴⁸ French Code, at arts. 185-86.

¹⁴⁹ *Ibid.* at arts. 197-201.

¹⁵⁰ *Ibid.* at art. 186.

¹⁵¹ *Ibid.* at arts. 170-73.

¹⁵² *Ibid.* at art. 207.

¹⁵³ Bouloc, *supra* note 61, at 437.

closing order.¹⁵⁴ Section 210 expressly provides that “the order by which the main proceedings were opened cannot be contested by the defendant.” The existence, however, of the intermediate procedure enhances the system of checks, as an independent court examines, *in camera*, whether further investigation is called for or whether the trial should proceed or not, thus providing another opportunity for a trial to be avoided.¹⁵⁵ The defendant is then given the chance on receipt of the indictment to persuade the court not to proceed to trial. This is not a right of appeal but it is an opportunity to contest the indictment. According to Section 201, the indicted accused may apply for individual evidence to be taken before the decision on opening main proceedings, or may raise objections to the opening of main proceedings. The court seeks to determine whether there is sufficient evidence to proceed to trial and only if it finds that the evidence is sufficiently strong will the case proceed to trial.¹⁵⁶ The court’s decision on the applications and objections is final.¹⁵⁷ (Section 201.2 of StPO). Despite the recognition of the fact that the purpose of this procedure is to protect the accused against a trial based on unfounded charges and provide a review process for all crimes¹⁵⁸, this procedure has been criticized on the basis that the court that reviews the prosecutor’s charge is subsequently the main trial court, and this fact prevents the judges from coming to trial with a completely open mind.

All in all, it seems that the intermediate procedure is the only possibility the accused has to avert a trial or to have the charges amended.

4.3 Egypt

The Egyptian criminal procedure allows the accused to appeal the indictment only on the basis of improper jurisdiction.¹⁵⁹ Article 163 of the Egyptian Criminal Code of Procedure mentions ‘jurisdiction’ in an absolute manner which implies that all forms of error in jurisdiction are valid bases for appeal.

Therefore, territorial or subject-matter jurisdiction could be invoked in this regard, where the former refers to the spatial boundaries of the area over which the

¹⁵⁴ Feeney, *supra* note 81, at 229.

¹⁵⁵ Hatchard, *supra* note 68, at 128-29.

¹⁵⁶ Hatchard, *supra* note 68, at 100-01, 128-29.

¹⁵⁷ German Code, at sect. 201.2

¹⁵⁸ Feeney, *supra* note 81, at 288, 382.

¹⁵⁹ Egyptian Code, at art. 163.

court is competent, while the latter is related to the specific nature of the legal issues that is within the scope of the court (e.g. Criminal Court, Military Court, Court of Felonies, Court of Misdemeanours). On the other hand, it is always possible for the victim or the civil right claimant (the representatives of the victim or those who are harmed indirectly by the criminal offence) to appeal a dismissal order.

This distinction is justified on the ground that the dismissal order ends the case; therefore it is important to permit the victim to appeal this order. However, the indictment literally means referring the charges to the judicial scrutiny and review, consequently, allowing the appeal in relation to the indictment may unduly delay the process of justice.¹⁶⁰

4.4 Japan

Under Japanese criminal law, a suspected person is not able to appeal the decision of prosecution by the public prosecutor. On the other hand, a plaintiff, informant, or the Bar Association who lodged a case can appeal the public prosecutor's decision. The prosecution must issue an indictment if the appeal is recognised as reasonable and there is sufficient evidence.¹⁶¹ However, if the public prosecutor still does not accept the appeal, the Bar Association may appeal to the court.¹⁶² The appeal is collectively examined by judges and may be dismissed if the appeal is contrary to statutory procedure or is not supported by sufficient evidence.¹⁶³

In addition, the accused is able to object to the indictment in court based on any factual or legal aspects or any abuse of the guarantees of the due process during the pre-trial stage.

4.5 Greece

As there is no procedural notion equivalent to a closing order in Greek criminal procedure, we shall examine the possibilities the accused has to appeal against any order or ruling that commits him to trial.

¹⁶⁰ Hosny, M. N., *Explanation of Procedural Law* (Cairo: Dar El-Nahda Alarabia, 1995) at 642-44.

¹⁶¹ Japanese Code, at art. 264.

¹⁶² *Ibid.* at art 171.

¹⁶³ Dando, *supra* note 93, at 380-81.

The accused has the right of appeal against the direct summons sending him/her to trial.¹⁶⁴ This right refers to an accused sent to trial after the conclusion of preliminary investigation¹⁶⁵ as well as an accused that was summonsed after the end of the main investigation.¹⁶⁶ However, this right is granted only to an accused that has been sent to Three-Judge First Instance Court. However it is strongly supported in theory that the denial of the right of the appeal to an accused sent to trial before the Single-Judge Court is against the principle of judicial hearing. The principle of judicial hearing is constitutionally sanctioned¹⁶⁷ and provides for the right of the accused to be heard before a court and enunciate his views about his rights and interests on every factual or legal issue that may arise. As the accused has been summoned before the Court without any chance to argue against the direct summons, which obviously is detrimental to his interests, he is deprived of his/her right to be heard. The counter-argument that the gravity of the crimes for which the accused is sent to trial before the Single-Judge Court is minor and so the violation of this principle should be tolerated, is not persuasive because the jurisdiction of the Single-Judge Court has been extended to crimes for which the maximum sentence is 5 years.¹⁶⁸

If the accused's appeal against the direct summons is rejected because it was not lodged in time or it is prohibited by law, then the accused may object to this finding of inadmissibility before the court. If the court accepts his objections then the case is declared inadmissible until the prosecutor of the Court of Appeal reviews the appeal against the direct summons.¹⁶⁹

The accused has the right of appeal under Article 478 against the ruling committing him to trial only if he was charged for a felony. This right extends to the accessory crimes as well, even if they involve misdemeanors. In all other cases that involve misdemeanours, the accused has no right to appeal against the ruling. However in practice, an informal way has been found to tackle this problem. As the prosecutor of the Court of Appeal has the power to appeal every ruling of the first

¹⁶⁴ Greek Code, at art. 322.

¹⁶⁵ *Ibid.* at arts. 322.1, 322.3.

¹⁶⁶ *Ibid.* at art. 308.3.

¹⁶⁷ Greek Constitution, at. art. 20.

¹⁶⁸ Karras, *supra* note 95, at 569.

¹⁶⁹ Greek Code, at art. 324.

instance judicial council,¹⁷⁰ the accused requests the prosecutor to appeal the ruling submitting all the necessary documents to support his request.

One more deficiency may be identified. According to the right of appeal contained in Art.322, if an appeal refers to the ruling of the first instance judicial council, the accused does not have the right to appeal against rulings of the judicial council of appeal, which has first instance competence for crimes provided by special laws like the Statute on Misappropriation of Public Funds¹⁷¹ or for crimes committed by people for which there is special jurisdiction. The domestic courts have in a number of cases stated that this prohibition to appeal against these rulings does not violate the rights of the accused as the prohibitive provision is a procedural one and does not affect substantive rights. Yet one might well argue that apart why should a wrongly accused go through the procedure before the court without having the right to be heard against his summon.

Moreover the accused has the right to request the quashing of the ruling for various reasons concerning the observance of procedural requirements.¹⁷² This right is again restricted to indictment for felonies. Further, if the prosecution is temporarily abandoned, with the possibility that might be reopened in the future, the accused has the right to appeal the decision that temporarily discontinues the proceedings. Practice has also attempted to extend this limited right to cases of misdemeanours.

5. The discretion of Co-investigative Judges and the Court to cut crime scenes, redefine, or not include charges requested by the Prosecution.

As we have interpreted crimes scenes to be locations relevant to the commission of the crime, we will proceed to examine the discretion of Judges to cut crime scenes. We will also examine the possibilities concerning the redefinition or omission of charges.

5.1 France

¹⁷⁰ *Ibid.* at art. 479.2.

¹⁷¹ Statute 1608/1950.

¹⁷² *Ibid.* at arts. 482-84.

Under French Criminal Law only the Public Prosecutor's office¹⁷³ or the victim (*la partie civile*)¹⁷⁴ has the power to open an investigation. Such a request may designate a suspect or suspects but may also just describe the body of crime of the offence (*corpus delecti*).¹⁷⁵ The examining magistrate can however refuse to start a judicial investigation on the grounds that it is evident from the documentation that no offence has been committed and that the prosecution is inadmissible.¹⁷⁶ The judicial investigation attempts to act as a filter whereby the judge builds on the work of the police investigation and determines whether there is sufficient evidence to refer the case to trial. Usually an examining magistrate works alone but if a case is particularly serious or complex, additional investigating judges can be attached to the case¹⁷⁷ Examining magistrates have *in rem* jurisdiction over all criminal acts alleged by the Public Prosecutor's complaint but cannot extend their investigation to other criminal acts not specified in the request or complaint by the prosecutor. If they discover such acts they must inform the Public Prosecutor who in turn decides whether to widen the field of investigation of the examining magistrate.¹⁷⁸ However, there is nothing to stop the examining magistrate from investigating issues which can mitigate or aggravate the offence. Within these jurisdictional limits the examining magistrates have quite wide powers. They can, for example, issue arrest warrants, visit crime scenes, and hear witnesses. One criticism of the instruction phase is that judges must delegate to the police most of their investigation powers over whom he have no direct control.

5.2 Germany

As stated previously, the German system does not involve any investigative judges and the intermediate stage of proceedings may be compared to the role of the Co-Investigative Judges.

¹⁷³ French Code, at art. 80.

¹⁷⁴ *Ibid.* at art. 51(1).

¹⁷⁵ *Ibid.* at art. 80(2). The term *corpus delecti* refers to the principle that there must be proof that a crime has occurred before a person can be convicted of committing a crime.

¹⁷⁶ *Ibid.* art. 80(1).

¹⁷⁷ *Ibid.* at chapt.1, art. 83.

¹⁷⁸ *Ibid.* at art. 80(3)-(4).

While the prosecution defines the scope of the investigation and the limits within which the Court may adjudicate,¹⁷⁹ and charges may not be withdrawn after the opening of the main proceedings,¹⁸⁰ the German Code of Criminal Procedure expressly provides that the trial judge is not bound by the allegations in the official charge.¹⁸¹ At the intermediate stage, the court determines whether there is sufficient evidence to proceed to trial.¹⁸² Once the case is moved to the main trial, only the offence specified in the bill of indictment and apparent in light of the outcome of the intermediate hearing will be heard. The trial court cannot convict the defendant of a crime other than the one referred to in the charges admitted by the court nor can the court convict the defendant of a more serious offence than that in the original indictment if new evidence uncovered during the trial, unless the accused is allowed to prepare a defence to this new charge.¹⁸³ If there is insufficient [evidence/time?] to prepare a defence to contest the new charges, the hearing shall be suspended upon the defendant's application. As the prosecutor's role is preparatory to the trial and this procedure does not dispense with the need for full proof of all the evidence necessary to establish the guilt of the accused at the public trial, therefore the official charge does not prevent the judges exercising their "free conviction obtained from the entire trial"¹⁸⁴ from cutting crime scenes and redefining charges.

5.3 Egypt

Within the Egyptian system, the designated Investigating Judge has unfettered discretion in cutting crime scenes and may redefine or exclude charges alleged by the Prosecution. At the end of the investigation, the Investigating Judge must send all the documents to the prosecution.¹⁸⁵ Subsequently, the Investigating Judge, according to the merits of the case, has the discretion to dismiss the case, or classify it (as a fine, misdemeanour or a felony) and refer it to the competent criminal court.¹⁸⁶ If the

¹⁷⁹ German Code, at sect. 155.

¹⁸⁰ *Ibid.* at 156.

¹⁸¹ *Ibid.* at 206.

¹⁸² Hatchard, *supra* note 68, at 100-01, 128-29.

¹⁸³ German Code, at sect. 265.

¹⁸⁴ Feeney, *supra* note 81, at 402.

¹⁸⁵ Egyptian Code, at art. 153.

¹⁸⁶ *Ibid.* at art. 154-58.

Investigating Judge's decision is to dismiss the case, the investigation cannot be re-opened unless the following three factors occur:

- new evidence appears;
- this occurs before the prescription of the criminal proceeding; and,
- the prosecution requests the re-opening of the investigation.¹⁸⁷

The Pre-Trial Chamber (Chamber of Instruction) has the absolute discretion to redefine, re-classify or dismiss the charges, and its decisions are final and without appeal.¹⁸⁸ However, this wide discretion is invoked only if the prosecution appeals the decision of the investigating judge. The prosecution (whether upon the request of the suspect or on its own discretion) has the right to appeal all the decisions of the investigating judge, even if the appeal is in the favour of the suspect.¹⁸⁹

5.4 Japan

The criminal procedural system of Japan does not have an investigating judge either. The public prosecutor is involved in investigation and possesses the right to prosecute. The Court may not amend crime scenes by itself. However, in Japanese criminal procedure, the Court may allow the public prosecutor to add, withdraw or amend counts or descriptions of laws or ordinances violated¹⁹⁰ in the indictment upon the request of the public prosecutor.¹⁹¹ The count here is meant to be equivalent to '訴因' (the cause of a legal action) in Japanese criminal procedural law. The 'cause of a legal action' ('訴因') is defined as the description of the prosecutorial facts which comprised of the date, site and measures which amount to crimes. Therefore, crime scenes seem to be included in this term ('訴因').¹⁹²

Moreover, in principle, the Court can order or suggest to the public prosecutor to add or alter the count or descriptions of laws or ordinances violated in the

¹⁸⁷ *Ibid.* at art. 199.

¹⁸⁸ *Ibid.* at art. 167.

¹⁸⁹ *Ibid.* at art. 161. If the investigating judge is a chancellor (senior judge), the prosecution can only appeal the decision based on jurisdiction or the procedure of referring the case. *Ibid.* at art. 167(2).

¹⁹⁰ 'Descriptions of laws and ordinances violated' is a translation of '罰状' in Article 312 of the Japanese Law of Criminal Procedure by Supreme Court of Japan in *The Rule of Criminal Procedure*, 1950. at p.190.

¹⁹¹ Japanese Code, at art. 312.

¹⁹² Dando, *supra* note 93, at 199-200.

indictment “where it deems it proper according to the development of the trial”.¹⁹³ The public prosecutor usually follows the order or suggestion of the Court. If the public prosecutor does not accept them, the Court may still continue its procedure as if the crime scenes were amended in accordance with the order. Such action has been considered controversial as it is viewed to erode the principles behind Japan’s adversarial system. For example, in a bribery case involving the Public Officer Election Law in 1965, the prosecutor was ordered to change a count from abetting to that of joint offender but chose not to follow the order. At the trial level, the Court found the accused guilty of being a joint offender although the prosecutor did not actually follow the order of the Court. In an appeal, the Supreme Court dismissed the trial court’s decision and ruled that a court was not permitted to redefine the count or description of laws or ordinances violated. The Supreme Court reasoned that allowing the court to change independently the count or description of laws or ordinances violated in the indictment would contradict the fundamental principle that the public prosecutor solely holds the authority to do so.¹⁹⁴

However, the order to change the count or description of laws or ordinances violated has in practice rarely been given by a Court. Usually the crime scenes are amended as a result of the prosecutor’s explanation of crime scenes requested by court or defence lawyers and the court cannot omit crime scenes unless there has been an illegality in the investigation or the indictment procedure.

5.5 Greece

The structure of the criminal trial in Greece is very different than the structure followed in ECCC. However, the judicial councils could be identified as a body having a similar function to the Co-Investigating Judges of the ECCC. The competent judicial council decides whether to proceed with the case and send the accused to trial or to dismiss the case and discontinue the proceedings (temporarily or permanently) or rules not to proceed with indictment. Moreover the judicial council has the power to order further investigation, if deemed necessary. The ruling of the judicial council is made after the closing of the investigation and the submission by the prosecutor,

¹⁹³ Japanese Code, at art. 312,

¹⁹⁴ Matsuo and Tamiya, *Basic knowledge of Code of Criminal Procedure*, 1st edn, (Tokyo: Yuhikaku, 1972) at 104-05.

who might suggest the discontinuation of the proceedings or that there should be no charge¹⁹⁵ or the committing of the defendant to trial.

The submission made by the prosecutor is a mere suggestion and therefore is not binding on the judicial council that has the discretion to evaluate the results of the investigation and decide itself whether to proceed or not. It must be noted that the Greek Code of Criminal Procedure explicitly prohibits the participation of those already involved in the investigation of the case interrogator in the judicial council that will decide about investigation issues or the conclusion of the investigation.¹⁹⁶ The judicial council may also restrict the acts for which the defendant will be committed for trial. It may also change the penal characterization of these acts provided that there is no change in the material existence of the act in place, time and historical context, as this would constitute a reason for the nullity of the procedure,¹⁹⁷ as the only person competent to institute proceedings is the Prosecutor.¹⁹⁸ If evidence is discovered regarding an act that is not included in the indictment, then the council must prepare a report, which it will forward, along with any relevant information, to the competent prosecutor.¹⁹⁹

Similarly the Court's jurisdiction is limited by the initiation of the proceedings by the Public Prosecutor that defines the discretion within which the interrogators, the judicial councils and the court may act. Consequently, both the judicial council and the Court have the right to omit charges and crime scenes if they do not find there is sufficient evidence to proceed with the case.

Section D: Conclusion

In summary, we have examined the practice of five domestic jurisdictions and three international criminal tribunals in an attempt to identify best practice regarding the "closing order" and issues surrounding it. In particular we have examined the right of the accused to appeal the closing order and the discretion of the judges to cut crime scenes and redefine charges.

¹⁹⁵ Greek Code, at arts. 245.2, 245.3, 308.1.

¹⁹⁶ *Ibid.* at art. 305.2.

¹⁹⁷ *Ibid.* at art. 171.1b. *See also* Karras, *supra* note 95, at p. 309.

¹⁹⁸ Greek Code, at art. 27.

¹⁹⁹ Karras, *supra* note 95, at 309, 546-47; *See also* Supreme Court of Greece 373 and 320/1989.

The Issue of the “Closing Order”

Firstly, with regard to the closing order, various equivalents were identified across domestic and international systems.

Despite the fact that The ICTY and ICTR procedure do not use the term, “closing order,” this may be equivalent to the decision of the designated judge, who reviews the indictment, submitted by the prosecutor, to either confirm or dismiss the indictment. Such decision terminates the investigation.

Under the ICC procedure, the term “closing order” is analogous to the process of the judicial confirmation of charges contained in the indictment prepared by the Prosecution which is conducted by the Pre-Trial Chamber of the ICC. The Chamber considers whether it is appropriate to proceed with charges or dismiss them. The Pre-Trial Chamber has the ultimate power to finalizing the charges to be included in the accused’s indictment for trial.

In France, the Examining Magistrates give a closing order after having conducted all acts of judicial investigation useful to reveal the truth. They must confirm or dismiss each charge prepared by the Prosecution. In the case of felonies, a second stage of judicial investigation is carried out by the pre-trial chamber, which decides whether to go ahead with the transfer for trial or to dismiss the charges.

In Germany, the closing order may take two different forms, namely indictment or dismissal. An indictment may take various forms. Firstly, the term “indictment” correlates with the preferment of public charges by the public prosecutor at the end of the investigation. This is done by making a formal note in the file and submitting the indictment to the Judge. Secondly, it refers to the judgment of the Court at the intermediate stage that transfers the case for trial when there is sufficiently strong evidence. Similarly in less serious cases when expedited procedure is followed and the intermediate stage is omitted, the written accusation of the prosecutor has a function similar to indictment. In addition, in the case of penal order procedure, the prosecutor’s application for a penal order is considered equivalent to an “indictment”. In German law a dismissal order may be either a decision of the prosecutor to terminate proceedings when there are not sufficient reasons, a decision to dispense with prosecution in minor offences (unconditionally or imposing conditions) or to discontinue prosecution or a decision of the “intermediate” court not to proceed.

Under the Egyptian Criminal Code, the prosecution is the authority entitled to issue an order ending the investigation, which is equivalent to “closing order” of the ECCC. This order must include the decision either to refer the case to the competent criminal court (indictment) or to dismiss it. However, in certain cases and only after the decision of the competent chief justice, a delegated investigating judge is vested with the power to investigate and to issue the closing order.

Under Greek law, as in German law, the “closing order” may take two forms. The “indictment” might be either a direct summons issued by the prosecutor which sends the accused to trial or in more serious cases, it may be a judgment by the judicial council to proceed with the case after the conclusion of investigation. A dismissal order is equivalent to a procedural act of the prosecution to i.e. abandoning the case or an exculpatory ruling of the judicial council that decided not to proceed with the case.

In Japanese criminal procedure although the exact term “closing order” does not exist, it can be assumed that the decision of public prosecutor whether to indict or dismiss is equivalent.

The right of the accused to appeal the closing order

As far as the right of appeal of an accused against the closing order is concerned, apart from Greece no right of appeal has been identified.

The right of the accused to appeal the closing order is not provided for in the ICTY and ICTR.

Under the ICC system, the accused does not have a direct right of appeal against the charges after the Pre-Trial Chamber refers the case to the Trial Chamber. He can only present his evidence challenging the Prosecution’s proposed charges during the confirmation hearing before the Pre-Trial Chamber confirms the charges. There is a limited right to appeal on interlocutory issues under Article 82 however,

In France, the accused has no right of appeal against the charges that are affirmed in the “closing order.” There is a limited right of appeal to the *Chambre de l’Instruction* against a decision of the examining magistrate relating to issues such as pre-trial detention or the denial of a request for expert evidence.

Similarly, under German law, there is no right of the accused to appeal the closing order, especially the indictment that sends him to court. There is however a system of checks built into the intermediate stage whereby an independent court

examines, *in camera*, whether further investigation is called for or whether the trial should proceed or not, thus providing an opportunity for a trial to be avoided. During this stage, the accused is given the chance to persuade the court not to proceed to trial. He/she may apply for individual evidence to be taken before the decision on opening main proceedings, or may raise objections to the opening of main proceedings. Only if the court finds that the evidence is sufficiently strong will the case proceed for trial and the court's decision on the applications and objections is final.

In Japanese and Egyptian criminal procedure, the accused does not possess the right to appeal the indictment issued by the public prosecutor. However, in Egypt, if there is error in jurisdiction (territorial or subject-matter) when the closing order is issued by an investigating judge, the accused has the right to appeal the indictment.

In Greek legal system, however, the accused possesses the practical possibility to appeal, what was considered -for the purposes of this paper- as "closing order". First, the accused has the right of appeal against the direct summons that sends him/her on trial, though only in the cases where the accused is sent to the Three-Judge First Instance Court. The accused has also the right of appeal against the ruling / bill of indictment of the judicial council under Article 478 if he/she had been committed to trial for a felony. This right extends to accessory crimes as well, even if they involve misdemeanors. Yet, the prosecutor of the Court of Appeal has the power to appeal every ruling of the first instance judicial council (Art.479.2) and therefore in practice the accused requests the prosecutor to appeal the ruling in cases of misdemeanors. Moreover the accused has the right to request the quashing of the ruling for various reasons concerning the observation of procedural requirements (Art. 482-484), yet, this right is again restricted to the indictment for felonies. Further, in cases that the proceedings are temporarily suspended, the accused has the right to appeal this decision. Practice has attempted to extend this limited right to cases involving misdemeanours.

The discretion of Judges to cut crime scenes and redefine or omit charges

In relation to the power of the ECCC to cut crime scenes or redefine charges, we must caution that the meaning of the term "crime scenes" is rather obscure. This term could not be identified either within Cambodian criminal procedure or any of the systems we analyzed. For the purposes of this research, we have defined crime scenes as equivalent to locations relevant to the commission of the crime. Thus, we

understand the ability of the court to cut crime scenes as the power to exclude particular sites of crimes. Redefining charges is more straightforward: this involves the reclassification or the penal re-characterization of the material act *per se* without changing the existence of the act in place, time and historical context.

In both the ICTY and ICTR, the designated judge has the competence to dismiss any of the counts submitted by the prosecution. Consequently, it is possible to reduce or dismiss the charges. Regarding the trial chamber, the ICTY rules of procedure states that the trial chamber may request the prosecutor to reduce the number of counts and may cut crime scenes in the indictment. The ICTR does not provide for the same provision as such. It is ICTY and ICTR practice to accept cumulative charges on the basis that the other charge has another element which is materially distinct from the first charge. Otherwise it is not possible to have cumulative charges. If this threshold is not met and there are two competing charges it is necessary to only choose one then the principle of *lex specialis* applies, where the specific offence takes precedence over the general offence.

In the ICC system, if the charges submitted by the Prosecutor do not present ‘substantial grounds to believe’ that the person committed the crime charged, the Pre-Trial Chamber has the duty to dismiss them. The ICC Trial Chamber has the competence to ‘modify the legal characterization’ of the facts; that is, it can determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or a different form of participation than that which the Prosecutor has chosen. However this can be difficult to evaluate in practice as we have seen in the *Lubanga* case due to the power that the Pre-Trial Chamber has assumed via the informal amendment of charges before the accused is heard in the Trial Chamber. This is further undermined by the fact that the sole avenue of appeal is to the Pre-Trial Chamber. Rejected charges may only be brought again by the Prosecutor if supported by sufficient evidence.

In France, the examining magistrate can refuse to include charges in an indictment that do not meet the necessary standard of proof in order to be sent forward for trial. If the examining magistrates discover additional grounds for additional charges they may refer this information to the Prosecutor who has the ultimate power whether to prosecute them or not. The magistrate can investigate issues which aggravate or mitigate the offences included in the indictment.

The Japanese Criminal procedural system does not have investigative judges; however, the court may allow the public prosecutor to add, withdraw or amend crime scenes and charges upon the request of the public prosecutor. Moreover, in principle, the court may order or suggest that the public prosecutor add, withdraw or amend crime scenes and charges. In practice, few orders of this nature have been issued.

Under Egyptian law, the delegated investigating judge has the unfettered discretion to cut crime scenes and not include or redefine charges requested by the prosecution. In this vein, the role of the pre-trial chamber is limited to where the prosecution appeals any of the decisions of the investigating judge. The chamber adjudicates this appeal and its decisions are irrevocable. In exercising this competence, the chamber has the discretion to reclassify or re-characterise the charges or even dismiss them.

Within the Greek system, the judicial council has a similar function to that of investigating judges. The submission made by the prosecutor to the council is a mere suggestion and therefore, is not binding as it has the discretion to evaluate the results of the investigation and decide whether to proceed or not. The council may restrict the acts for which the defendant will be committed for trial or change the legal characterization providing that there is no change in the material existence of the act in place, time and historical context. All in all, both the judicial Council and the Court have the right to omit charges and crime scenes if they do not find there are sufficient evidence to proceed with the case.

Relevance of the issues considered to Cambodia

The ECCC system includes elements derived from civil law systems, including those ones examined in this project, and has been influenced by the French system in particular.

The ECCC system involves Co-Investigating judges and co-prosecutors. Although the Prosecutor is an indispensable actor present in the criminal proceedings of all the systems analysed in this paper, this is not always the case with investigative judges. The ECCC system seems to have adopted many of the French procedural notions. Even the term ‘closing order’ is borrowed from French. However an exact term is not to be found in other jurisdictions.

After an overview of the ECCC system, based in particular on the internal rules of the Court,²⁰⁰ we have concluded that the term “closing order” may describe two actions. Our understanding of the term refers to the act of concluding an investigation, either by referring the charges to court or by dismissing them. Therefore, we identified the numerous forms of these acts under the different systems we researched. According to ECCC rules the closing order is an act of the Co-Investigative judges, the various forms we came across appear to refer to acts conducted either by the Prosecutor or by some other authority i.e. judicial council or court.

The Cambodian system does not provide for a right of appeal of the accused against a closing order. This is mirrored in several of the systems researched. Like Cambodian law, the French, German, Egyptian, Japanese systems provide for a limited right of appeal against other orders or procedural deficiencies involved at pre-trial stage, but not for an appeal against the closing order itself, i.e. the decision which commits the accused for trial. There is no right of appeal at international level either against such a decision. However, according to the Greek procedural system, there is a significant right of appeal regarding serious offences.

At the ECCC, the Co-Investigating judges are not bound by the submissions of the co-prosecutors concerning the charges that the prosecutor wishes to include in the indictment. Under Rule 67, of the Internal Rules, the Co-Investigating Judges will decide to proceed with the case only if there is sufficient evidence against the charged person(s). Therefore, it appears that only when the Co-Investigating Judges are satisfied by the standard of evidence present will they indict the accused. As a result they might indict the accused for some of the charges and not for others, which do not meet the threshold of probability necessary to send the charge onto trial. This also justifies the discretion of the Investigating Judges to include particular “crime scenes” only. Similarly, research into domestic jurisdictions has shown that in the majority of procedures, the judges at the pre-trial stage possess the right to cut “crime scenes” and change legal characterization, namely redefine charges and even omit charges on condition that the charges are based on the same factual scenario as the prosecutor’s submission.

²⁰⁰ The Court itself has consistently said that the Internal Rules have priority over the Cambodian Code of Criminal Procedure.

The crimes under the jurisdiction of the ECCC are set out in Articles 3-8 of the Law on the Establishment of the ECCC and include both domestic and international crimes. The ECCC is competent to consider both types of crimes. Under Article 1, international law and Cambodia penal law are on equal footing. There is no hierarchy of crimes. The issue is whether the Court can charge these crimes cumulatively. According to international practice the ICTY and ICTR have affirmed the validity of cumulative charges under the condition that the separately indicted crime has a material element different to the other crimes charged. This avoids the practice of alternative charging in the ICTY and the ICTR. This could have practical significance in Cambodia allowing the cumulative charging of seemingly overlapping national and international crimes of torture which when examined represent materially different elements from each other.

Under Article 98.2 of the Internal Rules, the Trial Chamber may change the legal characterization of the crime as set out in the indictment so long as new constitutive elements are not introduced. Due to the fact that the ECCC has not yet delivered any judgments, it is difficult to foresee how this provision will be interpreted in practice. The ICC system also includes a similar provision conferring competence on the Trial Chamber to modify the legal characterization of the crimes contained in the indictment. Again due to the lack of ICC jurisprudence it is difficult to say how broadly this provision would be interpreted. This lack of clarity is heightened by the fact that the Pre-Trial Chamber has begun the practice of amending charges submitted by the Prosecutor in excess of its powers under the Rome Statute and Rules of Procedure and Evidence make it difficult. The sole avenue of appeal against this is to the Pre-Trial Chamber itself. There is therefore a lot of expectation on this provision of modification by the Trial Chamber of charges but it is preceded by major procedural problems in the Pre-Trial Chamber and a lack of guidance on how to deal with this. As far as the researched domestic jurisdictions are concerned, in the majority of them the Court has the power to change the legal characterization. This power must be exercised within the limits of the material act included in the indictment. Research on domestic jurisdictions depicts that in most systems, courts have the power to change legal characterization and cut crime scenes, according to their own evaluation of the evidence.

Recommendations

The ECCC should adopt a cumulative approach rather than the alternative paradigm, through direct amendment of the internal rules to avoid undue variances in the development of jurisprudence of the ECCC. This amendment would include express provision for cumulative charging of offences, on the condition that the second offence contains a materially distinct element from the first offence.

Taking into account the seriousness of the crimes being charged at the ECCC, we recommend either the provision of the right of appeal of the accused against the closing order or the provision of a second stage of scrutiny where the definitive decision is made to proceed to trial or to dismiss the charges. This would serve as an additional protection for the accused against unmeritorious charges.