January 2015

International Crimes and Case Demarcation: What Are We Trying to Prove?

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Fry, Elinor (2015) "International Crimes and Case Demarcation: What Are We Trying to Prove?," *Florida Journal of International Law*. Vol. 27 : Iss. 2 , Article 1.

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ARTICLES

INTERNATIONAL CRIMES AND CASE DEMARCATION: WHAT ARE WE TRYING TO PROVE?

*Elinor Fry**

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I. INTRODUCTION

Cases involving international crimes are not easy to demarcate. International crimes generally occur on a massive scale over a prolonged period of time involving many different perpetrators at various levels of command and resulting in copious amounts of victims. Who did what to whom, when, and where exactly? The degree of specificity to which these elements ought to be defined is not as easy to determine as one might think, and with international crimes lack of specificity seeps in at every level. Temporal, geographical, and personal (meaning the identity and amount of both perpetrators and victims) demarcation of the case present ample challenges. It has done so ever since the first international criminal

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prosecutions. In a memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General dated January 22, 1945 the difficulties of prosecutions of large-scale crimes were forewarned as follows:

The names of the chief German leaders are well known, and the proof of their guilt will not offer great difficulties. However, the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged.¹

While modern day international criminal tribunals have come a long way in dealing with these challenges, vague indictments—the main document that contains the nature (legal characterization) and the cause (underlying facts) of the charges—remain an issue until this day. This is for two reasons. First, unspecific charges stem from difficulties with, for instance, pinpointing the exact day a crime took place, in which village it happened, or which (physical) perpetrators were involved. These are factual problems of specificity, usually reflected by vaguely-worded indictments with phrases such as ‘on or about’ to indicate when something happened or with references to entire provinces instead of towns or villages to indicate where something happened. Second, vague charges are caused by more abstract evidentiary matters, such as unclear distinctions between material facts—meaning those encompassed in the charges and subject to proof—and subsidiary facts—meaning those that serve as indirect proof or background information without needing to be judicially established. Questions may arise as to which facts should be part of the indictment, and how different types of facts relate to the evidence supporting the charges. This unclear distinction caused problems in *Gbagbo* at the International Criminal Court (ICC). The Pre-Trial Chamber (PTC) adjourned the hearing on the confirmation of charges and requested the Prosecution to gather more evidence relating to a number of incidents allegedly constituting the “attack” as element of the charged crime against humanity, deeming those incidents material facts, but which incidents the Prosecution itself had *not* regarded as being part of the material facts charged. Rather, it had intended to use those incidents as subsidiary facts to demonstrate a certain pattern.² Such

1. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, International Conference on Military Trials: London, 1945 (Jan. 22, 1945), § IV, available at <http://avalon.law.yale.edu/imt/jack01.asp>.

2. See Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-432, Decision adjourning

confusion of material and subsidiary facts is not only time-consuming to rectify; litigation on this matter went on for almost a year—it also leaves the defense in the dark with respect to the indictment’s factual parameters.

Case demarcation solidifies with the charging document or indictment, which then puts the accused on notice as to the case against him or her. Allowing the defense to know the case against him or her is crucial from a fair trial perspective, and the indictment is the core document on which that knowledge depends. This right and the indictment are therefore at the heart of the demarcation dilemmas discussed in this Article. The indictment should not be confused, though, with other official documents such as the arrest warrant, issued by a judicial organ and intended to secure an accused’s presence at trial, or to prevent a suspect from obstructing the investigation or committing further crimes,³ nor with pre-trial briefs, issued by the prosecution or the defense after the indictment has been filed and setting out how that party intends to argue its case.⁴

The indictment’s effect of providing notice to the accused demonstrates the unique and fundamental dual purpose of the accusatory instrument: (1) to inform the accused about the charge(s), and (2) to settle the factual scope of the trial.⁵ While both aspects are imperative to an effective defense, there are two interests at stake here that seem to pull in opposite directions. On the one hand, the principle of the specificity of charges ensures the right of the defense to be informed promptly and in detail of the nature, cause, and content of the charge as well as the ability to mount his or her defense. On the other hand, prosecutors are faced with considerable challenges of case demarcation caused by international crimes’ largely vague factual parameters. In international criminal justice, it is difficult to find definitive answers to the five W’s (*who, what,*

the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ¶¶ 36, 44 (June 3, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf> [hereinafter Gbagbo Adjournment Decision]; Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-474, Prosecution’s appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute,” ¶¶ 3, 23, 26, 29 (Aug. 12, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1631903.pdf> [hereinafter Gbagbo Prosecution’s Appeal].

3. See, e.g., Rome Statute of the International Criminal Court art. 58(1)(b), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 19(2), 20(2), adopted May 25, 1993, as amended by S.C. Res. 1877, U.N. Doc. S/RES/1877 (July 7, 2009) [hereinafter ICTY Statute].

4. See, e.g., Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 rule 65 *ter* (E) & (F), U.N. Doc. IT/32/Rev. 49 (May 22, 2013) [hereinafter ICTY RPE].

5. See Håkan Friman et al., *Charges, in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 381, 383 (Göran Sluiter et al. eds., 2013).

when, where and why?), intended as formula for ascertaining the complete story on any given topic, due to the massive scale of the events, the array of actors involved, the difficult access to direct or high-quality evidence, and investigations taking place long after the events. While the accused's interests are of paramount importance in light of due process protection and the legitimacy of the court and its proceedings in general, the prosecution's task to state a case must remain a realistic endeavor.

This Article seeks to ascertain the following: how specific should the charges in an international crimes case be, which circumstances play a role in answering this question, and what influences specificity, or the lack thereof? The focus is therefore on case demarcation in light of an investigation or case against an identified suspect or accused and centers on the indictment phase of criminal proceedings. It does not include investigation demarcation in the sense of prosecutorial discretion regarding determining who to investigate or indict. Case demarcation can only take form and be examined fruitfully once a suspect or accused has been identified. Investigations of a preliminary nature into situations of mass atrocity, which face prosecutors with complex questions of which potentially responsible persons to focus investigative and prosecutorial efforts on lie outside the ambit of this Article. The law and practice of amending charges is also excluded. Although related, it is beyond this Article's query, because it does not pertain to factual and evidentiary case demarcation in the strictest sense, as it should take form at the indictment stage. Rather, it relates to subsequent procedural matters of *shifting* boundaries, not *placing* them.

Part II starts with reviewing the issue of vague indictments as dealt with by the historical Nuremberg, Tokyo, and Control Council Law No. 10 trials, as well as case law from the modern day U.N. tribunals and the ICC regarding ambiguous charges and general pleading principles. This is the first type of case demarcation, which focuses on factual specificity. Part III deals with the second type of case demarcation, which may be regarded as legal demarcation of evidentiary matters, and that has never before been examined in international criminal justice scholarship. It deals with various types of facts and evidence and the importance of distinguishing them, and explores the differences between material facts and subsidiary facts, pattern evidence and evidence of similar conduct. Part IV highlights the defense's perspective by looking at the right to be put on notice, a number of related rights and the principle of *ne bis in idem*, also known as double jeopardy protection. The analysis of these three issues shows that courts have developed relatively sound pleading principles over the last decades, but have mostly ignored the issue of evidentiary precision in the sense of consistently distinguishing different types of evidence and facts.

II. INDICTMENTS

Disagreements as to how definite the charging instrument ought to be are found in many domestic legal systems and are as such not unique to prosecutions of international crimes. However, it is a recurring theme with international criminal trials, mainly because of the perceived prosecutorial difficulties in proving such complex crimes of a massive scale, which the international crimes of war crimes, crimes against humanity and genocide undoubtedly are when focusing on high-level accused.

Bringing charges is generally done slightly differently in adversarial systems compared to inquisitorial systems; the common law tradition is known for its concise indictments, while the civil law tradition employs more elaborate and comprehensive indictments. It is useful to briefly note this difference, because the drafters of the Nuremberg indictment felt the distinction between the two legal systems indeed played an important role. However, neither legal family represents a pure model. Variations exist among legal systems belonging to one tradition and some systems are mixed.⁶ Also, similarities between the two exist where general principles are derived from international human rights instruments.⁷ Furthermore, both legal families have had a significant influence on the charging practices of the contemporary international criminal courts and tribunals, which have had to combine and balance the differences between domestic practices, often leading to experimentalism and procedural uncertainty. The importance of distinguishing between the two major legal traditions regarding the issue at hand—indictments involving international crimes—should therefore not be overvalued. In this Article, the problem of case demarcation is approached from a crime-based perspective, not a system-based perspective.⁸ This means that the court, or the legal system, in which the crime is prosecuted ought not be a differentiating factor nor eventually the focus; the massive scale and complex nature of international crimes is.

A. IMT, IMTF, and Control Council Law No. 10

The form of the first international indictment of the Nuremberg International Military Tribunal (IMT) is said to be the result of a compromise between the common law countries and the civil law countries. The IMT's Chief U.S. Prosecutor Robert Jackson later stated

6. *Id.* at 460.

7. *Id.*

8. See generally Elinor Fry, *The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

that the Soviet lawyers advocated for a detailed indictment with a complete statement of all evidence against the accused, while the American and British lawyers would have found a simple indictment charging the crimes that would later be proved more appropriate. Supported by the French and Soviet (civil law) lawyers and more in accordance with the German (civil law) practice, the indictment at the IMT more or less turned out as envisaged by the Soviet delegation, according to Jackson.⁹ Indeed, the Soviet prosecutor, General R.A. Rudenko, left a considerable mark on the endeavor, as he was the one who suggested dividing the indictment into four counts, with each delegation being responsible for one count.¹⁰ Some accounts of the drafting process talk of a slightly less than harmonious process, though, namely one that was controlled by the Americans.¹¹ Jackson allegedly had a clear strategy to ensure American control over the prosecution's case, as evidenced by a memorandum sent to trial counsel Robert Storey in which Jackson wrote he intended on "keeping control of the bulk of the case in American hands."¹²

The Tribunal's Charter reads, in relevant part, that the "Indictment

9. See Robert H. Jackson, *Some Problems in Developing an International Legal System*, 22 TEMP. L.Q. 147, 151 (1948). For the discussion on the form of the indictment between Justice Jackson and General Nikitchenko, see also REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, Document XXI: Minutes of Conference Session of July 3, 1945, London, 1945, at 154, available at http://www.loc.gov/rf/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf. General Nikitchenko states that:

[i]n the opinion of the Soviet Delegation this procedure would on the one hand insure a fair trial since the defendant would be given every chance to refute the evidence produced against him and would, on the other hand, insure him promptness of trial since most of the preliminary work would have been done before.

Id.

10. See DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT*, Vol. I, at 97 (1998).

11. *Id.*

12. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 99 (1992). Taylor quotes a memorandum sent by Jackson to Robert Storey on September 17, 1945, in the midst of drafting, saying:

I do not think division of work is advisable in view of the situation concerning our fellow-prosecutors. Candidly, I think we must utilize Committee 4 [chaired by Jackson] as the basis for keeping control of the bulk of the case in American hands. To this end, I think . . . that Committee 4 will have to take primary responsibility for the development of the case in all its aspects on the questions of common plan conspiracy and individual and organizational responsibilities.

Taylor himself adds: "For 'Committee 4' read 'Jackson.'" *Id.*

shall include full particulars specifying in detail the charges against the Defendants.”¹³ The indictment of 66 pages with four counts against 23 individuals and 6 organizations relayed the particulars on individual criminal responsibility, criminality of groups and organizations, and violations of international treaties, agreements, and assurances in three narrating appendices. Count 1 dealt with the common plan and conspiracy, and was done in such a comprehensive manner by Committee 4 led by the Americans that it left very little substance for Committee 1 led by the British in charge of count 2. Count 2 on crimes against peace was a one-pager only charging the actual attacks and occupied countries. Count 3 and 4, drafted by both Committees 2 and 3 headed by the Soviets and the French respectively, dealt with war crimes and crimes against humanity, and were more comprehensive.¹⁴

The indictment itself (*i.e.*, the four counts), did not mention the accused individually. It only referred to them as “all the defendants.” The defendants’ names and specific roles were listed in appendix 1, which devoted one short paragraph to each defendant stating their occupation and activities during the war as well as one- or two-sentence explanations of their involvement in each count. The printed version of the indictment’s official English translation took up more than 65 pages.¹⁵ Compared to a contemporary international indictment against only one high-level accused, as often encountered at the ICTY for instance, the Nuremberg document was rather concise. For instance, the indictment against Radovan Karadžić at the International Criminal Tribunal for the former Yugoslavia (ICTY) consists of 11 counts explained in 40 pages, and includes 7 tables listing specific incidents relating to the crimes charged.¹⁶ Despite the Nuremberg indictment’s potential flaws against modern day standards, the trial record does not reveal any defense grievances with respect to vagueness. Most litigation centered on issues such as fitness to stand trial,¹⁷ and the legality principle.¹⁸

Nuremberg’s counterpart, the International Military Tribunals for the Far East (IMTFE) in Tokyo, has a different history. While the United States was the main driving force behind the tribunal coming into being,

13. Charter of the International Military Tribunal art. 16(a), Aug. 8, 1945, 82 U.N.T.S. 279.

14. See TAYLOR, *supra* note 12, at 79–80.

15. See SPRECHER, *supra* note 10, at 104.

16. See Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Prosecution’s Marked-Up Indictment (Oct. 19, 2009), http://www.icty.org/x/cases/karadzic/ind/en/indictment_091019.pdf.

17. See, e.g., Motion on Behalf of Defendant Gustav Krupp von Bohlen for Postponement of the Trial as to Him, Nuremberg Trial Proceedings Vol. 1, Nov. 4, 1945, available at <http://avalon.law.yale.edu/imt/v1-09.asp>; Motion on Behalf of Defendant Hess for an Examination by a Neutral Expert with Reference to his Mental Competence and Capacity to Stand Trial, Nuremberg Trial Proceedings Vol. 1, Nov. 7, 1945, available at <http://avalon.law.yale.edu/imt/v1-26.asp>.

18. See Motion Adopted by All Defense Counsel, Nuremberg Trial Proceedings Vol. 1, Nov. 19, 1945, available at <http://avalon.law.yale.edu/imt/v1-30.asp>.

it is said that the indictment was completely dominated by the assigned subcommittee's British chair, Comyns-Carr.¹⁹ Others, however, have suggested that Comyns-Carr merely merged various suggestions made by the 11 Allied powers involved in the drafting process, concluding that the indictment was a mix of common law and civil law features.²⁰ In any event, discussions on the level of detail required in an indictment such as had occurred in Nuremberg, presumably because of the strong Soviet presence, seems not to have occurred during the drafting process in Tokyo.

The IMTFE Charter stated that the "indictment shall consist of a plain, concise, and adequate statement of each offence charged,"²¹ which is different than the text of the Nuremberg Charter, which spoke of "full particulars specifying in detail." This difference is likely the result of the U.S. dominance of the entire IMTFE project, but it cannot be said with certainty that this difference in wording directly influenced the difference in form of the indictments. The indictment's drafters probably had the biggest influence, and the end result of their efforts did not go without criticism. The Tokyo indictment departed from the Nuremberg example in the sense that it contained a much greater number of individual charges, creating many overlaps in relation to the underlying factual substance of the charges.²² Five appendices accompanied the indictment to provide the particulars of the numerous counts, but these were grouped thematically instead of per charge.²³ There were 28 defendants in total and 55 counts that were divided into three groups: (1) crimes against the peace, (2) murder, and (3) conventional war crimes and crimes against humanity.²⁴ Similar to the Nuremberg indictment, the defendants' names and occupations were listed in one of the appendices, yet hardly any specifics were provided regarding the defendants' individual movements and activities during the war.

Quite some litigation relating to the vagueness of the indictment unfolded. The defense argued that the indictment failed to provide the essential facts to adequately support the charges,²⁵ and that it neglected

19. See PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951*, at 14 (1979); NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* 69 (2008).

20. BOISTER & CRYER, *supra* note 19, at 70.

21. Charter of the International Military Tribunal for the Far East art. 9(a), Jan. 19, 1946, T.I.A.S. No. 1589.

22. See BOISTER & CRYER, *supra* note 19, at 70.

23. See International Military Tribunal for the Far East (United States v. Araki), Indictment Annex 6 to the Judgment (Apr. 29, 1946), *reprinted in* NEIL BOISTER & ROBERT CRYER, *DOCUMENTS ON THE TOKYO MILITARY TRIBUNAL* 16–69 (2008), *also available at* <http://werle.rewi.hu-berlin.de/tokyo.anklageschrift.pdf> [hereinafter IMTFE Indictment].

24. *Id.*

25. See International Military Tribunal for the Far East (United States v. Araki), Motion to Dismiss the Indictment (May 25, 1946), Paper no. 85, Motions Presented to the Court Vol. 1 (May

to specify times, places, and their clients' involvement in each of the crimes charged.²⁶ The Prosecution argued that as long as the beginning and end of the conspiracy are specified, details relating to when important events occurred, where they occurred, and who was involved were to be left as matters of proof.²⁷ The defense's complaints were all dismissed before the final judgment was rendered. President Webb opined that time and place had to be stated broadly.²⁸ Furthermore, it was unnecessary to specify the actual role an accused played in a conspiracy or to state the location it took place.²⁹ In the end, the Tribunal's judgment dismissed 45 of the 55 counts, not due to lack of specificity, but on grounds of redundancy, lack of jurisdiction, and merging counts due to overlap.³⁰

Most of the indictments in the ensuing 12 Nuremberg cases—the subsequent trials conducted under Control Council Law No. 10 in Nuremberg by U.S. military tribunals—were rather elaborate; they targeted certain crimes more narrowly and focused on defendants of a lower level than at the IMTs. While elaborateness does not necessarily preclude vagueness, the indictments did not seem to suffer from too much lack of specificity compared to the Tokyo indictment, although that may also only appear to be so because it was not litigated. However, from the indictments alone it is not always clear what role the defendants played in which acts that constituted the crimes. The assertions on underlying facts and personal involvement remained rather vague, and some indictments only specified defendants' positions and related responsibilities in general. For example, the indictment in the *Medical* case (or '*Doctors' Trial*') specified the horrific experiments that were conducted upon concentration camp prisoners during the war, and stated

3, 1946–Oct. 14, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by BOISTER & CRYER, *supra* note 19, at 71).

26. See International Military Tribunal for the Far East (United States v. Araki), Motion for Bill of Particulars (no date), Paper no. 56, Motions Presented to the Court Vol. 1 (May 3, 1946–Oct. 14, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by BOISTER & CRYER, *supra* note 19, at 71).

27. See BOISTER & CRYER, *supra* note 19, at 73.

28. See International Military Tribunal for the Far East, Proceedings in Chambers, Saturday 25 May 1946: On a Motion by Hiranuma, Kiichiro; Matsuoka, Yosuke; Shigemitsu, Mamoru; Togo, Shigenori; and Umezu, Yoshijiro, for Bill of Particulars; A Motion by All the Accused for a Bill of Particulars; and other motions, Vol. 1, Proceedings in Chambers (May 8, 1946–July 24, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand, at 20ff (cited by BOISTER & CRYER, *supra* note 19, at 72).

29. See International Military Tribunal for the Far East (United States v. Araki), Order Dismissing Motion for Bill of Particulars (May 25, 1946), Paper no. 86, Orders on Motions Presented to the Court, Vol. I (Apr. 29, 1947–Dec. 27, 1946), Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by BOISTER & CRYER, *supra* note 19, at 72).

30. See International Military Tribunal for the Far East (United States v. Araki), Judgment §§ 447–454 (Nov. 4–12, 1948), available at <http://werle.rewi.hu-berlin.de/tokio.pdf>. See also BOISTER & CRYER, *supra* note 19, at 73.

which of the 23 defendants were involved. With respect to most accused, however, it did not specify individual acts or factual connections to the crimes. It merely stated the defendants “are charged with special responsibility for and participation in these crimes.”³¹ The same format was followed in other cases, too. For instance, in the *Justice* indictment, the Ministry of Justice was named as the main entity that had committed the crimes listed in each of the paragraphs that all ended with a sentence naming the defendants as responsible without specifying their precise actions.³² The same was done in the *RuSHA* indictment.³³ Similarly, in *Milch*, the sole defendant Erhard Milch’s involvement was explained in general terms relating to his membership of the Central Planning Board and his several high positions in the German air force.³⁴ The same can be said of the defendants in the rather short indictment of *Pohl*. The 17 accused were hardly individualized apart from their held positions.³⁵

The more elaborate indictments, such as in the cases of the *Ministries*, *I.G. Farben*, *Krupp*, *High Command*, and *Flick*, of which the last three also included appendices explaining company and military structures as well as defendants’ histories, were very similar to contemporary international indictments with respect to the level of detail.³⁶ Conversely, the *Einsatzgruppen* indictment and the *Hostage* indictment were both concise yet very specific and factually comprehensive in a different way than the other post-war charging documents. The *Einsatzgruppen* indictment identified the number of victims made by the various units and the dates the killings took place.³⁷ The level of the indictment’s specificity was the result of the fact that most of the information supporting the charges came from Otto Ohlendorf’s earlier testimony at the IMT. Ohlendorf, who had been Major General of the SS, member of the SD, and Commanding Officer of Einsatzgruppe D, had given a remarkably extensive and candid testimony about the crimes committed

31. See Office of Military Government for Germany (U.S.) Nuremberg 1946, NUERNBERG MILITARY TRIBUNALS 2 (Oct. 25, 1946) (count two—war crimes), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=2.

32. See *id.* at 21 (United States v. Josef Alstötter) (Justice Case).

33. See *id.* at 162 (United States v. Ulrich Greifeldt) (RuSHA Case).

34. See *id.* at 14 (United States v. Erhard Milch) (Milch Case).

35. See *id.* at 36 (United States v. Oswald Pohl) (Pohl Case) (count 1: each paragraph’s final sentence(s) stating which defendant was part of which *Amtsgruppe*) (counts 3,4,5 on war crimes, crimes against humanity and membership in a criminal organization only speak of “all of the defendants” without making any reference to the accused individually).

36. United States v. Ernst von Weizsäcker (Ministries Case or Wilhelmstrasse Trial), Indictment, U.S. Military Tribunal, 1947; United States v. Carl Krauch (I.G. Farben Case), Indictment, U.S. Military Tribunal, 1947, § 7; United States v. Alfred Krupp (Krupp Case), Indictment, U.S. Military Tribunal, 1947; United States v. Wilhelm von Leeb (High Command Case), Indictment, U.S. Military Tribunal, 1947; United States v. Friedrich Flick (Flick Case), Indictment, U.S. Military Tribunal, 1947.

37. See *id.* at 176 (United States v. Otto Ohlendorf) (Einsatzgruppen Case).

by his and other units.³⁸ The *Hostage* indictment displayed a similar level of specificity; dates and numbers of victims were included in the document's four counts.³⁹ Here, too, the reason for precision of facts had an evidentiary basis. Documentary evidence was readily available and the case benefitted from evidence presented at the IMT trial.⁴⁰

Lack of specificity in charging does not appear to have been argued at the IMT or the subsequent trials in Nuremberg as it had been in Tokyo. However, a certain amount of inevitability in this respect was stipulated in one of the subsequent proceedings. In the *Justice* case judgment, the judges reminded that:

Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. [. . .] The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.⁴¹

Although some of these early (international and military) indictments were very elaborate, the specific acts with which the accused were charged remained vague at times, in the sense that the link between the accused and the crimes charged was mostly demonstrated by the position held by the accused. Moreover, the temporal scopes of these indictments were relatively precise yet very wide, making the cases less defined

38. See Transcript of Otto Ohlendorf's testimony at 311–54 (Jan. 3, 1946), IMT Proceedings vol. 4 (part 1 of 3), available at <http://avalon.law.yale.edu/imt/01-03-46.asp#ohlendorf>; see also KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 63–64 (2011).

39. See NUERNBERG MILITARY TRIBUNALS, *supra* note 31, at 139 (United States v. Wilhelm List) (Hostage Case).

40. See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 80 (Aug. 15, 1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf.

41. U.S. GOVERNMENT PRINTING OFFICE, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, Vol. III, at 984–85 (1951).

(although to some extent this fits the nature of the charge of conspiracy): the Nuremberg indictment included Hitler's first attempt to come to power in 1923 and covered the entire period until May 8, 1945;⁴² the Tokyo indictment covered a span from January 1, 1928 to September 2, 1945;⁴³ the *I.G. Farben* indictment goes back to 1932 when the alliance of the corporation with Hitler and the Nazi Party was formed, and defendants Beutefish and Gattineau, representing Farben, met with Hitler to discuss business;⁴⁴ the *Ministries, High Command, Krupp, Pohl* and *Justice* indictments all cover events from January 1933—when Hitler was appointed Chancellor by President Paul Von Hindenburg—to April or May 1945; the other indictments in the subsequent proceedings covered smaller time spans (from September 1939 to April or May 1945).⁴⁵

Only the IMTFE record shows that litigation occurred on the issue of vagueness, and even there, all objections along these lines were discarded. Were these indictments flawed from a contemporary perspective? They usually contained the following elements: (1) the defendant's link to the legal definition of the crime (X did crime Y), (2) statements of general facts (without reference to defendants), and (3) the defendant's professional position or occupation preceding and during the war. Lacking was the following crucial element, without which conducting a defense becomes an extremely difficult task: the link between the defendant (*i.e.*, the physical person, not their employment position, and the facts, not the crime definition, committed by them). As will become apparent in the next subsection, compared to contemporary international criminal tribunals, these indictments were not nearly specific enough, most notably in relation to the defendants' individual acts.

B. *The Contemporary Ad Hoc and Hybrid Institutions*

The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both state that the prosecutor "shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute."⁴⁶ The Special Court for

42. See *United States v. Goering*, IMT, Oct. 6, 1945, reprinted in 1 *Trial of the Major War Criminals Before the International Military Tribunal* 27, 41 (1948), count 1; *United States v. Goering*, IMT, Count 2, 3, and 4 (Sept. 1, 1939 to May 8, 1945).

43. See IMTFE Indictment, *supra* note 23.

44. See *NUERNBERG MILITARY TRIBUNALS*, *supra* note 31, at 67 (*United States v. Carl Krauch*) (*I.G. Farben Case*).

45. With the exception of the temporally narrower *Einsatzgruppen* case indictment, which, apart from the common membership count, only dealt with crimes committed between May 1941 and July 1943.

46. Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, art. 18(4) (2009);

Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) do not contain such a provision in their statutes, but provide guidance in their Rules of Procedure and Evidence (RPE). The SCSL RPE specifies that “[t]he indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence.”⁴⁷ It also states that it “shall be accompanied by a Prosecutor’s case summary briefly setting out the allegations he proposes to prove in making his case.”⁴⁸ The STL RPE provides, identical to the equivalent provisions in the ICTY and ICTR RPEs, that “[t]he indictment shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged.”⁴⁹ The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) use a different phrasing, stating that “[t]he Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characteri[z]ation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.”⁵⁰

It is important to keep in mind that specificity of charges is something else than the *scope* of indictments. Breadth or narrowness with respect to facts and time periods does not necessarily preclude specificity, even though in practice breadth and vagueness may be linked. In light of this, it is worth noting that when it comes to scope the ad hoc Tribunals have gone through an interesting development, too. Initially, ICTY and ICTR prosecutors’ approach to charging mirrored the international precedent of the IMT and IMTF, and many of the early indictments included a wide

Statute of the Int’l Criminal Tribunal for Rwanda, art. 17(4) (1994), *amended by* S.C. Res. 1431, U.N. Doc. S/RES/1431 (Aug. 14, 2002), U.N. Doc. S/RES/955 [hereinafter ICTR Statute].

47. Rules of Procedure and Evidence of the Special Court for Sierra Leone Rule 47(C) (2002) (amended May 31, 2012) [hereinafter SCSL RPE].

48. *Id.*

49. Rules of Procedure and Evidence of the Special Tribunal for Lebanon Rule 68(D) (2009), U.N. Doc. STL-BD-2009-01-Rev.6-Corr.1 (amended Apr. 9, 2013 and corrected Apr. 3, 2014) [hereinafter STL RPE]; *see also* Rules of Procedure and Evidence of the Int’l Criminal Tribunal for the Former Yugoslavia Rule 47(C), U.N. Doc. IT/32/Rev.37 (2006); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda Rule 47(C), U.N. Doc. ITR/3/REV.1 (1995) (amended Feb. 2, 2009) [hereinafter ICTR RPE].

50. Internal Rules of the Extraordinary Chambers in the Courts of Cambodia Rule 67(2), Rev. 8 Aug. 3, 2011, *available at* [http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20\(Rov.8\)%20English.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rov.8)%20English.pdf) [hereinafter ECCC Internal Rules]. The same provision can be found in the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art. 35 new (a), with inclusion of amendments as promulgated on Oct. 27, 2004 (NS/RKM/1004/006), http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Law]. The ECCs Law, however, does not specify what the Closing Order, which refers to either the indictment or a dismissal order issued by the Co-Investigating Judges, must contain.

range of offences and historical background.⁵¹ After Slobodan Milošević's death in March 2006 before the completion of his trial, the judges at the ICTY amended the RPE in order to create more options for trial chambers to encourage prosecutors to reduce indictments.⁵² In *Karadžić*, the Trial Chamber (TC) used Rule 73 *bis* to urge the prosecutor to trim the indictment by limiting the number of charges, crimes scenes and witnesses.⁵³ It noted that Rule 73 *bis* (D) and (E) allow for four forms of direct or indirect action by a Chamber, namely: (1) the Chamber can invite the Prosecution to reduce the number of counts charged; (2) the Chamber can fix the number of crime sites; (3) the Chamber can fix the number of incidents; and (4) the Chamber can direct the Prosecution to select the counts upon which to proceed.⁵⁴

There is no similar provision at the ICTR, but the Rwanda Tribunal has experienced a similar development toward streamlining indictments in pursuance of more manageable cases. The early indictments at the ICTR were grouped thematically, much like the subsequent trials in Nuremberg, and involved many defendants.⁵⁵ The Tribunal later

51. See, e.g., Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment, ¶¶ 52–79 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 22, 2002), available at http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai040421-e.htm ("additional facts") later amended by Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 28, 2004), available at http://www.icty.org/x/cases/slobodan_milosevic/ind/en/040727.pdf, containing 66 counts; see also Jeffrey Locke, *Indictments*, in INTERNATIONAL PROSECUTORS 604, 616 (Luc Reydam et al. eds., 2012).

52. The following sentence (emphasized) was added to ICTY RPE rule 73 *bis* (D) in May 2006, two months after Milošević's death in March 2006: "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 charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged." ICTY RPE, *supra* note 4, r.73 *bis*(D). The following sentence (emphasized) was added to Rule 73 *bis*(E) at the same time:

Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 [ter], the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, *may direct the Prosecutor to select the counts in the indictment on which to proceed*. Any decision taken under this paragraph may be appealed as of right by a party.

Id. r.73 *bis*(E).

53. See Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Order to the Prosecution under Rule 73 *bis*(D), ¶¶ 5–6 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2009), <http://www.icty.org/x/cases/karadzic/tord/en/090723.pdf>.

54. See *id.* ¶ 3.

55. See, e.g., Press Release, International Criminal Tribunal for Rwanda, Bagosora, Ntabakuze and Nsengiyumva given life sentences; Kabiligi acquitted, ICTR/INFO-9-2-582.EN

switched from a “multi-accused” to a “single-accused” approach, narrowing the scope of indictments.⁵⁶ This was given an extra push by the ICTR completion strategy imposed by the U.N. Security Council.⁵⁷

While the scope of indictments is a matter of prosecutorial discretion, requirements relating to specificity of charges are legal matters. These have evolved, too, and the idea that there exists a certain amount of inevitability when it comes to vague indictments has gradually lost support in the jurisprudence of the contemporary international criminal tribunals. An early Trial Chamber decision in *Blaškić* provided that “an indictment, by its very nature and given the very initial phase in which it is reviewed, is inevitably concise and succinct,”⁵⁸ and gave the basic principles regarding content: “the indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise.”⁵⁹ The ICTY Appeals Chamber judgment in *Kupreškić et al.* provided more detailed guidance and is a leading authority at the international tribunals with respect to the issue of specificity of charges.⁶⁰ The judges reminded that: “[a] decisive factor in determining the degree of specificity with which the Prosecution is required to particularize the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.”⁶¹ In large part, this consideration is influenced by the position—both physically and legally—of the accused:

In a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the

(Dec. 18, 2008) (Military I Case); Press Release, International Criminal Tribunal for Rwanda, Appeals Chamber Delivers Judgement in Military II Case, ICTR/INFO-9-2-752.EN (Feb. 11, 2014) (Military II Case); see also Locke, *supra* note 51, at 618.

56. See Locke, *supra* note 51, at 619. See also, e.g., Prosecutor v. Ildephonse Nizeyimana, Case No. ICTR-00-5 5-PT, Second Amended Indictment (Int’l Crim. Trib. for Rwanda Dec. 17, 2010), http://www.unictr.org/Portals/0/Case%5CEnglish%5CNizeyimana%5Cindictment%5Cnizeyimana_indictment_101217e.pdf.

57. See Locke, *supra* note 51, at 618; see generally Paul Ng’arua, *Specificity of Indictments in ICTR Genocide Trials*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 175 (Ralph Henham & Paul Behrens eds., 2007).

58. Prosecutor v. Blaškić, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), ¶ 21 (Int’l Crim. Trib. for the former Yugoslavia Apr. 4, 1997), available at <http://www.icty.org/x/cases/blaskic/tdec/en/70404DC113291.htm> [hereinafter *Blaškić Defects Decision*].

59. *Id.* ¶ 20.

60. See generally Chile Eboe-Osuji, *‘Vague’ Indictments and Justice at the International Criminal Tribunals: Learning from the World of Common Law*, in *BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW* 105 (Christopher P.M. Waters ed., 2006).

61. See Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 89 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf> [hereinafter *Kupreškić Appeal Judgment*].

indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a reasonable range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.⁶²

The scale of the crimes plays a role here, too, since magnitude “makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.”⁶³

Thus, there are two factors that determine the required degree of specificity: (1) the proximity of the accused to the crime (geographically but more importantly in terms of mode of liability: if the accused *directly* committed the crime, the material facts comprising the crime must be pleaded in great detail); and (2) the nature of the crime, including the scale and magnitude. If the accused is alleged to have personally committed the crime, as opposed to being charged as an accessory or under command or superior forms of liability, the material facts will include such details as the identity of the victim, the location and the approximate date of the events in question, and the means by which the offence was committed.⁶⁴ As noted by the ICTR Appeals Chamber, “the

62. Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Objections by Momir Talić to the Form of the Amended Indictment, ¶ 22 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), *available at* <http://www.icty.org/x/cases/brdanin/tdec/en/10220FI214869.htm> [hereinafter Brđanin & Talić Decision on Objections by Talić] (summarizing and citing Kupreškić Appeal Judgment, *supra* note 61, ¶ 89 & Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, ¶ 18 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 11, 2000), *available at* <http://www.icty.org/x/cases/krnjelac/tdec/en/00211AI212639.htm> [hereinafter Krnojelac, Feb. 11, 2000 Decision]). *See also* Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 32 (Int’l Crim. Trib. for Rwanda Feb. 25, 2004), https://www1.umn.edu/humanrts/instree/ICTR/IMANISHIMWE_ICTR-97-36/IMANISHIMWE_ICTR-99-46-T.pdf [hereinafter Ntagerura Trial Judgment].

63. Kupreškić Appeal Judgment, *supra* note 61, ¶ 89; *see also* Krnojelac, Feb. 11, 2000 Decision, *supra* note 62, ¶ 18; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 22.

64. *See* Ntagerura Trial Judgment, *supra* note 62, ¶¶ 32, 35; Prosecutor v. Gatete, Case No. ICTR-00-61-I, Decision on Defence Preliminary Motion, ¶ 8 (Int’l Crim. Trib. for Rwanda Mar. 29, 2004), <http://www.unictr.org/Portals/0/Case/English/Gatete/decisions/040326.pdf> (citing Kupreškić Appeal Judgment, *supra* note 61, ¶ 89); Prosecutor v. Galić, Case No. Case: IT-98-29-

Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual."⁶⁵ The demanded degree of specificity is therefore a sliding scale from extreme precision to the relative ambiguity depending on the position of the accused:

[a]s the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.⁶⁶

Consequently, the required degree of specificity is lower where criminal responsibility is based on accomplice liability or superior responsibility.⁶⁷ In this context, it is vital for the accused to know from the indictment just what that alleged proximity is.⁶⁸

In relation to the nature of the crimes, the *Kupreškić* AC explained that when a crime involves an extended number of victims, for instance

AR72, Decision on Application by Defence for Leave to Appeal, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2001), available at <http://www.icty.org/x/cases/galic/acdec/en/11130F1317059.htm> [hereinafter *Galić Decision*].

65. Prosecutor v. Ntakirutimana & Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment, ¶ 74 (Int'l Crim. Trib. for Rwanda Dec. 13, 2004), http://www.unicttr.org/Portals/0/Case%5CEnglish%5CNtakirutimanaE%5Cdecision2%5C041213_appeal_judgement.pdf [hereinafter *Ntakirutimana Appeal Judgment*].

66. *Galić Decision*, *supra* note 64, ¶ 15. See also *Ntagerura Trial Judgment*, *supra* note 62, ¶ 33.

Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime. Where superior responsibility is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.

Id. (References omitted).

67. See *Ntagerura Trial Judgment*, *supra* note 62, ¶ 35; Prosecutor v. Rasim Delić, Case No. IT-04-83-PT, Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), [http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ac9cb6430e6e0049c12571b50050bed9/60522d262b405a61c12571fe004be5ac/\\$FILE/Delic%20TCD%2030-06-2006.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ac9cb6430e6e0049c12571b50050bed9/60522d262b405a61c12571fe004be5ac/$FILE/Delic%20TCD%2030-06-2006.pdf).

68. See Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, ¶ 13 (Feb. 23, 2001), available at <http://www.icty.org/x/cases/brdanin/tdec/en/10223F1214978.htm>.

because of an exponential amount of attacks over a prolonged period of time and in a great number of locations, the prosecution need not specify every victim. However, if the prosecution possesses such information, it should name the victims.⁶⁹ With regard to the scale of international crimes, the SCSL Trial Chamber in Sesay allowed similar vagueness with respect to locations:

It is inaccurate to suggest that the phrases “various locations” and “various areas including” in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45, and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example “within the Southern or Eastern Province” or “within Sierra Leone.” This is clearly permissible in situations here the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases “such as” and “including but not limited to” would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is therefore the Chamber’s thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of said phrases in the context herein.⁷⁰

In sum, and as identified by ICTY and STL trial chambers,⁷¹ there are a number of general principles relating to indictments that can be derived from the ad hoc Tribunals’ case law: (1) the indictment must contain enough detail to inform the accused clearly of the nature and cause of the charges to allow him or her to prepare a defense;⁷² (2) all material facts

69. See Kupreškić Appeal Judgment, *supra* note 61, § 90.

70. Prosecutor v. Sesay, Case No. SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, § 23 (Oct. 13, 2003), <http://www.rscsl.org/Documents/Decisions/RUFR/05-080/SCSL-03-05-PT-080.pdf> [hereinafter Sesay Indictment Decision].

71. See, e.g., Prosecutor v. Stanišić & Župljanin, Case No. IT-08-91-PT, Decision on Mićo Stanišić’s and Stojan Župljanin’s Motions on Form of the Indictment, ¶¶ 7–17 (Mar. 19, 2009), http://www.icty.org/x/cases/zupljanin_stanisicm/tdec/en/090319.pdf [hereinafter Stanišić & Župljanin Decision]; Prosecutor v. Ayyash, Case No. STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, ¶ 17 (Sept. 13, 2013), *available at* <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/fl105> [hereinafter Ayyash Decision].

72. See Prosecutor v. Furundžija, Case No. IT-95-1711-A, Judgment, ¶¶ 61, 147 (July 21, 2000), <http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf> [hereinafter Furundžija Appeal Judgment]; Kupreškić Appeal Judgment, *supra* note 61, ¶ 88; Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 209 (July 29, 2004), <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf> [hereinafter Blaškić Appeal Judgment]; Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgment, ¶ 116 (Mar. 22, 2006),

substantiating the charges must be pleaded, but it is not required to plead the evidence used to prove the material facts;⁷³ (3) each of the material facts must be pleaded expressly, however, in some circumstances it may suffice if they are expressed by necessary implication;⁷⁴ (4) an indictment must be considered as a whole, not as a series of paragraphs existing in isolation;⁷⁵ (5) whether a fact is material depends on the nature of the prosecution case;⁷⁶ (6) decisive in this respect is the nature of the alleged

<http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf> [hereinafter Stakić Appeal Judgment]; Prosecutor v. Simić, Case No. IT-95-9-A, Appeal Judgment, ¶ 20 (Nov. 28, 2006), <http://www.icty.org/x/cases/simic/acjug/en/061128.pdf> [hereinafter Simić Appeal Judgment]; see also Ntabakuze v. Prosecutor, ICTR-98-41A-A, Appeal Judgment, ¶ 30 (May 8, 2012), <http://www.unict.org/Portals/0/Case%5CEnglish%5CNtabakuze%5CJudgement%5C120508.pdf>, and the line of authority at the ICTR cited there.

73. See Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-A, Appeal Judgment, ¶ 23 (May 3, 2006), http://www.icty.org/x/cases/naletilic_martinovic/acjug/en/nal-aj060503e.pdf [hereinafter Naletilić & Martinović Appeal Judgment]; Blaškić Appeal Judgment, *supra* note 72, ¶ 210; Stakić Appeal Judgment, *supra* note 72, ¶ 116; Furundžija Appeal Judgment, *supra* note 72, ¶¶ 61, 147, 153; Prosecutor v. Ntagerura, ICTR-99-46-A, Appeal Judgment, ¶ 21 (July 7, 2006), <http://www.unict.org/Portals/0/Case/English/Ntagerura/judgement/060707.pdf> [hereinafter Ntagerura Appeal Judgment]; Simić Appeal Judgment, *supra* note 72, ¶ 20.

74. See Prosecutor v. Halilović, Case No. IT-01-48-A, Appeal Judgment, ¶ 86 (Oct. 16, 2007), <http://www.icty.org/x/cases/halilovic/acjug/en/071016.pdf> [hereinafter Halilović Appeal Judgment]; Blaškić Appeal Judgment, *supra* note 72, ¶ 219; Prosecutor v. Rasević, Case No. IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of Indictment, ¶ 18 (Apr. 28, 2004), available at http://www.icty.org/x/cases/todovic_rasevic/tdec/en/040428.htm; Prosecutor v. Mrkšić, Case No. IT-95-13/1-PT, Decision on Form of Indictment, ¶ 12 (June 19, 2003), available at <http://www.icty.org/x/cases/mrksic/tdec/en/030619.htm> [hereinafter Mrkšić Indictment Decision]; Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-PT, Decision on Form of Indictment, ¶ 10 (Dec. 7, 2001), available at http://www.icty.org/x/cases/hadzihasanovic_kubura/tdec/en/11207F1216966.htm [hereinafter Hadžihasanović & Kubura Decision]; Prosecutor v. Brđanin & Talić, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, ¶ 12 (Nov. 23, 2001), [http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/6804b868ef218604c12571fe004be57e/\\$FILE/Brdjanin%20TCD%2023-11-2001.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/6804b868ef218604c12571fe004be57e/$FILE/Brdjanin%20TCD%2023-11-2001.pdf); Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 48.

75. See Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Judgment, ¶ 266 (Mar. 15, 2006), http://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315e.pdf; Prosecutor v. Prlić, Case No. IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, ¶ 78 (Oct. 18, 2005), available at <http://www.icty.org/x/cases/prlic/tdec/en/051018.htm>; Prosecutor v. Prlić, Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of Indictment, ¶¶ 13 & 50 (July 22, 2005), [http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/8485f17e3db5bb18c12571b5004ee21d/92fld4e8470e6725c12571fe004d3322/\\$FILE/Prlic%20TCD%2022-07-2005.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/8485f17e3db5bb18c12571b5004ee21d/92fld4e8470e6725c12571fe004d3322/$FILE/Prlic%20TCD%2022-07-2005.pdf); Mrkšić Indictment Decision, *supra* note 74, ¶ 28; Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Appeal Judgment, ¶ 304 (May 26, 2003), <http://www.unict.org/Portals/0/Case%5CEnglish%5CRutaganda%5Cdecisions%5C030526.pdf>; Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 123 (July 7, 2006), http://www.unict.org/Portals/0/Case/English/Gacumbitsi/judgement/judgement_appeals_070706.pdf; Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Appeal Judgment, ¶ 27 (Mar. 12, 2008), http://www.unict.org/Portals/0/Case/English/Seromba/decisions/080312-Appeals_judg.pdf; see also Hadžihasanović & Kubura Decision, *supra* note 74, ¶ 38.

76. See Halilović Appeal Judgment, *supra* note 74, ¶ 86; Naletilić & Martinović Appeal

criminal conduct charged against the accused, and more specifically, the proximity of the accused to the events alleged in the indictment;⁷⁷ (7) if the accused person is alleged to have personally committed the acts giving rise to the charges against him, the material facts would include such details as the identity of the victim, the place and the approximate date of the events in question, and the means by which the offence was committed. As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him;⁷⁸ (8) thus, the legal qualification of the accused's liability, including the particulars thereof, must be expressly pleaded in the indictment;⁷⁹ (9) if the state of mind (*mens rea*) of the accused is relevant to the charges, the indictment must either (i) contain the state of mind as a material fact, or (ii) set forth the evidentiary facts (*i.e.*, facts that prove material facts, more on which below in Part III) from which the state of mind is to be inferred;⁸⁰ and finally, (10) a date—and by analogy other specifics such as location—may be considered to be a material fact if it is necessary to inform the accused clearly of the charges so that he or she may prepare his or her defense, but a reasonable range of dates may be pleaded where precise dates cannot be specified (a broad range of dates does not of itself invalidate a paragraph in an indictment).⁸¹ With respect to these

Judgment, *supra* note 73, ¶ 24; Kupreškić Appeal Judgment, *supra* note 61, ¶ 89; Blaškić Appeal Judgment, *supra* note 72, ¶ 210.

⁷⁷ See Halilović Appeal Judgment, *supra* note 74, ¶ 86; Ntagerura Appeal Judgment, *supra* note 73, ¶ 121; Prosecutor v. Krnojelac, Case No. IT-97-2S-A, Appeal Judgment, ¶ 132 (Sept. 17, 2003), <http://www.icty.org/x/cases/krnjelac/acjug/en/krn-aj030917e.pdf> [hereinafter Krnojelac Appeal Judgment]; Kupreškić Appeal Judgment, *supra* note 61, ¶ 89; Blaškić Appeal Judgment, *supra* note 72, ¶ 210.

⁷⁸ See Galić Decision, *supra* note 64, ¶ 15; Kupreškić Appeal Judgment, *supra* note 61, ¶¶ 88–90.

⁷⁹ See Simić Appeal Judgment, *supra* note 72, ¶ 22; Krnojelac Appeal Judgment, *supra* note 77, ¶ 138; see also Prosecutor v. Đorđević, Case No. IT-OS-S7/1-PT, Decision on Form of Indictment, ¶ 9 (Apr. 3, 2008), <http://www.icty.org/x/cases/djordjevic/tdec/en/080403.pdf> [hereinafter Đorđević Decision]; Prosecutor v. Krnojelac, Case No.: IT-97-2S-PT, Decision on Form of Second Amended Indictment, ¶ 16 (May 11, 2000), available at <http://www.icty.org/x/cases/krnjelac/tdec/en/00511FI212948.htm> [hereinafter Krnojelac May 11, 2000 Decision]; Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 28 (Feb. 28, 2005), <http://www.icty.org/x/cases/kvočka/acjug/en/kvo-aj050228e.pdf> [hereinafter Kvočka Appeal Judgment].

⁸⁰ See Mrkšić Indictment Decision, *supra* note 74, ¶ 11; Prosecutor Brđanin & Talić, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 33 (June 26, 2001), available at <http://www.icty.org/x/cases/brdanin/tdec/en/10626FI215879.htm>. See also *infra* Part III on evidentiary facts.

⁸¹ See Ndindabahizi v. Prosecutor, Case No. ICTR- 01-71-A, Judgment, ¶¶ 19, 20 (Jan. 16, 2007), <http://www.unict.org/Portals/0/Case/English/Ndindabahizi/judgement/160107apl.pdf>;

principles, ICTY Chambers have stated that when particulars (dates, locations, victims) are known to the prosecution, it should specify those details in the indictment regardless of whether they may be deemed as material facts.⁸²

In relation to the eighth principle listed above, there are a few additional clarifications that may be deduced from case law. For instance, the prosecution must include in the indictment whether physical commission or participation in a Joint Criminal Enterprise (JCE) is charged.⁸³ In other words, it is insufficient to merely make a broad reference to Article 7(1), which deals with individual criminal responsibility, of the ICTY Statute. Whether or not the type of JCE is to be pleaded expressly is unclear. Most chambers at the ad hoc Tribunals dictate that the type of JCE must be specified,⁸⁴ but some state that this is only preferable.⁸⁵ All chambers seem to agree though that when charging JCE the indictment must also include the nature, purpose, and time or period over which the joint criminal enterprise is said to have existed, the identity of its members insofar this is known, but at least by reference to their category as a group, and the nature of the accused's participation in that enterprise.⁸⁶

In case of accomplice liability, the Prosecutor must plead clearly the acts—meaning the “particular acts” or “the particular course of

Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 534 (May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 22; Rukundo v. Prosecutor, Case No. ICTR-2001-70-A, Judgment, ¶ 163 (Oct. 20, 2010), <http://www.unict.org/Portals/0/Case/English/Rukundo/decisions/101020-appeals.pdf>; Bagosora & Nsengiyumva v. Prosecutor, Case No. ICTR-98-41-A, Judgment, ¶ 150 (Dec. 14, 2011), <http://www.unict.org/Portals/0/Case/English/Bagosora/Judgement/111214-%20Appeals%20Judgement.pdf>.

⁸² See Kupreškić Appeal Judgment, *supra* note 61, ¶ 90; Prosecutor v. Kvočka, Case No. IT-98-30/1, Decision on Defence Preliminary Motions on the Form of the Indictment, ¶ 23 (Apr. 12, 1999), available at <http://www.icty.org/x/cases/kvocka/tdec/en/90412FI56822.htm>.

⁸³ Simić Appeal Judgment, *supra* note 72, ¶ 22; Krnojelac Appeal Judgment, *supra* note 77, ¶ 138.

⁸⁴ Stanišić & Župljanin Decision, *supra* note 71, ¶ 13; Simić Appeal Judgment, *supra* note 72, ¶ 22 referring to Ntagerura Appeal Judgment, *supra* note 73, ¶ 24; Kvočka Appeal Judgment, *supra* note 79, ¶ 28; Ntagerura Trial Judgment, *supra* note 62, ¶ 34.

⁸⁵ Krnojelac Appeal Judgment, *supra* note 77, ¶ 138; see also Friman et al., *Charges*, *supra* note 5, at 387.

⁸⁶ Stanišić & Župljanin Decision, *supra* note 71, ¶ 13; Đorđević Decision, *supra* note 79, ¶ 9; Krnojelac, May 11, 2000 Decision, *supra* note 79, ¶ 16; Kvočka Appeal Judgment, *supra* note 79, ¶ 28; Simić Appeal Judgment, *supra* note 72, ¶ 22; Ntagerura Trial Judgment, *supra* note 62, ¶ 34; Prosecutor v. Brima, Case No. SCSL-2004-16-A, SCSL, Appeal Judgment, ¶¶ 72–86 (Feb. 22, 2008), <http://www.rscsl.org/Documents/Decisions/AFRC/Appeal/675/SCSL-04-16-A-675.pdf> [hereinafter Brima Appeal Judgment]; Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, ¶¶ 66–68 (Feb. 27, 2009), <http://www.rscsl.org/Documents/Decisions/Taylor/752/SCSL-03-01-T-752.pdf> [hereinafter Taylor Decision].

conduct”⁸⁷—by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.⁸⁸ Additional sorts of particulars are required when charging command or superior responsibility. The material facts that must be pleaded in the indictment include the accused’s position as a superior of identified subordinates over whom he or she had effective control—in the sense of a material ability to prevent or punish criminal conduct⁸⁹—and the subordinates’ acts for which he or she is allegedly responsible.⁹⁰ Also, the accused’s knowledge—who must have known or had reason to know—of the crimes must be indicated.⁹¹ Finally, the conduct of the accused by which he or she may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them must be specified.⁹²

While SCSL Chambers at times appeared to follow ICTY and ICTR case law with respect to indictment specificity,⁹³ the SCSL prosecution employed a worrisome charging method that in practice circumvented some of the safeguards provided by the general principles listed above, and arguably, failed to provide sufficient notice to the accused. The first Chief Prosecutor David Crane devised a charging strategy that moved away from the practice of relatively detailed indictments at the ICTY and ICTR, which he thought were too long, inexact, and “fraught with potential legal land mines.”⁹⁴ He opted for what he referred to as a form of ‘notice pleading,’ making the indictments “simple and direct.”⁹⁵ This

⁸⁷ Blaškić Appeal Judgment, *supra* note 72, ¶ 213; Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on the Defence Preliminary Motion on the Form of the Indictment, ¶ 13 (Feb. 24, 1999), available at <http://www.icty.org/x/cases/krnjelac/tdec/en/902247325494.htm>; Krnojelac, Feb. 11, 2000 Decision, *supra* note 79, ¶ 18; Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 20.

⁸⁸ See Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 20; Ntagerura Trial Judgment, *supra* note 62, ¶ 33.

⁸⁹ See Prosecutor v. Mucić (Čelebići Camp), Case No. IT-96-21-A, Appeal Judgment, ¶ 256 (Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

⁹⁰ See Stanišić & Župljanin Decision, *supra* note 71, ¶ 14; Prosecutor v. Halilović, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-P, ¶ 14 (Dec. 17, 2004), available at <http://www.icty.org/x/cases/halilovic/tdec/en/041217.htm>; Blaškić Appeal Judgment, *supra* note 72, ¶ 218.

⁹¹ See Stanišić & Župljanin Decision, *supra* note 71, ¶ 14; Prosecutor v. Mejačić, Case No. IT-02-65-PT, Decision on Zeljko Mejačić’s Preliminary Motion on the Form of the Indictment, ¶ 3 (Nov. 14, 2003), available at <http://www.icty.org/x/cases/mejadic/tdec/en/031114.htm> [hereinafter Mejačić Decision]; Blaškić Appeal Judgment, *supra* note 72, ¶ 218.

⁹² See Stanišić & Župljanin Decision, *supra* note 71, ¶ 14; Mejačić Decision, *supra* note 91; Ntagerura Trial Judgment, *supra* note 62, ¶ 33.

⁹³ See, e.g., Brima Appeal Judgment, *supra* note 86, ¶¶ 37–41; Taylor Decision, *supra* note 86, ¶¶ 66–68; Prosecutor v. Taylor, Case No. SCSL-2003-01-T, Decision on “Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment,” ¶¶ 14–16 (May 1, 2009), available at <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/775/SCSL-03-01-T-775.pdf>.

⁹⁴ David Crane, *Symposium: International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs*, 21 AM. U. INT’L L. REV. 505, 511 (2006).

⁹⁵ *Id.*

method of charging, reminiscent of the indictments in the subsequent proceedings in Nuremberg and federal civil procedure in the United States,⁹⁶ stated the crimes' standard legal categorization and a brief stipulation of the alleged form of liability, but it often failed to include the link between the two and the accused's actual acts and omissions.⁹⁷

The indictment at the SCSL had to be accompanied by a separate case summary setting out the allegations the prosecutor proposed to prove in making the case, potentially remedying the lack of specificity in the indictment if the two were read together. However, the case summary could not plead material facts that were not in the indictment, and the document was not susceptible to amendment by the Court.⁹⁸ In other words, the prosecution could change the case summary, which likely contained vital information from a defense's perspective in light of how concise the indictments were at the SCSL, throughout the trial without permission from the Court, because the case summary was not considered part of the indictment.⁹⁹ This arguably resulted in ever-fluctuating factual parameters of the case throughout the trial, which was an issue in, for instance, the case against Sesay, Kallon and Gbao, also known as the RUF case. Defense counsel identified the cause of this issue as the erroneous application of two legal standards:¹⁰⁰ (1) overreliance on the exception—as established by the ICTY—that less specificity is required when the crimes' massive scale makes detailed charging unrealistically demanding,¹⁰¹ and (2) qualifying evidence, sometimes constituting new charges or new material facts, as not new as long as it was a "building block constituting an integral part of, and connected with, the same *res gestae* [things done] forming the factual substratum of the charges in the indictment."¹⁰² The SCSL created a charging practice that will most

⁹⁶ See FED. R. CIV. P. 8.

⁹⁷ See, e.g., Prosecutor v. Sesay, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006), available at <http://www.rscsl.org/Documents/Decisions/RUF/617/SCSL-04-15-T-619.pdf>; see also Wayne Jordash & Scott Martin, *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone*, 23 LEIDEN J. INT'L L. 585, 591 (2010).

⁹⁸ See Taylor Decision, *supra* note 86, ¶ 61; Prosecutor v. Norman, Case No. SCSL-04-15-T, Decision on Amendment of the Consolidated Indictment, ¶¶ 51–52 (May 16, 2005), available at <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/397/SCSL-04-14-T-397.pdf> [hereinafter Norman Decision].

⁹⁹ See Norman Decision, *supra* note 98, ¶ 52.

¹⁰⁰ See Jordash & Martin, *supra* note 97, at 593.

¹⁰¹ See, e.g., Sesay Indictment Decision, *supra* note 70, ¶ 7.

¹⁰² See, e.g., Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, ¶ 11 (Feb. 27, 2006), <http://www.rscsl.org/Documents/Decisions/RUF/496/SCSL-04-15-T-496.pdf>; Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 & TF1-041, ¶¶ 7, 11 (Mar. 20, 2006), <http://www.rscsl.org/Documents/Decisions/RUF/519/>

likely cease to exist along with the Court itself, which is now in residual mode, but it is nevertheless an interesting example of blurred case demarcation and confusion of charges and evidence, upon which will be elaborated further below (Part III).

The ECCC, while having a completely different system, applies the specificity requirements as articulated by the ad hoc Tribunals. Modeled on the French civil law system, the Court has a separate Office of Co-Investigating Judges, which conducts the investigation and concludes the pre-trial phase with the issuance of a Closing Order (indictment) comparable to a dossier in an inquisitorial system. The Closing Order, “either indicting a person and sending him or her to trial or dismissing the case,” is an elaborate document that forms the parameters of the case if indeed sent to trial.¹⁰³ Despite its unique system impacting the way in which charges are brought, and while formally not bound by the jurisprudence of other tribunals, in Case 001 against Kaing Guek Eav alias “Duch,” the ECCC’s Pre-Trial Chamber decided that international standards will be applied regarding requirements of specificity in the Closing Order because the Internal Rules do not provide further guidance.¹⁰⁴ Indeed, also in Case 002/01 against the two surviving accused, Nuon Chea and Khieu Samphan, the Trial Chamber relied on ICTY and ICTR case law on general pleading principles when discussing the factual parameters of the case and the rights of the accused in this respect.¹⁰⁵ The example of the ECCC is consistent with the crime-based approach of this Article: the legal system does not cause issues of case demarcation to arise, nor does the legal system influence the way in which specificity of charges can be safeguarded. The general pleading principles can be legitimately applied in both dominantly adversarial and inquisitorial systems.

C. Bringing Charges at the ICC

Like the ECCC, the ICC has a different procedural framework than the ad hoc Tribunals. Especially regarding the charging instrument, matters are handled differently. At the contemporary international criminal tribunals, as was also standard procedure at the Nuremberg and

SCSL-04-15-T-519.pdf.

¹⁰³ See ECCC Internal Rules, *supra* note 50, r.67.

¹⁰⁴ See Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order Indicting Kain Guek Eav Alias “Duch,” ¶ 46 (Extraordinary Chambers in the Courts of Cambodia Dec. 5, 2008), http://www.eccc.gov.kh/sites/default/files/documents/courtdec/D99_3_42_EN_0_1.pdf.

¹⁰⁵ See Prosecutor v. Nuon Chea, Case No. 002/19-09-2007-ECCC/TC, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), ¶¶ 17–23 (Sept. 22, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdec/E122_EN-1.PDF [hereinafter Nuon Chea Decision].

Tokyo Tribunals, the indictment is the basis for arrest.¹⁰⁶ At the ICC, however, the document providing the basis for arrest is the arrest warrant, which follows a separate procedure and involves a lower standard of proof.¹⁰⁷ Moreover, not every suspect is brought into custody, and an indictment is not a precondition for the issuance of an arrest warrant. Whether or not present—he or she may waive this right¹⁰⁸—the suspect is subject to a confirmation of charges process whereby the Pre-Trial Chamber decides whether the case will proceed to trial; the charging instrument or indictment is then referred to as the Document Containing the Charges (DCC).¹⁰⁹ Because of these procedural differences, as well as some substantive differences relating to crimes and modes of liability, Pre-Trial Chambers have stated that the ICTY's and ICTR's case law is of limited relevance at the ICC.¹¹⁰ However, in the Lubanga Appeal Judgment in his conviction of December 1, 2014, the Appeals Chamber relied heavily on the ad hoc Tribunals' case law dealing with pleading rules without adding such a caveat.¹¹¹

Article 61(3) of the Rome Statute, dealing with the confirmation of charges before trial, holds that the prosecutor must provide the accused with a copy of the DCC and the evidence upon which the prosecutor intends to rely at the confirmation of charges hearing within a reasonable time before that hearing.¹¹² It does not indicate what should be in the DCC, nor do the Rules provide any particular guidance. However, Regulation 52 of the Regulations of the Court states that the DCC referred to in Article 61 shall include “[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial,” as well as “[a] legal characterization of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.” In line with Article 74(2) of the Statute, “a ‘charge’ is composed

¹⁰⁶ See ICTY Statute, *supra* note 3, art. 19(2) & 20(2); ICTR Statute, *supra* note 46, art. 18(2) & 19(2); see also ICTY RPE, *supra* note 4, r.55.

¹⁰⁷ See Rome Statute, *supra* note 3, art. 58 (the applicable standard being “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”).

¹⁰⁸ See *id.* art. 61(2)(a).

¹⁰⁹ See *id.* art. 61(3)(a); see also Locke, *supra* note 51, at 605, n.4.

¹¹⁰ See Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-648, Decision on the Defences' Motions Regarding the Document Containing the Charges, ¶¶ 6–8 (June 25, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc520404.pdf> [hereinafter Katanga & Ngudjolo Decision on Defences' Motions]; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 44 (Nov. 30, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc371733.PDF>. See also Rome Statute, *supra* note 3, art. 21(2).

¹¹¹ See Prosecutor v. Thomas Lubanga Dyilo, Case No. IC-01/04-01/06-3121-Red, Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 87 of the Statute,” ¶¶ 122, 127 (Dec. 1, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1877186.pdf> [hereinafter Lubanga Appeal Judgment].

¹¹² See Rules of Procedure and Evidence of the ICC rule 121(3), Sept. 3, 2002, ICC-ASP/1/3.

of the facts and circumstances underlying the alleged crime as well as of their legal characterization.”¹¹³ Furthermore, Article 74(2) of the Statute makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage that are determinative of “the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit.”¹¹⁴ In fact, this flows directly from the nature of a confirmation of charges decision: it sets the factual subject matter of the trial, and the confirmed charges “fix and delimit [. . .] the scope of the case for the purposes of the subsequent trial.”¹¹⁵

The “facts described in the charges” have been defined by the Appeals Chamber as those “factual allegations which support each of the legal elements of the crime charged.”¹¹⁶ The facts described in the charges must be distinguished from “the evidence put forward by the Prosecutor at the confirmation hearing to support a charge [. . .], as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged.”¹¹⁷

There is not an abundance of ICC case law dealing with the lack of specificity of charges. Yet, there are examples of chambers relying amply on ICTY and ICTR case law despite the procedural differences between these courts. For example, the PTC in the *Bemba* case followed and referred to the ad hoc Tribunals when holding that “in case of mass crimes, it may be impractical to insist on a high degree of specificity.”¹¹⁸ It continued by explaining that, similar to the way stated at the ad hoc Tribunals, when dealing with such crimes it is not necessary for the prosecution to show for each individual killing “the identity of the victim

¹¹³ See Prosecutor v. William Samoei Ruto, Henry Kiprono Kogsey & Joshua Arap Sang, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 44 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> [hereinafter Ruto & Sang Confirmation Decision].

¹¹⁴ Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09-121-Corr-Red, Corrigendum of the “Decision on the Confirmation of Charges,” ¶ 34 [Mar. 7, 2011], <http://www.icc-cpi.int/iccdocs/doc/doc1036947.pdf> [hereinafter Banda & Jerbo Confirmation Decision].

¹¹⁵ Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 44; Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 34.

¹¹⁶ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of July 14, 2009 entitled “Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” ¶ 90 n.163 (Dec. 8, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf> [hereinafter Lubanga Regulation 55 Decision].

¹¹⁷ *Id.* See also Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 47.

¹¹⁸ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision on the confirmation of charges, ¶ 134 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> [hereinafter Bemba Confirmation Decision].

and the direct perpetrator,” nor is it necessary to specify the precise number of victims; evidence referring to “many” killings or “hundreds” of killings may very well be used.¹¹⁹

In *Mbarushimana*, in which the charges against the suspect were not confirmed, the issue of specificity—in this case in relation to locations—played a more prominent role. The defense had raised a number of issues in this respect, namely the prosecutor’s wording that locations “include but are not limited to,” as well as phrases such as “and neighboring villages,” “surrounding villages” and “the village of W673 and W674 [. . .] in Masisi territory in the second part of 2009.”¹²⁰ The prosecutor took the stance that use of the words “include but not limited to” allowed it to prove other events to establish the same crime, and submitted it was permissible to charge a pattern of crimes in a defined period and geographical area, including specific incidents as examples.¹²¹ In the decision that declined to confirm the charges against *Mbarushimana*, the Pre-Trial Chamber was alarmed by the prosecution’s approach, and gave it valuable guidance as to charging practices:

The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.¹²²

The Chamber further held that broad geographic and temporal parameters lack enough detail to inform the suspect regarding the location

¹¹⁹ *Id.*

¹²⁰ Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10-465, Decision on the confirmation of charges, ¶ 79 (Dec. 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf> [hereinafter *Mbarushimana Confirmation Decision*].

¹²¹ See Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10-T-6-Red2-ENG, Transcript of Sept. 16, 2011, at 22–23, <http://www.icc-cpi.int/iccdocs/doc/doc1244722.pdf>. See also *Mbarushimana Confirmation Decision*, *supra* note 120, ¶ 80.

¹²² *Mbarushimana Confirmation Decision*, *supra* note 120, ¶ 82.

and dates of the alleged crimes.¹²³ In the *Ruto & Sang* case, the use of the word “including” when referring to specific locations was similarly held to be too ambiguous because it implies that the specified locations are “exemplary and not exhaustive.”¹²⁴

In relation to modes of liability, the PTC offered some guidance in *Katanga & Ngudjolo*. When co-perpetration in accordance with Article 25(3)(a) of the Rome Statute is charged, the co-perpetrators’ roles and contributions to the common plan must be clearly specified. In this context, it is considered impermissibly vague to use open-ended language such as that the accused contributed “in at least the following ways.” However, it is not necessary to identify every single member of a common plan when those others are not considered co-perpetrators of the relevant crimes.¹²⁵

This approach was confirmed and elaborated upon, once again referring to the ad hoc Tribunals, by the Appeals Chamber in the *Lubanga* Appeal Judgment. The Chamber, reminding that Lubanga was charged and convicted based on the notion of co-perpetration based on a common plan, formulated three points of which the accused must then be notified with sufficient detail: “(i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators.”¹²⁶ Regarding the underlying criminal acts, the Appeals Chamber stated that “the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances.”¹²⁷

While in the past having reiterated to not follow the ad hoc Tribunals’ case law in relation to pleading principles due to alleged limited relevance, there are many overlaps in how the ICC and the ICTY and ICTR deal with issues of lack of specificity. Moreover, in the *Lubanga* Appeal Judgment, the Appeals Chamber relied heavily on the ad hoc Tribunals’ case law without asserting its alleged limited relevance. Rightfully so, because the different procedure for bringing charges at the ICC does not necessarily warrant an alternate approach in this respect as shown by, for instance, the ECCC’s willingness to be guided by ad hoc Tribunal jurisprudence. As a relatively young court, the IC may therefore benefit from the pleading principles.

¹²³ *Id.* ¶ 85.

¹²⁴ See Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Case No. ICC-01/09-01/11-522, Decision on the content of the updated document containing the charges, ¶¶ 32–33 (Dec. 28, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1532402.pdf>.

¹²⁵ *Katanga & Ngudjolo* Decision on Defences’ Motions, *supra* note 110, ¶¶ 33–34.

¹²⁶ See *Lubanga* Appeal Judgment, *supra* note 111, ¶ 123.

¹²⁷ *Id.*

III. CASE DEMARCATION: WHAT IS MATERIAL?

In part, the prosecution's theory of the case becomes clear through context and background information revealing the narrative upon which the case is built. Without such information, the account of the events as pleaded in the indictment accompanied only by a list of evidence could become incomprehensible. This is especially true for international crime cases. Due to the crimes' massive scale, the facts underlying the charges and the supporting evidence are usually of great quantity, and massive amounts of information are hard to navigate for Chambers and the accused without a compass in the form of a little explanation.

The need for this extra narrative element has been recognized by ICC Chambers. Generally, it has been stated that providing a narrative that sheds light on the prosecution's theory of the case is an important aspect of presenting evidence at the confirmation stage of the proceedings. At that stage, the prosecution "must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations."¹²⁸

As shown by the cases and general pleading principles discussed above, the seemingly simple question of what is part of the case and what is not, or how materiality of a certain fact is determined, has a far from straight-forward answer in international crime cases. It is of course of paramount importance to establish this accurately, because it goes to the very heart of the criminal trial as tool for ascertaining the truth with respect to the conduct of an accused. This has everything to do with standards of proof and the right of the accused to be put on notice of the nature and cause of the charges against him or her, the latter of which will be discussed in Part IV. It is those facts that are material, which include the individual crimes charged, the accused's criminal responsibility and the contextual elements,¹²⁹ that need to be proven to the requisite standard of proof—at the trial stage, for instance, beyond a reasonable doubt—and eventually, may form the basis of a conviction. In other words, the material facts are those upon which the verdict is critically dependent,¹³⁰ and from which the conclusion of law is eventually drawn.

However, material facts are not the only facts involved in framing a case against a suspect. Evidentiary facts (as they are referred to at the ICTY and ICTR)¹³¹ or subsidiary facts (as they are referred to at the

¹²⁸ See, e.g., *id.* ¶ 39; Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-243, Decision on the Confirmation of Charges, ¶ 37 (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>; Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37; Mbarushimana Confirmation Decision, *supra* note 120, ¶ 40.

¹²⁹ See Gbagbo Adjudgment Decision, *supra* note 2, ¶ 19.

¹³⁰ See Nuon Chea Decision, *supra* note 105, ¶ 19.

¹³¹ See, e.g., Blaskić Appeal Judgment, *supra* note 72, at 219; Prosecutor v. Simba, Case No. ICTR-01-76-A, Judgment, ¶ 264 (Nov. 27, 2007), <http://www1.umn.edu/humanrts/instree/ICTR/>

ICC)¹³² are of a particular significance, too. In common law, evidentiary facts have been defined as those subsidiary facts introduced to prove material facts.¹³³ At the ICC, subsidiary facts have been defined as facts providing background information or indirect proof of material facts.¹³⁴ While it seems illogical that facts would prove facts, it may be understood as creating the following chain: *direct* evidence going to subsidiary (evidentiary) facts constitutes *indirect* evidence going to material facts. Material facts are then proven by inference from subsidiary (evidentiary) facts. For the purpose of this Article, it will be assumed that evidentiary facts and subsidiary facts refer to the same type of facts despite the different terminology used at the ad hoc Tribunals and the ICC, and the term ‘subsidiary facts’ will be used hereinafter.

While the ad hoc Tribunals never devoted much attention to the distinction between facts of a subsidiary nature and material facts, the ICC PTC reiterated in numerous Confirmation of Charges decisions that the facts and circumstances underlying the charges must be distinguished from other facts not mentioned in the charges but otherwise subsidiary or related to them.¹³⁵ Yet, it is not always clear how material facts are to be distinguished from subsidiary facts and background information, and what role or status these other types of information have.

In addition to the need for drawing a sharper line between material facts and other facts, a distinction must also be made between facts and evidence. Again, this may seem an easy query. Yet, how is evidence distinguished from facts, for instance, when subsidiary facts are used to support other evidence, to demonstrate the material facts or to show a certain pattern? Can subsidiary facts even take on all these roles? It is well established that material facts must be distinguished from evidence tendered to prove those facts—the latter does not need to be stated by the prosecution in the indictment.¹³⁶ However, confusion in this respect was highlighted, for instance, by *Gbagbo* mentioned in the introduction and more elaborately dealt with further below: the prosecution used a number of incidents, which it classified as subsidiary facts, to support evidence demonstrating the features of the charged incidents constituting the attack

SIMBA_ICTR-01-76/SIMBA_ICTR-01-76-A.pdf.

¹³² See, e.g., Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37.

¹³³ See, e.g., Woodard v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951): “Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.” In common law, material facts are usually referred to as “ultimate facts,” but that terminology is not used at the international criminal courts and tribunals. See also BLACK’S LAW DICTIONARY 500 (5th ed. 1979).

¹³⁴ See Banda & Jerbo Confirmation Decision, *supra* note 114, ¶ 37.

¹³⁵ See, e.g., *id.* ¶ 36; Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 47.

¹³⁶ See, e.g., Kupreškić Appeal Judgment, *supra* note 61, ¶ 88. See also *supra* Part II.B pleading principle no. 2.

(as part of a crime against humanity), but these subsidiary facts were interpreted by the PTC as material facts *constituting* the attack, resulting in the confirmation of charges hearing being adjourned and the prosecution being sent off to conduct further investigations.¹³⁷ Moreover, if indeed used to show a pattern or certain features, it raises the question whether these additional incidents perhaps should have been regarded not as subsidiary facts, but as a type of similar fact evidence.

The question whether a fact is a material fact, the answer to which demarcates the case and puts the accused on notice, will therefore be explored here from two different angles: how are material facts distinguished from other facts, and how are facts distinguished from evidence?

A. *Subsidiary Facts and Background Information*

A closer look at the *Gbagbo* pre-trial saga reveals how blurred boundaries between different types of facts and evidence became entangled with the issue of uncertain case delineation. Laurent Gbagbo, former President of Côte d'Ivoire, stands accused of four counts of crimes against humanity in the context of post-electoral violence in his home country between December 16, 2010 and April 12, 2011. On January 17, 2013, the prosecution filed the DCC identifying four incidents ("charged incidents") during which the crimes against humanity allegedly had taken place. In a separate subsection titled "attack against a civilian population" it described a series of attacks, including the four charged incidents, as well as 41 other incidents.¹³⁸ This subsection of the DCC was not placed under the heading dealing with the actual charges, in which the four incidents were once again explicitly referred to.

The hearing on the confirmation of charges was held from 19 till February 28, 2013.¹³⁹ This hearing is part of the confirmation of charges process—unique to the ICC and unrelated to the issuance of arrest warrants—that is used as screening to make sure only persons against whom a relatively strong case exists are subjected to a trial.¹⁴⁰ On the basis of the hearing, the PTC will determine whether "there is sufficient

¹³⁷ See *Gbagbo Adjournment Decision*, *supra* note 2, ¶¶ 44–45.

¹³⁸ See *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11-357-Anx1-Red, Document amendé de notification des charges [DCC], § E.1 (Jan. 25, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1545439.pdf> [in French only]; see also *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11-572, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," ¶ 1 (Dec. 16, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1700000.pdf> [hereinafter *Gbagbo Adjournment Appeal Judgment*].

¹³⁹ See *Gbagbo Adjournment Decision*, *supra* note 2, ¶ 11 (and accompanying footnote 17 for transcripts).

¹⁴⁰ See Rome Statute, art. 61. See also Friman et al., *Charges*, *supra* note 5, at 399.

evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”¹⁴¹ It may then either (1) confirm the charges and commit the person to trial, after which the case is transferred to a Trial Chamber, (2) decline to confirm the charges, or (3) adjourn the hearing and request the prosecutor to either collect more evidence or amend the charges.¹⁴² In *Gbagbo*, the PTC adjourned the hearing on the confirmation of charges on June 3, 2013—this is possible even though the actual hearing had already taken place.¹⁴³ It urged the prosecution to gather more evidence or conduct further investigations, as well as provide an updated DCC and a new list of evidence.¹⁴⁴ More specifically, the Chamber stated that none of the 45 discussed incidents, taken on their own, could establish the existence of an “attack” in the sense of article 7(2) of the Rome Statute. Even though not all 45 incidents needed to be proven to the required threshold, at least “a sufficient number of incidents” must meet the requisite standard of proof.¹⁴⁵

Putting aside evidentiary issues relating to a high reliance on NGO reports and press articles, which in large part caused the judges to remain unconvinced, the PTC made it clear that it considered *all* 45 incidents to be constituting the attack.¹⁴⁶ Accordingly, none of these incidents were considered to be subsidiary facts or background information, and all of them were treated as being part of the facts and circumstances described in the charges.

The prosecution’s appeal of the PTC’s decision claimed a different intent with respect to the 41 additional (*i.e.*, not-charged) incidents, and stated that “[the prosecution] also led evidence in relation to another 41 incidents to support evidence from the Charged Incidents that goes to demonstrating the features of the attack, but in relation to which the Prosecution did not plead any material facts [. . .].”¹⁴⁷ It continued by

¹⁴¹ See Rome Statute, art. 61(7).

¹⁴² See *id.* art. 61(7)(a), (b) & (c).

¹⁴³ See Prosecutor v. Jean-Pierre Bemba Combo, Case No. ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ¶ 37 (Mar. 3, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc638848.pdf>; *Gbagbo* Adjournment Decision, *supra* note 2, ¶ 13.

¹⁴⁴ See *Gbagbo* Adjournment Decision, *supra* note 2, ¶¶ 44, 45.

¹⁴⁵ See *id.* ¶ 23.

¹⁴⁶ See *id.* ¶ 36.

¹⁴⁷ *Gbagbo* Prosecution’s Appeal, *supra* note 2, ¶ 3. This also follows from the transcripts of the confirmation of charges hearing. See, e.g., Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-T-14-ENG, Transcript of 19 Feb. 19, 2013, at 45.

[T]he Prosecution has selected four incidents that are representative of the crimes committed by the pro-Gbagbo forces in a sustained series of attacks put into motion by Mr. Gbagbo during the post-election violence, and during the next few days the Prosecution will summarise its core evidence regarding these four incidents.

explaining that “the purpose of the [41 incidents] was to support evidence from the Charged Incidents that goes to proof of the attacker’s pattern of conduct as well as pattern of victimization.”¹⁴⁸ Judge Silvia Fernández de Gurmendi sided with the Prosecution in her dissent to the PTC’s decision, adding that the prosecution had made a clear distinction between the charged allegations and other facts by adding separate sections to the DCC dealing only with the charges.¹⁴⁹ She opined that the subsidiary facts did not constitute the attack, but “merely serve to prove, together with *all* available evidence, the attack and/or its widespread or systematic nature.”¹⁵⁰

The Appeals Chamber confirmed the PTC’s majority decision. It noted that the wording of the DCC does not automatically lead to the conclusion that the prosecution intended to use only the four charged incidents to establish the attack, and it concluded that the prosecution did not make a clear enough distinction between the four charged incidents and the other 41 incidents.¹⁵¹ Moreover, the AC was not convinced that the distinction between material facts and subsidiary facts was even warranted here, because the incidents were all separate events. It explained: “[T]he prosecutor did not present any contextual information or any other factual allegations that would provide a basis for making such a distinction, or serve to explain the alleged link between the 41 Incidents and the four Charged Incidents.”¹⁵² In other words, in order to claim to be using facts as subsidiary facts, the prosecution must at least establish some kind of connection between those facts and the material facts. Bearing in mind subsidiary facts may also be referred to as evidentiary facts, this makes a lot of sense: a piece of evidence connects to an alleged fact.

In *Gbagbo*, the prosecution seemed to have had two different intentions with the additional 41 incidents: to use them to demonstrate a pattern, and to support other evidence that in turn supported the material facts. These two types of usages, however, do not seem to correspond to the definition of “subsidiary fact.” PTCs have made it clear that in assessing the prosecution’s case at the confirmation stage, subsidiary facts are only to be considered “as background information or as indirect proof of the material facts.”¹⁵³ In other words, these other factual allegations offer general background information or “indicate

Id.

¹⁴⁸ *Gbagbo Prosecution’s Appeal*, *supra* note 2, ¶ 18.

¹⁴⁹ *See Gbagbo Adjournment Decision*, *supra* note 2, ¶ 35 (Silvia Fernández de Gurmendi, J., dissenting).

¹⁵⁰ *Id.* ¶ 41.

¹⁵¹ *See Gbagbo Adjournment Appeal Judgment*, *supra* note 138, ¶¶ 43, 44.

¹⁵² *Id.* ¶ 46.

¹⁵³ *Banda & Jerbo Confirmation Decision*, *supra* note 114, ¶ 37.

intermediate steps in the prosecution's chain of reasoning."¹⁵⁴ Moreover, "subsidiary facts [. . .] are of relevance only to the extent that facts described in the charges may be inferred from them."¹⁵⁵ As the AC noted in *Gbagbo*, a link between the subsidiary facts and the material facts must be discernible.

Other information (*i.e.*, non-essential information or subsidiary facts) indeed seem to have a dual function at the ICC: (1) it may provide a narrative intended to enhance understanding of the alleged events, and (2) it may be used to infer the existence of material facts. Conflating the term "subsidiary" on the one hand and "background information" on the other is likely to cause confusion, though, despite they are indeed linked. While subsidiary facts may lead to a greater understanding of the prosecution's theory of the case, they do not necessarily serve the (exclusive) purpose of providing background information. Strictly speaking, they are intended to demonstrate or support the existence of the facts underlying the charges, in other words the material facts. In a way, they provide a narrative of what factually happened, and act as glue connecting the evidence with the material facts, which indeed provides a background. To illustrate, take a single murder as example. The material facts are likely to be: (1) the victim was killed, (2) the accused did the act that killed the victim, and (3) the accused intended to kill the victim. A subsidiary fact could be, for instance, that the accused was seen beating the victim on the same day the killing took place. That subsidiary fact—which naturally in itself should be supported by evidence, but that taken on its own does not constitute a material fact in a murder case—in turn aids to prove the material fact, creating a chain of reasoning that paints the full factual picture of the prosecution's case.

The *Gbagbo* Pre-Trial Chamber, reiterating the importance of factual and legal demarcation at the confirmation stage, argued for a clear distinction between the facts and circumstances underlying the charges (material facts) and other factual allegations supporting the existence of the material facts (subsidiary facts).¹⁵⁶ It also emphasized that subsidiary

¹⁵⁴ Prosecutor v. Muthaura & Kenyatta, Case No. ICC-01/09-02/11-536, Order regarding the content of the charges, ¶ 13 (Nov. 20, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1510847.pdf>. See also *Gbagbo* Adjournment Decision, *supra* note 2, ¶ 34 n.39 (Silvia Fernández de Gurmendi, J., dissenting), where Judge Silvia Fernández de Gurmendi observed that "facts of a subsidiary nature will usually emerge from 'circumstantial evidence.'" While not clarifying the distinction between material and subsidiary facts any further, the AC has endorsed the use of the term 'subsidiary facts' on several occasions: see *Lubanga* Regulation 55 Decision, *supra* note 116, ¶ 90 n.163; Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of Nov. 12, 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons," ¶ 50 (Mar. 27, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1573822.pdf>; *Gbagbo* Adjournment Appeal Judgment, *supra* note 138, ¶ 37.

¹⁵⁵ Ruto & Sang Confirmation Decision, *supra* note 113, ¶ 47.

¹⁵⁶ See Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-325, Decision on the date

facts are not part of the charges and are therefore not subject to the confirmation of charges process. Judge Christine van den Wyngaert articulated a logical conclusion of such reasoning in a separate opinion to a decision in *Muthaura & Kenyatta* where the Majority explicitly authorized the prosecution to keep other factual allegations (considered to be background information or other information of a subsidiary nature) in the updated DCC.¹⁵⁷ She disagreed with including subsidiary facts in a DCC altogether. She argued that the DCC should only contain the material facts, and should not include any unnecessary background information or subsidiary facts. The correct place for such information is the pre-trial brief.¹⁵⁸ She pointed out that the DCC has a very specific and fundamental purpose: it demarcates the case legally and factually, while the pre-trial brief tells the defense how the prosecution intends to plead the case. It is therefore imperative that the facts and circumstances contained in the DCC are “clear, precise, and unambiguous.”¹⁵⁹ Allowing both material facts and subsidiary facts in a DCC complicates matters needlessly, and turns a DCC into a dual-functioning hybrid between a charging instrument and a pre-trial brief.¹⁶⁰

Indeed, keeping subsidiary facts out of the charging instrument delimits the case more clearly, and reduces any potential confusion as to which facts are material. But it is possible to imagine exceptions to this rule. At the ICTY, for instance, while there is limited case law dealing with the issues surrounding evidentiary or subsidiary facts in general, Trial Chambers have held—this is pleading principle no. 9 discussed in Part II.B—that where the state of mind of the accused is relevant to the charges, the prosecution must plead in the indictment either (1) the specific state of mind as a material fact (in which case the facts by which that material fact is to be established are ordinary matters of evidence and need not be pleaded further); or (2) the evidentiary facts—the term used at the ICTY for subsidiary facts—from which the state of mind is to be inferred.¹⁶¹ This has only been held with respect to *mens rea* as an exception to having to plead all the material facts explicitly, and nothing similar has been dealt with at the ICC. This is a very logical exemption,

of the confirmation of charges hearing and proceedings leading thereto, ¶ 27 (Dec. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1528879.pdf>.

¹⁵⁷ See Prosecutor v. Muthaura & Kenyatta, Case no. ICC-01/09-02/11-584, Decision on the content of the updated document containing the charges, ¶ 13 (Dec. 28, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1532400.pdf>.

¹⁵⁸ *Id.* ¶ 3 (Christine van den Wyngaert, J., separate opinion).

¹⁵⁹ *Id.* ¶ 4 (Christine van den Wyngaert, J., separate opinion).

¹⁶⁰ *Id.* ¶ 5 (Christine van den Wyngaert, J., separate opinion).

¹⁶¹ See Stanišić & Župljanin Decision, *supra* note 71, ¶ 16; Mrkšić Indictment Decision, *supra* note 74, ¶ 11; Blaskić Appeal Judgment, *supra* note 72, ¶ 219; see also Prosecutor v. Ayyash, Case No. STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment, ¶ 58 (June 12, 2013), <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0952>.

though, one that perhaps may be transplanted to the ICC. The state of mind of an accused is not likely directly observable and will almost always need to be inferred from other facts.

Looking at the definition of subsidiary facts, and how they are only found in the indictments at the ad hoc Tribunals by way of a narrow exception, the question arises whether in *Gbagbo* the 41 incidents were supposed to have been used as subsidiary facts, material facts, or as something else. If they were included to support the material facts, for instance the attack, they may be considered subsidiary facts. If this had been crystal clear, it may even not have been that detrimental to have them in the DCC, because confusion was likely avoided. If they were indeed crucial to, or part of, the attack, they may be regarded as material facts and must form part of the charges. If the additional incidents were not as such directly linked to the primary charged incidents, namely the attack, but were used to show a pattern, they may be a type of similar fact evidence, in which case they should not have been in the DCC as it would have been a matter of proof.

B. Between Proof and Pleading: Patterns of Conduct and Similar Fact Evidence

In the June 2013 *Gbagbo* Decision, the PTC pulled the other 41 incidents into the realm of material facts, which need to be proven to the required standard of proof. This did not lead to the factual parameters of the case drastically changing, though. Still speaking of four charged incidents (during which four counts of crimes against humanity—rape, murder, other inhumane acts or attempted murder, and persecution—were allegedly committed), the PTC eventually confirmed the charges on June 12, 2014, after the prosecution had gathered more evidence as it had been directed to do.¹⁶² Other acts were mentioned in the Confirmation of Charges Decision as well, but their exact purpose remained ambiguous.¹⁶³ They were not part of the four charged incidents during which the four counts of crimes against humanity took place; some acts were used to show a pattern,¹⁶⁴ while in relation to other acts the Chamber merely stated it took “note of the evidence establishing that the following events took place.”¹⁶⁵

The prosecution in this case had stated earlier that it intended to use the other not-charged incidents not as material facts as such nor to support

¹⁶² See Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶¶ 267–77 (June 12, 2014), http://www.icc-cpi.int/icc_docs/doc/doc1783399.pdf.

¹⁶³ See *id.* ¶¶ 73–77.

¹⁶⁴ *Id.* ¶ 75.

¹⁶⁵ *Id.* ¶ 77.

the material facts, but to support the evidence underlying the material facts in relation to proof of the accused's pattern of conduct and the pattern of victimization.¹⁶⁶ This does not seem to adhere to the definition of subsidiary facts, which are used to prove material facts, not to support the underlying evidence. The ensuing decision confirming the charges did not touch upon this subject, but the use of the word "incident" was perhaps unfortunate, too. The definition of crimes against humanity does not speak of "incidents;" it only demands the commission of multiple acts.¹⁶⁷ In this case, one incident already encompassed a plurality of acts, and moreover, one incident did not correspond one-on-one to one count of a crime against humanity. In any event, matters got very confused, but strangely, none of the actors involved suggested that all of this might have been a misinterpretation of pattern of conduct evidence, despite its similarities and hints in that direction.

In international crime cases, information about other events or acts not charged in the indictment is often introduced to demonstrate a certain pattern. For a series of acts or incidents to be qualified as a pattern, they must show common features of, for instance, the perpetrator, the victims or the modus operandi.¹⁶⁸ Pattern evidence, often equated with the notion of "similar fact evidence" or "evidence of similar conduct," is a well-known phrase from common law systems and it is also used at the ad hoc Tribunals. It may be further defined as evidence of crimes not alleged in the indictment, but nevertheless used to establish guilt for the acts with which the accused is charged.¹⁶⁹ Such type of evidence, also known as character evidence, is generally inadmissible where it goes to show the accused's propensity or disposition to do the type of acts charged and is therefore guilty of the crime in the indictment.¹⁷⁰ Moreover, in relation to international crimes evidence relating to the accused's character is considered to have very little probative value: the nature of international crimes, which take place during a national or international emergency, is

¹⁶⁶ See *supra* Part III.A.

¹⁶⁷ See Rome Statute art. 7(2)(a): "'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

¹⁶⁸ See Xabier Agirre Aranburu, *Sexual Violence: Using Pattern Evidence and Analysis for International Cases*, 23 LEIDEN J. INT'L L. 609, 610 (2010).

¹⁶⁹ See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 790 (2010) [hereinafter SCHABAS COMMENTARY].

¹⁷⁰ See *Prosecutor v. Kupreškić*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, § 4 (Feb. 17, 1999), available at <http://www.icty.org/x/cases/kupreskic/tdec/en/90217MS25407.htm> [hereinafter Kupreškić Tu Quoque Decision]; *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, ¶ 12 (Sept. 18, 2003), <http://41.220.139.198/Portals/0/Case/English/Bagosora/Trail%20and%20Appeal/180903.pdf> [hereinafter Bagosora DBY Decision].

such that they are often committed by persons with no prior convictions or history of violence.¹⁷¹

Pattern evidence can be quite prejudicial to the defense, and it potentially erodes the presumption of innocence.¹⁷² Under certain circumstances it may be admissible, though. The RPEs of the ICTY, ICTR and SCSL share the same Rule 93 dealing with this type of evidence, providing that it may be admissible in the interests of justice.¹⁷³ The ICTY AC has endorsed using this evidentiary method pointing out that:

[U]nder the so-called principle of “similar fact evidence”, courts in England and Wales, Australia and the United States admit evidence of crimes or wrongful acts committed by the defendant other than those charged in the indictment, if the other crimes are introduced to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well.¹⁷⁴

The admission of such evidence always requires respecting and balancing the rights of the accused. Although comprised of professional judges and not juries, Chambers ought not be distracted by hearing endless testimony on irrelevant and prejudicial evidence, as this may cause the trial to lose focus and be unduly lengthened.¹⁷⁵

There are a number of international cases in which similar fact evidence was used. For example, in *Galić*, similar fact evidence with respect to an additional (not-charged) sniping incident was admitted, as it corroborated the accused’s consistent pattern of conduct in relation to the charged sniping incidents.¹⁷⁶ In *Kvočka et al.*, similar fact evidence was admitted against two accused. One woman’s testimony relating to

¹⁷¹ See Kupreškić Tu Quoque Decision, *supra* note 170, § 4. See also Alette Smeulders et al., *Sixty-Five Years of International Criminal Justice: The Facts and Figures*, in THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 7, 34 (D.L. Rothe et al. eds., 2013).

¹⁷² See SCHABAS COMMENTARY, *supra* note 169, at 791.

¹⁷³ See ICTY/R RPEs & SCSL RPE, r.93(A); RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 105–06 (2002); Prosecutor v. Ngeze & Nahimana, Case No. ICTR-99-52-A, *Décision sur les appels interlocutoires*, ¶ 20 (Sept. 5, 2000) (Shahabuddeen, J., separate opinion), available at http://www.legal-tools.org/uploads/tx_ltpdb/doc906823_02.pdf.

¹⁷⁴ Kupreškić Appeal Judgment, *supra* note 61, ¶ 321.

¹⁷⁵ Bagosora DBY Decision, *supra* note 170, ¶ 28; see also Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Evidence Tendered Through Witness K82, ¶ 19 (Oct. 3, 2006), available at <http://www.icty.org/x/cases/milutinovic/tdec/en/061003.pdf>.

¹⁷⁶ See Prosecutor v. Galić, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, ¶ 3 n.1 (Oct. 3, 2002), <http://www.icty.org/x/cases/galic/tjug/en/021003.pdf>; Prosecutor v. Galić, Case No. IT-98-29-PT, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated Oct. 10, 2001 Should Be Considered as the Amended Indictment, ¶ 23 (Oct. 19, 2001) available at <http://www.icty.org/x/cases/galic/tdec/en/11019FI117058.htm>.

Mlado Radić, who encouraged a guard to have sex with the witness in exchange for a meeting with her husband, was admitted into evidence under Rule 93(A) ICTY RPE,¹⁷⁷ as well as a second testimony relating to a witness's actual rape by Radić.¹⁷⁸ The other accused in this case, Zoran Žigić, also had similar fact evidence admitted against him in relation to a number of assaults of which the victims were not listed on the Amended Indictment or Schedules.¹⁷⁹ Also, in *Popović et al.*, evidence relating to the Bišina execution site, which did not form part of the indictment, was admitted into evidence, because it was nevertheless "still relevant and highly probative as to [Popović's] knowledge, intent and "pattern of conduct" during the relevant time period, particularly in relation to the alleged joint criminal enterprise to murder the able bodied Bosnian Muslim men."¹⁸⁰

In *Bagosora et al.*, the leading decision in this respect, the ICTR TC discussed a number of ways in which similar fact evidence may be used, relying mostly on the often-cited separate opinion of Judge Shahabuddeen to a decision from *Ngeze & Nahimana*. The context of the former decision was dealing with extra-temporal evidence in light of the Tribunal's jurisdiction. Such extra-temporal evidence from before 1994, the year from which the Tribunal's mandate allows it to exercise jurisdiction, is generally inadmissible at the ICTR bar three exceptions: (1) evidence relevant to an offence continuing into 1994; (2) evidence providing a context or background; and (3) similar fact evidence.¹⁸¹ With respect to similar fact evidence, the *Bagosora* TC held that the rule must be understood from the perspective of the general principle that evidence regarding the character of the accused is not admissible if that evidence is only introduced to blacken the accused's reputation by showing that he or she committed the same crime before, is inclined to commit the crime or is capable of committing the crime.¹⁸² Similar fact evidence is admissible, however, when it serves "to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense."¹⁸³ Thus, for

¹⁷⁷ See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶ 547 (Nov. 2, 2001), available at <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>.

¹⁷⁸ *Id.* ¶ 556.

¹⁷⁹ *Id.* ¶¶ 652, 663, 664.

¹⁸⁰ 05-88-T, Decision on Motion to Reopen the Prosecution Case, ¶¶ 33, 39 (May 9, 2008), available at <http://www.icty.org/x/cases/popovic/tdec/en/080509.pdf>.

¹⁸¹ See *Bagosora* DBY Decision, *supra* note 170, ¶¶ 9–14; *Prosecutor v. Simba*, Case No. ICTR-01-76-I, Decision on Defence Motion to Preclude Prosecution Evidence, ¶ 3 (Aug. 31, 2004), <http://www.unict.org/Portals/0/Case/English/Simba/decisions/310804.pdf>; *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, ¶ 22 (Mar. 30, 2006), <http://www.unict.org/Portals/0/Case/English/Ndindiliyimana/decisions/300306.pdf>.

¹⁸² *Bagosora* DBY Decision, *supra* note 170, ¶ 12.

¹⁸³ *Id.* ¶ 13.

similar fact evidence to be admissible it must show more than a mere propensity to commit the crime; it must be “probative of some peculiar feature of the case which substantially enhances its probative value in relation to the charge.”¹⁸⁴ Judges will need to assess whether the evidence serves such a specific goal on a case-by-case basis keeping in mind the evidence should not be unfairly prejudicial towards the accused.¹⁸⁵

The ICC has thus far remained silent with respect to the phrase “similar fact evidence” and there is no mention of pattern evidence in the Rome Statute or RPE. In fact, Rule 93 of the ad hoc Tribunals’ RPEs is the only original evidentiary rule that was not included in the ICC’s equivalent.¹⁸⁶ However, there have been cases where patterns played a prominent role. One commentator noted the connection with pattern evidence when he discussed the use of evidence of other (not charged) attacks in *Katanga & Ngudjolo* with respect to context.¹⁸⁷ Indeed, in that case, under the heading *Theory of similar events: mode of proof by analogy*, the Pre-Trial Chamber allowed evidence regarding other attacks than the charged attack (which had taken place in the town Bogoro in the Democratic Republic of the Congo) in order to establish the overall context of the conflict. Referring to the *Lubanga* Confirmation of Charges Decision, the PTC held that “providing evidence which may assist [the Chamber] in establishing the overall context in which the crimes are alleged to have occurred is not only helpful to its understanding of the evidence supporting the charges but is also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the Statute.”¹⁸⁸ It must be assumed from the wording of the Chamber that the only type of context the evidence was used for were the contextual elements in the crime definitions, which are every bit a part of the material facts as the other legal elements of the crimes.¹⁸⁹ However, once again, this was not exactly what the prosecution had had in mind. They had submitted that evidence of other attacks was also probative regarding the suspects’ intent and knowledge.¹⁹⁰ In a later submission, the prosecution linked this evidence to the doctrine of “similar fact evidence” referring to the ICTY and ICTR case law,¹⁹¹ but

¹⁸⁴ *Id.* ¶ 14.

¹⁸⁵ *Id.*

¹⁸⁶ See Christopher Gosnell, *Admissibility of Evidence*, in PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 375, 431 (Karim A.A. Khan et al. eds., 2010).

¹⁸⁷ *Id.*

¹⁸⁸ Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-717, Decision on the confirmation of charges, ¶ 228 (Sept. 30, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> [hereinafter Katanga & Ngudjolo Confirmation Decision].

¹⁸⁹ See *supra* Part III.A.

¹⁹⁰ See Katanga & Ngudjolo Confirmation Decision, *supra* note 188, ¶ 226.

¹⁹¹ See Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-1645, Prosecution’s Consolidated Response to “Defence Objections to Admissibility in Principal and in Substance” (ICC-01/04-01-07-1558) and Requête de la Défense en vue d’obtenir

unfortunately, ICC Chambers have never clarified matters as they never used this terminology themselves nor devoted any substantial consideration to the notion.

With respect to the use of patterns at the ICC, it is also worth noting the dissenting opinion of Judge Anita Ušacka to the *Lubanga* Appeal Judgment. She observed that the charges—the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities—were divided into a “pattern” section and “individual cases” section, causing confusion as to the relationship between the two. Also, the evidence relating to the individual cases was, unforeseeably, rejected by the Trial Chamber only at the end of trial, leaving the “vague formulations” of the pattern charges as the basis for the conviction.¹⁹² In Judge Ušacka’s view, the pattern charges merely provided contextual or background information, incapable of adequately informing the accused of the charges. Moreover, by having to rely on the pattern charges after the evidence regarding the individual cases was thrown out, the Prosecutor effectively was forced to reclassify the individual cases from “core factual allegations underlying the charges” to evidence, or in the words of the Prosecutor, as “sample episodes chosen as evidence.”¹⁹³ While sampling of data—meaning, in general terms, the process of (1) selecting units such as people, organizations or events from a population or pool of interest, (2) studying the sample in order to (3) generalize the results back to the population or pool from which they were chosen—as method of investigating crime patterns is beyond the scope of this Article, sampling of incidents is a common technique for building a case in the legal sense at the international courts and tribunals. As one senior investigator pointed out, “[i]ncidents are chosen in a way like ‘case studies’ as representative of the overall pattern.”¹⁹⁴ Especially in international crime cases, patterns often play a role since most cases involve a large number of incidents.¹⁹⁵ Key in this respect is making a clear distinction between (material and subsidiary/evidentiary) facts and (pattern of conduct) evidence. While the former are found in the charging instrument when deemed material or, if one follows ICTY case law, when used as evidentiary facts to establish *mens rea*, the latter are matters of proof and are therefore not found in the indictment. If parties are clear on

une decision d’irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T-167 et T-258 (ICC-01/04-01/07-1556), ¶¶ 65–66 n.68 (Nov. 16, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc781779.pdf>.

¹⁹² See *Lubanga* Appeal Judgment, *supra* note 111, ¶ 12 (Anita Ušacka, J., dissenting).

¹⁹³ *Id.* ¶ 18 (Anita Ušacka, J., dissenting); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04—01/06-2969-Red, Prosecution’s Response to Thomas Lubanga’s Appeal Against Trial Chamber I’s Judgment Pursuant to Article 74, ¶ 104 (Feb. 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1555036.pdf>.

¹⁹⁴ See Aranburu, *supra* note 168, at 620.

¹⁹⁵ *Id.*

how they intend to use different facts and evidence at their disposal, the types of evidence discussed in this section do not influence case demarcation in the strict sense, meaning when taking the charging instrument as the foundation of demarcation. It does, however, have an effect on the scope of the case in a broader sense. Additional incidents, although not charged, factually widen the amount of issues dealt with at trial, and therefore inevitably affect the interests of the accused with respect to the length of trial and the disclosure of evidence. However, as elaborated upon next, this is usually a different matter than the right of the accused to be given notice of the nature and cause of the charge against him or her, which relates to the charging instrument.

IV. THE SPECIFICITY OF CHARGES AND THE RIGHT TO BE PUT ON NOTICE

The purpose of the charging instrument or indictment is to fix the factual and legal parameters of the case at trial and to inform the accused about the charges.¹⁹⁶ Vague charges and conflation of subsidiary and material facts, and facts and evidence corrode these fundamental goals and have a dire effect on the rights of the defense. Both parts of the charging instrument's dual function express a number of essential fair trial rights. This includes the fundamental principle to be presumed innocent when charged with a criminal offense and granting adequate opportunity to prepare a defense,¹⁹⁷ as well as safeguarding the *ne bis in idem* principle (protection from repeated charges of the same offense, also known as the double jeopardy protection).¹⁹⁸ The fair trial rights at play here comprise the normative boundaries in light of this Article's main query: lack of specific case demarcation finds its limits in the rights of the accused to be given fair notice of the charges against him or her, discussed in Part IV.A, and to be protected against subsequent charges of the same crime, discussed in Part IV.B.

A. Notice: Preparing a Defense

Defense complaints relating to the vagueness of charges are commonly heard at the international criminal courts and tribunals.¹⁹⁹ Such objections are based on the right of the accused to be informed of the case against him or her.²⁰⁰ The ICTY, ICTR, SCSL and STL statutes

¹⁹⁶ See Friman et al., *Charges*, *supra* note 5, at 383.

¹⁹⁷ See, e.g., Jordash & Martin, *supra* note 97, at 588; Friman et al., *Charges*, *supra* note 5, at 454.

¹⁹⁸ Friman et al., *Charges*, *supra* note 5, at 436–37.

¹⁹⁹ ICTY Statute, art. 21(4)(a).

²⁰⁰ *Id.*

all follow the major international human rights instruments—the ICC and ECCC do as well, but use slightly different language—in guaranteeing that an accused will “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.”²⁰¹ The nature of the charge translates as the legal qualification and the cause of the charge as the underlying material facts,²⁰² both of which the accused must be made aware of.²⁰³ It has been observed by the European Court of Human Rights that “in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.”²⁰⁴ The accused’s right to be informed, or in other words, to be put on notice enables preparing an effective defense, which is the touchstone criterion in relation to sufficient specificity of charges.²⁰⁵ Moreover, it relates closely to the right to have adequate time and facilities for the preparation of the defense, and already encompasses the right to have information translated into a language the accused understands. Obviously, an effective defense starts with knowing in detail what one is being accused of, and consequently, these rights also apply to any amendments to charges.²⁰⁶

Because the ultimate objective of these fair trial provisions is allowing an effective defense, which is a notoriously subjective notion, the assessment whether an accused has received sufficient notice is inherently one that must be conducted on a case-by-case basis. Allowing special features to be taken into consideration in this respect does not deviate from international human rights standards per se.²⁰⁷ As previously noted, the *Kupreškić* AC held that the massive scale of international crimes might justify a lower degree of specificity, which in and of itself is not unreasonable. However, especially in the early days of the ad hoc Tribunals, it opened the door to using this claim of “uniqueness” as an excuse for “loose drafting, less particularization, and less rigorous

²⁰¹ *Id.*; ICTR Statute, art. 20(4)(a); SCSL Statute, art. 17(4)(a); STL Statute, art. 16(4)(a). See also Rome Statute, art. 67(1)(a); ECCC Internal Rules, *supra* note 50, r.21(1)(d).

²⁰² See, e.g., Ntagerura Trial Judgment, *supra* note 62, ¶ 29.

²⁰³ See *Pélissier & Sassi v. France*, App. No. 25444/94, Eur. Ct. H.R. (1999), ¶ 52.

²⁰⁴ *Id.*

²⁰⁵ See *Blaškić* Defects Decision, *supra* note 58, ¶ 32. See also Wayne Jordash & John Coughlan, *The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy*, in *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* 286, 289 (Shane Darcy & Joseph Powderly eds., 2010).

²⁰⁶ See, e.g., *Mattoccia v. Italy*, App. No. 23969/94, Eur. Ct. H.R. (2000), ¶¶ 59–61.

²⁰⁷ See, e.g., *Fox, Campbell & Hartley v. United Kingdom*, App. No. 12244/86; 12245/86; 12383/86, Eur. Ct. H.R. (1990), ¶ 40 (observing that “[w]hether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.”).

scrutiny of indictments.”²⁰⁸ Fortunately, this tendency has changed, and recent case law at the ICTY and ICTR shows adequate charging standards consistent with international human rights law.²⁰⁹ At the ICC, the practice of the ICTY and ICTR is largely followed, too.²¹⁰ The SCSL’s practice remained problematic though. Commentators have noted that the concise charging instrument supplemented with a case summary fell short of international standards.²¹¹

The idea that the nature of international crimes leaves prosecutors with unparalleled challenges has at times inspired a search for creative solutions outside of indictment requirements. For instance, in *Ntakirutimana* at the ICTR, the Trial Chamber allowed indictment defects to be cured through disclosure of evidence, holding that it depends on the circumstances of the case and as long as this is done before the commencement of trial. To be more specific, one of the indictments was found to lack specificity, but the pre-trial brief included eighty witness statements of the witnesses who would be called to testify at trial. This additional information was submitted one month before trial, and the Chamber held that this was most indicative of the material facts of the case.²¹² Thus, where there had been sufficient notice to the accused through pre-trial disclosure of evidence, charges were not dismissed. This is controversial. In another case, a different ICTR Trial Chamber refused to allow other submitted information to so easily cure defects in the indictment: it held that all material facts must be properly pleaded in the indictment and pre-trial submissions and disclosure are not adequate substitutes.²¹³ If a paragraph in the indictment is indeed defective, the Chamber continued, it could be disregarded.²¹⁴ This does not mean, however, that the Chamber cannot take the evidence supporting said paragraph into consideration.²¹⁵ Moreover, referring to *Kupreškić*, the Chamber noted it “might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the

²⁰⁸ Jordash & Coughlan, *supra* note 205, at 289.

²⁰⁹ See Friman et al., *Charges*, *supra* note 5, at 456.

²¹⁰ See *supra* Part III.

²¹¹ See, e.g., Jordash & Martin, *supra* note 97; Friman et al., *Charges*, *supra* note 5, at 456.

²¹² See Prosecutor v. Ntakirutimana & Ntakirutimana, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶ 63 (Feb. 21, 2003), <http://www.unictr.org/Portals/0/Case/English/Elizaphan/index.pdf>. The judgment and sentence were upheld on appeal. However, some factual finding by the Trial Chamber were quashed because they were not in the indictment, making it defective, and this was not remedied for the facts were not specified in the Pre-Trial brief or witness statements. See *Ntakirutimana Appeal Judgment*, *supra* note 65, ¶¶ 86, 99, 289, 555.

²¹³ See *Ntagerura Trial Judgment*, *supra* note 62, ¶ 66.

²¹⁴ *Id.* ¶ 67.

²¹⁵ *Id.*

accused.”²¹⁶ In other words, in exceptional instances solutions may indeed be found through other avenues as long as a balance is struck. Underscoring the case-by-case nature of the assessment, it held that “[i]f strong evidence of guilt is found to exist, the Chamber will take into consideration to what extent the lack of notice and the ambiguity influenced the evidence and will adjust its findings if necessary.”²¹⁷

The right to be put on notice and its attached rights relate primarily to the charging instrument, which should contain all the material facts. However, at the ad hoc Tribunals, a narrow exception exists that allows disclosed evidence or other information (such as a pre-trial brief) to have a curing effect on an otherwise defective indictment (*i.e.*, one that lacks specificity). This exception can only be allowed when the accused is given “timely, clear and consistent information detailing the factual basis underpinning the charges.”²¹⁸ This exception is far from ideal and should be avoided whenever possible. It is highly problematic to require from the defense that it sift through large amounts of disclosures in order to ascertain which facts may underpin the charges, especially when such information is not made available until the eve of trial.²¹⁹ Moreover, “in light of the factual and legal complexities normally associated with [international] crimes” the number of cases in which indictment defects may be cured through such means is extremely limited.²²⁰

Until recently, it was not clear whether the ICC allowed a curing effect by other documents in the same way as at the ad hoc Tribunals.²²¹ Commentators even thought the ICC’s Approach might turn out to be stricter.²²² As a general rule, the DCC must be read in conjunction with the prosecution’s list of evidence.²²³ This means that when items on this list can remedy a certain amount of ambiguity in the DCC, a defense’s claim that the DCC is too vague has no merit.²²⁴ Both documents are provided simultaneously, which arguably, makes it rather unproblematic if the list can remedy a certain degree of vagueness. However, in the *Lubanga* Appeal Judgment, the Appeals Chamber seemed to have opened the door to a worrisome practice. It reiterated the importance of the prosecution’s list of evidence in remedying vagueness of charges, but

²¹⁶ *Id.* ¶ 68 (citing Kupreškić Appeal Judgment, *supra* note 61, ¶ 125).

²¹⁷ *Id.*

²¹⁸ Kupreškić Appeal Judgment, *supra* note 61, ¶ 114. See also Blaškić Appeal Judgment, *supra* note 72, ¶ 237; *Fofana & Kondewa*, AC, SCSL, May 28, 2008, ¶ 443; Ntakirutimana Appeal Judgment, *supra* note 65, ¶ 125.

²¹⁹ See Ntagerura Trial Judgment, *supra* note 62, ¶ 66.

²²⁰ See Kupreškić Appeal Judgment, *supra* note 61, ¶ 114.

²²¹ Cf. Bemba Confirmation Decision, *supra* note 118, ¶ 207. See also Friman et al., Charges, *supra* note 5, at 423.

²²² See Friman et al., Charges, *supra* note 5, at 423.

²²³ See Bemba Confirmation Decision, *supra* note 118, ¶ 150.

²²⁴ See Katanga & Ngudjolo Decision on Defences’ Motions, *supra* note 110, ¶ 25.

added “other auxiliary documents” to the list of possible curing items.²²⁵ It found that “all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges.”²²⁶ The Appeals Chamber then continued by adding a couple of conditions, namely: (i) this relates only to information made available before the start of the trial hearings,²²⁷ and (ii) “where submissions by the Prosecutor made in advance of the trial hearings related to the factual allegations provide additional detail, this can be taken into account when determining whether the accused’s right to be information in detail of the charges has been violated.”²²⁸ In the case at hand, the Appeals Chamber referred, in addition to the DCC, to the Amended DCC and the Summary of Evidence,²²⁹ but this second prerequisite theoretically adds a very wide range of documents capable of curing defective indictments.

B. *Ne bis in idem*

An often neglected yet related issue in relation to the importance of indictment specificity is the protection against double jeopardy. In common law, preventing multiple jeopardy for the same crime, also known as the *ne bis in idem* principle, is a function of indictments given substantial attention. In *Hagner*, the U.S. Supreme Court observed that:

[t]he true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged “and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.”²³⁰

Protection against double jeopardy may be regarded as the basis of the prerequisite that the pleading sets forth the essential elements of the crime, and that it provide sufficient specificity as to the underlying facts.²³¹ It is a principle found in nearly every system—national, regional and international—in the world.²³² *Ne bis in idem* literally means “not

²²⁵ See Lubanga Appeal Judgment, *supra* note 111, ¶ 124.

²²⁶ *Id.* ¶ 128.

²²⁷ *Id.* ¶ 129.

²²⁸ *Id.* ¶ 130.

²²⁹ *Id.* ¶ 132.

²³⁰ *Hagner v. United States*, 285 U.S. 427, 431 (1932).

²³¹ See WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 915–16 (5th ed 2009).

²³² See Friman et al., *Charges*, *supra* note 5, at 471–77, 482.

twice for the same.” The principle’s details vary per system, but in most national systems “the same” entails a factual approach (the historical facts and conduct) as opposed to a legal approach (a particular criminal offense, which offers narrower protection).²³³

Due to the relationship international criminal courts and tribunals have with states, double jeopardy plays a role in different ways that are “trans-jurisdictional” or “transnational,”²³⁴ and which may be characterized as downward and upward vertical *ne bis in idem* (i.e., externally between national and international systems), as opposed to horizontal (i.e., internally within one national or international system). As Article 10 of the ICTY Statute and Article 9 of the ICTR Statute say: “no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.”²³⁵ Such downward vertical double jeopardy protection is absolute. While some commentators have suggested it is not clear whether it entails a factual or a legal approach, most seem to agree that *idem* is to be understood as ‘same offense,’ making it a legal approach.²³⁶ Upward vertical double jeopardy protection is not absolute. The ICTY, ICTR and SCSL may try a person already tried by a national court (1) in case the person was tried for an act characterized as an ordinary crime, or (2) when the national proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.²³⁷ Only the second exception applies to the STL.²³⁸ The ordinary crime exception with upward *ne bis in idem* underscores that the conduct’s legal qualification is indeed relevant, making it a legal approach. The statutes of the ad hoc Tribunals do not include horizontal *ne bis in idem* provisions, probably because the drafters found the occurrence of a retrial at the same tribunal very unlikely.²³⁹

At the ICC, the *ne bis in idem* provision in Article 20 of the Statute

²³³ *Id.* at 475–76. See generally Gerard Conway, *Ne Bis In Idem in International Law*, 3 INT’L CRIM. L. REV. 217 (2003); WIENE FRANCINE VAN HATTUM, *NON BIS IN IDEM : DE ONTWIKKELING VAN EEN BEGINSEL* (2012).

²³⁴ Friman et al., *Charges*, *supra* note 5, at 482.

²³⁵ The statutes of the SCSL and STL only prohibit Sierra Leonean and Lebanese courts from trying persons already tried by these international tribunals, because their founding agreements do not bind other states than Sierra Leone and Lebanon. See SCSL Statute, art. 9(1), STL Statute, art. 5(1). See also Sarah M.H. Nouwen & Dustin A. Lewis, *Jurisdictional Arrangements and International Criminal Procedure*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 116, 121 (Göran Sluiter et al. eds., 2013).

²³⁶ See Friman et al., *Charges*, *supra* note 5, at 440.

²³⁷ See ICTY Statute, art. 10(2)(a)–(b); ICTR Statute, art. 9(2)(a)–(b); SCSL Statute, art. 9(2)(a)–(b). See also ICTY/R RPEs, r.13.

²³⁸ See STL Statute, art. 5(2).

²³⁹ See Friman et al., *Charges*, *supra* note 5, at 439.

must be read in light of the principle of complementarity. Pursuant to Article 20(3), which mirrors Article 17 of the ICC Statute that deals with admissibility of cases and provides the division of labor between the ICC and national jurisdictions, no person who has been tried by another court for conduct also proscribed under Articles 6, 7, or 8 shall be tried by the ICC with respect to the same conduct unless the proceedings in the other court were (1) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (2) otherwise not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.²⁴⁰ This upward vertical *ne bis in idem* entails a factual approach, which means that it does not matter whether the national court qualified the conduct as an ordinary crime or not. In other words, the ICC Statute, like the STL Statute, does not contain the “ordinary crime” exception like the statutes of the other Tribunals do.²⁴¹ The downward vertical *ne bis in idem* specified in Article 20(2) entails a legal approach, though, which means that national courts are free to try crimes outside the jurisdiction of the ICC. Another difference with the ad hoc Tribunals is that the ICC includes an internal, horizontal *ne bis in idem* provision in Article 20(1), which employs a factual approach.²⁴²

The *ne bis in idem* principle expresses “the uniqueness of the criminal trial.”²⁴³ The principle’s inclusion here is necessary, because—similar to the right to prepare an effective defense—it is a tool that helps determine how specific a case must be delineated. This is especially so when a factual approach to double jeopardy is applicable. While offering more protection than the legal approach, the factual approach “typically encounters significant problems in determining the precise limits of the object of a trial.”²⁴⁴ This provides all the more reason to be as specific as possible from the beginning. When drafting indictments, a useful hypothetical question would be how it would stand under the *ne bis in idem* principle test. If repeated charges are easily conceivable, the indictment is too vague under the specificity of charges principle.

²⁴⁰ See Rome Statute, art. 20(3).

²⁴¹ Cf. *id.* (“with respect to the same conduct”). See also Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Case No. ICC-01/11-01/11-344-Red, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ¶ 86 (May 31, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>.

²⁴² See generally Friman et al., *Charges*, *supra* note 5, at 442–45.

²⁴³ *Id.* at 436.

²⁴⁴ *Id.* at 476.

V. CONCLUSION

Throughout the history of international criminal courts and (military) tribunals, the complex nature of international crimes has been stated as reason to forgive lowering standards of specificity of charges. From the Control Council Law No. 10 *Justice* judgment to contemporary ICTY, ICTR, SCSL, and ICC decisions, judges have expressed the idea that with crimes of “cataclysmic dimensions”²⁴⁵ the prosecution “cannot be obliged to perform the impossible,”²⁴⁶ and requiring a high degree of indictment specificity is “impracticable.”²⁴⁷ Indeed, the factual parameters of international crime cases are not easily set, and a prosecutor’s perspective in this is easily sympathized with. The challenges are undoubtedly tremendous. In practice, however, this has led to vague indictments. This is not only due to a lack of factual specificity. It is also caused by evidentiary imprecision—conflating material facts and subsidiary/evidentiary facts on the one hand, and facts and (pattern) evidence on the other.

While allowing exceptions to specificity based on international crimes’ uniqueness is most certainly not without merit, it finds its limit in the 10 general pleading principles and related fair trial rights discussed in this Article. Accordingly, the effect of international crimes’ massive scale on their prosecution should be left to a minimum. This corresponds with how case law developed over the past two decades. While the early post-World War II judgments showed much more leniency in respect of scale-related prosecutorial challenges, the contemporary cases have been faced with much higher demands. The argument that the nature of international crimes pardons a lower degree of specificity of charges has slowly been losing ground, and the “unique nature” argument therefore no longer carries as far as it once did.

The rights of the accused comprise the normative boundaries of how unspecific charges are allowed to be and how much confusion of facts and evidence is remediable fairly. They form a two-prong test in this respect: (1) is the accused in a position to prepare an effective defense, and (2) can a double jeopardy assessment be made? These two questions are to be kept in mind when applying the 10 pleading principles as well as when making a distinction between different types of facts evidence, for tolerating erosion of the rights of the accused in deference of perceived challenges is not the way to go. If something needs to give due to the challenging nature of the crime, it should not be the rights of the accused. Rather, answers should be sought in prosecutorial methods of framing the case, which goes back to the investigation stage of the

²⁴⁵ Sesay Indictment Decision, *supra* note 70, ¶ 23.

²⁴⁶ Brđanin & Talić Decision on Objections by Talić, *supra* note 62, ¶ 22.

²⁴⁷ Kupreškić Appeal Judgment, *supra* note 61, ¶ 89.

proceedings.

Admittedly, international crimes' complexities and associated evidentiary challenges, as described by, amongst others, Nancy Combs in her book *Fact-Finding without Facts*,²⁴⁸ lead to unparalleled fact-finding impediments. There is indeed a certain amount of uniqueness to proving international crimes, but where fact-finding becomes so challenging that it lacks adequate precision, this will be reflected in the indictment and throughout the presentation of evidence during trial. This in turn affects the rights of the accused to be sufficiently informed of the charges. In other words, a well-defined indictment must be preceded by precise fact-finding; if the latter lacks accuracy, the charging document will inevitably be vague, too. The link between available evidence through adequate fact-finding and indictment specificity was already illustrated very early on by *Einsatzgruppen*.²⁴⁹ The *Einsatzgruppen* indictment had reached its high level of specificity because most of the evidence came from elaborate previous testimony by defendant Otto Ohlendorf in the IMT trial where he had testified as a witness.

International crime cases still suffer from vague charges and imprecise categorization of facts and evidence too often, resulting in ambiguous case demarcation to the detriment of the accused. This unwanted result is usually approached from the perspective of specificity of charges, which indeed sets the factual and legal boundaries of a case at trial and puts the accused on notice. An understudied topic thus far, however, has been the use of facts and evidence in this respect. This Article has shown that all parties, but most importantly prosecutors and judges, need to be much clearer and more explicit in how they use and characterize different types facts, pattern evidence, and evidence of similar conduct. While seemingly simple in theory, such distinctions are notoriously complicated to make in practice. This kind of confusion not only hurts the prosecution, but also violates the rights of the accused as it renders the question of what it is we are trying to prove without a straightforward answer.

²⁴⁸ See generally NANCY A. COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010).

²⁴⁹ See *supra* Part II.A.