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The Use of Sealed Indictments in International Law and the Issuance of Sealed Indictments Ex Parte. Specifically addressing the case law of the international tribunals as it pertains to sealed indictments. Also, Whether it is legally possible to issue sealed indictments Ex Parte.

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MEMORANDUM FOR THE SPECIAL TRIBUNAL FOR LEBANON

ISSUE: THE USE OF SEALED INDICTMENTS IN INTERNATIONAL LAW AND THE ISSUANCE OF SEALED INDICTMENTS *EX PARTE*.

SPECIFICALLY ADDRESSING THE CASE LAW OF THE INTERNATIONAL TRIBUNALS AS IT PERTAINS TO SEALED INDICTMENTS. ALSO, WHETHER IT IS LEGALLY POSSIBLE TO ISSUE SEALED INDICTMENTS *EX PARTE*.

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I. Introduction

A. *Scope*

This memorandum discusses the use of sealed indictments by the international criminal tribunals.[*] Specifically, this memorandum discusses the case law as it relates to the use of sealed indictments by the International Criminal Tribunal for the former Yugolsavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Court of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the International Criminal Court (ICC). In each section, this memorandum will discuess the provisions that expressly allow sealed indictments as they appear in each Tribunal's rules of procedure and evidence. Additionally, this memorandum will review cases that have utilized sealed indictments and the precedential effect these cases have in international law. Finally, this memorandum will address the issue of whether it is legally possible to file and confirm a sealed indictment in *ex parte* proceedings.

B. *Summary of Conclusions*

The ICTY and the ICTR expressly allow the use of sealed indictments evidenced by non-disclosure provisions enumerated in their rules of procedure and evidence. The SCSL also has similar provisions in their rules of procedure and evidence; however, its case law in regards to the use of sealed indictments is not as prevalent as the ICTY and the ICTR. The rules of procedure and evidence of the STL allow the use of sealed indictments; however, the tribunal has apparently not yet employed the use of sealed indictments to date. The ECCC currently does not have any provisions that expressly allow the use of sealed indictments, nor has the tribunal

[*] What is the case law of the international tribunals as it pertains to sealed indictments? Is it legally possible to issue and confirm sealed indictments *ex parte*?

issued any indictments under seal thus far. Finally, although the ICC does not use sealed indictments, it utilizes similar methods, such as sealed arrest warrants and summons to appear, to hail unknowing defendants into its court. In each of the cases reviewed, the various Trial Chambers offer little reasoning for their ordering of sealed indictments, but the repetitive use of the procedure in international law is evidence that the international law community openly accepts sealed indictments.

This memorandum also concludes that it is possible to issue sealed indictments in *ex parte* proceedings for both implicit and explicit reasons. First, it is implied that one can legally issue and confirm sealed indictments in *ex parte* proceedings. If it was not, then the accused's presence would be required during the proceeding (making it a non-*ex parte* proceeding), which would defeat the need for a sealed indictment. It is possible that a tribunal may appoint a public defender to represent the interests of the accused (in accordance with the respective tribunal's rules of procedure and evidence) making the proceeding non-*ex parte*; however, this option does not seem feasible as the rules and procedure of many tribunals provide that counsel will only be assigned to persons "detained under the authority of the tribunal."[1] Since sealed indictments are needed for the accused at large, it is unlikely the tribunal would appoint a public defender to represent the absent accused's interests. Further, no tribunal has utilized this tactic to date. Therefore, for the reasons stated above, sealed indictments are implicitly allowed under international law.

Second, sealed indictments are also explicitly accepted by the international criminal tribunals. As discussed below, Prosecutor's motions for sealed indictments are always made *ex*

[1] *See e.g.*, Rule 53, 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, Rules of Procedure and Evidence (hereinafter "ICTY RPE") (2009). [Reproduced in accompanying notebook at tab 3].

parte. Also, as illustrated, the Tribunal's rarely deny these motions made by the Prosecutor. Therefore, the actions by the Prosecutors and acceptance of these motions by the Tribunal demonstrate that it is legally possible to issue sealed indictments *ex parte*.

II. Factual Background

A sealed indictment is an indictment that is not made public until moments before the indictee is taken into custody.[2] Although some consider this practice unfair, David Crane, the former Chief Prosecutor at the Special Court for Sierra Leone, believes that "sealed indictments [are] instruments in shattering a suspect's sense of security."[3]

Sealed indictments first developed at the ICTY and ICTR. At the ICTY, an early obstacle was making arrests.[4] Richard Goldstone, the first Chief Prosecutor at the ICTY had initially issued more than seventy indictments.[5] However, out of these seventy public indictments, only a handful of low-level defendants had been apprehended.[6] After Goldstone's departure, Louise Arbour, a former Canadian Justice took over as Chief Prosecutor at the ICTY.[7] Arbour felt that a main priority of the ICTY should be bringing higher level defendants to The Hague for trial.[8] To accomplish this, she adopted a "sealed indictment" strategy.[9] This strategy

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[2] Tim Curry, *Review of Conference: International Criminal Tribunals in the 21st Century*, 13 No. 1 HUM. RTS. BRIEF 6, 9 (2005). [Reproduced in accompanying notebook at tab 60].

[3] *Id*.

[4] Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 3 HOFSTRA L. & POL'Y SYMP. 37, 38 (1999). [Reproduced in accompanying notebook at tab 57].

[5] John Hagan, et al., *Swaying the Hand of Injsutice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia*, 31 LAW AND SOCIAL INQUIRY 585, 596 (2006). [Reproduced in accompanying notebook at tab 56].

[6] *Id*.

[7] *Id*.

[8] *Id*.

received the approval of United States Secretary of State Madeline Albright and was deemed a success by the ICTY and its investigative staff.[10] Accordingly, sealed indictments were adopted for their ability to prevent the accused from fleeing before authorities had a chance to bring him into custody.

The sealed indictment strategy was first utilized against the Croatian Serb Mayor of Vukovar, Slavko Dokmanovic, who was charged with war crimes.[11] At least one commentator suggests that the success of this arrest was predicated on "the element of surprise and vulnerability preserved by sealing the…indictment and using the element of secrecy to lure [Dokmanovic] back from his home in Serbia with a false promise that he could negotiate the sale of property he owned…."[12]

From the Dokmanovic case, sealed indictments have flourished in the international tribunals as they have provided the prosecution with a solution to the operational difficulties of arresting publicly indicted accused.[13]

Currently, there are no instruments that expressly condone or prohibit the use of sealed indictments in international law.[14] In fact, it is clear from a review of the rules of procedure and

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[9] *Id*. at 596-597.

[10] *Id*. at 597.

[11] *Id.*

[12] *Id.*

[13] Louise Arbour, *Symposium on 'The ICTY 10 Years on: The View from the Inside',* 2 J. INT'L CRIM. JUST. 396, 397 (2004). [Reproduced in accompanying notebook at tab 58].

[14] Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did they Provide an Outline for International Legal Procedure?,* 37 COLUM. J. TRANSNAT'L L. 851, 882 (1999). [Reproduced in accompanying notebook at tab 55].

evidence of the international tribunals, and their relevant case law, that sealed indictments are an acceptable means to capture accused suspects in international law.

III. The case law of the Criminal Tribunals

A. *The International Criminal Tribunal for the Former Yugoslavia*

The ICTY adopted the approach of requesting orders for non-disclosure due to the noncooperation of states in executing arrest warrants issued by the tribunal.[15] Today, the Rules of Procedure and Evidence of the ICTY expressly allow the issuance of sealed indictments. Specifically, Rule 53, the Non-Disclosure rule, which was adopted in April 1994, as part of the ICTY's Rules of Procedure and Evidence, states:

> (A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the nondisclosure to the public of any documents or information until further order.
>
> (B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.
>
> (C) A Judge of Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document of information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.
>
> (D) Notwithstanding paragraphs (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an opportunity for securing the possible arrest of an accused from being lost.[16]

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[15] ACKERMAN AND O'SULLIVAN, PRACTICE AND PROCEDURE OF THE ICTY, p. 275 (2000). [Reproduced in accompanying notebook at tab 49].

[16] Rule 53, ICTY RPE (2009).

As mentioned above, Chief Prosecutor Arbour was the first to utilize this provision and employ a strategy of using sealed indictments to capture high level individuals.

The first case that illustrates the use of sealed indictments in the ICTY is *Prosecutor v. Dokmanović*. Slavko Dokmanović was indicted under seal on March 26, 1996, along with three others, for the mass killing of 260 non-serb men who were removed from Vukovar Hospital in Croatia.[17] Among other things, Dokmanović was charged with crimes against humanity and grave breaches of the Geneva Conventions.[18] The indictment was confirmed *ex parte* by Judge Fouad Riad.[19] A few days later, in an *ex parte* proceeding on April 3, 1996, Judge Riad ordered the non-disclosure of the indictment.[20] The effectiveness of non-disclosure was proven on June 27, 1997 when Dokmanović was arrested by ICTY investigators in Eastern Salvonia.[21] That same day, Judge Riad issued a verbal order, later confirmed in writing, which lifted the non-disclosure of the indictment on account that Dokmanović had been arrested and transferred to The Hague.[22] Since this was the first time sealed indictments were used, challenges to the new process were inevitable.

[17] Indictment, Prosecutor v. Dokmanovic, International Criminal Tribunal for the Former Yugoslavia, IT-95-13a, April 1, 1996. [Reproduced in accompanying notebook at tab 29].

[18] *Id.*

[19] Press Release, The Hague, Apprehension and Transfer to The Hague of an Accused Under a Sealed Indictment, June 27, 1997. [Reproduced in accompanying notebook at tab 62].

[20] Order lifting the Non-Disclosure Order of April 3 1996, The Prosecutor v. Slavko Domanovic, July 1, 1997. [Reproduced in accompanying notebook at tab 36].

[21] *Id.*

[22] *Id.*

At an oral hearing on September 8, 1997 Dokmanović claimed "that his arrest amounted to a kidnapping."[23] However, the Trial Chamber rendered a decision confirming that Rule 53 (of the ICTY Rules of Procedure and Evidence) is in clear and absolute terms and the non-disclosure of an indictment "did not violate principles of international law."[24] The decision of the Trial Chamber both upheld the use of sealed indictments at the ICTY and reinforced Rule 53 of the ICTY's Rules of Procedure and Evidence, thus paving the way for the use of sealed indictments in future proceedings.

The second case in which the Prosecutor sought a sealed indictment involved Slobodan Milosevic. In Milosevic's proceedings, the ICTY gave the first insight as to what satisfies the threshold set forth in Rule 53 of the ICTY's Rules of Procedure and Evidence to warrant non-disclosure. Milosevic was charged with crimes against humanity involving persecution, deportation and murder.[25] Pursuant to rule 53 of the ICTY's Rules of Procedure and Evidence, the Prosecutor requested the non-disclosure of "the indictment, the accompanying material and the confirmation materials."[26] In addressing the request of the prosecutor, the tribunal recognized that Rule 53 empowers Tribunal "to make an order for non-disclosure …where there are exceptional circumstances and where it is in the interests of justice that the order be made."[27]

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[23] Brian Tittemore, News from the International War Crime Tribunals *available at http://www.wcl.american.edu/hrbrief/v5i1/html/warcrime.html* (1997). [reproduced in accompanying notebook at Tab 64].

[24]Press Release, The Hague, Trial Chamber Denies the Motion for Releae by the Accused, CC/PIO/251-E, October 27, 1997. [Reproduced in accompanying notebook at tab 63].

[25] Decision on Review of Indictment and Application for Consequential Orders, Prosecutor v. Milosevic, 1999 WL 33483320, ¶ 1 (1999). [Reproduced in accompanying notebook at tab 25].

[26] *Id.* at ¶ 30.

[27] *Id.*

In granting the non-disclosure request, Judge David Hunt accepted several assertions by the prosecution. First, the Judge cited the accused's high position of power within the Federal Republic of Yugoslavia and the Republic of Serbia.[28] Judge Hunt felt that Milosevic's position allowed him to exercise power over "their territories and their resources, with all the apparatus of State at their disposal."[29] Second, the Judge recognized that the acused's reaction to the indictment would be unpredictable.[30] Finally, the Judge stated that the Prosecutor's staff and other persons within the Federal Republic of Yugoslavia would be at the risk of "reprisals and intimidation" because of the accused's exercise of power in the area.[31] For the above reasons, the tribunal approved the non-disclosure of the indictment, indicating that doing so would both minimize the risk of "reprisals and intimidation," as well as reduce the security risks for all.[32]

The tribunal's decision provides the first glimpse of a potential threshold to determine what is sufficient to issue a sealed indictment. More importantly, as the second major decision upholding a sealed indictment, the case reinforces the notion that sealed indictments are accepted at the ICTY.

The following year, the tribunal issued another sealed indictment for the capture of Radoslav Brdanin and Momir Talic. The two were charged in a sealed indictment that alleged the accused committed crimes against humanity.[33]

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[28] *Id*. at ¶ 32.

[29] *Id*.

[30] *Id*.

[31] *Id*. at ¶¶ 32-33.

[32] *Id*.

[33] Decision on Motions by Momir Talic (1) To Dismiss the Indictment, (2) For Release, And (3) For Leave to Reply to Response of Prosecution to Motion For Release, Prosecutor v. Brdanin & Talic, 2000 WL 33705581, ¶ 2 (2000). [Reproduced in accompanying notebook at tab 20]

Talic was arrested by plainclothes police officers while attending a conference at the National Defense Academy.[34] The secret nature of the arrest prompted angry reactions from Bosnian officials, and some members of the conference even flew home.[35] However, as Arbour notes, the arrest was siginificant because it showed people that they are always in the international reach of justice.[36]

After a series of motions by his counsel to have his indictment dismissed for lack of jurisdiction, Brdanin moved for "provisional release pending his trial."[37] Pursuant to Rule 65(B) of the ICTY Rules of Procedure and Evidence "release may be ordered by a Trial Chamber only…if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.[38]

In analyzing its decision on whether or not to grant the release of the accused, the Tribunal addressed several contentions by the parties that were both in support of, and against, the release or Brdanin. Specifically, in addressing the pertinent factors, the Tribunal stated that "where an accused person has voluntarily surrendered to the Tribunal…considerable weight is often given to that fact in determining whether the accused will appear at his trial."[39] However, as the Tribunal recognized in this case, since Brdanin was arrested on a sealed indictment, there

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[34] Marlise Simons, *Top Bosnian Serb Officer Arrested for U.N. Tribunal*, N.Y. TIMES, August 26, 1999 at A10. [Reproduced at accompanying notebook at tab 59]

[35] *Id.*

[36] *Id.*

[37] Decision on Motion By Radoslav Brdanin For Provisional Release, Prosecutor v. Brdanin & Talic, 2000 WL 33705586, ¶ 1, July 25, 2000. [Reproduced in accompanying notebook at tab 21]

[38] ICTY RPE, Rule 65(B) (2009). [Reproduced in accompanying notebook at tab 3]

[39] Decision on Motion By Radoslav Brdanin For Provisional Release, at ¶ 17.

is no evidence that he knew of the indictment's existence.[40] Because of this, the Trial Chamber decided that "absent specific evidence directed to that issue, the Trial Chamber cannot take the fact that the applicant did not voluntarily surrender into account."[41]

The discussion of surrender as a mitigating factor in the Brdanin decision demonstrates that sealed indictments prevent the Prosecutor may not assert that the accused refused to surrender voluntarily, as the accused is not given the chance. However, the decision also prevents the accused from asserting his surrender as a mitigating for himself. Although possibly controversial, the Tribunal's acceptance of sealed indictments in relation to Brdanin and Talic echoes the notion that sealed indictments an accepted form of practice at the ICTY.

Another notable case in which the ICTY issued a sealed indictment involved Radovan Karadzic. On May 31, 2000 Judge Patricia Wald issued and confirmed the amended sealed indictment of the Prosecutor (in an *ex parte* proceeding) agreeing that "the consolidated amended indictment will expedite the proceedings, should [Karadzic] be arrested."[42] The indictment was later unsealed on October 11, 2002 by Judge Gunawardana.[43]

The Karadzic case seems to be the most recent use of sealed indictments at the ICTY; however, the secret nature of sealed indictments makes it almost impossible to determine whether any additional sealed indictments currently exist at the ICTY. Unless all of the sealed indictments are unsealed, we will not have a definite answer as to how many were executed at the ICTY. However, the prevalent use of sealed indictments at the ICTY shows that sealed

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[40] *Id.*

[41] *Id.*

[42] Press Release, The Hauge, JL/PIS/703-e, October 14, 2002. [Reproduced in accompanying notebook at tab 61]

[43] *Id.*

indictments are both continuously accepted by the Tribunal and are repeatedly utilized to bring high profile suspects to The Hague.

B. The International Criminal Tribunal for Rwanda

The Rules of Procedure of the ICTR contain a similar rule to that of the ICTY relating to sealed indictments. When originally adopted, Rule 53(B) of the Rules of Procedure and Evidence provided:

> A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any pan [sic] of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.[44]

However this rule was amended and, today, Rule 53(B) of the ICTR mirrors that of the ICTY to generally provide that there may be non-disclosure of an issued indictment in, among other things, the interests of justice.[45] Like the ICTY, the ICTR has utilized Rule 53(B) in its case law to bring accused individuals to trial.

The case of *Prosecutor v. Muvunyi* exemplifies additional powers that the Tribunal defers to the Prosecutor. Tharcisse Muvunyi was indicted for genocide, and in the alternative, complicity in genocide and crimes against humanity in his capacity as Commander of the *Ecole Sous Officers*.[46] Although the Trial Chamber confirmed the non-disclosure of the indictment on

[44] ICTR, Rules of Procedure and Evidence, Rule 53(B)(June 29, 1995). [Reproduced in accompanying notebook at tab 6].

[45] ICTR, Rules of Procedure and Evidence, Rule 53(B)(February 9, 2010). [Reproduced in accompanying notebook at tab 5].

[46] Indictment, Prosecutor v. Muvunyi, ICTR-2000-55A-I, December 23, 2003. [Reproduced in accompanying notebook at tab 30].

February 2, 2000, the Prosecutor later submitted a request to disclose the indictment.[47] The Prosecutor felt that the Non-Disclosure Order no longer served to protect confidential information or the interests of justice.[48] Further, the Prosecutor felt that non-disclosure of the indictment might actually impair the possibility of receiving assistance to arrest the accused.[49]

The case of Muvunyi illustrates that the Prosecutor ahs the power to both request disclosure of an indictment, in addition to non-disclosure of an indictment. This principle laid was most recently confirmed in *Prosecutor v. Ntawukuriryayo* where the Trial Chamber granted the Prosecutor's motion to unseal an indictment on the grounds that the interests of justice are not served by keeping the information from the public.[50] Finally, the *Muvunyi* case reinforces the notion that the Tribunal will offer little resistance when granting a Prosecutor's request for non-disclosure.

The ICTY continued its use of sealed indictments in March of 2001 when the Prosecutor sought nondisclosure of the indictment for Samual Musabyimana.[51] The indictment charges Musabyimana with genocide, or alternatively complicity in genocide, conspiracy to commit genocide and crimes against humanity for extermination.[52] Specifically, the Prosecutor

[47] Decision on the Prosecutor's Motion to Rescind Non-Disclosure Order of 2 February 2000, Prosecutor v. Muvunyi, ICTR-2000-55-I, February 6, 2001. [Reproduced in accompanying notebook at tab 23].

[48] *Id.*

[49] *Id.*

[50] Decision on Prosecutor's Motion to Unseal the Indictment and Warrant of Arrest, Prosecutor v. Ntawukuriryayo, ICTR-2008-82-I, April 27, 2007. [Reproduced in accompanying notebook at tab 24].

[51] Confirmation of the Indictment and Order for Non-Disclosure, Prosecutor v. Musabyimana, ICTR-2001-62-I (March 13, 2001). [Reproduced in accompanying notebook at tab 15].

[52] *Id.* at ¶ 1.

requested the non-disclosure of the indictment until it was served upon the accused.[53] The Trial Chamber granted the Prosecutor's request pursuant to Rule 53(A). In granting the request, the Tribunal stated that "the fact that the accused has not been apprehended yet constitutes an exceptional circumstance."[54] Also, the Tribunal felt that the "non-disclosure of the indictment…is necessary to facilitate the arrest and transfer of the accused and to ensure the safety of victims and witnesses."[55]

The Tribunal's reasoning in its decision to confirm the non-disclosure of the indictment in *Musabyimana* demonstrates how low of a threshold exists for the Tribunal to grant the request for nondisclosure. Making the failure of apprehension an acceptable basis for requesting non-disclosure the Tribunal inherently has granted universal acceptance of all requests for non-disclosure. Since the Prosecutor's will not make a request for a sealed indictment unless they are pursuing the accused, it seems there is no possible situation where the request for non-disclosure will not be granted by the Tribunal.

The *Musabyimana* decision also provided a limit in issuing sealed indictments. In its decision, the Tribunal denied the Prosecutor's request to issue sealed indictments against co-suspects that were not named in the original indictment in the original indictment.[56] However, this limit appears to be illusory as the Prosecutor can by-pass this imposed limitation by amending the original indictment and naming the co-suspects in the new indictment. After doing

[53] *Id*. at ¶ 3(a).

[54] *Id*. at ¶ 6.

[55] *Id*.

[56] *Id*. at ¶ 7.

so, the Prosecutor will more than likely succeed in receiving sealed indictments for the co-suspects.

In *Prosecutor v. Sagahutu*, the accused sought to sever the trial on a claim that the sealed indictment prejudiced him. Innocent Sagahutu was indicted on counts of genocide for his role as the Second-in-Command of the Reconnaissance Battalion within the Rwandan Army and as a commander of "A Company" in the Battalion.[57] Although Sagahutu's indictment was disclosed, there were joint defendants whose names were non-disclosed in the indictment. Sagahutu's counsel filed preliminary motions on June 25, 2001 in response to the indictment claiming that "that there cannot be a joint indictment between one accused whose trial has already begun and another accused whose trial has not yet commenced."[58]

After reviewing Sagahutu's request, the Chamber did not agree and denied the motion. Although the Chamber's decision lacked reasoning for the specific point, the Chamber did not feel that the absence of co-accused—whose identities were not disclosed pursuant to Rule 53 of the Rules of Procedure and Evidence when the motion was heard—is prejudicial to the defendant at this stage in the proceedings.[59]

Sagahutu illustrates that the ICTR will allow the Prosecutor to issue indictments that are sealed for some parties and unsealed for the others, thus reserving the indictments' element of surprise for those that may be more difficult to apprehend. Also, the case reiterates the leniency

[57] Indictment, Prosecutor v. Sagahutu, ICTR-00-56-I, ¶ 11, August 23, 2004. [Reproduced in accompanying notebook at tab 32].

[58] Decision on Sagahutu's Preliminary, Provisional Release and Severance Motions, Prosecutor v. Sagahutu, ICTR-00-56-T, 2002 WL 32307697, ¶¶ 1, 40 September 25, 2002. [Reproduced in accompanying notebook at tab 26].

[59] *Id*. at ¶ 40.

of the Tribunal towards the Prosecutor, and is also evidence of the tribunal's acceptance of sealed indictments.

The cases above show that the ICTR will rarely (if ever) deny a motion for an indictment to be kept under seal. By setting such a low threshold in *Musabyimana* the Tribunal indicates that apprehending an accused person is more important than accused's rights to be informed of the indictments issued against them. Also, the cases demonstrate the reluctance that the Tribunal has in denying the Prosecutor's motions for a sealed indictment, thus, giving more weight to the interests of the Prosecution outweigh as oppose to the accused. Therefore, for the reasons stated above, it is apparent that sealed indictments are accepted at the ICTR.

C. *The Special Court for Sierra Leone*

The Rules of Procedure and Evidence of the SCSL also contain provisions that allow the nondisclosure of an indictment. Rule 53(B) of the Rules of Procedure and Evidence reads: "When approving an indictment the Designated Judge may, on the application of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all of the accused."[60] Although the wordage of the rule differs from that of the ICTY and the ICTR, the substantive effect of the rule is the same. Further, like the ICTY and the ICTR, the case law below illustrates that sealed indictments are expressly allowed and used at the SCSL.

A series of indictments were issued at the SCSL on March 3, 2007 against those accused for involvement with the Revolutionary United Front (RUF)/Armed Forces Revolutionary Council (AFRC). Out of all of the accused parties at the SCSL, the indictment of Johnny Paul

[60] Special Court of Sierra Leone, Rules of Procedure and Evidence, Rule 53(B)(2010). [Reproduced in accompanying notebook at tab 7].

Koroma is the only indictment that was issue unsealed.[61] Koroma was the alleged leader of the AFRC,[62] which was founded by the members of the Armed Forces of Sierra Leone.[63] The AFRC seized power from the elected government of the Republic of Sierra Leone via coup d'état on May 25, 1997.[64] It was on this day that Koroma became the elected leader of the AFRC.[65] In this capacity, it was alleged that Koroma exercised authority, command, and control over all members of the AFRC; participated in a joint criminal enterprise; and had superior responsibility.[66] However, the indictment did not contain a request for non-disclosure because Koroma fled Freetown a couple of months before the indictment was issued.[67] In this case, although it is speculation, it is likely that the Prosecutor was hoping that the public nature of the indictment would assist in the apprehension of the accused.

An indictment was also issued for Foday Saybana Sankoh, who was a commander in the RUF, the Civil Defences Forces and the AFRC.[68] The RUF was founded in approximately 1988 or 1989 in Libya.[69] The RUF began operations in Sierra Leone in March of 1991.[70] Shortly

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[61] Indictment, Prosecutor v. Koroma, SCSL-2003-03-I, March 7, 2003. [Reproduced in accompanying notebook at tab 31].

[62] *Id*. at ¶ 18.

[63] *Id*. at ¶ 7.

[64] *Id.*

[65] *Id*.

[66] *Id*. at ¶¶ 18, 24, 27.

[67] The Special Court of Sierra Leone, Cases, The Prosecutor v. Johnny Koroma, *available at* http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx, last visited October 21, 2010. [Reproduced in accompanying notebook at tab 39].

[68] Indictment, Prosecutor v. Sankoh, SCSL-2003-02, ¶ 3, March 7, 2003. [Reproduced in accompanying notebook at tab 33].

[69] Indictment, Prosecutor v. Sesay, SCSL-2003-05-I, ¶ 4, March 7, 2003. [Reproduced in accompanying notebook at tab 34].

thereafter, at the invitation of Koroma, Sankoh ordered that the RUF and the AFRC forces unite in Sierra Leone.[71] For the acts committed while in association with these groups, the indictment charged the Sankoh with crimes against humanity, violations of the Geneva Conventions and other violations of international humanitarian law.[72] On the same day the indictment was issued, the Judge issued a decision approving the request for nondisclosure of the indictment.[73]

Another case at the Special Court involved Issa Hassan Sesay and three other former leaders of the RUF. Sesay, Sam Bockarie, and Morris Kallon were all indicted on March 7, 2003.[74] About a month later, Augustine Gbao was also indicted.[75] For efficiency, the Trial Chamber later ordered a joint trial between Sesay, Kallon and Gbao.[76]

Sesay was a senior officer and commander in the RUF/AFRC.[77] Sesay held a number of positions within the RUF/AFRC and was an immediate subordinate to Koroma and Sankoh.[78] During the period where Sankoh was incarcerated in the Republic of Sierra Leone, Sesay, by

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[70] *Id*.

[71] *Id*. at ¶ 8.

[72] *See generally* Indictment, Prosecutor v. Sankoh.

[73] Withdrawal of Indictment, Prosecutor v. Sankoh, SCSL-03-02-PT-054, December 8, 2003. [Reproduced in accompanying notebook at tab 48].

[74] The Special Court of Sierra Leone, Cases, Prosecutor v. Sesay, Kallon and Gbao *available at* http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx, last visited October 21, 2010 [Reproduced in accompanying notebook at tab 40].

[75] *Id*.

[76] *Id*. Also, the indictments against Sankoh (mentioned above) and Bockarie were withdrawn in December of 2003 after the Trial Chamber learned of the death of the two accused.

[77] Indictment, Proscutor v. Sesay, SCSL-200-305-I, at ¶ 17.

[78] *Id*. at ¶ 18.

order of Sankoh, directed all RUF activities in the Republic of Sierra Leone.[79] The indictment charged Sesay with acting in concert (in a joint criminal enterprise) with Charles Taylor, Sankoh and Koroma for unlawful killings, abductions, physical violence and sexual violence.[80] Without offering any reason, Judge Bankhole Thompson approved the indictment and ordered that it be issued under seal.[81]

That same day the Prosecution issued an indictment for Charles Taylor.[82] Taylor was accused of acing in concert with Sankoh and supporting the actions of the RUF.[83] Specifically, Taylor was charge with, among other things, abductions and forced armed labor, physical violence, sexual violence and unlawful killings.[84] The prosecutor requested that this indictment be issued under seal. On the same day, the Trial Chamber approved the indictment and confirmed that it remain under seal until further notice by the Special Court.[85]

However, at the time the indictment was issued, it was believed that Taylor had fled to neighboring Ghana.[86] Because of this belief, the Prosecutor made the indictment public on his

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[79] *Id*. at ¶ 20.

[80] *Id*. at ¶ 21-24.

[81] Decision Approving the Indictment and Order for Nondisclosure, Prosecutor v. Sesay, SCSL-03-05-I, March 7, 2003. [Reproduced in accompanying notebook at tab 17].

[82] Indictment, Prosecutor v. Taylor, SCSL-2003-01-I-001, March 7, 2003. *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=5glkIHnmPYM=&tabid=159. [Reproduced in accompanying notebook at tab 35].

[83] *Id*.

[84] *Id*.

[85] Decision Approving the Indictment and Order for Nondisclosure, Prosecutor v. Taylor, SCSL-2003-01-I, March 7, 2003. [Reproduced in accompanying notebook at tab 18].

[86] Arrest Warrant for Liberian Leader, BBC News, June 4, 2003, http://news.bbc.co.uk/2/hi/africa/2961390.stm. [Reproduced in accompanying notebook at tab 52].

own accord and called upon Gahnian authorities to arrest the accused.[87] As a result of the Prosecutor's actions, Taylor fled to Nigeria.[88] However, he was later apprehended and because of this, on March 30, 2006, the Special Court formally lifted its earlier order and disclosed the indictment to the public.[89]

The actions of the Prosecutor in the Taylor case show that, in certain circumstances, the Prosecutor may deem it necessary to bypass the court system and disclose the indictment himself. Obviously, his plan backfired as Ghanaian authorities did not arrest Taylor, thus, allowing him to flee. Although disaster was avoided in the Taylor case because he was eventually apprehended, Taylor's decision to flee shows us the impact that unsealing an indictment can have on the accused.

Alex Tamba Brima was also indicted on March 7, 2003. The indictment alleged that Brima had joined the Sierra Leon army in 1985 and rose to the rank of Staff Sergeant.[90] Brima was also a senior member of the AFRC,[91] and a member of the group that staged a coup and ousted then President Kabbah.[92] Brima was later appointed by Koroma as the Public Liaison

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[87] WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS, THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE, p. 356 (2006). [Reproduced in accompanying notebook at tab 51].

[88] The Special Court of Sierra Leone, Prosecutor v. Taylor, *available at* http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx, last visited October 21, 2010. [Reproduced in accompanying notebook at tab 41].

[89] Decision and Order for Disclosure, Prosecutor v. Taylor, SCSL-2003-01-I, March 30, 2006. [Reproduced in accompanying notebook at tab 19].

[90] Indictment, Prosecutor v. Brima, SCSL-2003-06-I, ¶ 2, March 7, 2003. [Reproduced in accompanying notebook at tab 28].

[91] *Id*. at ¶ 18.

[92] *Id*. at ¶ 19.

Officer within the AFRC and also held a position as a governing member of the Junta.[93] In early 1998, Brima was in direct command of the AFRC/RUF forces in the Kono district.[94] Additionally, Brima was in direct command of the forces that conducted operations throughout the northeastern and central areas of the Republic of Sierra Leone.[95] Finally, it was alleged that Brima was the commander of the forces that attacked Freetown in January of 1999.[96] Because of his position within the AFRC, the indictment charged Brima with joint criminal enterprise and superior responsibility.[97]

The indictment was submitted and approved on March 7, 2003 by Judge Bankhole Thompson.[98] Again, following the previous practice of the SCSL, Judge Thompson ordered that the indictment be issued under seal pursuant to Rule 53 of the Rules of Procedure and Evidence. Unfortunately, the Tribunal did not offer any reasoning for its order.[99]

Therefore, as the above illustrates, sealed indictments are accepted and used in proceedings at the SCSL.

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[93] *Id*.

[94] *Id*. at ¶ 20.

[95] *Id*.

[96] *Id*.

[97] *Id*. at ¶¶ 24-26.

[98] Decision Approving the Indictment and Order for Nondisclosure, Prosecutor v. Brima, SCSL-03-06-I-003, March 7, 2003. [Reproduced in accompanying notebook at tab 16].

[99] *Id*.

D. The Extraordinary Chambers in the Courts of Cambodia

The Internal Rules of the ECCC do not contain any provisions that pertain to the non-disclosure of indictments.[100] Also, the case law of the ECCC is not as developed as the other tribunals as the ECCC has only heard two cases thus far, with a total of five defendants.

The first case involved Guek Eav Kaing who was indicted on October 27, 2004.[101] Kaing was indicted for Crimes Against Humanity, Grave Breaches of the Geneva Conventions, Homicide and Torture.[102] Kaing was indicted for his involvement with the Khmer Rouge. Specifically, Kaing was the deputy in charge of the interrogation unit of S21, which was the headquarters of the Communist Party of Kampuchea Special Branch of the secret police.[103]

The proceedings against Kaing commenced in February 2009.[104] However, because Kaing was already in custody when he was indicted, the ECCC did not need to issue his indictment under seal.

The second case involved four other defendants. Chea Nuon, Sary Ieng, Thirith Ieng and Samphan Khieu were indicted on October 27, 2004.[105] The accused were charged with crimes

[100] Internal Rules, Extraordinary Chambers in the Court of Cambodia, September 17, 2010. [Reproduced in accompanying notebook at tab 1].

[101] Case Information Sheet, Guek Eav Kaing, 001/18-07-2007/ECCC-TC, Last updated July 2, 2010. [Reproduced in accompanying notebook at tab 10].

[102] *Id*.

[103] Closing Order indicting Kaing Guek Eav, Case 001, 001/18-07-2007-ECCC-OCIJ, August 8, 2008. Rreproduced in accompanying notebook at tab 14].

[104] *Id*.

[105] Chea Nuon, Case Information Sheet, 002/19-09-2007/ECCC-PTC, Last Updated February 3, 2010 [Reproduced in accompanying notebook at tab 9]; Sary Ieng, Case Information Sheet, 002/19-09-2007/ECCC-PTC, Last Updated February 3, 2010 [Reproduced in accompanying notebook at tab 12]; Thirith Ieng, Case Information Sheet, 002/19-09-2007/ECCC-PTC, Last Updated February 3, 2010 [Reproduced in accompanying notebook at tab 13]; Samphan Khieu, Case Information Sheet, 002/19-9-2007-ECCC-PTC, Last Updated February 3, 2010. [Reproduced in accompanying notebook at tab 11].

against humanity, grave breaches of the Geneva Conventions Genocide, Homicide, Torture and Religious Persecution.[106]

Nuon "allegedly exercised authority and…control over the internal security…of Democractic Kampuchea."[107] Further, it was alleged that Nuon "directed, implemented and enforced policies of the Communist Party of Kampucheam," which involved forcible transfers of the population, enslavement and forced labor.[108]

Sary Ieng allegedly exercised control over the Ministry in his capacity as the Minister of Foreign Affairs.[109] "He is alleged to have instigated, ordered, failed to prevent and punish, or otherwise aided and abetted…in acts characterized by murder, extermination, imprisonment, persecution on political grounds and other inhuman acts…"[110]

It was alleged that Thirith Ieng exercised authority and control over the Ministry and subordinate organs as the Minister of Social Affairs and Action for Democratic Kampuchea.[111] In this capacity, Thirith Ieng is alleged to have instigated, ordered and aided and abetted for the crimes that she was indicted for.[112]

Khieu was the Head of State (Chairman of the State of Presidium), a leader within the Centre Political Office and as a full rights member of the Central Committee of the Communist

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[106] *Id*.

[107] Chea Nuon, Case Information Sheet.

[108] *Id*.

[109] Sary Ieng, Case Information Sheet.

[110] *Id*.

[111] Thirith Ieng, Case Information Sheet.

[112] *Id*.

Party of Kampuchea.[113] He is also alleged to have instigated or aided and abetted in the commission of the crimes that he was indicted for.[114]

The ECCC does not provide any indication why it chooses not to use sealed indictments; however, it is possible to speculate some of the reasons why the procedure has not been utilized. First, the ECCC is a young tribunal compared to the others. Therefore, it may be possible that the tribunal is "testing the waters" with their current system before they incorporate new strategies in apprehending the accused. Second, neither the Tribunal's website, nor any secondary authority indicates that the ECCC is having any difficulties of bringing highly accused persons to the Chambers. Therefore, it may not be necessary to keep the indictments secret. Finally, the Tribunal may not have the resources or the necessary personnel to serve sealed indictments on the accused.

In summary, the ECCC does not provide much guidance on its position of sealed indictments. Even though sealed indictments are not used at the ECCC it does not seem that a situation has presented itself where sealed indictments are necessary. However, given the nature of sealed indictments it is almost impossible to predict whether the ECCC has issued any until they are disclosed. Whatever the case may be, it is important to remember that the ECCC has not condoned the use of sealed indictments at its own facilities or any of the other tribunals.

E. The International Criminal Court

The International Criminal Court (ICC) differs from the tribunals discussed above. First, the Court is an independent institution.[115] This means that the Court is not set up by a particular

[113] Samphan Khieu, Case Information Sheet.

[114] *Id*.

nation or Security Council, but by a multilateral treaty. Second, unlike the ICTY or the ICTR, which were tribunals created in response to a specific conflict and therefore are only temporary; the ICC is a permanent international tribunal.[116] Third, although the Prosecutor can initiate proceedings, the Prosecutor usually is responsible for receiving referrals and any substantiated information on crimes, which can be referred by State Parties or the United Nations Security Council.[117] Finally, the ICC is a court of last resort and it can not act if a case is investigated or prosecuted by a national judicial system.[118]

Because of the unique procedural aspects of the ICC, sealed indictments are not utilized at the ICC. Therefore, it follows that the Rules of Procedure and Evidence of the ICC do not expressly provide for the authorization of sealed indictments like some of the tribunals discussed above.[119] However, the ICC utilizes a "sealed" procedure in other procedural aspects of its law.

The Rome Statute provides two methods by which the Prosecutor can hail someone to the ICC. Article 58 of the Rome Statute provides that upon receiving sufficient information, the Prosecutor can request and the Pre-Trial Chamber can issue an Arrest Warrant or a Summons to

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[115] Structure of the Court, International Criminal Court *available at* http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/, last visited October 18, 2010. [Reproduced in accompanying notebook at tab 67].

[116] Frequently asked questions, The International Criminal Court, *available at* http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/, last visited October 18, 2010. [Reproduced in accompanying notebook at tab 65].

[117] *Id*.

[118] ICC at a glance, The International Criminal Court, *available at* http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/, last visited October 18, 2010. [Reproduced in accompanying notebook at tab 66].

[119] *See generally* The Rules of Procedure and Evidence, The International Criminal Court, September 10, 2002. [Reproduced in accompanying notebook at tab 4].

Appear.[120] An example of each procedure is analyzed below in a "sealed" context, demonstrating how the ICC can utilize the similar procedural aspects of its fellow tribunals, even though they may differ substantively.

The ICC has issued eleven arrest warrants that the public knows about. Of these eleven, five were originally sealed for some period of time while six were made public immediately.[121] Four of the five sealed arrest warrants actually resulted in an arrest and transfer of the accused to the ICC.[122]

Uganda was the first of three states to self refer cases from its own country to the ICC.[123] Following a referral on December 1, 2003, the ICC began investigating the Lord's Resistance Army (LRA).[124] Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen were all alleged members of the LRA. The warrant of arrest alleged that the LRA directed attacks against civilian populations.[125] By doing so, the LRA engaged in a cycle of violence and established a pattern of "brutalization of civilians" including murder, abduction, sexual enslavement, mutilation and forcibly recruiting children.[126] In *Prosecutor v. Joseph Kony, at al.*, the

[120] The Rome Statute, Issuance of the Pre-Trial Chamber of a warrant of arrest or a summons to appear, Article 58, July 1, 2002. [Reproduced in accompanying notebook at tab 2].

[121] Christopher Gosnell, Recent Steps of the ICC Prosecutor in the Darfur Situation: Prosecutor v. President, The Request for An Arrest Warrant in Al Bashir, Idealistic Posturing or Calculated Plan, 6 J. INT'L CRIM. JUS. 841, 842 (2008). [Reproduced in accompanying notebook at tab 54].

[122] *Id*. at 842-43.

[123] Alex Whiting, In international Criminal Prosecutions, Justice Delayed Can be Justice Delivered, 50 HARV. INT'L L.J. 323, 347 (2009). [Reproduced in accompanying notebook at tab 53].

[124] *Id. (See also* Warrant of Arrest for Joseph Kony, Case No. ICC-02/04-01/05, Issued on 8 July 2005 as amended on 27 September 2005). [Reproduced in accompanying notebook at tab 44].

[125] *See generally* Warrant of arrest, Joseph Kony.

[126] *Id*.

Prosecutor applied for an arrest warrant on May 6, 2005.[127] Specifically, each defendant had a significant role in the LRA. Kony, as Chairman and Commander in Chief of the LRA, issued orders to "target and kill" civilian populations, ordered the LRA to begin the campaign of attacks and to "loot and abduct civilians."[128]

Otti was the Vice-Chairman and Second in Command of the LRA.[129] Specifically, the warrant of arrest alleged that Otti was "the addressee of Kony's standing orders to attack and brutalise civilians; that he was responsible for making orders regarding the timing and location of various LRA operations, as well as for participating in their execution;" and by his role as intermediary between Kony and the other LRA commanders, Otti was responsible for attacks committed by subordinates.[130]

Odhiambo served as the Brigade Commander and Deputy Army Commander.[131] Further, it was alleged that Odhiambo ordered the commission of several crimes within the jurisdiction of the ICC.[132] Finally, Ongwen was the alleged brigade commander of the Sinai Brigade of the

[127] Prosecutor v. Joseph Kony, et al., *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Uganda.htm, last visited October 18, 2010.[Reproduced in accompanying notebook at tab 37].

[128] *Id*. at ¶ 12.

[129] Warrant of Arrest, Vincent Otti, The Prosecutor v. Joseph Kony, et al., ICC-02/04-01/05-54, September 27, 2005. [Reproduced in accompanying notebook at Tab 47].

[130] *Id*. at ¶ 10.

[131] Warrant of arrest, Okot Odhiambo, The Prosecutor v. Joseph Kony, et al., ICC-02/04-01/05-56, September 27, [Reproduced in accompanying notebook at tab 45].
2005.

[132] *Id*. at ¶ 10.

LRA.[133] Like his co-accused, Ongwen was alleged to have committed many of the same crimes in his position of the LRA.

The aforementioned situation is the first example of the ICC to utilize a "sealed" method, as every arrest warrant was initially issued under seal. Similarly, in subsequent situations, the ICC has issued sealed arrest warrants as an attempt to bring defendants to the ICC. For example, in the Situation in the Democratic Republic of the Congo the ICC issued sealed arrest warrants for Thomas Dyilo and Germain Katanga.[134] The sealing of the arrest warrants proved effective as both of the accused were apprehended by the ICC.

Like the Tribunals, the Chambers at the ICC will unseal warrants when circumstances allow it. In the case of *Prosecutor v. Ntaganda* the Chamber unsealed the arrest warrant for the accused for the following reasons: (i) the accused may have become aware of the sealed warrant against him; (ii) proactive measures have been taken to mitigate the risks for victims and witnesses involved in the case; and (iii) unsealing the warrant may assist the authorities of the Democratic Republic of Congo in apprehending Ntaganda.[135] This reasoning is evidence that, although Chambers will seal arrest warrants to pursue the accused, the ICC, like the Tribunals, recognize that sealed warrants may not always be the best option in apprehending the accused.

Like the sealed indictment method of utilized in the other Tribunals, the ICC's method of sealing arrest warrants experiences little resistance from the Judges at the ICC. However, in

[133] Warrant of arrest Dominic Ongwen, Prosecutor v. Joseph Kony, et al., ICC-02/04-01/05-57, September 27, 2005. [Reproduced in accompanying notebook at tab 42].

[134] Warrant of Arrest for Thomas Lubanga Dyilo, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, October 2, 2006 [reproduced in accompanying notebook at Tab 46]; Warrant of Arrest of Germain Katanga, Prosecutor v. Germain Katanga, ICC-01/04-01/05, February 7, 2007 [Reproduced in accompanying notebook at tab 43].

[135] Decision to Unseal the Arrest Warrant of Arrest Against Bosco Ntaganda, Prosecutor v. Ntaganda, ICC-01/04-02/06, pp. 4-6, April 28, 2008. [Reproduced in accompanying notebook at tab 27].

issuing the sealed arrest warrants, the Judges offer little reasoning for their doing so. Overall, the continued use of sealed arrest warrants and their ability to facilitate in the capture of high level defendants, make them an accepted practice at the ICC.

Another method that is utilized by the ICC is the issuance of Summons to Appear in accordance with Article 58 of the Rome Statute.[136] The Summons to Appear is similar to that of an arrest warrant in that the Pre-Trial Chamber bases its issuance on a belief that there are reasonable grounds that the accused committed the crime.[137] However, a summons will be issued when the Pre-Trial Chamber does not think the accused is a flight risk, whereas an arrest warrant will be issue when the Pre-Trial Chamber is in doubt that the accused will appear.

Like sealed arrest warrants, the ICC has issued sealed summons to appear on the accused in an effort to hail the accused to the ICC. The most recent case that utilized a sealed Summons to Appear involved the Situation in Darfur, Sudan. On November 20, 2008 the Prosecutor issued a request for a Summons to Appear for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus on a confidential basis.[138] In the request the Prosecutor alleged that that the two accused participated in attacks at Military Group Site Haskanita.[139] Specifically, the Prosecutor alleged that the events which took place during the attacks "gave rise to crimes [of violence to life], [attacking personnel or objects involved in a peacekeeping mission] and [pillaging]."[140] Taking the Prosecutor's allegations into consideration, the Pre-Trial Chamber issued the

[136] The Rome Statute, *supra* note 119, Article 58(7).

[137] *Id*.

[138] Second Decision on the Prosecutor's Application Under Article 58, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (2008). [Reproduced in accompanying notebook at tab 38].

[139] *Id*. at ¶ 5.

[140] *See generally Id*.

Summons to Appear and ordered that it be kept confidential from the public. Subsequently the summons was unsealed on June 15, 2010.[141]

It is hard to determine whether sealed methods used by the ICC assisted in the apprehension of the accused; however, the ICC clearly recognizes an advantage to using sealed methods in the jurisprudence. Therefore, the ICC's acceptance of using sealed arrest warrants and summons to appear are further evidence that using various "sealed" methods to apprehend defendants is accepted in international law.

F. The Special Tribunal for Lebanon

The Rules and Regulations of the STL contain a Non Disclosure provision for indictments. Rule 74 of the Rules and Regulations contains similar language to the ICTY's Rule 53 section A and B.[142] However, Rule 74 of the Rules and Regulations for the STL omit section C and D of the ICTY's rule.[143]

From the information that is currently available, the STL has not issued sealed indictments against any alleged defendants. However, the Rules and Regulations of the STL, as well as the case law of the other criminal tribunals, are evidence that the STL could utilize sealed indictments if they chose to do so.

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[141] *Id*.

[142] Rule 74, Rules of Procedure and Evidence, Special Tribunal for Lebanon, October 30, 2009. Rule 74 states:
(A) In exceptional circumstances, on the application of the Prosecutor or Defence, the Pre-Trial Judge may, in the interests of justice, order the non-disclosure to the public of the indictment, or any related document or information until further order.
(B) Notwithstanding paragraph (A), the Prosecutor may disclose an indictment or part thereof to the authorities of a State where the Prosecutor deems it necessary for the purposes of an investigation or prosecution. [Reproduced in accompanying notebook at tab 8].

[143] *Id*.

IV. Is it legally possible to issue sealed and confirm indictments *Ex Parte*?

Although *ex parte* proceedings are controversial in some regards, it is legally possible to issue a sealed indictment for both implicit and explicit reasons. *Ex parte* is a Latin term that means "from the part."[144] The term is defined as "on or from one party only" or "without notice to or argument from the adverse party."[145] Thus, it follows that an *ex parte* order is "an order made by the court upon the application of one party to an action without notice to the other."[146]

The definition of an *ex parte* communication is what gives rise to the implicit ability to issue and confirm sealed indictments *ex parte*. To better illustrate, it benefits us to review the indictment procedure at the international tribunals. Although they may differ in some ways, the ICTY provides the best illustration of the indictment process in its Rules of Procedure and Evidence.

First, the Prosecution will begin an investigation into a particular matter. Pursuant to Rule 39 of the Rules of Procedure and Evidence, the Prosecutor may summon and question suspects, victims and witnesses.[147] Also, the Prosecutor is entitled to "undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial."[148] Next, the Prosecutor may seek the assistance of any

[144] Bryan Garner (ed.), Black's Law Dicionary, 9th edition (2009). [Reproduced in accompanying notebook at tab 50].

[145] *Id*.

[146] *Id*.

[147] ICTY, Rules of Procedure and Evidence, Rule 39(a)(i), December 10, 2009. [Reproduced in accompanying notebook at tab 3].

[148] *Id*. at Rule 39(a)(ii).

State authority concerned, as well as any relevant international body.[149] Finally, if the Prosecutor is satisfied with his investigation he can request orders from a Trial Chamber or Judge.[150] In this case, the requested order would be a sealed indictment.

If the Prosecutor is "satisfied in the course of [his] investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, [he] shall prepare and forward to a Registrar an indictment for confirmation by a Judge."[151]

Next, the registrar will forward the indictment and material to a designated judge, who will set a date to review the indictment.[152] After the designated judge receives and reviews the materials he may: (i) request that the Prosecutor present additional material in support; (ii) confirm each count; (iii) dismiss each count; or (iv) adjourn the review to give the Prosecutor the opportunity to modify the indictment.[153] As illustrated above, in this point of the proceedings, if the Judge confirms the indictment, he may order that the indictment is issued under seal pursuant to Rule 53. However, it is important to note that an indictment will only be issued under seal at the Prosecutor's request, and it is not at the Judge's discretion to issue an indictment under seal upon his own accord. Finally, if the Judge confirms the indictment, he may issue an arrest warrant and the suspect shall have the status of an accused.[154]

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[149] *Id*. at Rule 39(a)(iii).

[150] *Id*. at Rule 39(a)(iv).

[151] *Id*. at Rule 47(B).

[152] *Id*. at Rule 47(D).

[153] *Id*. at Rule 47(F).

[154] *Id*. at Rule 47(H).

The implicit ability of the Tribunals to issue and confirm sealed indictments lies in the nature of the indictment proceedings and the definition of a sealed indictment. Using a fictional character, Mr. A, we can see how sealed indictments are implicitly allowed in international law. Suppose Mr. A was a high profile leader of an indigenous tribe within a State and feels that his people are being persecuted. Because of this, Mr. A deems it necessary to kill all the people who are not members of his particular tribe. To do so, Mr. A uses his leadership and power to form and army and subsequently murder 100,000 people who are not members of his tribe. After some time has passed and peace has been restored a tribunal is set up to bring Mr. A and his subordinates to justice. However, Mr. A is aware of this and decides to hide within the country and avoid being arrest.

In accordance with the procedures above, the Prosecutor would begin an investigation into the alleged crimes that Mr. A and his followers committed. After the Prosecutor has conducted a series of interviews and gathered all of the information relevant to the situation, the Prosecutor believes that there are reasonable grounds to charge Mr. A with genocide. Acting on his belief, the Prosecutor goes to the Tribunal that has been set up and requests that the presiding Judge issue an indictment for Mr. A, charging him with genocide. However, the Prosecutor knows that if Mr. A learns of the indictment he will flee the country and may never be seen again. Therefore, the Prosecutor requests that the indictment be issued under seal. After reviewing all of the relevant information, the Judge issues the indictment and orders that it is kept under seal.

Although the above illustration may be elementary, it follows the same pattern as the actual cases before the several Tribunals in their search for their high profile defendants. Further, the example shows that the Tribunal has the implicit power to issue sealed indictments

ex parte. In none of the examples, real or fictional, was the accused present while the Prosecutor conducted his investigation or requested a sealed indictment. Moreover, the accused was not present when the Tribunal made its decision to order that the indictment be issued under seal. If Mr. A was present during the proceedings, then it would be unnecessary to have indictments sealed. If the accused party were present at the proceedings (making it a non-*ex parte* proceeding), then the sealed indictment loses its main attribute of secrecy, thus, defeating its purpose in international law.

The only conceivable situation in which a sealed indictment may be necessary where the accused is not present, is if a tribunal were to appoint a public defender pursuant to its rules of procedure and evidence. For example, the ICTY and the ICTR both provide that the tribunal may appoint a public defender in order to protect the interests of the accused.[155] However, these specific rules of the ICTY and the ICTR only apply to an accused if they are detained by the respective tribunal.[156] For this reason, the Tribunals will not appoint a public defender to defend the accused's interest in a sealed indictment motion because the accused is not yet apprehended by the Tribunal. Therefore, it can be implied that it is legally possible to issue a sealed indictment *ex parte* because the only situation in which a sealed indictment is necessary is one where the accused is not apprehended, which is a situation where the accused does not qualify for a public defender.

Second, case law exists in which Tribunals have explicitly issued orders in *ex parte* proceedings. The first example comes from the ICTR, where the Tribunal granted the request for nondisclosure in the Musabyimana case. In the order, in the Pre-Trial Chamber it indicates

[155] *See* Rule 45, ICTY RPE; Rule 45, ICTR RPE. [Reproduced at accompanying tab 3].

[156] Rule 45 *bis*, ICTY RPE; Rule 45 *bis* ICTR RPE. [Reproduced at accompanying tab 5].

that it recalls the "Prosecutor's Ex Parte Motion for Non-Disclosure of the Names of Witnesses and Other Identifying Information in the Indictment."[157] Since the accused was not present at the decision to grant the request, it is clear that the entire procedure, from request to order, was conducted only in the presence of one party making it *ex parte*. Since these proceedings were accepted by the Tribunal it is clear that the Tribunal felt the ex parte proceeding was legal.

Similarly, the Prosecutor issued the same type of request in Prosecutor v. Kanyaarukiga. In this case, the decision of the Trial Chamber is in response to the "Prosecutor's Ex Parte Request to Rescind the Non-Disclosure Order…Relating to the Indictment and Warrant of Arrest.[158] Again, this illustrates that the Prosecution can issue requests and those requests can subsequently be granted on an *ex parte* basis, thus providing the validity of the proceedings in international law.

Finally, if we revisit the Darfur situation at the ICC, the decision to issue a summons to appear indicates that the Prosecutor "requested the Chamber to issue warrants of arrest or, alternatively, summonses to appear for Bahar Idriss Abu Garda, and Saleh Mohammed Jerbo Jamus, on a confidential and *ex parte* basis.[159] Additionally, the accused were also not present when the Pre-Trial Chamber made its decision, granting the Prosecutor's request, also making it an *ex parte* proceeding. Therefore, these decisions indicate that proceedings can take place *ex parte*, thus supporting the notion that sealed indictments can be issued legally *ex parte*.

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[157] Confirmation and Order for Non-Disclosure, Prosecutor v. Musabyimana, ICTR-2001-62-I, March 13, 2001.

[158] Decision on the Prosecutor's Ex Parte Request to Rescind the Non-Disclosure Order of 4 March 2002 Relating to The Indictment and Warrant of Arrest, Prosecutor v. Kanyarukiga, 2003 WL 22735935, April 9, 2003. [Reproduced at accompanying tab 22].

[159] *See generally* Second Decision on the Prosecutor's Application Under Article 58, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.

V. Conclusion

This memorandum has provided an overview of the case law of sealed indictments in the international legal system. The ICTY, ICTR, SCSL and STL each have provisions in their respective Tribunal's rules that allow the use of sealed indictments. Further, the ICC also utilizes the equivalent of sealed documents, but since the ICC does not issue indictments, there are no provisions that expressly allow the issuance of sealed indictments. Also, each of the Tribunals, with the exception of the STL, has used sealed indictments in their international proceedings.

Therefore, this memorandum concludes that it is legally possible to issue and confirm sealed indictments in international law. If it were not implicitly possible to issue sealed indictments *ex parte*, then the practice would cease to exist. Further, the several motions accepted in Criminal Tribunals are explicit evidence that it is possible to issue sealed indictments *ex parte*