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Reading Between the Lines: Charging Instruments at the ICTR and the ICC

Claire Knittel*

Introduction

Black's Law Dictionary defines "due process" as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case."[1] This definition is admittedly an oversimplification of a complex and deep category of law, but it is illuminating for what it does include. The authors of the most authoritative legal dictionary in the United States felt that three elements were so integral that they must be mentioned by name in the limited space allowed: notice, a fair hearing, and jurisdiction.

These concerns are not limited to the domestic legal context of the United States. All tribunals have an interest in ensuring their trials comport with due process expectations—however those expectations may be defined. Some may argue that extraordinary tribunals, such as international criminal tribunals, are even more sensitive to these concerns. As Judge Dolinc, sitting in the Trial Chamber for the International Criminal Tribunal for Rwanda (ICTR or the "Tribunal"), stated,

> I strongly believe that the ultimate interest of international justice, the universal application of the rule of law, may be achieved only by respecting the basic rights of an accused to a fair trial and due process. Even when trying cases involving the most serious crimes, the

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1. BLACK'S LAW DICTIONARY 228 (3d pocket ed. 2006).

Tribunal is responsible for ensuring a fair trial.[2]

Notice requires that the accused is aware of the charges against him. Many fear that without notice, an individual could be accused, unfairly tried, and convicted without ever knowing what crime he committed. As Edmond Dantés cries out "on what charges?" when he is arrested by the gendarmes,[3] and as Joseph K. in *The Trial* is taken away without knowing his crime,[4] so the rest of us fear trial and imprisonment without ever knowing what we did wrong. Lack of notice in judicial proceedings represents the state bringing its full power against an individual—a kind of tyranny that the Framers of the United States Constitution reasonably feared when they included the right to notice in the Sixth Amendment.[5] It is unsurprising that international tribunals are concerned about this tyranny as well.

Determining what "notice" requires, however, is neither as straightforward nor as widely agreed upon. Does the accused need to see all the evidence against him in order for "notice" to be satisfied? How soon before the proceedings should he know of the charges? Do notice requirements extend throughout the trial, or do they exist only at the beginning? Courts regularly wrestle with these questions and the boundary between the rights of the accused and fairness, accuracy, and the safety of evidence and witnesses. International criminal tribunals struggle with the same issues in extraordinary circumstances: what does "notice" mean when an individual is being tried sixteen years after allegedly perpetrating one of the worst crimes society recognizes?

International criminal procedure, including the principle of notice, has grown exponentially from the Nuremburg Trials conducted after WWII, but the tribunals of today still face many sticky procedural issues. This Article will focus on two problems that the ICTR and the International Criminal Court (ICC), respectively, have faced with regard to notice. Part I reviews the jurisprudence of the ICTR and ICC, focusing

2. Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 3 (Feb. 25, 2004) (opinion of Dolinc, J.).

3. THE COUNT OF MONTE CRISTO (Touchstone Pictures 2002). This exciting bit of drama is in the film version of the story, rather than the original novel, but nevertheless captures the injustice with which Dantés was treated. To stay true to the story it must be noted that he was eventually told that he was denounced for treason by his first mate, Danglars, but when he arrived at the Chateau D'If, he did not know his crime.

4. FRANZ KAFKA, THE TRIAL (David Wyllie trans., Dover Publ'ns 2009) (1925).

5. U.S. CONST. amend. VI.

particularly on requirements of notice and the requirements of the charging instruments in each tribunal. Part II discusses in detail a problem that each tribunal is facing: vagueness in the indictment at the ICTR and informal changes to the charging instrument at the ICC. Part III explores the shortcomings of partial solutions the tribunals have adopted and possible future consequences of these solutions. I argue that the ICTR has a troubling jurisprudential gap regarding the sufficiency of the indictment and that this gap remains unaddressed by the Appeals Chamber, which means that there is no standard for a proper pre-trial indictment. I also argue that, while the ICC took a questionable procedural shortcut in allowing informal changes to the charging instrument, the practical effects of this shortcut may be less dire than some have claimed.

I. Charging Instruments

A. *Contextual Differences at the ICTR and ICC*

Before going into the specifics of the charging instruments used at the ICTR and the ICC, it is worth noting some contextual differences between the two, both broadly and as related to the specific charging procedure. It is unclear what the precise effects of these contextual differences are (or will be) but they must therefore at least be noted.[6]

Broadly speaking, the ICTR and the ICC were created during two very different times in history. The ICTR was created in response to the genocide in Rwanda in 1994 and its jurisdiction covers only those crimes.[7] It is also relatively temporary—after all of the trials have been completed the Tribunal will be dissolved and replaced by a "Residual Mechanism," which will take care of any remaining judicial duties and maintenance of the ICTR's archives.[8] The ICTR is therefore limited to a specific purpose. The ICC, on the other hand, was created as a standing

6. These introductory comments are meant to outline some of the relevant contextual features; they are by no means exhaustive.

7. *General Information*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx (last visited Jan. 11, 2012).

8. *Security Council Establishes Residual Mechanism to Conclude Tasks of International Criminal Tribunals for Rwanda, Former Yugoslavia*, UNITED NATIONS: MEETING COVERAGE & PRESS RELEASES, Dec. 22, 2010, *available at* http://www.un.org/News/Press/docs/2010/sc10141.doc.htm.

tribunal to try cases involving genocide, war crimes, or crimes against humanity committed after 2002 (when the Rome Statute was ratified).[9] Its mandate is therefore broader and permanent; the ICC is designed to be a fixture in an international system of justice.

There has also been a broader societal shift towards protecting the rights of the accused. As Gregory S. Gordon points out, "[f]rom the bare-bones privileges afforded defendants at the International Military Tribunal at Nuremberg, to the more fleshed-out protections of the ad hoc Yugoslavia and Rwanda tribunals, to the recent refinements of the International Criminal Court, the rights of the accused in the international criminal dock have most certainly expanded."[10] The procedures at the ICC reflect many of these changes, while the procedures at the ICTR (created roughly eight years earlier) reflect the jurisprudential atmosphere at the time they were created. Subparts B and C will go into these procedures in more detail.

B. *The ICTR: The Indictment*

Article 20 of the Tribunal's statute outlines the rights of the accused at the ICTR. It covers rights such as the presumption of innocence,[11] equality of all individuals,[12] and the right to a fair and public hearing.[13] Additionally, Article 20(4)(a) mandates that the accused must "be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her."[14]

Proceedings at the ICTR start when the prosecutor has conducted an investigation and has gathered enough evidence such that a prima facie case against the accused exists.[15] When such a case exists, "the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged

9. Alicia Mazurek, Prosecutor v. Thomas Lubanga Dyilo*: The International Criminal Court As It Brings Its First Case to Trial*, 86 U. DET. MERCY L. REV. 535, 538 (2009).

10. Gregory S. Gordon, *Towards an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 638 (2007).

11. S.C. Res. 955, art. 20(3), U.N. Doc. S/RES/955 (Nov 6, 1994).

12. *Id.* art. 20(1).

13. *Id.* art. 20(2).

14. *Id.* art. 20(4)(a).

15. *Id.* art. 17(4).

under the Statute."[16] The indictment is then transmitted to the Chamber, where a judge reviews it to determine whether, in fact, a prima facie case has been made.[17] If so, the indictment will be confirmed and the Chamber will arrest the individual or make any other preparations necessary for a trial.[18] If not, the indictment will simply be dismissed.[19] This determination is conducted ex parte, giving the accused no opportunity to respond to the charges. Once the accused appears before the Tribunal, the indictment is read (thus starting the proceedings) and the accused pleads guilty or not guilty.[20] Only after this procedure can the accused challenge the indictment.

An indictment can be changed by the prosecutor at three different stages: before confirmation, after confirmation but prior to the initial appearance of the accused, and after the initial appearance of the accused. Before confirmation of the indictment by a judge, the prosecutor can amend it at will, as many times as necessary.[21] After confirmation but prior to the initial appearance of the accused, the prosecutor can only amend the indictment with leave of the judge who confirmed it; acceptance of the new indictment is determined by the same standards as the initial confirmation of the indictment.[22] After the initial appearance of the accused, the indictment can be amended only if the Trial Chamber in charge of the case grants leave.[23]

An indictment is therefore the beginning of all proceedings and the basis upon which a trial is grounded. It is the primary charging tool by which the accused determines what crimes he is charged with and is informed of a limited amount of the evidence against him. As such, it fulfills two functions: the information function (giving the accused notice of the charges against him); and the limiting function (restricting what the accused can be charged with by requiring all charges to appear in the indictment).[24] An accused can only be convicted of crimes charged in the

16. *Id.*

17. *Id.* art. 18(1).

18. *Id.* art. 18(1)-(2).

19. *Id.* art. 18(1).

20. See *id.* art. 19(3).

21. ICTR Rules of Procedure and Evidence 50(A)(i) (June 29, 1995) , http://www.unictr.org/Portals/0/English%5CLegal%5CROP%5C100209.pdf.

22. *Id.* The President of the Tribunal may also appoint another judge to look over the indictment.

23. *Id.*

24. Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-A, Judgment, ¶ 2 (July 7, 2006) (Schomburg, J., dissenting).

indictment,[25] and the prosecutor cannot add charges during the trial as new evidence is discovered.[26] Consequently, the indictment restricts the prosecutor and tells the accused what he is *not* charged with.[27] The specificity required of the indictment also changes depending on the crime: crimes the accused personally perpetrated require details while mass crimes do not.[28] Therefore, the requirements of the indictment the prosecutor must meet depend upon the crimes with which the accused is charged. The indictment, therefore, is a very powerful tool: it is the locus of the rights the accused is afforded during the trial and its precision or lack thereof significantly shapes the proceedings.

C. *The ICC: Confirmation of the Charges*

The rights of a charged individual at the ICC closely mimic the guarantees provided to accused persons at the ICTR. Various articles ensure rights such as the presence of the accused at trial,[29] the presumption of innocence,[30] and a fair and impartial public hearing.[31] Furthermore, as at the ICTR, accused individuals at the ICC are entitled "[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks."[32]

Proceedings at the ICC start with a confirmation of the charging instrument. The Rome Statute requires that "the Pre-Trial Chamber [] hold a hearing to confirm the charges on which the Prosecutor intends to seek trial."[33] At the ICTR a judge performs this task ex parte; at the ICC, it is an adversarial proceeding—"[t]he hearing shall be held in the

25. Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶ 18 (Aug. 29, 2008).

26. *Id.* ("The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.").

27. See *id.*

28. *Compare* Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-A, Judgment, ¶ 17 (Sept. 19, 2005) *with* Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶ 58 (Aug. 29, 2008).

29. Rome Statute of the International Criminal Court art. 63, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (entered into force July 1, 2002).

30. *Id.* art. 66.

31. *Id.* art. 67.

32. *Id.* art. 67(1)(a).

33. *Id.* art. 61(1).

presence of the Prosecutor and the person charged, as well as his or her counsel."[34] The adversarial nature of the proceeding means that such issues as disclosure, admissibility of evidence, and protection of witnesses and victims come in to play before the charging instrument has even been confirmed.

Rule 121(3) of the Rome Statute states that the prosecutor must supply, to the person charged, a detailed description of the charges as well as a list of all the evidence to be presented.[35] This second requirement goes far above and beyond the requirements at the ICTR: at no point before the actual presentation of evidence during trial is an accused afforded the privilege of seeing all evidence the prosecutor at the ICTR has amassed. The mandate at the ICC goes both ways, however: the person charged (not yet an "accused" or a "defendant") is required to disclose all evidence to the Pre-Trial Chamber and the prosecutor.[36] During the hearing, the prosecutor must "support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."[37]

As at the ICTR, there are procedures by which the prosecutor can amend the charging instrument at the ICC. Before the hearing, the prosecutor may amend the charges at will, provided that notice is given to the charged individual.[38] After the charging instrument has been confirmed (but before the trial has started) the prosecutor can still amend the charges, but he must do so with the permission of the court and provide adequate notice to the accused.[39] If, after the amendments, a new charge has been added to the charging instrument, another hearing must be held to confirm that new charge.[40]

After the hearing, the Pre-Trial Chamber has a few different paths it can take regarding the charging instrument. The first path is to confirm the charges, by finding the evidence sufficient and committing the person

34. *Id.* art 61. Provision (2) allows for a situation where the person charged has waived his right to presence or has fled and cannot be found. In those situations, the proceeding can be conducted ex parte. *Id.* art. 61(2).

35. Finalized Draft Text of the Rules of Procedure and Evidence, Preparatory Comm'n for the Int'l Criminal Court, 13-31 Mar., 12-30 June, 2000, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) [hereinafter ICC RPE].

36. *Id.* r. 121(6).

37. Rome Statute, *supra* note 29, art. 61(5).

38. *Id.* art. 61(4).

39. ICC RPE, *supra* note 35, r. 128; *id*. art. 61(9) .

40. Rome Statute, *supra* note 29, art. 61(9).

to stand trial; the second is to not confirm the charges where there is not sufficient evidence.[41] The third path is somewhat unique: the Pre-Trial Chamber may adjourn the hearing so that the prosecutor can either a) present more evidence or do further investigations to discover more evidence; or b) amend the charge(s) because the evidence submitted during the hearing "appears to establish a different crime within the jurisdiction of the Court."[42]

As at the ICTR, the confirmation of charges hearing at the ICC is the beginning of proceedings against the charged individual. While the confirmation hearing is not intended to be a "mini trial," the adversarial nature of the hearing and the resulting rules of evidence and procedure make it more, rather than less, like a trial.[43] Additionally, the Pre-Trial Chamber has used this procedural step to render lengthy and detailed opinions regarding confirmation. The Lubanga Decision on the Confirmation of the Charges runs 157 pages;[44] the Katanga and Chui Decision runs 226 pages;[45] and the Bemba Decision runs 186 pages.[46] In these opinions the Pre-Trial Chamber provides factual background and discusses preliminary evidentiary steps and procedural matters before touching on the elements of the crime.[47] Thus, while the confirmation of charges hearing is statutorily limited to the issue of confirmation, the Pre-Trial Chamber has nonetheless seized the opportunity to begin clarifying the application of the statute and rules to practical situations.

41. *Id.* art. 61(7)(a)-(b).

42. *Id.* art. 61(7)(c).

43. *See* Mazurek, *supra* note 9, at 540.

44. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

45. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges (Sept. 30, 2008).

46. Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009).

47. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

II. Gaps at the ICTR and the ICC

A. *At the ICTR: Vagueness in the Indictments*

1. Defective Indictments

An indictment is defective when it does not fulfill its primary purpose of putting the accused on notice of the charges against him.[48] By failing to give notice, the indictment creates prejudice against the accused and materially impairs his ability to defend his case, thus violating his rights.[49] This defect most commonly occurs in a vague indictment that lacks the necessary specifics (such as date, place, names, or even the actual crime) to inform the accused of the charges he is facing.

Vagueness can lead to a defect in either the information or the limitation function of the indictment. If there is a defect in the information function, then there is not enough information for the accused to properly build a defense. For example, the charge against the accused may be so vague that the accused cannot gather evidence or find witnesses to support his defense, because he does not know enough information about the date, time, and location of the alleged crime. If there is a defect in the limitation function, then there is not sufficient specificity to ensure the trial sticks to the charges in the indictment. For example, the prosecutor may exploit any vagueness in the indictment by attempting to slip extra charges into the grey areas. If the charges are so vague that they are "capable of misleading the accused as to the nature of the criminal conduct with which he is charged," then the prosecutor may try to take advantage of that ambiguity.[50] The consequence is that by the end of the trial, the accused is charged with crimes for which he has not been put on notice and against which he has not and cannot defend himself. A vague indictment often fails in both functions. There is a balance, however, between the requirements of notice and what is reasonable to demand of the prosecutor: lack of specificity does not

48. *See* Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 322 (Nov. 28, 2007).

49. Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-A, Judgment, ¶ 28 (July 7, 2006).

50. Prosecutor v. Ntakirutimana & Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶ 471 (Dec. 13, 2004).

automatically result in a defective indictment,[51] and the indictment does not need to be so specific that it pleads the evidence.[52]

2. Challenging a Defective Indictment

An accused can challenge the indictment before, during, and after the trial. Current jurisprudence shows that during trial the court has a variety of options to respond to such a challenge. The Trial Chamber can order the prosecutor to amend the indictment, can rule that the prosecutor has "cured" the defect by providing supplementary information, or can exclude evidence relating to the vague charge.[53] If the indictment is challenged after the trial is completed but before the Trial Chamber has reached a verdict, then the Chamber may exclude evidence from its considerations or determine that the indictment was cured. After the accused has been convicted, the Appeals Chamber on appeal can consider whether the indictment was cured.

a. *During Trial*

The first option that the Trial Chamber may consider in response to a challenge to the indictment is to order an amendment to the indictment, to provide the necessary information, and fix the ambiguity. This response is illustrated in *Prosecutor v. Nchamihigo*. Shortly after the start of the trial, Nchamihigo challenged the indictment as deficient because the prosecutor had not complied with an earlier order to include more specific information.[54] Nchamihigo argued that "the non-compliance violate[d] the rights of the [a]ccused to know the charges against him and prepare his defence [sic]," and requested that the prosecutor either follow the directions given by the Trial Chamber or strike the offending

51. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, ¶ 27 (Mar. 12, 2008).

52. Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgment and Sentence, ¶ 28 (July 15, 2004) ("[T]he indictment need not achieve the impossible standard of reciting all aspects of the evidence against the accused as it will unfold at trial.").

53. Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgment, ¶ 196 (July 9, 2004).

54. Prosecutor v. Nchamihigo, Case No. ICTR-2001-63-T, Decision on Defense Motion for Non-Conformity of the Indictment with the Trial Chamber's Decision on Defects in the Form of the Indictment, ¶ 1 (Dec. 7, 2006).

paragraphs.[55] The Trial Chamber determined that, while the prosecutor had provided more details in other supplementary materials, it had not included these details in the indictment itself, and should have.[56] The Chamber therefore ordered the prosecutor to file a new amended indictment with the necessary changes and specifications.[57]

There are many motions with similar rulings scattered throughout the ICTR jurisprudence. However, there have also been many motions for more specificity in the indictment that the Trial Chamber has not granted. For example, in *Prosecutor v. Karemera*, Karemera challenged multiple paragraphs in the indictment and claimed lack of specificity.[58] The Trial Chamber stated that the prosecutor must strike a balance between adequate notice and brevity and, after pointing out that the Chamber "has discretion in assessing such balance," rejected Karemera's motion.[59] It found that the indictment, when read as a whole, gave adequate notice considering the crimes that were charged and the level of specificity already present.[60]

Curing, the second option, allows the prosecutor to use materials outside of the indictment to "fix" ambiguity. To cure, the prosecutor has to give the accused "timely, clear, and consistent information detailing the factual basis underpinning the charge."[61] Since "the [i]ndictment is not to be seen in isolation,"[62] this timely, clear, and consistent information is provided in supplementary materials, such as the Pre-Trial brief, opening statements and, in special instances, witness summaries.[63] The Appeals Chamber justifies curing (which, practically speaking, is acknowledging that the prosecutor did not provide enough information in the beginning and yet allowing it) by using the accused's right to build an adequate defense as the standard:

55. *Id.*

56. *Id.* ¶¶ 4, 7, 10.

57. *Id.* ¶ 11.

58. Prosecutor v. Karemera, Ngirumpatse, Nzirorera & Rwamakuba, Case No. ICTR-98-44-T, Decision on the Accused Karemera's Preliminary Motion Alleging Defects in Form of the Amended Indictment, ¶ 9 (Apr. 23, 2004).

59. *Id.* ¶ 16.

60. *Id.* ¶ 17-19.

61. Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶¶ 20, 120 (Aug. 29, 2008).

62. Muhimana v. Prosecutor, Case No. ICTR-95-1B-A, Judgment, ¶ 5 (May 21, 2007) (Schomburg, J., dissenting).

63. Prosecutor v. Mpambara, Case No. ICTR-01-65-T, Judgment, ¶ 165 (Sept. 11, 2006).

> The question of delayed disclosure is irrelevant as long as the accused is able to defend himself against all the allegations. As the right to be informed cannot be viewed in isolation and must be seen in the context of the right to prepare a defence [sic], the decisive factor in determining whether the accused's rights were in fact impaired has to be whether he was able to frame his defence [sic] accordingly.[64]

Curing is, however, the exception and not the rule. The prosecutor cannot substantially rely on it to provide notice during the trial and it "should be limited to exceptional cases."[65] The limit is logical: while some flexibility would best serve the interests of justice, the Tribunal is not interested in allowing the prosecutor to start a trial with only a skeleton case against the accused that it fills in as the trial progresses. Curing is not permitted to add counts[66] or radically change the indictment;[67] outside information can therefore only supplement the indictment to cure lack of specificity.

The third option, excluding evidence, does not involve changing the indictment itself but instead addresses the evidentiary consequences of vagueness. In order for evidence of a crime to be accepted by the Tribunal, the crime must be included in the indictment.[68] If the crime is not in the indictment because the indictment is vague, then no evidence should be allowed in to prove it. If evidence is submitted and accepted by the Trial Chamber anyway, then the Chamber has violated the rights of the accused because the accused can only be convicted of crimes charged in the indictment. Determining whether evidence should be excluded therefore pivots on whether the charge was sufficiently pled in the charging instrument. The prosecutor will argue that the evidence relates

64. Muhimana v. Prosecutor, Case No. ICTR-95-1B-A, Judgment, ¶ 15 (May 21, 2007).

65. Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-A, Judgment, ¶ 114 (July 7, 2006).

66. Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶ 156 (Aug. 29, 2008).

67. *Id.* ¶ 20.

68. *See* Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, ¶ 2 (June 29, 2006).

to a charge that was technically included in the indictment and should therefore be allowed in, while the accused will argue that the evidence relates to a vaguely pleaded charge, and therefore should be kept out.[69] The determination becomes whether the indictment has been cured, as discussed above, such that notice was provided.[70]

These second and third options are often intertwined: if a challenge arises during trial it usually is triggered by the admission of evidence, and the question becomes whether to allow the evidence in and whether it proves something pled in the indictment. One motion in *Prosecutor v. Nsengiyumva* provides a good example of the intersection between these two remedies for the Tribunal. In that motion, Ntabakuze challenged the inclusion of evidence based on its relevance.[71] In its decision, the Trial Chamber set out the relevant law as follows:

> Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment. Notice of a material fact anywhere in the Pre-Trial Brief would inform the Defence [sic] of the need to address and investigate the allegation, regardless of the specific witness who is said to be the source of the information.[72]

In other words, if the evidence is probative but connected to nothing in the indictment, the Trial Chamber cannot consider it because it was not properly pled and notice was not given to the accused. If the evidence is probative but there is ambiguity or vagueness concerning the indictment, then the Trial Chamber will look at supplementary materials to evaluate whether the prosecutor has provided notice to the accused (in other words, curing). As outlined above, some supplementary materials

69. *Id.*

70. *Id.*

71. Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, ¶ 1 (Sept. 15, 2006).

72. *Id.* ¶ 9.

provide notice while others do not. The Trial Chamber in *Nsengiyumva* found that the Pre-Trial brief, opening statement, Supporting Material (a specific document disclosed by the prosecutor), and witness statements provided adequate notice for some grounds, but not for others, and therefore partially granted the motion for exclusion.[73] For each allegation the Trial Chamber examined the relevant documents, examined the testimony that was actually provided, and determined whether there was a sufficient match between the two to allow admissibility.

For example, the defense argued that the prosecutor failed to plead command responsibility of the accused over the *Interahamwe* for a particular event, pointing out that the prosecutor only used the word "troops."[74] The Trial Chamber found that the prosecutor, in other areas of the indictment as well as in the Supporting Material and Pre-Trial Brief, used the word *Interahamwe* and provided details supporting its allegation.[75] Thus, while the indictment may not have explicitly said "Ntabakuze exercised command responsibility over the *Interahamwe* on this particular date," there was sufficient notice. The Trial Chamber concluded that the whole of the indictment didn't allow ambiguity such that "the Defence [sic] would have been prejudiced in its investigations or . . . would have misapprehended the nature of the material facts alleged against the Accused."[76] Thus, the evidence was allowed in.

In the instances where the evidence was not allowed in, the Trial Chamber's determination was similarly straightforward: if no mention of the underlying crime or facts were mentioned in any of the charging documents or supporting materials, then the evidence was excluded.[77] As an illustration, in *Nsengiyumva* the defense challenged evidence relating to various meetings during which the accused allegedly planned to exterminate Tutsis; after an examination of the indictment the Trial Chamber found no supporting allegations.[78] It held that "[a]lthough the [i]ndictment does make general allegations . . . there is no allegation resembling this meeting or this particular type of conduct."[79] Additionally, there was no supplementary evidence "which would cure

73. *Id*. ¶¶ 21 (pre-trial brief), 16 (opening statement), 18 (supporting material), and 11 (witness statements).

74. *Id* ¶ 19.

75. *Id*.

76. *Id*.

77. *See, e.g.*, *id*. ¶¶ 42, 44-45, 69.

78. *Id*. ¶ 42.

79. *Id*.

the vagueness of the [i]ndictment."[80] As a result, the evidence was excluded.

b. *After Trial*

After the trial has been completed, the Chamber may decide whether or not to consider evidence. If the underlying charge was not sufficiently pled then the evidence must be excluded for the same reasons as above; if the indictment was cured, such that proper notice was given, then the evidence may be admitted.

Prosecutor v. Niyitegeka provides an illustrative example of these two options. There, the Trial Chamber addressed the issue of notice for each allegation in the indictment separately.[81] Its determination of whether the accused was properly on notice incorporated all the elements of the jurisprudence outlined above: whether notice was given in the indictment, whether it was given by supplementary materials, whether it was given early enough to allow the accused to mount a proper defense, etc. The analysis had to be allegation-specific because the amount of detail required for an allegation changed depending on what crime was charged.

There were a number of different areas where the Trial Chamber found that the accused was put on notice. In one, concerning a particular attack in the later half of April, the defense complained that it was notified late of the allegation.[82] The Trial Chamber allowed that "this event is not mentioned in the Indictment, the Pre-trial Brief, or the witness's statement dated 31 January 1996," but ultimately concluded that the accused was put on notice by a memorandum submitted before trial.[83] Thus, "[t]he Chamber consider[ed] that this cure[d] the lack of notice in the Indictment."[84] The defense made a similar argument concerning another attack around the same time in April and the Trial Chamber considered the same factors. It determined that

> [a]lthough this allegation is not mentioned in the

80. *Id.*

81. Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment and Sentence (May 16, 2003).

82. *Id.* ¶¶ 84-87.

83. *Id.* ¶ 87.

84. *Id.*

> Indictment nor in the witness's prior statements, the Chamber notes that the 13 May attack is mentioned as being Witness GGY's anticipated testimony in the Prosecutor's Pre-trial Brief filed on 11 March 2002, about 3 months before the commencement of trial and 5 months before the witness's testimony. The Chamber considers that this constitutes sufficient notice to the Defence [sic].[85]

There were other allegations, however, that the Chamber did not find cured, and it therefore excluded the evidence relating to those allegations. For example, concerning an attack in June, one witness testified that he saw the accused personally club a child.[86] Without a specific protest by Niyitegeka, the Trial Chamber determined that he had not been given notice. It held that the alleged murder was not in the Indictment, Pre-Trial Brief, or witnesses' statements, and this lack of notice was fatal to the prosecutor's ability to use the evidence.[87] Since murder must be specifically pled in the indictment[88] and no supplementary materials were disclosed to provide notice, "the Defence [sic] had little or no notice of this alleged act of killing. Consequently . . . the Chamber will disregard this evidence."[89]

The seriousness of adequate notice to the accused—and the Trial Chamber's commitment to this requirement—is seen most clearly when the Trial Chamber decides to exclude evidence after the trial is completed. During trial, the prosecutor can respond to an exclusion of evidence by trying to support the allegations in some other way. At the end of trial, however, there are no other options left. If, in the above situation, the witness is telling the truth and the accused did beat a child to death on that day, then the prosecutor has forfeited her ability to hold the accused responsible due to a procedural error—failure to adequately plead the charge in the indictment. There may be legitimate reasons that the charge was not included in the indictment: the witness may have been too scared to speak about what he saw, or he may have forgotten some

85. *Id.* ¶ 147.

86. *Id.* ¶ 288.

87. *Id.* ¶ 289.

88. Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-A, Judgment, ¶ 17 (Sept. 19, 2005).

89. Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 289 (May 16, 2003).

details over sixteen years and remembered them later. Yet notice is integral for a fair trial: if the accused were convicted of a crime for which there was no notice, there is a possibility that a) he did not actually commit the crime; b) the resulting judgment would be viewed as fundamentally unfair and reputation of the Tribunal would suffer; and/or c) the lack of notice would create an automatic appeals point, which could overturn the judgment and waste judicial resources. Thus, while exclusion of evidence may seem harsh, it is a procedurally sound remedy for vagueness.

c. *On Appeal*

When a party appeals a decision[90] the Appeals Chamber will review the conviction for either "an error on a question of law invalidating the decision or . . . an error of fact which has occasioned a miscarriage of justice."[91] The Appeals Chamber therefore has a limited function in addressing challenges to the indictment: it will determine whether the indictment was cured and whether the trial produced a fair outcome.[92] A challenge to the indictment may be only one of many grounds for appeal.

The appeals judgment in *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe* provides an example of how the Appeals Chamber treats the issue. There, one challenge that Imanishimwe brought against his conviction asserted that he had been convicted for charges that were not properly pled in the indictment.[93] This challenge goes to the heart of the indictment jurisprudence: in order to ensure a fair trial the accused must have notice of the crimes for which he is being held responsible; if that notice is not given, the final outcome lacks credibility. Imanishimwe argued that the indictment "did not in any way inform him of the nature of the charges against him . . . since . . . [it did] not specify the actual perpetrators, the date and place of the alleged massacre, or the nature of

90. Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases*, 3 J. APP. PRAC. & PROCESS 589, 607 (2001) (internal quotation marks omitted). Either the defense or the prosecutor may appeal a final judgment at the ICTR. *Id.* at 610.

91. *Id.* at 618.

92. *See* Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgment, ¶ 196 (July 9, 2004).

93. Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-A, Judgment, ¶ 115 (July 7, 2006).

his alleged participation therein or that of his subordinates."[94] The prosecutor and the Trial Chamber agreed that the Indictment was impermissibly vague,[95] but the prosecutor argued that it had cured the defect by providing sufficient supplemental material to put Imanishimwe on notice.[96] The Trial Chamber considered evidence relating to the charges, and returned a conviction.[97]

The Appeals Chamber's analysis started with the question of whether an indictment could be cured and, after answering in the affirmative, whether it had in fact been cured.[98] It found that Imanishimwe was not on notice regarding a particular set of events because they had not been plead in the indictment and were not included in any supplementary materials.[99] Since he was not given timely notice of the allegations[100] "Imanishimwe's ability to prepare his defence [sic] in relation to the Gashirabwoba events was materially impaired," which rendered the proceedings unfair.[101] As a result, the Trial Chamber was incorrect in returning a verdict against him for his alleged participation in the events, and the Appeals Chamber reversed that part of the guilty verdict.[102]

B. *At the ICC: Changing the Charges*

1. The Confirmation Hearing of Lubanga

There are a limited number of confirmation hearings that have occurred at the ICC, and consequently the jurisprudence that discusses this stage of the proceedings is much more limited than the jurisprudence at the ICTR concerning vague indictments. This Paper will focus

94. *Id*. ¶ 116

95. *Id*. ¶¶ 117, 120.

96. *Id*. ¶ 132 ("The Prosecution submits that Imanishimwe was supplied with information pertaining to Gashirabwoba on 26 November 1999 through disclosure of the redacted statements of Witnesses LAC, LAB and LAH . . . . [and] in paragraphs 2.29 to 2.40 and in Annexes 3 and 5 of its Pre-Trial Brief, which was filed two and a half months prior to the start of trial.").

97. *Id*. ¶ 134.

98. *Id*. ¶ 136.

99. *Id*. ¶¶ 141.

100. *Id*. ¶¶ 155-56.

101. *Id*. ¶ 164.

102. *Id*. ¶ 164-65.

specifically on the first confirmation of charges at the ICC, against Thomas Lubanga Dyilo ("Lubanga"). Lubanga was charged under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute for conscripting and enlisting children under fifteen to participate in hostilities, not of an international character, in the Democratic Republic of Congo (DRC).[103] Lubanga allegedly entered politics in 1999, when he was first elected to the Ituri District Assembly, and then was integral in the creation of the *Union des Patriots Congolais* (UPC) and the corresponding military wing, *Forces Patriotiques pour la Liberation du Congo* (FPLC).[104] Lubanga became the Commander-in-Chief of the FPLC in early September 2002.[105]

2. Informal Amendments to the Charging Instrument

The purpose of the charging instrument, as with an indictment, is to inform the charged individual about the crimes the prosecutor believes he committed. If the charging instrument does not do this, then the Rome Statute allows for the instrument to be amended. The procedure, described in Part 1, *infra*, explicitly allows for the prosecutor to amend the indictment and bring it back to the Pre-Trial Chamber.

This situation arose at Lubanga's confirmation hearing.[106] The charging instrument that the prosecutor brought against Lubanga alleged that the crimes "occurred in the context of an armed conflict not of an international character," per Article 8(2)(e)(vii).[107] Article 8(2)(e)(vii) criminalizes "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities," when the hostilities are not part of an international

103. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Document Containing the Charges, Article 63(3)(a) (Aug. 28, 2006).

104. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 6-8 (Jan. 29, 2007).

105. *Id.*

106. This difficulty has arisen only once in the confirmation of charges against Lubanga. As of the writing of this Article only two other trials have started at the ICC and neither have dealt with the same issue. *See* Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges (Sept. 30, 2008); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009).

107. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Document Containing the Charges, Article 63(3)(a), ¶ 7 (Aug. 28, 2006).

conflict.[108] After evidence was presented during the hearing, however, the Pre-Trial Chamber decided that the conflict was better characterized as an "armed conflict" that was international, thus criminalizing Lubanga's conduct under Article 8(2)(b)(xxvi).[109] Article 8(2)(b)(xxvi) criminalizes "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" that are international.[110] The Pre-Trial Chamber drew this conclusion based on arguments made by the prosecutor, Lubanga's attorney, and counsel for the victims.[111] It found that both Rwanda and Uganda were involved in the violence in the DRC in the relevant area and during the relevant time, making it an "international" conflict.[112] Since the character of the conflict was international, the Pre-Trial Chamber decided that the evidence more clearly fit under Article 8(2)(b)(xxvi), rather than the article that the prosecutor originally charged—Article 8(2)(e)(vii).

Per Article 61(7)(c)(ii), when this situation arises, the Pre-Trial Chamber must adjourn the proceedings and give the prosecutor a chance to amend the charging instrument so that the charges reflect the evidence. Here, the Pre-Trial Chamber should have adjourned the proceedings, allowed the prosecutor to amend the charging instrument to reflect charges under Article 8(2)(b)(xxvi) (or both articles), and then brought that charging instrument back to the confirmation hearing to give Lubanga a chance to challenge the amended charges. As the Pre-Trial Chamber pointed out, this procedure is to "prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence [sic] would not have had the opportunity to submit observations at the confirmation hearing."[113] In other words, a charging instrument with crimes that do not match the evidence would deprive the charged individual of notice, the lack of which would prevent him from giving a proper defense. Here, Lubanga would have been formally charged under Article 8(2)(e)(vii) but would have been actually facing

108. Rome Statute, *supra* note 29, art. 8(2)(e)(vii).

109. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 220 (Jan. 29, 2007).

110. Rome Statute, *supra* note 29, art. 8(2)(b)(xxvi).

111. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 200 (Jan. 29, 2007)..

112. *Id.*

113. *Id.* ¶ 203.

charges under Article 8(2)(b)(xxvi). This mismatch, according to the Rome Statute, would deprive Lubanga of his right to notice.

At the Lubanga confirmation hearing, however, the Chamber did not adjourn the proceedings so that the prosecutor could amend the charging instrument. Rather, the Chamber found that the two charges "criminalise[d] the same conduct" and, as a result, decided that "it [wa]s not necessary to adjourn the hearing and request the Prosecutor to amend the charges."[114] The Pre-Trial Chamber outlined the elements for each crime and noted the elements in common: namely, enlistment or conscription of children under fifteen years old to actively participate in hostilities, knowledge by the perpetrator that the children were under fifteen, and knowledge by the perpetrator that the conflict existed.[115] The Pre-Trial Chamber noted that there were two areas in which the crimes were not the same: first, clearly, in the difference between an international and a non-international armed conflict; and second, in the difference between "national armed forces" and "an armed force or group."[116] The Chamber, through interpretation of other treaties and preparatory materials, interpreted "national armed forces" to mean "not limited to the armed forces of a State."[117] Consequently, Lubanga's actions (supported by enough evidence to provide substantial grounds to believe Lubanga committed these actions) were criminalized equally under both articles. Since the Pre-Trial Chamber found no material differences between the conduct that each section of the statute criminalized, it believed that an adjournment was not necessary to amend the charging instrument.[118] It did not follow the procedure outlined in the Rome Statute and instead confirmed the charging instrument as it was written.

114. *Id.* ¶ 204.

115. *Id.* ¶ 240.

116. *Id.*; *see also* Rome Statute, *supra* note 29, art. 8(2)(e)(vii) (referring to non-international conflicts), art. 8(2)(b)(xxvi) (referring to international conflicts).

117. *Id.* ¶ 285.

118. *See* Olympia Bekou, Prosecutor v. Thomas Lubanga Dyilo—*Decision on the Confirmation of Charges*, 8 Hum. Rts. L. Rev. 343, 345 (2008).

III. The Bridge to Nowhere

A. *The ICTR: When will it get solved?*

As shown above, there is a gap in the jurisprudence of the ICTR regarding the sufficiency of the indictment before the proceedings start. The Appeals Chamber has clearly outlined the law addressing challenges during and post-trial, and has fashioned remedies to make the best of a bad situation: in these instances the trial has started, evidence has been submitted, and then it becomes clear that the charging instrument is not fulfilling its functions. In this setting, the jurisprudence must bridge any divide between what the indictment is and what it should be, and remedies like exclusion of evidence or curing are created to make the best of a flawed scenario. These solutions, however, do not comment on what a sufficient indictment looks like. This gap is troubling because the Trial Chambers at the ICTR and Appeals Chamber have had numerous occasions to determine whether an indictment is defective and whether the accused was afforded a fair trial. One could even make the generalization that each case that has appeared before the Tribunal includes challenges to the indictment, in one form or another. Despite this wealth of opportunities, however, there is no Appeals Chamber determination regarding sufficiency of an indictment when raised during a pre-trial motion.

What caused this gap? As with all courts, judges have some discretion to raise issues but mostly respond to arguments brought by the attorneys. Therefore, in order for the adequacy of the indictment to be treated by the Appeals Chamber before the trial has started, a variety of factors are required to align.[119] First, there must be a vague indictment. Second, the accused's counsel must challenge the indictment, which means counsel must raise the motion at the right time, must challenge the right parts, and must, of course, have a good argument. This second factor is dependent upon the circumstances of the case because, as shown above, the level of specificity required in indictments depends on the crimes charged. Third, the judge must agree that the indictment is vague and order it amended. Fourth, the prosecutor must fail or refuse to fix the indictment; if the indictment is fixed, or an amended indictment is filed, then the issue becomes moot. Fifth, the defense must challenge the

119. E-mail from Amanda Grafstrom, Assoc. Legal Officer, ICTR, to Author (Jan. 6, 2011, 09:44 EST) (on file with Author).

indictment again claiming that it was not fixed or is still insufficiently vague. Sixth, after the Trial Chamber has ruled on it, the defense must make a motion for certification to appeal. Seventh, and finally, that motion must be granted by the Trial Chamber.

1. Missed Opportunities

Unfortunately, the ICTR jurisprudence is littered with situations where these elements failed to align. One example is *Prosecutor v. Akayesu*. Of the motions filed only one pertained to vagueness in the indictment. However, when counsel argued before the Chamber, he did not address the indictment but instead spoke about the conditions of Akayesu's detention.[120] The Chamber was unable to make any decisions or determinations addressing Akayesu's concerns about the indictment because of this deviation, and limited itself to "taking notice of the merits" of Akayesu's complaint.[121] Counsel did not raise the issue again and it remained unaddressed, even if there were valid grounds for challenging the ambiguity of the indictment.

Another is seen in *Prosecutor v. Simba*. In that case, Simba challenged the indictment but the Trial Chamber determined that it was adequate.[122] Simba appealed the decision, but did not follow the proper procedure: interlocutory appeals concerning jurisdiction are a matter of right, but all other appeals must be certified by the Trial Chamber.[123] Since Simba did not obtain certification from the Trial Chamber, the Appeals Chamber had no choice but to dismiss the challenge without considering the merits. [124] Simba challenged the ambiguity of the indictment a second time, and this time the Trial Chamber agreed that there was impermissible vagueness and required changes to the indictment.[125] Dissatisfied, Simba appealed the decision but again failed

120. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Decision on the Preliminary Motion Submitted by the Defense on the Form of the Indictment and Exclusion of Evidence, ¶ 2 (Sept. 27, 1996).

121. *See id.*

122. Prosecutor v. Simba, Case No. ICTR-2001-76-I, Decision on Defence Motion Alleging Defects in the Form of the Indictment (Jan. 26, 2004).

123. Simba v. Prosecutor, Case No. ICTR-01-76-AR72, Decision on Aloys Simba's Interlocutory Appeal Regarding Defects in the Form of the Indictment (Mar. 24, 2004).

124. *Id.*

125. Prosecutor v. Simba, Case No. ICTR-01-76-I, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment (May 6, 2004).

to get certification from the Trial Chamber; the appeal was therefore dismissed without the Appeals Chamber discussing the merits, as before.[126] Still unsatisfied with the indictment, Simba raised a third challenge; the Trial Chamber gave him a slap on the wrist for his piecemeal motions and found the indictment to be sufficient.[127] Simba must have remembered his prior failures in the Appeals Chamber because he decided to change his approach: he appealed on grounds of jurisdiction, which is an appeal that does not need to be certified by the Trial Chamber.[128] The content of his argument was the same, however: "the Appellant has attempted to reformulate his arguments in jurisdictional terms, [but] the Appeals Chamber considers that the substance of the Appeal remains nonetheless concerned with alleged defects in the form of the indictment." [129] The Appeals Chamber therefore dismissed the appeal without discussing the merits. Simba did not challenge the indictment again. All of his motions were properly preliminary, and there may have been merit to his complaints, but without the proper procedure and arguments the Appeals Chamber would not weigh in on the issue.

Many other preliminary motions have been filed but have either failed to run the gamut[130] or have failed to be certified for appeal.[131]

2. *Nizeyimana*

There has been only one instance where all of these different factors aligned to reach the Appeals Chamber: *Prosecutor v. Nizeyimana*. Nizeyimana challenged the vagueness in the indictment, and he did so

126. Simba v. Prosecutor, Case No. ICTR-01-76-AR72.2, Decision on Validity of Appeal Pursuant to Rule 72(E) of the Rules of Procedure and Evidence (June 4, 2004).

127. Prosecutor v. Simba, Case No. ICTR-01-76-I, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment (July 14, 2004).

128. Prosecutor v. Simba, Case No. ICTR-01-76AR72.3, Decision on Validity of Appeal Pursuant to Rule 72(E) of the Rules of Procedure and Evidence (Sept. 30, 2004).

129. *Id.* ¶ 5.

130. *See, e.g.*, Prosecutor v. Renzaho, Case No. ICTR-97-31-I, Decision on Preliminary Motion on Defects in the Form of the Indictment (Sept. 5, 2006); Prosecutor v. Mpambara, Case No. ICTR-2001-65-1, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (May 30, 2005); Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment (July 15, 2004).

131. *See, e.g.*, Prosecutor v. Setako, Case No. ICTR-04-81-I, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 3 March 2008 on Defects in the Indictment (June 17, 2008).

through a preliminary motion.[132] As in many of the other motions, the Trial Chamber agreed that the indictment was vague and required that the prosecutor amend particular paragraphs in order to provide more information.[133] The prosecutor failed to amend the indictment with sufficient particularity; Nizeyimana filed another motion, but the Trial Chamber ruled that, except for a few minor changes, the prosecutor had complied with the order and the indictment was sufficient.[134]

Nizeyimana then filed a motion to certify the decision for appeal. Nizeyimana argued two points: that the Trial Chamber misinterpreted its own decision in determining compliance with its orders, and that the prosecutor still had not complied with the decision.[135] In the Trial Chamber's treatment of the issue, it pointed out that "[t]he two grounds of appeal are linked together by the shared complaint of vagueness in the Indictment" and "[t]he resolution of the first would directly affect the resolution of the second."[136] It found that specificity in the indictment would materially affect the outcome of the proceedings, and that an immediate resolution by the Appeals Chamber would speed up the proceedings (a trial date had not been set yet and this motion was standing in the way of the case proceeding).[137] The Trial Chamber therefore certified the appeal and it was sent to the Appeals Chamber.[138]

In four scant pages the Appeals Chamber dismissed the motion on the merits because the prosecutor had filed a new indictment and the issue had become moot.[139] It left open the option that Nizeyimana could challenge the new indictment, but declined to examine the previous one

132. Prosecutor v. Nizeyimana, Case No. ICTR-2000-55-PT, Defence Motion to Order the Prosecution to Comply with a Trial Chamber Decision (Mar. 18, 2010).

133. Prosecutor v. Nizeyimana, Case No. ICTR-2001-55-PT, Decision on Nizeyimana's Preliminary Motion on Defects in the Amended Indictment (June 9, 2010).

134. Prosecutor v. Nizeyimana, Case No. ICTR-2001-55C-PT, Decision on Nizeyimana's Motion to Order the Prosecutor to Conform with a Trial Chamber Decision and Strike Parts of the June 18 Amended Indictment (July 12, 2010).

135. Prosecutor v. Nizeyimana, Case No. ICTR-2000-55-PT, Nizeyimana Defense Motion for Certification (July 15, 2010).

136. Prosecutor v. Nizeyimana, Case No. ICTR-2001-55C-PT, Decision on Ildephonse Nizeyimana's Motion for Certification, ¶ 5 (Aug. 12, 2010).

137. *Id.* ¶ 7.

138. *Id.* ¶ 8.

139. Nizeyimana v. Prosecutor, Case No. ICTR-00-55-AR73, Decision on Nizeyimana's Interlocutory Appeal from the Decision on Nizeyimana's Motion to Order the Prosecutor to Conform with a Trial Chamber Decision and Strike Parts of the June 18 Amended Indictment (Oct. 14, 2010).

because it was no longer operative.[140]

3. Moving Forward

The lack of jurisprudence, therefore, can be explained by the lack of opportunity for the Appeals Chamber to legitimately analyze the sufficiency of pre-trial indictments. It will not make a decision where none is required, and it will not waste its scarce time on an illuminating but unnecessary determination of an issue that is no longer relevant. However, the issue that prompted the appeal still remains: what amount of specificity is required for a proper indictment? Who decides? What standard is used?

How the Tribunal deals with challenges to the indictment is partially determined by the stage of the proceedings during which the challenge was raised. During trial, proceedings have already started and the Chamber has an interest in finding ways to satisfy the requirement of notice without seriously interrupting or delaying the flow of the trial or making demands on the prosecutor that it cannot actually meet.[141] During appeal, the main concern is whether a respected, fair judgment—one that can be cited as precedent, will withstand the rigors of examination and debate, and satisfies the desire to mete out justice and assign responsibility—was given.[142]

The same concerns exist pre-trial as during trial, but in a slightly different way: the Trial Chamber has more of an interest to take the time and ensure the indictment is sufficient before proceedings start. Thus, the balance between the rights of the accused and judicial efficiency tips in favor of the accused. Proceedings have not started and so it is the proper time to hammer out difficulties in the indictment. However, while the Trial Chamber is fully invested in protecting the rights of the accused, it could not allow challenges to the indictment to stretch into perpetuity, thus preventing the setting of a trial date and delaying the purpose for which the Tribunal was established. Similarly, there are reasonable limits to what can be demanded of the prosecutor in terms of specificity.

140. *Id.* ¶ 8.

141. Hence, the creation of curing. *See supra* Part II.A.

142. Ntagerura, Bagambiki & Imanishimwe, Case No. ICTR-99-46-A, Judgment, ¶ 29 (July 7, 2006) ("When challenges to an indictment are raised on appeal, amendment of the indictment is no longer possible and so the question is whether the error of trying the accused on a defective indictment "invalidat[ed] the decision" and warrants the Appeals Chamber's intervention.")

Nonetheless, this difference in focus and concern suggests why the jurisprudence as it stands is insufficient to determine how a pre-trial challenge to the indictment should be solved: the underlying concerns during trial are not present in the same way as before trial.

If such an appeal reached the Appeals Chamber, there are a number of possibilities for how the Chamber might address the question. It may rule that the determination of sufficiency is properly within the scope of the Trial Chamber and refuse to add any new standards or determinations regarding the issue. It is also possible that the Chamber might weigh the indictment itself, and determine whether it is defective or not and what remedies are required (a new indictment, for example, or amendments to the indictment, similar to the many Trial Chamber decisions mentioned above).[143] It is unlikely, however, that the Chamber would declare a bright-line rule: all of the jurisprudence so far allows for changing circumstances (using non-indictment materials to supplement the indictment and provide notice) and some flexibility in the charging instrument (different requirements depending on the crime charged).[144] Another possibility is that the Chamber may decline to establish any new standard or rule and apply already-existing standards for specificity (for example, more precision when the accused is charged with committing the crimes himself, and less precision when a mass crime is charged).

B. *The ICC: Is this a sustainable path?*

When the Pre-Trial Chamber held that it did not need to adjourn to allow the prosecutor to amend the Document Containing the Charges, it set a questionable precedent. One of the recurring complaints against the Pre-Trial Chamber's decision is that it effectively created a shortcut: if the Pre-Trial Chamber does not believe the statutorily-required process is the most efficient use of its time, then it will interpret the statute in such a way as to not require an adjournment at all.[145] It is understandable why the Chamber would want to expedite the proceedings (or at least ensure

143. *See supra* Part II.A.

144. The requirement of flexibility is not surprising given the unique situation of the ICTR. The Tribunal is prosecuting crimes that occurred over sixteen years ago, some of which are so sweeping that a full collection of the evidence is impossible, and it must work with the limited number of cases over which it has jurisdiction.

145. *See* Michela Miraglia, *Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in* Lubanga, 6 J. INT'L CRIM. JUST. 489, 502-03 (2008).

they are not delayed), but what about notice?

There is much language in the decision upholding the sanctity of notice—the Pre-Trial Chamber points to this very concept in its reasoning behind not adjourning the procedures. It states that the purpose of the confirmation hearing is to ensure that the charged individual faces the same crimes as in the Document Containing the Charges and has an opportunity to rebut the allegations.[146] Yet, when the Chamber stated that there was no material distinction between Article 8(2)(e)(vii) and Article 8(2)(b)(xxvi) and inserted a charge of criminal conduct under the second statute—without requiring an adjournment for the Document Containing the Charges—it collapsed part of the notice requirements.[147] A charged individual may now have the charges against him expanded at the discretion of the Pre-Trial Chamber.[148]

This move by the Pre-Trial Chamber may not appear problematic at this stage in the proceedings, but what happens at the end of the trial? At the ICTR, an individual can only be convicted of charges in the indictment. This has been one reason, as seen above, why ambiguities and vagueness in the indictment are so problematic—without this limitation, an accused may find himself facing a panoply of charges at the end of the trial that were not presented at the beginning. This wrinkle has not been clarified at the ICC, either by the Rome Statute or the Rules on Evidence and Procedure, and so it is up for debate how the ICC Trial Chamber will deal with this when a verdict must be written. Since Lubanga was not charged in his Document Containing the Charges under Article 8(2)(b)(xxvi), under ICTR case law he could not be found guilty of a violation at the end of his trial—he could only be found guilty for violating Article 8(2)(e)(vii), which is included in the formal document.[149]

How will the Trial Chamber at the ICC handle this difficulty? Will it hold that the accused may be convicted on charges in the Decision on the Confirmation of the Charges, rather than restricting it to the charging instrument itself? If the Pre-Trial Chamber may add charges at its discretion, without the requisite amendment by the Prosecutor, what is the purpose of the elaborate scheme for amendments included in the

146. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 203 (January 29, 2007).

147. *Id.* ¶ 204.

148. *Id.*

149. Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶ 18 (Aug. 29, 2008).

Rome Statute? Furthermore, this decision may negatively affect defense strategy. If the defense spent all its time, energy, and resources combating the charge of enlistment in an international conflict, it is questionable whether it has been able to present a proper defense if the accused can only be convicted for enlistment in an internal conflict. Will the defense be forced to choose between strategies, possibly sacrificing one exonerating strategy and taking a risk on another? These questions may take the current situation to an extreme, but they illustrate the problematic realities for notice.

On the other hand, given the fact that the hearing is not *ex parte*, are concerns about notice as troublesome? As stated above, one of the main evils that the requirement of notice protects against is a defendant going to trial without knowing the charges he is facing. Conversely, notice limits the charges that can be brought against him after the trial has run its course. In this case, Lubanga was present during the entirety of the confirmation hearing. He heard all of the evidence that the prosecutor submitted, heard all of the arguments raised, and was given an opportunity to rebut the same with evidence and legal arguments.[150] Going forward, he has a copy of the confirmation of charges, he has all of the evidence,[151] and as a result he is perfectly aware that he is on trial for conscripting child soldiers to participate in both an international and internal armed conflict. His ability to mount a defense, one could argue, has therefore not been materially affected in any way. This suggests that the ICC's shortcut in the confirmation hearing might not have such dire consequences as forecast above, at least for requirements of notice. Yet this does not quite comport with the firm commitment that the ICC has made to protect the rights of the accused. If the Pre-Trial Chamber takes a shortcut, albeit a transparent shortcut that each party is aware of, is it not still a shortcut?

Conclusion

Thus, while the problems that the ICTR and the ICC face are distinct, they nevertheless implicate the same concerns of notice. The

150. See Miraglia, *supra* note 145, at 502. This was partially the basis upon which the PTC denied appellate review of this issue. It held that both sides had been able to adequately litigate the issue. *Id.*

151. Mazurek, *supra* note 9, at 540 ("The defense has access to the entire investigation dossier which contains both inculpatory and exculpatory evidence.").

ICTR has created clear jurisprudence correcting an insufficient indictment after the trial has already started, but has yet to determine what a sufficient indictment looks like when challenged during the pre-trial stage. Yet the pre-trial stage is the crucial time to challenge the indictment, and this lack of jurisprudence imposes on the rights of the accused. The ICC, even though it has just begun creating its jurisprudence, has already manufactured a grey area that it must resolve before the end of Lubanga's trial. Despite the fact that the confirmation hearing is not an *ex parte* hearing, the Pre-Trial Chamber has infringed upon the charged individual's right to notice without any discernable benefit or reason.

Given the aggressive trend towards protecting the rights of the accused, there are likely to be decisions from the Appeals Chamber and the ICC that fill in the grey areas. There is rumor that Nizeyimana is challenging the new, amended indictment on similar grounds, and therefore it is possible that the issue will reach the Appeals Chamber again. Yet Nizeyimana's trial has started, and thus the window of opportunity for determining pre-trial sufficiency has closed. Similarly, the ICC cannot complete Lubanga's trial without addressing the problem it started at the confirmation hearing, and therefore is likely to discuss the issue as the trial proceeds. As the Tribunals continue to move forward, however, one thing is certain: their commitment to notice, and the desire to protect rights and adjudicate a fair trial, will not waver.