ARTICLE

FRIVOLOUS MOTIONS AND ABUSES OF PROCESS AT THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

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I. INTRODUCTION

The chambers of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) are empowered by their rules to sanction counsel for filing motions that are abusive or frivolous.[1] While there is a substantial body of decisions applying this power,[2] it has not yet been subject to a comprehensive examination either by the tribunals or in the literature, and each individual application exists largely apart from the broader jurisprudence.[3] This lack of clarity is of concern since the decisions themselves often do not provide lengthy reasons nor do they refer to the jurisprudential context in which they are applied.[4] Indeed, upon review of the variety of ways in which these rules are applied (see Part III, *infra*), the view may be taken that many chambers appear to treat the power to declare motions frivolous or abusive as largely discretionary. This approach has led to allegations of bias and prejudice that are difficult to counter,[5] given the lack of a comprehensive statement of the law to guide the rules' application. Further, if the purpose of these rules is to discourage the filing of improper motions, this can only be helped by developing a clear restatement of their application to assist counsel in delineating acceptable motion practice.

This article provides some initial analysis to assist in developing such a regime. Part II outlines the initial rationale for the enactment of the relevant rules at the international criminal tribunals. Part III examines how the rules have been raised and applied, including identifying the dominant reasons provided by different chambers to classify a motion as frivolous or as an abuse of process, providing

1 Int'l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, adopted July 5, 1995, amended Feb. 21, 2000 (7th rev.), U.N. Doc. ITR/3/REV.7 (2000), *available at* http://www.unictr.org/Portals/0/English/Legal/Evidance/English/210200.pdf, Rule 73(F); Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, adopted Feb. 11, 1994, amended Dec. 8, 2010 (45th rev.), U.N. Doc. IT/32/Rev.45, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf, Rule 73(D).

2 For the purposes of this Article the author examined over 150 decisions applying the relevant Rules (the full corpus of relevant decisions up to 2011), many of these decisions are cited throughout this article.

3 As an example that is largely typical, *see* Prosecutor v. Nshogoza, Case No. ICTR-07-91-PT, Decision on Defence Motion for Clarification and Request for an Extension of Time (Feb. 3, 2009); this decision consists of one page of reasons and summarily concludes that a motion is 'without merit and that costs should therefore be denied.'

4 *Id.*

5 *E.g.* Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Decision on Motion to Vacate Sanctions: Rules 73(F) and 120 of the Rules of Procedure and Evidence, ¶ 2 (Feb. 23, 2005).

examples for the five major factors used to ground a finding of frivolousness or abuse. Part III also briefly discusses the use of sanctions upon a finding of frivolousness or abuse. The article ends by briefly analysing three potential issues arising from the tribunals' use of this power and how the preceding analysis can help to resolve them, along with some lessons learned from the experience of the ad hoc criminal tribunals.

II. THE ENACTMENT OF THE RELEVANT RULES AT THE AD HOC TRIBUNALS

In the early years of ad hoc tribunals, it was expected that the chambers of such tribunals would need to deal with an unusually large number of motions due to "uncertainty about questions of procedure and practice."[6] However, once the more straightforward questions regarding proceedings were resolved, there was an increasing concern over the merits of many of the motions being filed and a worry over "excessive" filings by some parties.[7] At one stage, the ICTR's registry even suspended the assignment of certain lawyers as defence counsel for a period of one year to discourage their alleged attempts to delay proceedings with baseless motions.[8] Some chambers also made attempts to discourage frivolous motions through the use of their "inherent powers,[9] though this was not a widespread practice.[10]

6 WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 404 (2006).

7 *Id.*; Expert Group to the Secretary General, *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, ¶¶ 70-71, U.N. Doc. A/54/634 (Nov. 22, 1999) [hereinafter *Report of the Expert Group*].

8 *See* KINGSLEY CHIEDU MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 94 (2005).

9 *See, e.g.*, Eric Møse & Cécile Aptel, *Trial Without Undue Delay Before the International Criminal Tribunals*, *in* MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 539, 564 (Lal Chand Vohrah et al. eds., 2003). This author was unable to find any decision applying this "inherent power" prior to the implementation of Rule 73(F) of the ICTR's Rules of Procedure and Evidence; however in Prosecutor v. Kabiligi the chamber exercised its inherent power to deny fees, while also strangely referring to Rule 73(F) "in the alternative." Prosecutor v. Kabiligi, Case No. ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment *Void Ab Initio*, ¶ 53 (Apr. 13, 2000); *see also* Prosecutor v. Muhimana, Case No. ICTR-95-1B-I, Decision on the Defence Motion for the Annulment of the Initial Appearance, ¶ 16 (Mar. 20, 2000) (where the chamber found a defence motion frivolous and subsequently denied it, though did not impose sanctions, without reference to Rule 73(F)); *see also* Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Decision on Motion to Vacate Sanctions: Rules 73(F) and 120 of the Rules of Procedure

In 1999, a review ordered by the United Nations General Assembly[11] found that, among other things, dilatory tactics and excessive filings of motions causing issues for the efficient running of the tribunals.[12] Following the subsequent Report of the Expert Group, a series of reforms were made of the ICTR's Rules of Procedure and Evidence (hereinafter ICTR's Rules) with the aim of reducing the length of trials and deterring excessive filing.[13] These reforms included, *inter alia*, the addition of Rule 73(F), which states that:

> In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.[14]

The ICTY enacted its version of Rule 73(F) in December 2001 under Rule 46(C) of its Rules of Procedure and Evidence (hereinafter ICTY's Rules).[15] It was on the same terms as the ICTR's Rule 73(F).[16] The ICTY's Rule has subsequently been amended and moved to Rule 73(D).[17] It now reads: "Irrespective of any sanctions which may be imposed under Rule 46 (A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/or costs thereof."[18] In addition to the specific rules dealing with frivolous

and Evidence, ¶ 6 (Feb. 23, 2005) (where the chamber seems to indicate that this type of rule is part of its inherent power by stating that it is "reasonably required in any judicial system").

10 *Id.*

11 G.A. Res. 53/212, ¶ 5, U.N. Doc. A/RES/53/212 (Feb. 10, 1999); G.A. Res. 53/213, ¶ 4, U.N. Doc. A/RES/53/213 (Feb. 10, 1999).

12 *Report of the Expert Group*, *supra* note 7, ¶¶ 70-71; *see also* MOGHALU, *supra* note 8, at 94.

13 *See* Sarah Williams, *The Completion Strategy of the ICTY and the ICTR*, *in* INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 153, 172-75 (Michael Bohlander ed., 2007).

14 The substance of Rule 73(F) was originally found at Rule 73(E), which was added to the ICTR's Rules on Feb. 21, 2000. Int'l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, adopted July 5, 1995, amended Feb. 21, 2000 (7th rev.), U.N. Doc. ITR/3/REV.7 (2000), *available at* http://www.unictr.org/Portals/0/English/Legal/Evidance/English/210200.pdf.

15 Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, adopted Feb. 11, 1994, amended Dec. 13, 2001 (22nd rev.), U.N. Doc. IT/32/Rev.22, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev22_en.pdf.

16 Compare *id.* Rule 46(C) with Rule 73(F) of the ICTR RPE.

17 Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, adopted Feb. 11, 1994, amended Dec. 8, 2010 (45th rev.), U.N. Doc. IT/32/Rev.45, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf.

18 *Id.*

motions and abuses of process, both the ICTY's and ICTR's Rules also contain provisions dealing with misconduct of counsel,[19] although analysis of those rules is beyond the scope of this article.

Although there is a textual difference between the relevant rules at the ICTR and ICTY, this has not resulted in a discernible difference in the approaches of the two tribunals to frivolous or abusive motions. For convenience, this article will refer to the ICTR's Rule 73(F) and the ICTY's Rule 73(D) jointly as Rule 73(F)/73(D) where appropriate.

III. APPLICATION OF THE RULES

A. *Raising the Rules*

A chamber can make a determination under Rule 73(F)/73(D) at the request of either party or *proprio motu*.[20] Though parties have, on a number of occasions, moved the chamber to issue sanctions,[21] chambers have often applied the rule without recognising that it has been raised by any party.[22]

19 *See* Rule 46 of the ICTR RPE; and Rule 46 of the ICTY RPE.

20 *See* Rule 73(F) of the ICTR RPE; Rule 73(D) of the ICTY RPE. Though neither Rule explicitly refers to this being a *proprio motu* power, neither do they require a party to agitate for a frivolous motion/abuse of process ruling. Chamber practice indicates the Rules may be exercised *proprio motu*, *see e.g.* Barayagwiza v. Prosecutor, Case No. ICTR-99-52-A, Decision (Interlocutory Appeal Against the 27 August 2001 Trial Chamber I Oral Decision) (Feb. 1, 2002).

21 *See* Prosecutor v. Ngirabatware, Case. No. ICTR-95-54-T, Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92 *bis* Decision of 22 September 2011, ¶ 8 (Nov. 25, 2011); Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Decision on Prosecution Motion to Vacate the Trial Date, ¶ 25 (May 24, 2010); Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Motion by the Accused to Dismiss All Charges Against Him (Submissions 387) and its Addendum (Submission 391) (Int'l Crim. Trib. for the Former Yugoslavia Sept. 18, 2008); Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, Prosecutor's Response to the Confidential Defence Motion to Exclude the (Anticipated) Testimony of Prosecution Witness SGM (Mar. 27, 2006); Prosecutor v. Josipovic, Case No. IT-95-16-R2, Decision on Motion for Review, ¶ 39 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 7, 2003); Prosecutor v. Talić, Case No. IT-99-36/1-T, Decision on Motions (Int'l Crim. Trib. for the Former Yugoslavia Nov. 26, 2002); Prosecutor v. Brđanin, Case No. IT-99-36-T, Decision on "Request for Certification to Appeal against the Decision to Separate Trial" and on "Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2002); Prosecutor v. Delalic, Case No. IT-96-21-A, Esad Landzo's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delalic (Int'l Crim. Trib. for the Former Yugoslavia Jan. 28, 1999); Prosecutor v. Delalic, Case No. IT-96-21-T, Motion for Warning Pursuant to Rule 46(A) and to Inform Professional Body Pursuant to Rule 46(B) and for Disclosure of Document (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1997).

22 *See* Barayagwiza v. Prosecutor, Case No. ICTR-99-52-A, Decision (Interlocutory Appeal Against the 27 August 2001 Trial Chamber I Oral Decision) (Feb. 1, 2002); Prosecutor v.

The prosecution has regularly raised issues of frivolousness and abuse when replying to defence motions. Though these references are often cursory in nature, consisting, for example, of no more than a sentence concluding that the lack of the merit of a defence motion or its lateness should result in a finding of frivolousness,[23] some do also contain more detailed support for the prosecution's allegation. For example, on various occasions, the prosecution has: (a) alleged that defence motions have called into question the "integrity and competence" of a judge;[24] (b) raised issue with the defence "repeat[ing] verbatim" a "significant portion" of an earlier motion and filing repetitive motions;[25] (c) raised issue with twenty-one pages annexed to a defence motion that the prosecutor alleged to be unnecessary;[26] (d) alleged that motions were premature;[27] and (e) submitted the defence

Bisengimana, Case No. ICTR-00-60-I, Decision on the Prosecution's Motion for Protective Measures for Witnesses, ¶ 4 (Nov. 10, 2005); Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Emergency Motion to Vary Witness List: Rule 73 and 73*ter*(E) of the Rules of Procedure and Evidence, ¶ 12 (June 12, 2008).

23 *See, e.g.*, Karera v. Prosecutor, Case No. ICTR-01-74-A, Prosecutor's Response to Appellant Karera's "Requête Extrêmement Urgente de la Défense aux fins de Présenter des Eléments de Preuve Supplémentaires," ¶¶ 10-11 (Sept. 16, 2008); Prosecutor v. Ndayambaje, Case No. ICTR-98-42-T, Prosecutor's Response to Arsène Shalom Ntahobali's motion for reconsideration of the Decision of the Trial Chamber on the request for a separate trial, ¶ 20 (Feb. 14, 2005); Prosecutor v. Karemera, Case No. 98-44-I, Response of the Prosecutor to Preliminary Motion filed by the Accused 16 January 2001, ¶ 8 (Feb. 21, 2001); Prosecutor v. Brđanin, Case No. IT-99-36-T, Decision on "Request for Certification to Appeal Against the Decision to Separate Trial" and on "Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal" (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2002); Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on "Joint Defence Request for Certification of the 'Decision on Motion for Leave to Amend the Amended Indictment' dated 18 June 2003" (Int'l Crim. Trib. for the Former Yugoslavia July 25, 2003).

24 Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Prosecutor's Response to Joseph Nzirorera's Submission to Substitute Judge, ¶ 4 (Apr. 25, 2007).

25 Prosecutor v. Niyitegeka, Case No. ICTR-96-14-I, Prosecutor's Response to the Extremely Urgent Defense Motion Dated February 22, 2001, ¶ 11 (Feb. 23, 2001); *see also*, Prosecutor v. Ngirabatware, Case No. ICTR-95-54-T, Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92*bis* Decision of 22 September 2011, ¶ 8 (Nov. 25, 2011) where the Prosecution took issue with the Defence filing "repetitive and frivolous motions"; *see also* Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on the Accused's Requests for an Advisory Opinion of the International Court of Justice (Dec. 15, 2004) (noting the prosecution's claim that "repetitive" motions are frivolous).

26 Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, Prosecutor's Response to the Confidential Defence Motion to Exclude the (Anticipated) Testimony of Prosecution Witness SGM, ¶ 14 (Mar. 27, 2006).

27 Prosecutor v. Uwinkindi, Case No. ICTR-01-75-PT, Decision on Defence Motion for the Setting of a Timetable for Disclosure, Pre-Trial Conference and Start of Trial (Apr. 11, 2011); Prosecutor v. Talić, Case No. IT-99-36/1, Decision on Motions (Int'l Crim. Trib. for the Former Yugoslavia Nov. 26, 2002).

had fundamentally misinterpreted the law.[28]

Defendants have also, at times, attempted to raise Rule 73(F)/73(D) against prosecution motions, although, as will be discussed below, with limited success.[29]

B. Factors Indicating a Motion is Frivolous and/or an Abuse of Process

Once Rule 73(F)/73(D) is raised, a chamber then determines if the relevant motion is frivolous and/or an abuse of process. Viewing each individual decision under Rule 73(F)/73(D) in isolation can make it difficult to see whether or not a coherent and consistent process is undertaken by chambers when making this determination. Indeed, it can appear that the rules are used in a largely discretionary manner (although this has never been stated as such explicitly). However, from a review of the jurisprudence, it is possible to divide the Rule 73(F)/73(D) jurisprudence into at least five of the following major categories of defective motions:

(a) Motions lacking merit;

(b) Motions raising issues that are barred under the principle of *res judicata*;

(c) Motions indicating a lack of diligence or professionalism on the part of counsel;

(d) Motions involving duplicate material; and

(e) Motions demonstrating ill-intent by a party.

This section briefly describes what is meant by each of the above categories and provides examples of decisions that fall within each. Note that this article does not analyse the difference between "frivolous" and "abuse of process." While an argument can be made that the two terms should apply to separate types of defective motions,

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[28] Prosecutor v. Brđanin, Case No. IT-99-36, Decision on "Request for Certification to Appeal Against the Decision to Separately Trial" and on "Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal" (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2002).

[29] *See* Prosecutor v. Bisengimana, Case No. ICTR-00-60-I, Decision on the Prosecution's Motion for Protective Measures for Witnesses (Nov. 10, 2005); and Prosecutor v. Stakić, Case No. IT-97-24-AR73.4, Decision on the Prosecution Motion Seeking Leave to Appeal the Decision of Trial Chamber II Ordering an Identification Parade (Int'l Crim. Trib. for the Former Yugoslavia June 28, 2002), the only examples of successful attempts to raise Rules 73(F)/73(D) against a Prosecution motion. In the *Bisengimana* decision, the chamber merely urged 'the Prosecution to observe more diligence in the discharge of its duties'. In the *Stakić* decision the chamber merely rejected the motion without further comment.

the vast majority of decisions examined do not make specific differentiation between the meaning of "frivolous" and "abuse of process." Further, the categories identified above are not necessarily definitive or exclusive, but represent only a first attempt to impose order upon this area of tribunal decision-making. Their main value of the categorisation used in this article is to show that it is possible to create a coherent and consistent framework for the application of these rules and to develop reasoned lines of authority in relation to them. This, as will be shown below, is important to counter the potential issues these rules raise.

1. Motions Lacking Merit

Where a motion lacks merit because it has no legal support or foundation, this can give rise to a finding that it is frivolous.[30] A motion can lack merit in a multitude of ways. For example, in *Nshogoza* the defence asked the tribunal's president to issue a directive to the registrar to formally advise Rwanda that the defendant enjoyed functional immunity from prosecution in Rwanda.[31] This request was denied and found to be frivolous on the basis that the president was not empowered to issue such a directive and the defence's motion lacked a legal basis.[32] Another example, from the ICTY, is found in a decision from *Šešelj*, where the defence requested an order of the president of the ICTY regarding a Rule 66 communications embargo.[33] The chamber labeled this request as "patently frivolous" as it "identified no precedent" and

30 *See* Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior statements of Prosecution Witnesses, ¶ 21 (July 6, 2006) (where the chamber found that the defence had failed to "advance the legal basis upon which a Chamber could be called to make" the requested determination, and considered the motion to be "frivolous and possibly vexatious"); Prosecutor v. Šešelj, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2009); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Accused's Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2010).

31 Prosecutor v. Nshogoza, Case No. ICTR-2007-91-PT, Urgent Defence Judicial and Administrative Application for Deferral in Favour of the ICTR (Articles 8(2), 9, and 28 of the ICTR Statute and Rules 10, 11, 54 and 73 of the I.C.T.R. Rules of Procedure and Evidence), ¶ 1 (Mar. 26, 2008).

32 Prosecutor v. Nshogoza, Case No. ICTR-07-91-PT, Decision on Defence Judicial and Administrative Application for Deferral in Favour of the ICTR, ¶¶ 20-21, 31 (Nov. 5, 2008).

33 Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on "Request of the Accused Asking President of the Tribunal Theodor Meron to Reverse the Decision of the Deputy Registrar Prohibiting Dr. Vojislav Šešelj from Communicating with Anyone and Receiving Visits for at Least 60 Days," (Int'l Crim. Trib. for the Former Yugoslavia Sept. 21, 2005).

showed "no reason why Rule 66's procedure for Presidential review would not suffice to protect" the accused's rights.[34]

A lack of evidence or mischaracterisation of the facts can also mean a motion is without merit. For example, in *Nshamihigo* the defence alleged, among other things, that it had not been provided with certain witness statements in the defendant's own language.[35] The tribunal's court management section reported to the chamber that this was not the case, except in relation to one document that the prosecution undertook to translate.[36] Given the inconsistency between the defence's characterisation of the facts and the version of events accepted by the chamber, in addition to other issues in the motion being barred under the principle of *res judicata*, the chamber found the motion frivolous.[37]

Similar circumstances have also resulted in a finding that a motion is an abuse of process. For example, in *Nzirorera* the defence requested an oral hearing regarding documents it requested from Rwanda, based on article 27 of the ICTR's Statute and Rule 7*bis* of the ICTR's Rules.[38] The chamber found that neither provision was relevant to the defence's request and that the request lacked a legal basis.[39] It concluded that the "motion is an abuse of process because there are no provisions in the Rules to support . . . it."[40] Similarly, an attempt to "seise the legislator" regarding matters that were not subject of interlocutory appeal was rejected by the appeals chamber as being an abuse of process.[41]

2. Motions Raising Issues that Invoke Res Judicata

Motions raising issues that have already been decided upon by the chamber are regularly found to be at least frivolous if not abuses of

34 Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on "Request of the Accused Asking President of the Tribunal Theodor Meron to Reverse the Decision of the Deputy Registrar Prohibiting Dr. Vojislav Šešelj from Communicating with Anyone and Receiving Visits for at Least 60 Days," ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 21, 2005).

35 Prosecutor v. Nshamihigo, Case No. ICTR-2001-63-DP, Decision on the Defence Motion Seeking Release of the Accused Person and/or Any Other Remedy on the Basis of Abuse of Process by the Prosecutor (May 8, 2002).

36 *Id.*

37 *Id.*

38 Prosecutor v. Nzirorera, Case No. ICTR-98-44-I, Motion for Order to Show Cause: Government of Rwanda, Oral Hearing Requested, ¶¶ 8-11 (Feb. 24, 2003).

39 Prosecutor v. Nzirorera, Case No. ICTR-98-44-I, Decision on the Defence Motion to Order the Government of Rwanda to Show Cause (Sept. 4, 2003).

40 *Id.*

41 Barayagwiza v. Prosecutor, Case No. ICTR-99-52-A, Decision (Interlocutory Appeal Against the 27 August 2001 Trial Chamber I Oral Decision), ¶ 2 (Feb. 1, 2002).

process.[42] These motions often involve requests for reconsideration or attempts by parties to put an issue before the chamber multiple times after being denied relief.[43] For example, in *Bisengimana* the prosecution sought protective measures that had already been granted by the chamber and the motion was declared to be frivolous and denied.[44] In *Muvunyi*, a defence request that a portion of witness testimony be struck out was denied with the chamber finding in its May 2006 decision that "the issues raised therein were already sufficiently ventilated as far back as November 2003 and are now *res judicata*."[45]

Re-litigation of issues has also led to findings of abuse. For example, in *Rukundo*, a defence request for certification to appeal was denied as it did not satisfy the criteria for certification and involved "extensive re-litigation of issues . . . to constitute an abuse of process."[46] Further, in *Kabiligi*, the Ntabakuze defence filed a motion requesting that the chamber declare the indictment *void ab initio* and find that the tribunal lacked jurisdiction.[47] The motion also contested the validity of Rule 50 of the ICTR's Rules and asked the chamber to apply Rule 50 of the ICTY's Rules in its place.[48] The chamber rejected this argument and found that "Rule 50 is a perfectly valid Rule and is in no way ultra

42 *See* Prosecutor v. Bisengimana, Case No. ICTR-00-60-I, Decision on the Prosecution's Motion for Protective Measures for Witnesses, ¶¶ 3-4 (Nov. 10, 2005); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX Pursuant to Article 20 of the Statute and Rules 44, 44*bis* and 73(F) of the Rules of Procedure and Evidence, ¶ 18 (May 31, 2006); Prosecutor v. Nshamihigo, Case No. ICTR-2001-63-DP, Decision on the Defence Motion Seeking Release of the Accused Person and/or Any Other Remedy on the Basis of Abuse of Process by the Prosecutor, ¶ 4 (May 8, 2002); Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings: Rule 82(b) and 72(D), Rules of Procedure and Evidence, ¶ 84 (Apr. 7, 2006).

43 *See, e.g.*, Prosecutor v. Karadžić, Decision on the Accused's Motion to Exclude Testimony of Aernout van Lynden, Case No. IT-95-5/18-T, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2010) (where the defence filed multiple motions regarding the privilege of war correspondents and their motion was found to be "frivolous and vexatious").

44 Prosecutor v. Bisengimana, Case No. ICTR-00-60-I, Decision on the Prosecution's Motion for Protective Measures for Witnesses, ¶¶ 3-4 (Nov. 10, 2005).

45 Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX Pursuant to Article 20 of the Statute and Rules 44, 44*bis* and 73(F) of the Rules of Procedure and Evidence, ¶ 18 (May 31, 2006).

46 Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Decision on Defence Request for Certification to Appeal or in the Alternative Reconsideration of the Chamber's Decision of 30 November 2007, ¶ 10 (Dec. 14, 2007).

47 Prosecutor v. Kabiligi, Case No. ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *Ab Initio*, ¶¶ 12-13 (Apr. 13, 2000).

48 *Id.* ¶ 49.

vires."[49] The chamber also found that the motion was an improper challenge to its earlier decision in which it allowed the prosecution to amend the indictment and that this was merely an attempt to contest the findings of an appeal chamber decision in relation to the same.[50] Thus, the chamber concluded that the motion was "frivolous, an abuse of process, and without merit", as it raised "issues already determined by Trial Chamber II."[51] The chamber then went further and stated that "[t]his issue will not be revisited" as "[t]he motion is misconceived" and is "not necessary or reasonable."[52]

3. Motions Indicating a Lack of Diligence or Professionalism on the Part of Counsel

Chambers have also found that motions evidencing a lack of diligence on the part of counsel merit a finding of frivolousness.[53] For example, while not operative to its finding of frivolousness under Rule 73(F), in a decision in *Nyiramasuhuko*, the chamber reminded defence counsel "of their obligation to act with care and diligence" as "many of the portions of the transcripts cited and relied upon by the Defence [were] not properly referenced or [were] not referenced at all."[54] Further, in *Hadžihasanović*, when ruling on a motion brought by the defense for access to certain documents, the chamber noted the failure of the defence to show that it had "even attempted to identify and get access" to the documents by following the chamber's previous guidance and concluded that "against this background" the motion was frivolous—essentially because it wasted the time and resources of the chamber.[55] A lack of "seriousness" in submissions can also indicate

49 *Id.*

50 *Id.* ¶¶ 50-52.

51 *Id.* ¶ 53.

52 *Id.*

53 *See, e.g.*, Prosecutor v. Bisengimana, Case No. ICTR-00-60-I, Decision on the Prosecution's Motion for Protective Measures for Witnesses, ¶ 4 (Nov. 10, 2005) (where the chamber urged "the prosecution to observe more diligence in the discharge of its duties" after the prosecution filed a superfluous motion for protective measures for witnesses that had already been granted by the chamber. The chamber found this superfluous motion to be "frivolous and moot." Note also the connection between the previous factor of relitigating issues and the finding of a lack of diligence.).

54 Prosecutor v. Nyriamasuhuko, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, A New Trial, and Stay of Proceedings: Rule 82(b) and 72(D), Rules of Procedure and Evidence, ¶ 62 (Apr. 7, 2006).

55 Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Defence Application for Certification of Decision on Access to EUMM Archives of 12 September 2003

insufficient diligence; for example, in *Martić*, insufficient diligence combined with a failure to read amendments to an indictment in "good faith" was said to make a defence motion frivolous.[56] Professionalism can also be relevant when looking at the kind of allegations made in a motion. For example, in *Blagojevic*, the defence, in its motion for leave to respond to the prosecution's final brief, alleged that prosecution's final trial brief contained information designed to "confuse, inflame and mislead the Trial Chamber."[57] Among other things, the chamber found that it appeared that the defence had a "fundamental misconception of the role of Judges as finders of fact and finders of law . . . as well as a fundamental misconception of the roles played by the Parties," but that given the defence counsel's legal experience, it was "difficult . . . to conclude that this [was] the case."[58] The motion was still found to be frivolous and the defence counsel admonished for making "such allegations regarding the professionalism and ethics of the members of the Prosecution team."[59]

A lack of diligence or professionalism can also be demonstrated by a culmination of factors. In *Ndindiliyimana*, counsel for Nzuwonemeye filed a late motion alleging defects in the form of the indictment,[60] which the chamber denied due to its failure to show good cause for the waiver of time limits.[61] The defence requested certification to appeal,[62] which was denied,[63] and then filed two supplemental motions alleging defects in the form of the indictment and defects in relation to how the indictment pleaded the charges.[64] The motions also claimed that the

(Int'l Crim. Trib. for the Former Yugoslavia Sept. 25, 2003).

56 Prosecutor v. Martić, Case No. IT-95-11-PT, Decision on Prosecution Motion to File Amended Indictment and on Second Motion Against the Amended Indictment, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 5, 2003).

57 Prosecutor v. Blagojevic, Case No. IT-02-60-T, Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief (Int'l Crim. Trib. for the Former Yugoslavia Sept. 28, 2004).

58 *Id.*

59 *Id.*

60 Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Nzuwonemeye Defence Motion on Defects in the Form of the Indictment in Light of the Chamber's Decisions in Respect to the Defence 98*bis* Motions and Pursuant to Rule 72(F) (Oct. 18, 2007).

61 Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motions to Address Defects in the Form of the Indictment and to Order the Prosecution to Disclose all Exculpatory Material (Feb. 29, 2008).

62 Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Nzuwonemeye Request for Certification of Appeal of Trial Chamber's Decision, Filed 29 February 2008, Pursuant to Rule 73(B) (Mar. 3, 2008).

63 Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008 (May 22, 2008).

64 Prosecutor v. Nzuwonemeye, Case No. ICTR-00-56-T, Supplemental Motion to

chamber had not dealt with the defence's request for certification to appeal,[65] which had in fact already been denied by the chamber.[66] The chamber first noted that the:

> Defence's unawareness that the Chamber has rendered such a Decision demonstrates neglect by the Counsel for Nzuwonemeye of their duties as officers of the Court, and towards their client. The Chamber further considers that if Counsel had exercised greater diligence . . . there may not have been any need for the filing of these . . . Motions.[67]

The chamber then disagreed with the defence's interpretation of a previous decision in relation to time limits on claims and noted "with dismay that Counsel for Nzuwonemeye [had] . . . persistently misquoted the . . . Judgement in all their motions on this issue."[68] It found that "[s]uch persistence in distorting the Appeals Chamber's ruling evidences an attempt to mislead this Chamber."[69] The chamber also was of the view that the motion re-litigated issues already considered in its earlier decision and that "such excessive re-litigation . . . render[ed] a significant part of the Supplemental Motions frivolous."[70] It therefore found "that such filing constitutes an abuse of process."[71] Similarly, in another case, the Appeals Chamber found that "blatantly untruthful allegations" of a defendant regarding his knowledge of a document meant a motion went "beyond being frivolous but constitute[d] an abuse of the Appeals Chamber's proceedings."[72]

Nzuwonemeye Defence Motion on Defects in the Form of the Indictment in Light of the Chamber's Decisions in Respect to the Defence 98*bis* Motions and Pursuant to Rule 72(F)—in Respect to Counts 7 and 8, ¶ 9 (June 9, 2008); Prosecutor v Ndindiliyimana, No. ICTR-00-56-T, Supplemental Nzuwonemeye Defence Motion on Defects in the Form of the Indictment in Respect to the Pleading of Crimes Against Humanity and Violations of Article 3 Common to the Geneva Convention, ¶¶ 4-6 (June 9, 2008).

65 Prosecutor v. Nzuwonemeye, Case No. ICTR-00-56-T, Supplemental Motion to Nzuwonemeye Defence Motion on Defects in the Form of the Indictment in Light of the Chamber's Decisions in Respect to the Defence 98*bis* Motions and Pursuant to Rule 72(F)—in Respect to Counts 7 and 8, ¶ 3 (June 9, 2008).

66 Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008 (May 22, 2008).

67 Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Supplemental Motions on Alleged Defects in the Form of the Indictment, ¶ 5 (July 15, 2008).

68 *Id.* ¶ 6.

69 *Id.*

70 *Id.* ¶ 8 (one of the few examples of chambers explicitly differentiating between the terms "frivolous" and "abuse of process").

71 *Id.*

72 Prosecutor v. Žigić, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review under Rule 119, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 25, 2006).

A well-known example of a lack of professionalism in motion practice can be found in the *Šešelj* matter before the ICTY. The self-represented defendant in that matter filed a motion before the tribunal's president for disqualification of certain judges on the basis of their nationality and religion, and it contained "several phrases or statements that [were] abusive and insulting."[73] The bureau, in its decision, noted that parties have "great latitude" in how their pleadings are phrased at the ICTY but that such latitude is "not boundless."[74] The motion was declared to be "manifestly frivolous and an abuse of process" and that the only reason sanctions were not imposed was because the defendant was self-represented.[75]

4. Motions Involving Duplicate or Unnecessary Material

The filing of a motion that is duplicative of or similar to previously filed motions has also been found to be frivolous, as well the filing of documents that are already part of the case file.[76] For example, in *Niyitegeka*, the defence filed two motions alleging that the prosecution had not complied with certain disclosure requirements in violation of the chamber's orders.[77] The chamber found that the defence's second

73 Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Motion for Disqualification, ¶¶ 2, 5 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2003).

74 *Id.* ¶ 5.

75 *Id.* The chamber noted, though, that a possible sanction might have been to "direct the Registrar to deny filing," in which case "[t]he applicant would then be required to file a new application without the offensive language," and "if the applicant were to persist, the Bureau might bar the filing of the application altogether." *Id.*

76 *See* Prosecutor v. Ntahobali, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Certification to Appeal the 20 November 2008 Decision Concerning the Recall of Prosecution Witness QCB, ¶ 17 (Dec. 9, 2008); Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, ¶ 13 (Sept. 23, 2005); Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on Defence Motion to Exclude the Testimony of Witness SGM: Rule 89(C) of the Rules of Procedure and Evidence, ¶¶ 11-12 (Apr. 7, 2006). *See also* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, *Inter Alia*, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time to File the Modified Amended Indictment Pursuant to the Trial Chamber II Order of 20 November 2000: Warning to the Prosecutor's Counsel Pursuant to Rule 46(A), ¶ 56 (Feb. 27, 2001) where the chamber agrees that a motion that was similar to a previously filed motion "could well be considered frivolous" before warning "that these kinds of motions would in the future be declared frivolous and attract the denial of fees payment."

77 *Compare* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Urgent Defence Motion Pursuant to, *Inter Alia*, Rule 5 of the Rules of Procedure and Evidence (Feb. 8, 2001), *with* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Extremely Urgent Defence Motion Pursuant to, Article 19.1: Article 20: Rule 54: and Rule 5 of the Statute and Rules of Procedure and Evidence (Feb. 22, 2001).

motion was "similar to its initial Motion, and could well be considered frivolous."[78] While stopping short of declaring the motion to be frivolous and denying fees, it warned that this could be the case in the future.[79] In *Niyitegeka* the second motion was in fact virtually identical to the first, apart from some minor additions to sections setting out the history of the case and adding an additional alleged violation of the prosecution of the defendant's rights.[80] In *Ntahobali* the defence filed two motions two days apart; the first motion asked for reconsideration of a decision, and the second motion requested certification to appeal the same decision, which the defence had already asked to be reconsidered.[81] The chamber found "such multiple filing with respect to the same decision to be frivolous and a wastage of time" and warned counsel against similar filings in the future.[82]

In a similar vein, in *Semanza*, the defence sought an interpretation of a scheduling order issued by the chamber.[83] The chamber issued a reminder to the parties in relation to a number of scheduling issues and also concluded that "the Defence could have requested further clarification with respect to the Chamber's timetable through the usual channel of the Court Management Section without any need to file this motion."[84] It thus found the motion to be "unnecessary and therefore an

78 Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, Inter Alia, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time to File the Modified Amended Indictment Pursuant to the Trial Chamber II Order of 20 November 2000: Warning to the Prosecutor's Counsel Pursuant to Rule 46(A), ¶ 56 (Feb. 27, 2001).

79 *Id.*

80 *Compare* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Urgent Defence Motion Pursuant to, *Inter Alia*, Rule 5 of the Rules of Procedure and Evidence (Feb. 8, 2001), *with* Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Extremely Urgent Defence Motion Pursuant to, Article 19.1: Article 20: Rule 54: and Rule 5 of the Statute and Rules of Procedure and Evidence (Feb. 22, 2001).

81 Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Requête de Arsène Shalom Ntahobali en Reconsidération de la Décision du 20 Novembre 2008 Concernant le Témoin QCB, (Nov. 25, 2008).

82 Prosecutor v. Ntahobali, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Certification to Appeal the 20 November 2008 Decision Concerning the Recall of Prosecution Witness QCB, ¶ 17 (Dec. 9, 2008); *see also* Prosecutor v. Ntahobali, Case No. ICTR-97-21-T, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, ¶ 5 (Sept. 23, 2005) (where the defence, in a motion filed August 25, 2005, moved the chamber to order an investigation into alleged false testimony of a witness. The chamber denied the motion and noted that the witness had "already been the subject of two earlier motions filed by the Defence for Ntahobali," filed on August 2 and 3, 2005, and stressed that "the filing of frivolous motions can be sanctioned by the non-payment of fees.").

83 Prosecutor v. Semanza, Case No. ICTR-97-20-T, Decision on the Defence Motion for Interpretation of the Scheduling Order Issued on 2 May 2002 (May 10, 2002).

84 *Id.* ¶ 7.

abuse of process."[85]

5. Motions Demonstrating Ill-Intent by a Party

Motions have also been found to be frivolous or abuses of process due to an ill-intent on the part of the party filing them; for example, intentional attempts to delay proceedings or disturb "the fair and expeditious conduct of the trial"[86] or failing to comply with a chamber's orders.[87] In *Bizimungu*, the chamber found that a defence motion to vary a witness list lacked merit to such an extent that it misused the legal standard under the ICTR's Rules in an attempt to "impeach the credibility" of a witness and bolster the accused's own testimony.[88] The chamber concluded that the motion was "frivolous, and has unnecessarily expended judicial time and resources" and thus denied defence counsel fees for the motion.[89]

Chambers have also looked to the entire circumstances of the motion to ascertain intent. For example, in *Muhimana*, the defendant had refused to enter a plea at his initial appearance, arguing that he would not do so until he had permanent representation—at the time he was represented by a duty counsel appointed by the registrar.[90] The chamber entered a plea of not guilty on his behalf.[91] Upon receiving permanent counsel, the defence filed a motion to have the initial appearance annulled, arguing that the defendant's right to counsel of his choice had not been observed and thus he could not understand the

85 *Id.*

86 Prosecutor v. Šešelj, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2009).

87 Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Order Concerning Appellant Hassan Ngeze's Filings of 27 September 2007 (Oct. 4, 2007). *See also* Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings: Rules 82(B) and 72(D), Rules of Procedures and Evidence, ¶¶ 82-84 (Apr. 7, 2006); Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on "Joint Defence Request for Certification of the "Decision on Joint Defence Oral Motion for Reconsideration of 'Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial' dated 18 July 2003" (Int'l Crim. Trib. for the Former Yugoslavia July 25, 2003).

88 Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Emergency Motion to Vary Witness List: Rule 73 and 73*ter*(E) of the Rules of Procedure and Evidence, ¶ 12 (June 12, 2008).

89 *Id.*

90 Prosecutor v. Muhimana, Case No. ICTR-95-1B-I, Motion for the Annulment of the Initial Appearance: Rule 73 of the Rules or Procedure and Evidence, ¶¶ 9, 10 (Feb. 14, 2000).

91 *Id.* ¶ 5.

indictment.[92] The chamber rejected the defence's arguments, finding, among other things, that the duty counsel had met with, conferred with and advised the defendant prior to the initial appearance and that the ICTR's Rules did not require representation by a permanent defence counsel from the outset of proceedings.[93] Moreover, as the defence did not wish to modify the plea made at the initial appearance—that is, as the defendant still wished to plead not guilty—the chamber could "conclude only that the Motion has no legitimate purpose,"[94] and that this, along with the conduct of the defendant at his initial appearance, evidenced a clear intention to delay proceedings, resulting in the motion being declared frivolous.[95]

Ill-intent has also led to a finding of abuse. In *Brđanin*, an ICTY chamber found a motion to be frivolous and abusive where the defence attempted to bring the chamber into "chaos."[96] In that case, a defendant who was unfit to stand trial had requested that the chamber reverse its decision to sever his trial from another set of ongoing proceedings.[97] To do so, the chamber would have had to halt both trials in a situation where it did not seem likely that the defendant's health would improve over time.[98] The chamber also considered the defence's prior statements in support of trial separation as indicative of the knowledge of counsel that this motion was without merit, ill-founded and frivolous.[99] It found that it "should have been obvious to the Defence . . . that what is in the interest of justice is the Decision to sever the two Trials and not the opposite."[100]

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92 Prosecutor v. Muhimana, Case No. ICTR-95-1B-I, Motion for the Annulment of the Initial Appearance: Rule 73 of the Rules or Procedure and Evidence (Feb. 14, 2000).

93 *Id.* ¶ 16. *See also* Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration of Sanctions: Rule 73 of the Rules of Procedure and Evidence, ¶ 11 (Oct. 3, 2007).

94 Prosecutor v. Muhimana, Case No. ICTR-95-1B-I, Decision on the Defence Motion for the Annulment of the Initial Appearance, ¶ 15 (Mar. 20, 2000).

95 *Id.* ¶ 16. *See also* Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration of Sanctions: Rule 73 of the Rules of Procedure and Evidence, ¶ 9 (Oct. 3, 2007).

96 Prosecutor v. Brđanin, Case No. IT-99-36-T, Decision on "Request for Certification to Appeal against the Decision to Separate Trials" and on "Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal," ¶ 10 (Oct. 3, 2002).

97 Prosecutor v. Brđanin, Case No. IT-99-36-T, Decision on "Request for Certification to Appeal against the Decision to Separate Trials" and on "Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal," ¶ 1 (Oct. 3, 2002).

98 *Id.* ¶ 10.

99 *Id.* ¶ 9.

100 *Id.*

Knowledge of counsel was also an issue that led to a finding of abuse in *Karemera* in a situation regarding intent. In that case, the defence for Nzirorera filed a motion alleging a violation of disclosure rules by the prosecution in relation to a letter sent by another defendant before the ICTR — Bisengimana.[101] The motion was denied by the chamber, which found there was no evidence that the letter was ever sent or in the possession of the prosecution; the motion was also held to be frivolous and sanctions were imposed on defence counsel.[102] Counsel for Nzirorera then contacted the registry requesting verification that the letter did exist and was received.[103] The registry made submissions stating that the letter did not exist within the records of the tribunal.[104] Bisengimana informed the registry that he had filed the letter, but could not remember to whom it was given.[105] Nzirorera then sought reconsideration of the chamber's sanction decision due to Bisengimana's statement that he filed the letter.[106] The chamber confirmed its original sanctions, noting "the prosecution's submission that the Motion for Reconsideration may be in bad faith," and finding that "it is at the very least abusive of the process."[107] As part of its findings the chamber noted that defence counsel only became aware of Bisengimana's statement *after* filing the original motion, and thus the circumstances raised did "not explain counsel's filing [of] the . . . Motion without any demonstrated reason for belief" that the letter was in the custody or control of the prosecution.[108] The lack of reasonable belief standard used in *Bisengimana* is also similar to a decision in *Semanza*, where the chamber found that the "Defence Counsel's decision to bring the Motion permits no reasonable explanation," and that "in bringing the Motion Defence Counsel acted frivolously and . . . his conduct constitutes an abuse of process."[109] The chamber there was

101 Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Paul Bisengimana (Feb. 13, 2009).

102 *Id.* ¶¶ 4-5.

103 Prosecutor v. Karemera et al., Case No. ICTR-98-44-T Registry's Submission under Rule 33(B) of the Rules on Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Paul Bisengimana, ¶ 2 (Feb. 19, 2009).

104 *Id.* ¶ 8.

105 *Id.* ¶ 5.

106 Prosecutor v. Nzirorera, Case No. ICTR-98-44-T, Joseph Nzirorera's Motion for Reconsideration of Decision on Bisengimana Disclosure (Feb. 23, 2009).

107 Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration of Decision on Bisengimana Disclosure, ¶ 8 (Mar. 24, 2009).

108 *Id.* ¶ 6.

109 Prosecutor v. Semanza, Case No. ICTR-97-20-I, Decision on the Defence Motion for Dismissal of the Entire Proceedings due to Persistent and Continuing Violations of the Rights of

of the view that the defence was engaging in a "dilatory tactic" as its motion reiterated previous objections to jurisdiction that defence counsel had previously "represented that he would 'not bring . . . back.'"[110]

C. The Imposition of Sanctions

Once a motion is deemed to be frivolous or abusive, the chamber is then able to impose sanctions upon a party for filing such a motion.[111] Under the open-ended wording of Rule 73(F), the ICTR chambers *prima facie* have broad freedom in relation to the types of sanctions they apply;[112] however, in practice, they have been generally consistent with the types of sanctions they issue for frivolous and abusive motions, relying on warnings to counsel and the withholding of fees (for reasons that are discussed below).[113] At the ICTY, Rule 73(D) is conversely quite restricted—only contemplating the withholding of fees for aberrant motions[114]—though there too, the chambers have not shied away from issuing warnings prior to withholding fees as a sanction.[115]

Warnings are often used in Rule 73(F)/73(D) decisions, but they have not been used in a uniform manner. While under Rule 46, chambers are required to warn counsel prior to imposing sanctions for

the Accused, Rules of Procedure and Evidence and the Statute of the Tribunal and Abuse of Process, ¶¶ 33, 34 (Sept. 11, 2000).

110 *Id.* ¶ 33.

111 Note that it does not appear that the imposition of sanctions, per se, means that the chamber cannot consider the arguments contained in a motion. In at least one case, the chamber, despite finding that the defence's motion to be "frivolous," went on to consider the arguments presented to it, finding that the accused "should not be prejudiced because of any negligence or inadvertence by his Counsel." Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct His Appellant's Brief, ¶¶ 19-20 (Aug. 17, 2006).

112 The text of the Rule does not provide any list of sanctions that may be imposed by the chamber. Thus it is largely up to the chamber what form sanctions will take. For example, some sanctions hypothetically available to the chamber includes warnings, refusal of fees, fines upon counsel, recommending the registry not to use the offending counsel or reporting counsel to their national bar association.

113 *See* the paragraphs directly following this one.

114 Rule 73(D) of the ICTY RPE specifically states that if a motion is frivolous or an abuse of process the registry is to deny the payment of fees. It leaves no room for the chamber to impose sanctions of its own design.

115 *See, e.g.,* Prosecutor v. Blagojevic, Case No. IT-02-60-T, Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 28, 2004) (wherein an ICTY chamber made use of an "admonishment" of counsel).

misconduct, this is not the case under Rule 73(F)/73(D). Though warnings have been issued in decisions prior to imposing sanctions,[116] this is not required, with many chambers issuing sanctions without referring to any prior warning (which either means there was no prior warning, or that there was a prior warning but the chamber declined to mention it).[117] Further, when warnings are used, the phrasing used has varied greatly; some decisions refrain from finding a motion frivolous but warn counsel against the filing of frivolous motions in the future,[118] while other decisions find the motion itself to be frivolous but refrain from imposing any sanctions beyond a warning.[119] Another alternative is the chamber noting that a motion is "bordering on frivolous" without saying anything further.[120] The clearest form of warning is that used by a trial chamber in the case of *Šešelj*. There, the chamber cautioned the Accused that "other requests with respect to the issue of photocopies will not be entertained and will be considered . . . frivolous."[121] Similarly, in *Hadžihasanović*, the chamber warned the defence that it

116 *See* Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Ndindiliyimana's Request for Certification of the Chamber's *Proprio Motu* Decision of 30 November 2007, ¶ 4 (Feb. 6, 2008); Prosecutor v. Brđanin, Case No. IT-99-36, Decision on Talić Motions (Int'l Crim. Trib. for the Former Yugoslavia Dec. 6, 2002); Prosecutor v. Talić, Case No. IT-99-36/1-T, Decision on Motions (Int'l Crim. Trib. for the Former Yugoslavia Nov. 26, 2002).

117 *See, e.g.*, Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Decision on the Respondent's Motion for Extension of Deadlines (Jan. 25, 2002); Prosecutor v. Bagosora, Case No. ICTR-98-41-I, Decision on Ntabakuze's Preliminary Motion and Motion for the Execution of the Decisions Rendered on 5 October 1998 and 8 October 1999, ¶ 32 (Oct. 20, 2000).

118 *See* Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, ¶ 13 (Sept. 23, 2005); *see also* Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Nzirorera's Motion for Further Extension of Time, ¶ 9 (Oct. 3, 2007); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, *inter alia*, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time to File the Modified Amended Indictment Pursuant to the Trial Chamber II Order of 20 November 2000: Warning to the Prosecutor's Counsel Pursuant to Rule 46(A), ¶ 56 (Feb. 27, 2001); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Decision on the Preliminary Motion of the Defence (Objections Based on Lack of Jurisdiction and Defects in the Form of the Indictment) and on the Urgent Defense Motion Seeking Stay of Proceedings, ¶ 58 (June 21, 2000).

119 *See* Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on Defence Motion to Exclude the Testimony of Witness SGM: Rule 89(C) of the Rules of Procedure and Evidence, ¶ 12 (Apr. 7, 2006); Prosecutor v. Muhimana, Case No. ICTR-95-1B-I, Decision on the Defence Motion for the Annulment of the Initial Appearance, ¶ 16 (Mar. 20, 2000).

120 *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Accused's Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2010); Prosecutor v. Šainović, Case No. IT-05-87-A, Decision on Nebojša Pavković's Motion for an Extension of Time for Filing His Supplementary Brief, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 2010).

121 Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Motion Number 28, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 19, 2003).

"may consider any future submissions of a similar character as the present Oral Motion as frivolous."[122] Following that warning, the defence filed a motion seeking certification of that decision, which the chamber did indeed find to be frivolous.[123]

The use of only warnings and the denial of fees as sanctions stems in large part from the appeals chamber's view of what sanctions are available under Rule 46 of the Tribunals' Rules of Procedure and Evidence, which regards misconduct of counsel.[124] In a decision in *Nshogoza*, the appeals chamber struck down pecuniary sanctions issued pursuant to Rule 46 on the basis that Rule 46 does not refer to pecuniary sanctions, though it does list other permissible disciplinary measures the chamber may use, while other provisions such as Rule 77(G), which deals with contempt, explicitly provide for pecuniary sanctions.[125] Rule 46's silence thus led the appeals chamber to conclude that the Rule did not empower chambers to impose pecuniary sanctions.[126] Following that decision, the trial chamber in *Karemera* reversed its imposition of a fine for the filing of frivolous motions and abuses of process in light of this reasoning.[127] Thus, chambers are clearly limited in terms of what sanctions they are able to apply under Rule 73(F) of the ICTR and Rule 73(D) of the ICTY. The limited nature of available sanctions makes it difficult to tailor the sanction to the severity of the breach of the rule, although some chambers have utilised strategies such as withholding half of the fee due to counsel.[128]

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122 Prosecutor v. Hadžihasanović, Case No. IT-01-47, Decision on Joint Defence Oral Motion for Reconsideration of "Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial," ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2003).

123 Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Defence Oral Motion for Reconsideration of "Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial'" (Int'l Crim. Trib. for the Former Yugoslavia July 25, 2003).

124 *See* Nshogoza v. Prosecutor, Case No. ICTR-2007-91-A, Decision on Appeal Concerning Sanctions, ¶ 29 (June 26, 2009); CHRISJE BRANTS, *Commentary: Contempt of Court, Misconduct of Counsel and Wasting the Court's Time*, *in* ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 458, 460 (André Klip & Göran Sluiter eds., 2003).

125 Nshogoza v. Prosecutor, Case No. ICTR-07-91-A, Decision on Appeal Concerning Sanctions, ¶ 29 (June 26, 2009).

126 *Id.*

127 Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Nzirorera Motion for Reconsideration of Fine: Rule 46 and 54 of the Rules of Procedure and Evidence (July 3, 2009).

128 *See* Prosecutor v. Semanza, Case No. ICTR-97-20-T, Decision on Defence Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94(B) and 54, ¶ 23 (Feb. 6, 2002).

IV. ANALYSIS AND POTENTIAL ISSUES ARISING FROM RULE 73(F)/73(D)

The large number of motions found by chambers to be frivolous and abusive, combined with the many examples of clearly defective motions filed (as examined above), demonstrates that there is a need for rules such as Rule 73(F)/73(D) at international criminal judicial bodies.[129] Chambers need to be able to control the motion practice in the proceedings before them, and being able to sanction counsel for improper use of procedure plays an important part in realising that control. Further, as identified by the chamber in *Karemera*, frivolous and abusive motions are a waste of defence resources, consuming time and energy that could otherwise be used on motions more fruitful for the accused's case.[130] Such motions are a waste of the chamber's time and resources as they negatively impact the ability of a tribunal to efficiently deal with not only the case before it, but with other accused individuals also facing trial in the same tribunal.

The overview of the above decisions illustrates how and when chambers have applied the Rule. Importantly, it is evident that some consistency exists in the Rules' application and that power is not wholly discretionary.[131] The categorisation attempted above is not designed to be an entirely comprehensive or exclusive approach to the Rules but, at the very least, shows that it is possible to limit and guide the application of these Rules through the use of past jurisprudence. This is important, as there are many unresolved issues with these types of rules. First, allegations of bias and prejudice continue to haunt the tribunals and their application of Rule 73(F)/73(D).[132] Second, the potential for the Rules to be applied in a discretionary manner is large, given the approach historically taken by chambers as described in this article. And third, the potential conflict between counsels' duties to their clients and their obligations under the Rules remain ever-present. These issues

129 A review of decisions for this Article found over 150 decisions across the tribunals that dealt with frivolous motions or motions that were abuses of process. The majority of these decisions resulted in findings of frivolousness or abuse.

130 Prosecutor v. Karemera, Case No. ICTR-98-44-AR11*bis*, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction (Aug. 21, 2007) ("the denial of fees for the filing of frivolous motions has no impact on the exercise of an accused's rights"); *see also* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Exclude Testimony of Aernot van Lynden, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2010) (reference is made by the chamber to frivolous motions being a "complete waste of resources available to the Accused").

131 *See infra* Part IV(A).

132 *See infra* Part IV(A).

are discussed below, along with how the use of a framework of the type developed above would assist in minimising their impact on the work of tribunals.

A. *Allegations of Bias and Prejudice*

The two tribunals have been on many occasions accused of bias and prejudice when it comes to dealing with defence teams.[133] It is also clear that at the ICTR and ICTY, the vast majority of applications of Rule 73(F)/73(D) have been made against defence counsel, as opposed to the prosecution. In reviewing over 150 of the decisions of the ICTR and ICTY that refer to Rule 73(F)/73(D) (i.e., frivolous motions and abuses of process) — that is the full corpus of the ad hoc tribunals' decisions on these Rules up to 2011 — this author found just one instance at the ICTR,[134] and one at the ICTY,[135] where a prosecution's motion was deemed to be frivolous or abusive; in both instances the prosecution was only warned against similar action in the future.[136] This disparity has been raised in the case of *Karemera* before the ICTR as evidence of prejudice against the defence.[137] In those proceedings, the Ndindilymana defence team filed a motion arguing that the application of Rule 73(F) was *de facto* prejudicial to the defence, had a chilling effect on the work of defence counsel, and violated the equality of arms.[138] This "statistical" argument was rejected by the chamber,

133 *See e.g.* Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-T, Decision on the Defence Motion for the Disqualification of the Judges of the Trial Chamber (Jan. 25, 2011); Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia* 10 INT'L LEGAL PERSPECTIVES 111, 162-92 (1998) (criticising the independence of the judges of the ICTY and in particular their drafting the Rules of Procedure and Evidence); Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111 (2002) (on the ability of the ad hoc tribunals to provide fair trials to accused).

134 Prosecutor v. Bisengimana, Case No. ICTR-00-60-I, Decision on the Prosecution's Motion for Protective Measures for Witnesses (Nov. 10, 2005).

135 Prosecutor v. Stakić, Case No. IT-97-24-AR73.4, Decision on the Prosecution Motion Seeking Leave to Appeal the Decision of Trial Chamber II Ordering an Identification Parade (Int'l Crim. Trib. for the Former Yugoslavia June 28, 2002).

136 *See also* Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the Alternative, to Limit its Scope and on Urgent Prosecution Request for Decision (June 19, 2008) (prosecution filed an urgent request for a decision from the chamber and was warned that future such filings would attract sanctions).

137 Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Decision on Motion to Vacate Sanctions: Rules 73(F) and 120 of the Rules of Procedure and Evidence, ¶ 2 (Feb. 23, 2005).

138 *Id.*

which stated that "[n]umerous motions were filed by the Defence in contrast to the few filed by the Prosecution and the Defence has not shown that, for similar behaviour, the Prosecution was only warned, while the Lead Counsel for Nzirorera was sanctioned."[139] The chamber considered that because Rule 73(F) could hypothetically be applied to both sides and the defence failed to demonstrate discriminatory application in similar circumstances, no violation of the principle of equality of arms was made out.[140]

While there is a superficial attraction to the argument that the disparity of the application of Rule 73(F)/73(D) amounts to prejudice to the defence or to bias on the part of chambers, it is difficult to make this argument without a deeper qualitative analysis of the motions and decisions. Clearly, chambers themselves are comfortable with the historic application of the rule, seeing it as both a true reflection of the contents of motions before it, and partly explicable by the large number of motions filed by the defence during proceedings, compared with those filed by the prosecution.[141] This may indeed be the case; however, the lack of explicit and descriptive reasons when applying Rule 73(F)/73(D) make it difficult to have full confidence in this conclusion. Most Rule 73(F)/73(D) decisions are only a few pages long and do not provide substantive reasoning regarding the frivolous or abusive content.[142] This makes it difficult for outside observers to contextualise a finding of frivolity or imposition of sanctions in the history of the motion practice before the chamber. Providing fuller reasoning would allow defence counsel and outside observers to better appreciate the justifications for the application of the Rule, and to comprehend the disparity of its application among the prosecution and defence.

Further, the use of a consistent framework when applying the Rules would provide a bulwark against accusations of bias. The factors elucidated above show it is possible to structure the application of the Rule to show that is not being applied in an entirely discretionary manner, but instead following a line of authority that is coherent and consistent. While it is difficult to entirely quell these types of allegations, the explicit use of a consistent framework, whether in terms

139 *Id.* ¶ 8.

140 *Id.* ¶¶ 6-8.

141 *See, e.g.*, Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Decision on Motion to Vacate Sanctions: Rules 73(F) and 120 of the Rules of Procedure and Evidence, ¶ 8 (Feb. 23, 2005).

142 *See, e.g.*, Prosecutor v. Nshogoza, Case No. ICTR-07-91-PT, Decision on Defence Motion for Clarification and Request for an Extension of Time (Feb. 3, 2009).

of the factors identified in this article or otherwise, would lend credence in showing when they lack merit.

B. The Discretionary Application of the Rules

The lack of reasons in decisions applying Rule 73(F)/73(D) makes it difficult for counsel to understand precisely their error in filing a motion and to critique the findings made by the chamber. Indeed, the lack of reasons provided could be seen as evidence of chambers approaching Rule 73(F)/73(D) as a discretionary power, without constraint or consistency in their application. In applying the Rules, however, the chamber is required to undertake an analysis of the specific history of proceedings before it and the experience, knowledge and professionalism of the relevant counsel and use that analysis to work out how best to regulate proceedings to ensure the orderly and fair proceeding of the matter — this necessarily entails the employment of an element of discretion given that there is no 'one size fits all' solution to issues that arise during a proceeding. A warning may suffice for certain counsel, while stronger sanctions may be necessary in specific cases. It would not be desirable, or perhaps even possible, to perfectly codify this regime given the vagaries of counsel and proceedings. However, at the same time, this does not mean it is impossible for the application of Rule 73(F)/73(D) to be guided by a set of criteria or factors (as identified above). The categories described above provide a clear starting point for the limits of acceptable motion practice before the tribunal and their use would demonstrate that the application of these Rules is not entirely discretionary in nature. Additionally, using a known set of principles when applying the Rules means that counsel can be guided in relation to their motion practice in order to minimise the risk of a breach. Further, chambers themselves could be more confident in the conclusions they reach when applying the rules if they could rely on a line of established authority regarding the Rules' application.

C. Potential Conflicts of Duties

Rules such as Rule 73(F)/73(D) raise clear potential conflicts between the ethical obligations of defence counsel towards their clients and their obligations under these rules. Defence counsel at the ICTR, ICTY and elsewhere, are required to act according to the best interests

of their client.[143] At times, this obligation may require counsel to advance arguments that may be weak or possess little chance of success. However, under the chamber's current approach to Rule 73(F)/73(D), counsel could easily be penalised for using creative or innovative approaches to the law, running the risk of their motions being deemed frivolous as a result of weak legal underpinning. Indeed, the Special Court for Sierra Leone has recognised this potential conundrum in its decision in *Brima* when it observed "emphatically that . . . it does not intend to discourage creative and imaginative legal argument," but without proposing any real solution to this tension.[144] Similarly, some ICTY and ICTR decisions emphasise that they have only applied sanctions because the motion lacked merit to a degree far beyond the bounds of reasonableness.[145]

These comments, however, appear to be of little comfort to defence counsel. On a number of occasions, ICTR defence counsel have argued that the denial of fees has had an adverse impact on counsel's ability to represent clients.[146] But this argument has been rejected on the grounds that "sanctions orders are not substantive" but "merely ancillary or consequential to the substantive motion," and "do not prevent the Defence from making fresh applications . . . if it has an appropriate basis to do so."[147] Chambers have also made it clear that

143 *See* Code of Professional Conduct for Counsel Appearing before the International Tribunal, Int'l Crim. Trib. for Rwanda, IT/125 Rev. 3, arts. 6, 9 (Mar. 14, 2008), *available at* http://www.unictr.org/Portals/0/English%5CLegal%5CDefence%20Counsel%5CEnglish%5C04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf; Code of Professional Conduct for Counsel Appearing before the International Tribunal, Int'l Crim. Trib. for the Former Yugoslavia, IT/125 Rev. 3, art. 14 (July 22, 2009, as amended).

144 Prosecutor v. Brima, Case No. SCSL-04-16-PT, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullen Crimen Sine Lege* and Non-retroactivity as to Several Counts, ¶ 39 (Mar. 31, 2004); *see also* Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11*bis*, Decision on Request to Admit Additional Evidence of 1 August 2008, ¶ 12 (Sept. 1, 2008).

145 *See* Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Emergency Motion to Vary Witness List: Rule 73 and 73*ter* (E) of the Rules of Procedure and Evidence, ¶ 12 (June 12, 2008); Prosecutor v. Gatete, Case No. ICTR-00-61-T, Decision on Defence Motion to Strike Portions of the Prosecution Closing Brief: Rule 54 and 73 of the Rules of Procedure and Evidence, ¶ 5 (Sept. 30, 2010); Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on Motion to Exclude Testimony of War Correspondents, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia May 20, 2009) (where the chamber emphasised the lack of merit in the following way: "The Trial Chamber considers this Motion to be both frivolous and vexatious. It is wholly lacking in merit and is a wasteful use of resources. . . . It contains no tenable argument in support of the relief sought.").

146 *See* Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to be of "No Effect": Rule 46(A) and 73 of the Rules of Procedure and Evidence, ¶ 12 (May 24, 2005).

147 *Id.*

they do not consider sanctions to prejudice the rights of the accused as they are applied only "against Defence Counsel for acting in an irresponsible manner."[148] Similarly, in the ICTY case of *Prlic*, the defence argued that sanctions imposed on counsel pursuant to Rule 73(D) of the ICTY Rules had a "chilling effect" and led to the defence having "a passive attitude [and] avoiding confrontation."[149] The defence further submitted that the fear of sanctions may turn into a "sword of Damocles" and "would constitute a matter likely to significantly affect the fair and expeditious conduct of the trial . . . ."[150] The chamber found that as the defence did "not raise any legal arguments . . . and merely mentions its state of mind," counsel's request for certification to appeal failed.[151]

Thus, both the ICTR and ICTY chambers have rejected arguments that sanctions imposed have had a chilling effect on defence counsel, instead emphasising that sanctions are levied against counsel in a personal capacity for improper conduct.[152] However, the lack of reference to prior authorities or principles guiding the application of Rule 73(F)/73(D) has meant that counsel do not have a comprehensive guide to the standards under the Rules and therefore cannot properly evaluate the Rules as against their other ethical obligations. The development of such a standard would thus assist counsel in resolving potential conflicts and help to remedy the tension identified in *Brima*.

V. LESSONS FROM THE AD HOC TRIBUNALS' APPROACH TO RULE 73(F)/73(D)

The experience of the ad hoc tribunals in applying Rule 73(F)/73(D) also provides a number of lessons for those future international criminal courts and tribunals attempting to use similar

148 Prosecutor v. Kabiligi, Case No. ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *Ab Initio*, ¶ 53 (Apr. 13, 2000).

149 Prosecutor v. Prlić, Case No. IT-04-74, Decision on Request for Reconsideration, or in the Alternative, for Certification to Appeal the 1 February 2010 Decision Applying Rule 73(D) of the Rules to the Prlić Defence (Int'l Crim. Trib. for the Former Yugoslavia June 28, 2010).

150 *Id.*

151 *Id.*

152 *See, e.g.*, Prosecutor v. Kabiligi, Case No. ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *Ab Initio*, ¶ 53 (Apr. 13, 2000) (where the chamber found that no prejudice to the accused's rights since the accused is being represented by assigned counsel and that the sanction was "against Defence Counsel for acting in an irresponsible manner.").

rules to control proceedings. First, clarification and consistency in relation to the chambers' approach to the distinction (or lack thereof) between the concepts of "frivolity" and "abuse of process" would be helpful. All of the factors discussed above have given rise to findings of both frivolousness and abuse by different chambers.[153] However, given the textual distinction between frivolousness and abuse of process, it is at least arguable that these should be distinct concepts. There is also some support for this in the case law, with one appeals chamber decision holding that a motion went "beyond frivolous" to "constitute an abuse of process."[154]

One possible method of differentiation may be through evaluating intent. For example, an abuse of process could be found in a demonstrated intent to delay proceedings,[155] to deceive the Chamber,[156] or even perhaps in an implication of intent from continually baseless and frivolous motions. Thus, abuse could only be found where a process is intentionally used in a manner that it is not designed for. Conversely, frivolous motions could be those that are merely baseless and waste the tribunal's time and resources, irrespective of actual intent. Giving this type of distinction in meaning to the two concepts might help clarify for counsel the problems with their motions, force chambers to apply appropriate reasoning when making their determination, and help to appropriately reprimand counsel in relation to the severity of their breach of the Rules.

Second, warnings should be an integral part of any chamber's approach to rules such as Rule 73(F)/73(D). Warnings are not required under the rules of the ad hoc tribunals, but were often utilised and served an important role in alerting counsel to the chamber's disposition on the subject.[157] This gives counsel the ability to either question the chamber's determination or to modify their practice accordingly, prior to the imposition of sanctions. Of course, warnings are not always necessary. In cases of egregious violations of the rules, offensive, or obviously dilatory motions, a chamber does and should have the discretion to sanction counsel without the need for a prior warning.

153 *See supra* Part III(B).

154 *See* Prosecutor v. Žigić, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review Under Rule 119, ¶ 10 (Aug. 25, 2006).

155 *See* Prosecutor v. Kabiligi, Case No. ICTR-96-34-I, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *Ab Initio*, ¶ 54 (Apr. 13, 2000).

156 Prosecutor v. Žigić, Case No. IT-98-30/1-A, Decision on Zoran Žigić's Request for Review Under Rule 119, ¶ 10 (Aug. 25, 2006).

157 *See supra* Part III(C) and in particular the second paragraph of that section.

Where warnings have been used prior to imposing sanctions, it is important that the chamber refer to these instances so that the record accurately reflects the history of proceedings in support of the imposition of a sanction. This might help to ward off allegations of bias or prejudice.

Third, it is clear that the history of proceedings in a given case will and should influence the chamber's disposition to a counsel, and provide further context to the determination process.[158] The chamber's application of rules such as Rule 73(F)/73(D) can be informed by its evaluation of counsel's experience and knowledge of the law and procedure of the tribunal, such that first time offenders are more likely to face lighter sanctions (in the form of less fees withheld) or just a warning. Conversely, long-time advocates should face harsher sanctions given the expectation of understanding of tribunal operations. However, it is equally important that the chamber explicitly state its reasoning (and the relevant context informing the decision) when taking such factors into account. This would help ensure that parties understand the determination process and have more confidence in the chamber's decision.

Finally, at the root of these considerations is the need for chambers to reason through their application of these Rules in their decisions, including reference to past authority. An ad hoc application of these types of rules only results in muddied case law, increased conflict between the chamber and parties, and an increased likelihood that the accused will not be adequately represented due to the defence counsel's fear of running afoul of the relevant rule. Furthermore, giving proper reasons will also allow for a more varied application of sanctions that can be applied consistently. This in turn would likely result in a reduction of frivolous and abusive motions. Without clear and explicit reasoning, the law lacks predictability and reliability, and counsel may continue to fall afoul of it. While it is clear that the chambers' time and resources are often stretched, adopting a more thoroughly reasoned

158 *See* Prosecutor v. Karemera, Case No. ICTR-98-44-AR11*bis*, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction, 4 (Aug. 21, 2007) (the chamber made its determination "in light of the history of the proceedings"); *see also* Prosecutor v. Blagojevic, Case No. IT-02-60-T, Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief (Int'l Crim. Trib. for the Former Yugoslavia Sept. 28, 2004) (the chamber prefaced its finding on the demonstrated experience and proficiency of the counsel before it, that made it difficult for it to conclude that he had merely had a "fundamental misconception" of the roles of the judges and parties before the tribunal).

approach to these Rules could ultimately save time and resources by helping to curb wasteful and inappropriate motions.

VI. CONCLUSION

The ad hoc tribunals have created a large body of decisions dealing with motions that are frivolous or an abuse of process. By examining jurisprudence, this article has demonstrated one possible approach to understanding how sanctions are applied and what type of conduct could lead to the imposition of sanctions. It also examined three potential issues that these types of rules create, as well as lessons that future tribunals and courts can learn from the experiences of the ICTR and ICTY. The lack of a consistent, coherent, and comprehensive approach to these rules that is explicitly used when the rules are applied, has left chambers open to allegations of bias, has contributed to a lack of consistency in decision-making, and has made it difficult for counsel to be aware of the expectations placed upon them and how to resolve potential ethical conflicts. With the experiences of the ad hoc tribunals in mind, it is hoped that the application of similar rules in other courts and tribunals may not needlessly repeat similar issues.