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BALANCING PREJUDICE:
FAIR TRIAL RIGHTS AND INTERNATIONAL PROCEDURAL
DECISIONS RELATING TO EVIDENCE

Rogier Bartels

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**BALANCING PREJUDICE:
FAIR TRIAL RIGHTS AND INTERNATIONAL PROCEDURAL DECISIONS
RELATING TO EVIDENCE**

Rogier Bartels*

1. Introduction

Despite the gravity of the alleged conduct in cases of aggression, genocide, crimes against humanity, or war crimes, it is – fortunately¹ – undisputed that a person accused of having committed international crimes is entitled to receive a fair trial. Shortly before the birth of international criminal law,² Winston Churchill favoured summary execution of all (alleged) German war criminals, referring to fair trial rights as ‘complications’.³ However, the Charter of the International Military Tribunal at Nuremberg, adopted a few months later, did include several provisions ‘to ensure fair trial for the Defendants’.⁴ At the International Criminal Tribunal for the former Yugoslavia (ICTY), the trial chambers had to ‘ensure that a trial is fair and expeditious and that proceedings are conducted [...] with full respect for the rights of the accused’, as stated in Article 20 of the Tribunal’s Statute.⁵ The International Criminal

* Legal Officer in Chambers (Trial Division) at the International Criminal Court, honorary judge in the District Court of Amsterdam, and academically affiliated with the Amsterdam Center for International Law (University of Amsterdam) and the Criminal Law Section of the VU University Amsterdam. The views expressed in this chapter are his own and should not be attributed to the aforementioned institutions.

¹ In the early years of the *ad hoc* tribunals, Gerry Simpson observed that ‘[i]t is clear that in an area of law so thoroughly politicised, culturally freighted and passionately punitive as war crimes there is a need for even greater protections for the accused’. Gerry J. Simpson, ‘War Crimes: A Critical Introduction’, in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes* (Kluwer Law International, 1997), p. 15.

² The Charter of the International Military Tribunal at Nuremberg has been referred to as the ‘birth certificate of international criminal law’: Heiko Ahlbrecht, ‘Foundations’, in Gerhard Werle (ed.), *Principles of International Criminal Law* (T.M.C. Asser Press, 2005), p. 6.

³ Churchill is quoted in minutes of a wartime cabinet meeting on 12 April 1945 as having said: ‘Agree the trial will be a farce. Indictment: facilities for counsel. All sorts of complications ensue as soon as you admit a fair trial. I would take no responsibility for a trial – even though U.S. wants to do it. Execute the principal criminals as outlaws – if no Ally wants them.’ Peggy McGuinness, ‘Churchill on War Crimes Trials’, *Opinio Juris* (23 January 2006), relying on Thomas Vinciguerra, ‘The Private Thoughts of a Public Man’, *The New York Times* (22 January 2006).

⁴ Section IV (‘Fair Trial for Defendants’) of the Charter of the International Military Tribunal.

⁵ Article 20 of the ICTY Statute. The next provision (Article 21), sets out the “[r]ights of the accused”. Its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), contained similar provisions. The ICTY and

Court (ICC or Court), on which this contribution focusses, naturally also acknowledges the accused's right to a fair trial. The Court's legal texts do not explicitly refer to this right as such, but its various components are incorporated in several provisions of the Rome Statute of the International Criminal Court (Rome Statute),⁶ such as Articles 22,⁷ 23,⁸ 55,⁹ and 67.¹⁰ In addition, some provisions of the Rome Statute more generally address the need for trial to be 'fair'¹¹ or refer to associated concepts, for instance the 'integrity of the proceedings'.¹² However, as discussed below, the phrase 'integrity of the proceedings', as well as the phrase 'in the interests of justice', are often used to justify the placing of certain limitations on the rights of an accused. Whereas the fair trial rights explicitly laid down in the various statutes of international criminal institutions mostly concern fundamental principles, such as *nullum crimen sine lege* and *ne bis in idem*, or the right not to be tried in secret, the present contribution focusses specifically on evidentiary matters, and the related fair trial rights, such as due notice and the principle of equality.

One of the corollaries of the right to fair trial is the assessment of prejudice to the accused caused by certain actions of the other party – that is, the Office of the Prosecutor (Prosecution) – and/or actions by participants to the proceedings – that is, at the ICC, mainly the Legal Representatives of Victims – or prejudice resulting from decisions taken by the

ICTR have now been replaced by the International Residual Mechanism for Criminal Tribunals (IRMCT), but the relevant provisions of the IRMCT Statute are virtually the same: see Articles 18 and 19 of the IRMCT Statute.

⁶ E.g., Articles 20, 22, 23, 24, 55, 64, 67, 68, and 69 of the Rome Statute. Naturally, the catch-all clause of Article 21(3), which requires the Court to bear 'internationally recognized human rights' in mind, can also be seen as incorporating fair trial rights.

⁷ Article 22 incorporates the principle of *nullum crimen sine lege*, albeit specifically in relation to the conduct in question being criminalised by the Rome Statute, as opposed to the law applicable to the alleged perpetrator at the time. However, Article 21(3), referred to in the previous footnote, provides that the Court is to apply and interpret the law in a manner consistent with internationally recognised human rights standards. Therefore, even if Article 22 does not provide the required protection, the Court would still be held to apply the broader *nullum crimen sine lege* principle as included in international human rights law, including, for example, the International Covenant on Civil and Political Rights. See Rogier Bartels, 'Legitimacy and ICC Jurisdiction following Security Council Referrals', in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy and Effectiveness of International Criminal Tribunals* (Cambridge University Press, 2017), pp. 159-161; and Dapo Akande, 'Sources of International Criminal Law', in Antonio Cassese *et al.* (eds.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), pp. 46-47.

⁸ Article 23 sets out the principle of *nulla poena sine lege*: 'A person convicted by the Court may be punished only in accordance with this Statute'.

⁹ Article 55 sets out the rights of persons during an investigation into alleged criminal conduct. At the time of an investigation, the relevant person is not yet an 'accused', which someone only becomes after the confirmation stage, but the relevant safeguards include traditional fair trial rights, such as the right not to be compelled to incriminate oneself, and the right to legal assistance.

¹⁰ Article 67 is entitled 'Rights of the accused' and provides that 'the accused shall be entitled [...] to a fair hearing conducted impartially', and sets out 'minimum guarantees', such as '[t]o be tried without undue delay' (Article 67(1)(c)).

¹¹ E.g., Article 68(1), (3), and (4); and Article 69(4) of the Rome Statute.

¹² Article 69(7) of the Rome Statute.

chamber seized of the case. Examples of such actions by the Prosecution are the late disclosure of materials that it intends to introduce as incriminating evidence, or the addition of (new) witnesses to the Prosecution's list of witnesses after the relevant deadline imposed by the chamber, or after the trial proceedings have commenced.¹³ Generally, a request will have to be made to do so, and in deciding on any such request the relevant chamber will evaluate the prejudice caused. That is to say, not merely whether prejudice is caused, but rather the level of prejudice that would be caused should the request be granted, since any decision by a trial chamber admitting incriminating evidence is, of course, prejudicial to the accused. Every witness testifying against the accused, and any piece of incriminating evidence admitted, as well as any day less to prepare because of late disclosure,¹⁴ causes a certain inconvenience, or may have another negative impact on the work of the defence, and thus on the accused. Therefore, what has to be assessed, and thus the language that ought to be used by the relevant chamber, is whether any 'undue prejudice'¹⁵ is caused.¹⁶ There may be some prejudice, but it must not be too much.¹⁷

Other procedural decisions may affect the rights of the accused in another way, thereby causing prejudice, such as the granting of a request to rely on anonymous witnesses at the pre-trial stage,¹⁸ or the granting of other, less far reaching, types of protective measures for witnesses that nonetheless limit the defence's ability to investigate these persons for the purposes of impeachment.¹⁹ Both impact on the accused's ability to confront the witnesses

¹³ See, for example, ICC, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11), 3 June 2013; ICC, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11), 3 September 2013; and ICC, Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), *Prosecutor v. Dominic Ongwen*, (ICC-02/04-01/15), 22 November 2016.

¹⁴ This is especially so when the preparation had initially started without the relevant items or witnesses in mind.

¹⁵ Other phrases used include 'unfair prejudice' or 'material prejudice'.

¹⁶ It is therefore important to observe that a decision granting any of the abovementioned requests by, *inter alia*, stating that 'no prejudice is caused' is incorrect.

¹⁷ Rule 136 of the ICC Rules of Procedure and Evidence mandates that cases against persons who are jointly accused must be tried separately if doing so is necessary 'to avoid serious prejudice to the accused'. It is not explained what would amount to 'serious prejudice', however.

¹⁸ See, e.g., Public Redacted Version of 'Decision on the Prosecution Motion for Authorization to File an Anonymous Summary concerning Witness MLI-OTP-P-P0113', *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, (ICC-01/12-01/18), 13 September 2018 (public redacted version filed on 27 September 2018).

¹⁹ Article 8(4) of the ICC Code of Professional Conduct for counsel states, for example, that 'Counsel shall not reveal the identity of protected victims or witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court'. In *Ruto and Sang*, the defence team for Mr Ruto argued that it was hampered in its ability to effectively investigate Prosecution witnesses because most of them had been granted protective measures. At the same time, the Prosecution was concerned that the methods of investigations used by the defence for Mr Ruto sufficiently protected the security and identity of some of its witnesses. See ICC, Decision Related to Defence Submission

against him or her. In practice, however, the fact that one of the fair trial rights is impeded upon will still be considered in terms of prejudice. It is clear that any limitation on a fair trial right, such as the right to effectively test and challenge incriminating evidence, causes prejudice. Also in these cases, the assessment therefore is whether the amount of prejudice is not undue, and whether the prejudice is sufficiently mitigated.

This chapter analyses whether it can be assessed if undue prejudice will be suffered, or has been suffered, when it concerns procedural matters before the ICC relating to evidence. The present edited volume addressed the balancing of the rights of accused persons and of victims of crimes allegedly committed by these persons. When a chamber assesses the potential prejudice for the purposes of procedural decisions, it is effectively carrying out a balancing exercise. As discussed below, it makes this assessment by looking at the interest of the accused on one side and those of the Prosecution and victims on the other. The present chapter further discusses whether prejudice can only be suffered by the accused, or also by other the Prosecution or – through their legal representatives – victims.

2. What is prejudice?

The notion of prejudice is mentioned in various provisions of the Rome Statute and the Rules of Procedure and Evidence,²⁰ but it is not explained by these instruments. Indeed, Trial Chamber II, in *Katanga and Ngudjolo*, observed that ‘as with probative value, it is not possible to define the meaning of prejudice exhaustively’.²¹ The concept of prejudice has been referred to in many ICC decisions, including explanations of what must be understood as undue prejudice, or what remedies may be taken to prevent an act from becoming unduly prejudicial. These explanations will be discussed below.

The present contribution does not discuss the assessment whether any irreparable prejudice has been caused by intentional breaches of the fair trial rights of accused. In *Lubanga*, for example, the existence of irreparable prejudice was alleged by the defence for Mr Lubanga as a result of the use of intermediaries to obtain witnesses, and the non-

of Confidential Defence Investigation Materials, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11), 6 June 2014.

²⁰ Articles 68 and 69 of the Rome Statute; and Rules 68, 72(2) and 136 of the Rules of Procedure and Evidence. It appears either as ‘prejudice’ or ‘prejudicial’. Most references to either of these words are made in a different, unrelated context.

²¹ ICC, Decision on the Prosecutor's Bar Table Motions, *Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, (ICC-01/04-01/07), 17 December 2012, para. 38.

disclosure by the Prosecution of United Nations documents.²² This led to a temporary stay of proceedings of the trial, but not – as requested by Mr Lubanga – a permanent stay, which would effectively have meant the end of the trial. As a result, it has been observed that the ‘threshold’ warranting a definite stay of proceedings as a result of a violation of the rights of the accused is very high and ‘almost impossible to meet’.²³

More recently, in *Ntaganda*, the defence team for Mr Ntaganda requested an ‘indefinite stay of proceedings’.²⁴ In the Defence’s submission, the Prosecution had obtained access to phone conversations of Mr Ntaganda with third persons which the trial chamber had decided should not be given to the Prosecution in unredacted form, and thereby it had become privy to information about the defence strategy and defence witnesses, as a result of which the Prosecution allegedly ‘gained an undue and unfair advantage causing grave prejudice to the accused and the fairness of the proceedings’.²⁵ Although the *Ntaganda* Trial Chamber found that Mr Ntaganda had suffered prejudice as a result of the Prosecution’s actions,²⁶ it considered that the prejudice did not rise to the level that would warrant a stay of proceedings. The Trial Chamber was ‘not convinced’ that the prejudice identified reached the ‘threshold for a stay of proceedings’.²⁷ Instead, it held that ‘any prejudice may be remedied, retroactively and prospectively, through alternative, less drastic measures’ than a stay of proceedings.²⁸

The aforementioned two decisions assess the amount of prejudice caused as a result of actions by the Prosecution, but do so by considering whether the negative impact on the accused’s rights was so disproportionate that it could not be remedied in any other way than

²² ICC, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008” *Prosecutor v. Lubanga*, (ICC-01/04-01/06), 21 October 2008; and ICC, Decision on Intermediaries, *Prosecutor v. Lubanga*, (ICC-01/04-01/06), 31 May 2010.

²³ Masha Federova, Sten Verhoeven and Jan Wouters, ‘Safeguarding the Rights of Suspects or Accused Persons in International Criminal Proceedings’, *Leuven University Institute for International Law Working Paper No. 27* (June 2009), p. 25.

²⁴ Interestingly, in light of the topic of this contribution, the Defence phrased its motion as a request for a ‘stay of the proceedings against Mr Ntaganda with prejudice to the Prosecutor’. ICC, Public redacted version of the Defence Request for stay of proceedings with prejudice to the Prosecutor, *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), 21 March 2017, paras 3, 12-13, 93-94 and p. 31.

²⁵ *Ibid.*

²⁶ The Chamber found that ‘the fact that the Prosecution has had access to such information is prejudicial to the accused as it places the Prosecution in an unduly advantageous position vis-à-vis the Defence.’ However, it continued to note that ‘[w]hile the Chamber is of the view that the Prosecution’s access to such information is in itself prejudicial, the Chamber considers that, on the basis of the submissions made so far, the information which may be relevant to defence strategy appears to be limited.’ (ICC, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), 28 April 2017, paras 42-43).

²⁷ *Ibid.*, para. 43.

²⁸ *Ibid.*

by staying the proceedings.²⁹ While relevant to mention in a chapter dealing with the concept of prejudice, this type of request will not be further addressed. The present contribution focusses on regular procedural decisions, in situations where it is clear that any level of prejudice does not warrant a stay of proceedings, but rather the question is whether granting the procedural request may cause certain prejudice, and whether – as a result of the prejudice being ‘undue’ – the request ought to be rejected, or granted with conditions, to mitigate the prejudice.

In assessing whether any such ‘undue prejudice’ would occur in a particular circumstance, one must differentiate between prejudice and mere inconvenience. Lawful actions, such as including a large number of witnesses on the Prosecution’s witness list, can cause the same form and level of inconvenience to the defence (and thereby the accused) as would be the case with actions that may be found to be unduly prejudicial. Yet, in the case of the former, the inconvenience is not prejudicial in the legal sense, as it has been contemplated and accepted by the legal process. Since the very nature of a criminal trial, as well as the Prosecution’s role in the process, involves the bringing of incriminating evidence before judges, the presentation of evidence as such cannot be seen as prejudicial. By way of example, if the Prosecution places 60 witnesses on its list, who it seeks to examine for an average of six hours each, this obviously causes more work for the defence, in terms of investigations and preparation, than would be the case if the Prosecution’s list of witnesses only included ten persons, each called to testify for a similar average of examination time. Yet, the placing of 50 more witnesses on its list, does not make the Prosecution’s action prejudicial to the accused. It would be different if the Prosecution seeks to add additional witnesses after the disclosure deadline, thereby impeding the time provided to the defence to prepare for the testimonies, or even more so if the request to add witnesses is made while the trial has already commenced. As will be shown below, prejudice can therefore arise with regards to a fair right, such as the right to examine a witness providing incriminating evidence,³⁰ but also more generally with regards to the accused organising a proper defence,

²⁹ The various chambers of the ICC have consistently held that the remedy of a permanent stay of proceedings serves situations where it would be ‘repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible’. Yet, a stay of proceedings constitutes ‘an exceptional remedy to be applied as a last resort’, and ‘not every violation of fair trial rights will justify the imposition of a stay’. See, for example, ICC, Public redacted version of Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, *The Prosecutor v. Uhuru Muigai Kenyatta*, (ICC-01/09-02/11), para. 14, and the case law referred to therein.

³⁰ As included for the ICC in Article 67(1)(e) of the Rome Statute.

including having sufficient time to prepare – although the latter is, of course, also guaranteed through the right ‘[t]o have adequate time and facilities for the preparation of the defence’.³¹

Actions out of the ordinary, including failing to abide by timelines set by a chamber, such as the late addition of witnesses to the list of witnesses, do result in prejudice. As mentioned in the introduction, an example of a non-ordinary situation is the use of anonymous witnesses. Interestingly, in the early years of the ICC, its Appeals Chamber noted that the use of summaries without disclosure of the identities of the relevant witnesses to the defence, at the pre-trial stage, ‘may affect the ability of the accused to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects’, the witnesses’ identities are unknown to the defence and because it does not receive the underlying material ‘the ability of the defence to evaluate the correctness of the summaries is restricted’, yet it found that the use of such summaries of anonymous witnesses is ‘not [...] necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.³² The Appeals Chamber appears to have accidentally mashed the concepts of prejudice to the accused, (in)consistency with the rights of the accused, and the concept of a fair and impartial trial, together.³³ Whereas the two aspects identified by the Appeals Chamber show that the use of summaries, and lack of disclosure of the identities and witness statements of witnesses, will negatively impact on the defence’s ability to challenge this evidence, and thus is *per se* prejudicial, so long as the reliance on these summaries is sufficiently counterbalanced, the accused’s rights – while affected – may not be *violated*, and the trial may still be fair.³⁴

The difference between prejudice and undue prejudice is shown by admission of prior recorded testimony. As a result of the principle of orality, ‘in-court personal testimony [is] the rule’ at the Court.³⁵ For any request to admit non-oral testimony, as one of the exceptions

³¹ Article 67(1)(b) of the Rome Statute.

³² ICC, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, *Prosecutor v. Thomas Lubanga Dyilo*, (ICC-01/04-01/06), 14 December 2006, para. 50.

³³ It is noted, however, that the same paragraph contains another sentence with similar, combined wording: ‘[...] is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’ (...).

³⁴ See *ibid.*, para. 51. See also, Public Redacted Version of ‘Decision on the Prosecution Motion for Authorization to File an Anonymous Summary concerning Witness MLI-OTP-P-P0113, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, (ICC-01/12-01/18), 13 September 2018 (public redacted version filed on 27 September 2018), paras 35-36, in which the Pre-Trial Chamber recalled that ‘Pre-Trial Chambers have consistently stated that they attached lesser probative value to summaries of statement than to evidence given by witnesses whose identities were known to the defence, that the summaries had to be corroborated, and that no conclusions could be drawn exclusively on the basis of anonymous hearsay evidence.’

³⁵ As concluded by the Appeals Chamber on the basis of Article 69(2) of the Rome Statute: ICC, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, *Prosecutor v. Jean-Pierre Bemba Gombo*, (ICC-01/05-01/08), 3 May 2011, para. 76.

provided for under Article 69(2) of the Rome Statute, ‘a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally’, and any decision on allowing the admission of prior recorded testimony therefore has to be made ‘cautious[ly]’.³⁶ The ICTY Appeals Chamber had on an earlier occasion recalled that ‘[t]he principle of orality is intended principally to ensure the accused’s right to confront the witnesses against him’.³⁷ By not being able to cross-examine a witness, the accused will suffer prejudice.³⁸ Trial Chamber II therefore, in a time before the amendment of Rule 68, which now allows for the admission of prior recorded testimony even with the accused’s opposition, held that ‘unless the accused persons have either waived their right to examine the witness or had the opportunity to do so when the testimony was recorded’, admission of prior recorded testimony of a witness would necessarily be ‘unduly prejudicial to the right of the accused to examine, or have examined, adverse witnesses’.³⁹ While the aforementioned right, as contained in Article 67(1)(e) of the Rome Statute, remains unchanged, the amendment of Rule 68⁴⁰ has now introduced legal limitations to this right. Interestingly, the level of prejudice resulting from the introduction of evidence against the will of the accused has changed as a result. Whereas, as found by Trial Chamber II, this would initially be unduly prejudicial, now that – following the amendment of the Rules of Procedure and Evidence – the admission of prior recorded testimony has become an institutionalised practice,⁴¹ a decision with the same outcome would no longer be unduly prejudicial by definition, but may only be merely ‘prejudicial’ – to such a level that it does not prevent the introduction of prior recorded testimony into evidence.

³⁶ *Ibid.*, para. 78. Recalled by the Appeals Chamber in ICC, Judgment on the Decision on the Admission of Prior Recorded Testimony under Rule 68, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11), 12 February 2016, para. 85.

³⁷ ICTY, Decision on interlocutory appeal concerning admission of record of interview of the accused from the bar table, *Prosecutor v. Sefer Halilovic*, (IT-01-48-AR73.2), 19 August 2005, para. 17.

³⁸ E.g., ICC, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, *Prosecutor v. Jean-Pierre Bemba Combo*, (ICC-01/05-01/08), 3 May 2011, para. 78.

³⁹ ICC, Decision on the Prosecutor’s Bar Table Motions, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07), 17 December 2010, paras 50-51.

⁴⁰ Rule 68 of the ICC Rules of Procedure and Evidence was amended by the Assembly of States Parties in 2013 (Resolution ICC-ASP/12/Res.7) to include the possibility to admit evidence of witnesses who are either not examined by the Prosecution, but available for cross-examination, or who do not appear in person at all, for example because they are deceased or have been threatened. The amendments reflect the rules as included for the ICTY as Rules 92 *bis*, *ter*, *quater* and *quinquies*.

⁴¹ Arguably, as a result of the amendment, the admission of prior recorded testimony could be seen as no longer being out of the ordinary, but the fact that the amended rule continues to state that any such admission may only be done, ‘provided that this would not be prejudicial to or inconsistent with the rights of the accused’ shows that this is not the case.

The relevant legal framework still recognises that any prior recorded testimony that ‘goes to proof of acts and conduct of the accused’ would be more prejudicial and as such ‘may be a factor against its introduction, or part of it’.⁴² However, such indications to assist the assessment of the chamber are not generally included in the Rules of Procedure and Evidence. So how can chambers assess in practice whether any prejudice is caused; and if so, whether it can be sufficiently mitigated or whether the relevant decision would lead to undue prejudice? This is discussed next.

Assessing whether the prejudice is undue

The Court’s case law has given some guidance how to assess prejudice. In relation to the admission of evidence, as mentioned above, and aptly noted by Trial Chamber I in *Lubanga*, ‘it is trite to observe that all evidence that tends to incriminate the accused is also “prejudicial” to him’.⁴³ A chamber, in deciding on requests for admission into evidence, must ensure that it is not unfair to admit the disputed material. Trial Chamber I clarified that this could be so ‘for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s fair assessment of the issues in the case’.⁴⁴ In *Katanga and Ngudjolo*, Trial Chamber II, after first noting that ‘[t]he existence and extent of prejudice must be ascertained on a case-by-case basis’ and that it therefore would ‘serve little purpose for the Chamber to discuss all possible forms of prejudice in general terms’,⁴⁵ did set out some criteria to consider when deciding on so-called bar table motions (requests for the admission of documentary evidence not tendered through a witness). It also clarified that ‘when addressing issues of prejudice, the Chamber will consider two questions: (a) what causes the prejudice; and (b) what suffers the prejudice’.⁴⁶ Trial Chamber II held that unduly prejudicial would be admission of evidence that would affect the right to be tried without undue delay, as enshrined in Article 67(1)(c) of the Rome Statute,⁴⁷ because the relevant evidence would require a disproportionate time to be presented to, or considered by, the

⁴² Rule 68(2)(c) and (d) of the ICC Rules of Procedure and Evidence.

⁴³ ICC, Decision on the admissibility of four documents, *Prosecutor v. Lubanga*, (ICC-01/04-01/06), 13 June 2008, para. 31.

⁴⁴ *Ibid.*

⁴⁵ ICC, Decision on the Prosecutor’s Bar Table Motions, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07), 17 December 2010, para. 40.

⁴⁶ *Ibid.*, para. 38.

⁴⁷ Interestingly, in *Mugiraneza* at the ICTR, first the trial chamber and then the Appeals Chamber considered that ‘prejudice to the accused, if any’ was only one of five factors of the ‘determination of whether an accused person’s right to be tried without undue delay has been violated’: ICTR, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, *Prosecutor v. Mugiraneza*, (ICTR-99-50-AR73), 27 February 2004, p. 3.

chamber, as compared to its probative value.⁴⁸ As examples, one can think of the admission of very lengthy videos, or of entire books, even though they contain only a limited amount of relevant information. Trial Chamber II further highlighted the rather obvious situation of evidence obtained in violation of the right to remain silent and not to be compelled to incriminate him- or herself, or the right to counsel, would be unduly prejudicial.⁴⁹ In relation to the same rights, it clarified that in a multi-accused trial, the admission of evidence on behalf of one of the accused, which would violate the rights of a co-accused, would also be unduly prejudicial; albeit not to the accused requesting the admission, but rather to his or her co-accused.⁵⁰

In the same decision, as noted above, Trial Chamber II, in a time before the amendment of Rule 68 to allow for the admission of prior recorded testimony even with the accused's opposition, further held that the admission of prior recorded testimony of a witness would be unduly prejudicial.⁵¹

Prejudicial to whom?

As a result of the mostly adversarial system adopted for the trial proceedings at the Court,⁵² the same legal framework is – perhaps unintentionally – generally used to decide on requests for both the phase in which the Prosecution presents its evidence⁵³ and the phase during which the Defence does so.⁵⁴ For example, the rule that in deciding on relevance or admissibility of any items, the trial chamber should take into account ‘the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness’,⁵⁵ is applied to requests for admissions into evidence by the Prosecution, as well as to such requests made by the Defence.⁵⁶ Similarly,

⁴⁸ *Ibid.*, para. 41.

⁴⁹ *Ibid.*, paras 55-65.

⁵⁰ *Ibid.*, paras 52-54.

⁵¹ *Ibid.*, paras 50-51. See the discussion above on Rule 68 of the ICC Rules of Procedure and Evidence.

⁵² Trial Chamber V(A) of the ICC observed in this regard that the [Rome] Statute does not prescribe a fixed structure for the manner or order in which evidence should be presented at trial.’ It notes, however, ‘the general practice in the administration of international criminal justice, which involves an arrangement in which the defence presents its own case following the conclusion of the case for the prosecution.’ ICC, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions), *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, (ICC-01/09-1/11-1334), Trial Chamber V(A), 3 June 2014, para. 17.

⁵³ Generally referred to as the ‘Prosecution case’.

⁵⁴ Referred to as the ‘Defence case’. If the Legal Representative of Victims is permitted to present evidence, there is also a so-called ‘Victims case’.

⁵⁵ Article 69(4) of the Rome Statute.

⁵⁶ Compare, for example, ICC, Decision on Prosecution’s request for admission of documentary evidence, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06), Trial Chamber VI, 28 March 2017, para. 6 with ICC, Decision on

the admission of prior recorded testimony for Defence witnesses is assessed on the basis of the same criteria as comparable requests by the Prosecution.⁵⁷ Although understandable from the perspective of the principle of equality of the parties,⁵⁸ one can wonder how admission of evidence at the request of the Defence can be prejudicial to a fair trial. The admission of any incriminating item of evidence will cause certain prejudice to the accused, and it is therefore correct for chambers to assess whether the admission of evidence that was disclosed late or is admitted in a different manner than the orality requirement, causes ‘undue prejudice’ to the accused. However, who would be prejudiced by the admission of Defence evidence? Would that be the Prosecution, the victims, or perhaps the international community? Article 69(4) can be read as referring to a ‘prejudice [...] to a fair evaluation of the testimony of a witness’, but it is unclear who would be prejudiced by an ‘unfair’ evaluation of such testimony? An incorrect or unfair reflection of evidence impacts on the ability to reflect the truth, but as parties generally put forward their version of the truth,⁵⁹ and given that witness testimonies are evaluated by the trial chamber, is the prejudice perhaps caused to the Judges?

Whether it is correct to treat the Defence request in the same manner as Prosecution requests, will be discussed below. First it is worth noting in what manner the similar treatment is done. In *Ntaganda*, for example, the ICC Prosecution, in response to a request by the defence team for Mr Ntaganda to add witnesses to the Defence’s witness list, submitted that ‘the extent to which the Chamber may grant such requests has a direct impact on the degree of undue prejudice to the Prosecution and the need for adequate time to prepare’.⁶⁰ The Prosecution made this argument referring to two decisions by the *Ntaganda* Trial Chamber on a similar request by the Prosecution. In arguing that the Chamber should apply the same assessment to the Defence request, the Prosecution averred that the ‘required’ case-by-case assessment should lead the Chamber to conclude that prejudice to the Prosecution

second Defence request for admission of evidence from the bar table, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06), Trial Chamber VI, 21 February 2014, para. 5.

⁵⁷ E.g., ICC, Public redacted version of ‘Decision on Defence request for admission of prior recorded testimony of Witnesses D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, and D-0179 pursuant to Rule 68(2)(b), *Prosecutor v. Ntaganda*, (ICC-01/04-02/06), Trial Chamber VI, 4 December 2017, para. 8, which incorporates by reference the applicable law as set out in decisions on similar requests for admission of prior recorded testimony made by the Prosecution.

⁵⁸ See, for example, ICTY, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, (IT-95-14/1-AR73), 16 February 1999, para. 27, in which the principle of the equality of the parties is referred to justify treating a request by the defence similar to a similar one by the prosecution.

⁵⁹ See, for example, Thomas Weigend, ‘Should We Search for the Truth and Who Should Do It?’, 36 *North Carolina Journal of International Law and Commercial Regulation*, (2011) pp. 401-416; Sergei Vasiliev, *International criminal trials: A normative theory* (Vol I, University of Amsterdam 2014), pp. 245-254.

⁶⁰ ICC, Public redacted version of ‘Prosecution response to the Defence ‘Request to add D-0251 and D-0257 to the Defence List of Witnesses, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06, , ICC-01/04-02/06-2052-Conf), 16 October 2017, para. 4.

and the victims caused by granting the Defence request would ‘far outweigh’ the justifications for granting out forward by the Defence.⁶¹ In deciding on the Defence request, Trial Chamber VI, seised of the *Ntaganda* case, did consider the ‘potential prejudice’ arising from the request – albeit not explicitly referring to the Prosecution.⁶²

The same trial chamber, in later decisions on Defence requests to admit documentary evidence, applied the same ‘applicable law’ as it did to decide on similar requests by the Prosecution, which had been made during the phase of the trial in which the Prosecution presented its evidence.⁶³ It therefore analysed the admissibility of documents, *inter alia*, ‘on the basis of its relevance, probative value, and any prejudice that its admission may cause to a fair trial or to the evaluation of the testimony of a witness’.⁶⁴ In its analysis, the trial chamber indeed considered whether any ‘undue prejudice’ would arise from admission of the requested documents.⁶⁵ The trial chamber did not state that the potential undue prejudice would be against the accused, and given its reliance on the wording of Article 69(4) of the Rome Statute, the prejudice assessed could have been ‘to the evaluation of the testimony of a witness’ and not to the Prosecution, but given that the admission request mostly concerned documents, such as reports and internal documents of the organisation the accused was a member of, it is more likely that the Chamber was assessing potential undue prejudice to the Prosecution.

In case of requests for admission of evidence submitted by the legal representatives of victims, the relevance of the items must similarly be considered and their probative value weighed against the prejudice admission would cause to the accused. Whereas the relevance and related probative value concern the crimes the accused is charged with, admission of the item is interest of the victims, as without any crimes (and any conviction) there are no ‘victims’ in the procedural sense of the term.⁶⁶

Fair trial rights for the Prosecution and victims

⁶¹ *Ibid*, para. 27.

⁶² ICC, Decision on Defence Request to add Witnesses D-0251 and D-0257 to its List of Witnesses, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06), 20 October 2017, para. 24.

⁶³ ICC, Public redacted version of “Decision on Defence request for admission of evidence from the bar table”, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06), 31 January 2018, para. 4, referring to ICC, Decision on Prosecution’s first request for the admission of documentary evidence, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06), 19 February 2016, paras 6-7.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*, e.g., paras 11, 14, and 15.

⁶⁶ Rule 85(a) of the ICC Rules of Procedure and Evidence explains that “[v]ictims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’

While the accused's right to a fair trial, as noted above, is undisputed, one can debate whether the Prosecution has a similar right to fair trial – and, consequently, whether the Prosecution can suffer any prejudice. The Appeals Chamber of the ICTY held in *Prlić et al.* that the requirement that the trial be fair was 'not uniquely predicated on the fairness accorded to any one party'.⁶⁷ As a result of the Appeals Chamber's ruling, the Prosecution was not held to the deadline for the presentation of evidence initially set by the trial chamber, and took approximately eight months longer.⁶⁸ Treating the Prosecution as having fair trial rights may thus have a big impact on the right of the accused to an expeditious trial. Yet, in another ICTY case, its Appeals Chamber noted in relation to fair trial rights that the Prosecution acts on behalf of victims and the international community,⁶⁹ while a trial chamber in a further case explicitly referred to the Prosecution having a right to fair trial.⁷⁰ A trial chamber of the Special Tribunal for Lebanon similarly explicitly recognised a 'right to a fair trial' for the Tribunal's prosecution.⁷¹

At the Court, Judge Herrera Carbuccia, albeit in a dissenting opinion,⁷² has twice expressed her view that fair trial rights 'do not only belong to the accused'.⁷³ According to her, 'the right to a fair trial must be interpreted in a flexible and comprehensive manner, as fairness pertains to all parties: on the one hand the accused, and on the other, the Prosecutor, who acts on behalf of the international community, including the victims.'⁷⁴ In Judge Herrera Carbuccia's view, chambers must ensure respect for the interests of justice also with regards to the Prosecution, as

[w]ithout these fundamental rights the Prosecutor's obligation to act before the court pursuant to Article 42(1) of the Statute and on behalf of the international community is hindered. Victims' right to seek justice and ultimately reparations is equally thwarted.⁷⁵

⁶⁷ ICTY, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, *Prosecutor v. Prlić et al.*, (IT-04-74-AR73.4), Appeals Chamber, 6 February 2007, para. 14.

⁶⁸ Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016), p. 109.

⁶⁹ ICTY, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, *Prosecutor v. Martić*, (IT-95-11-AR73.2), Appeals Chamber, 14 September 2006, para. 13.

⁷⁰ ICTY, Retrial Judgment, *Prosecutor v. Haradinaj et al.*, (IT-04-84bis-T), Trial Chamber, 29 November 2012, para. 3.

⁷¹ STL, Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, *Prosecutor v. Ayyash et al.*, (STL-11-01/T/TC), 13 April 2015, para. 47.

⁷² The majority opinions to which her dissenting opinions relate, did not pronounce on this issue.

⁷³ ICC, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019 (Judge Herrera Carbuccia), *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, (ICC-02/11-01/15), 15 January 2019, para. 35.

⁷⁴ ICC, Dissenting Opinion of Judge Herrera Carbuccia, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11), 5 April 2016, para. 27.

⁷⁵ ICC, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019 (Judge Herrera Carbuccia), *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, (ICC-02/11-01/15), 15 January 2019, para. 35.

This judge therefore clearly links the Prosecution's right to a fair trial to its role in acting on behalf of victims. However, if – as held by the ICTY Appeals Chamber in *Martić* – the ICTY Prosecution was considered to have a right to fair trial (in part) because it represented victims, one may wonder what this means for the ICC, where victims are represented by separate counsel. Does the difference in system mean that the victims, through their Legal Representative(s), have such a right, and the Prosecution does not?

In a series of decisions addressing the meaning of 'fairness' within the context of interlocutory appeals submitted pursuant to Article 82(1)(d) of the Rome Statute, the early ICC pre-trial chambers had defined 'fairness' in broad terms. Article 82(1)(d) requires a chamber to consider whether the issue a party wishes to appeal has the potential to affect the fair and expeditious outcome of the proceedings. In this context, Pre-Trial Chamber II held in 2005 that '[f]airness is closely linked to the concept of "equality of arms", or of balance, between the parties during the proceedings.'⁷⁶ It continued to explicitly 'recognise' that 'the requirement of fairness exists for all participants in the proceedings and therefore also operates to the benefit of the Prosecutor'.⁷⁷ In 2006, also linking it to the equality of the parties, Pre-Trial Chamber I explained that

[t]he term "fairness" (*equite*) from the Latin "*equus*" means equilibrium, or balance. As a legal concept, equity or fairness "is a direct emanation of the idea of justice." Equity of the proceedings entails equilibrium between the parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings.⁷⁸

This Chamber held that 'fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)'.⁷⁹

⁷⁶ ICC, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber's II's decision on the Prosecutor's applications for warrants of arrest under Article 58, *Situation in Uganda*, (ICC-02/04-01/05), Pre-Trial Chamber I, para. 30 (footnotes omitted).

⁷⁷ *Ibid.*, para. 31.

⁷⁸ ICC, Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS6, *Situation in the Democratic Republic of Congo*, (ICC-01/04), Pre-Trial Chamber I, 31 March 2006, para. 38.

⁷⁹ *Ibid.*

In a 2007 decision, also dealing with a request for leave to file an interlocutory appeal, Pre-Trial Chamber II considered that the right to fair trial, as set out in the major human rights treaties,

has two main components: “a general one”, applicable to various types of proceedings (civil, criminal or administrative), and a specific one, related to the rights of the defence in criminal proceedings. With regard to criminal proceedings, it is usually understood that the right to a fair trial applies first and foremost to a defendant or to the defence. However, the Chamber wishes to recall that “the general component” of fairness should be preserved to the benefit of all participants in the proceedings, including the Prosecutor.⁸⁰

Pre-Trial Chamber I held that ‘within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54.’⁸¹ One can wonder then, whether the fair trial rights only attach to the Prosecution during the investigation phase, when victims are not yet participating in a case before the Court, and the Prosecution therefore may be seen as representing their interests during these early stages of what may later become actual trial proceedings. In this regard, the decisions discussing fair trial rights of the Prosecution in the context of interlocutory appeals are not of much assistance, as victims, through their legal representatives, are participants to the proceedings and therefore do not have a right to appeal.⁸² Consequently, they cannot ask for leave to

⁸⁰ ICC, Decision on Prosecutor’s applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th of May 2006, *Situation in Uganda*, (ICC-02/04-01/05), Pre-Trial Chamber II, 10 July 2006, para. 24.

⁸¹ ICC, Decision on the Prosecutor’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS6, *Situation in the Democratic Republic of Congo*, (ICC-01/04), Pre-Trial Chamber I, 31 March 2006, para. 38.

⁸² Article 82 of the Rome Statute only refers to ‘[e]ither party’. The Court’s case law has confirmed that victims may request to participate in an interlocutory appeal, but may not themselves request leave to appeal. See in this regard the interesting filings in the Afghanistan situation before Pre-Trial Chamber II of the ICC, including the various victim representatives’ requests for leave to appeal and direct appeals before the Appeals Chamber (see, e.g. ICC, Victims’ Notice of Appeal of the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, *Situation in the Islamic Republic of Afghanistan*, (ICC-02/17-36), 10 June 2019, and the Prosecution’s reaction to these requests (ICC, Observations concerning diverging judicial proceedings arising from the Pre-Trial Chamber’s decision under article 15 (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber), *Situation in the Islamic Republic of Afghanistan*, (ICC-02/17-36), 12 June 2019). The Prosecution’s observation were afterwards heavily criticised on Twitter. On 17 September 2019, Pre-Trial Chamber II, by majority, while granting the Prosecution leave to appeal its decision, rejected the requests for leave to appeal filed by the various groups of victim. It held that ‘the individuals who submitted the Victims’ Request only qualify as potential

appeal decisions, even if a decision directly impacts on them. In requesting leave to start interlocutory appeal proceedings, the Prosecution therefore has to also represent the interest of the victims in the situation or case. In assessing the fairness for the purposes of Article 82(1)(d), the right to a fair trial awarded to the Prosecution may therefore, in whole or in part, be derived from its role in representing victims.

The ICC Prosecution evidently considers that it independently possesses fair trial rights, also during the rest of the proceedings. The Deputy Prosecutor, referring to the ICTY case law discussed above, stated that the Prosecution is ‘entitled to be treated fairly in proceedings before the ICC, pursuant to article 64(2) of the Rome Statute. Just as the accused and victims participating in the proceedings are entitled to a fair trial, so too fairness includes respect for the procedural rights of the Prosecutor.’⁸³ He averred that ‘[t]he guarantee of a fair trial attracts [...] the protection of the ability of the Prosecutor to fulfil her mandate under the Rome Statute.’⁸⁴ This argument is based on the provisions and case law of the ICC legal framework that relate to the equality of the parties, but also on the ‘strong societal interest’ in a fair trial.⁸⁵ Although it is correct that ‘[a] fair process serves the truth-finding function of a trial and offers greater assurance that the final judgment will be accurate’,⁸⁶ this does not support a finding that the Prosecution itself has fair trial rights under the ICC’s legal framework. Moreover, one can wonder how the Prosecution’s opposition to Defence evidence being admitted, or Defence witnesses being added, alleging that this would be prejudicial to the Prosecution, can be justified when the purpose is to find the truth.

Certainly, the Prosecution is entitled to have the case it brings before a chamber considered in a serious and impartial manner, but basic fair trial rights have developed in

victims, whose procedural rights are limited to those expressly bestowed on them’, and that ‘allowing (potential)victims to request leave for an appeal review of the decision adjudicating those proceedings would subvert [the] legislative choice [of th drafters not to expressly grant (potential) victims the option to appeal Article 15 decisions] and thus unduly interfere with the delicate balance underlying the provision as a whole.’ ICC, Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, *Situation in the Islamic Republic of Afghanistan*, (ICC-02/17-36), paras 20 and 24. In his partially dissenting opinion to the aforementioned decision, Judge Mindua expressed his view that, in specific circumstances, victim, and even ‘potential victims’, ought to be permitted to appeal such a decision, especially in case the Prosecution would not seek leave to appeal.

⁸³ James Stewart, *Fair Trial Rights under the Rome Statute from a Prosecution Perspective*, presentation at the ICTR Symposium (Arusha, 7 November 2014), p. 14. See also p. 2 of the same. Mr Stewart’s speech is included in the online ‘Compendium on the Legacy of the ICTR and the Development of International Law’, produced by the ICTR, available at <http://unictr.irmct.org/en/compendium-legacy-ict-and-development-international-law>.

⁸⁴ *Ibid*, p. 2.

⁸⁵ *Ibid*, pp. 14-15.

⁸⁶ *Ibid*, p. 16.

order to guard the accused in a system where the opposing side has a full State machinery at its disposal. The European Commission on Human Rights explained that

in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the "rights of the defence" [...] have been instituted.⁸⁷

That fair trial rights cannot be applied 'in reverse', that is, to the other party, was expressed early in the existence of the ICTY. As part of the Tribunal's first case, Judge Vohrah expressed the view that fair trial rights and the principle of equality of arms only aim to protect the accused, not the prosecution.⁸⁸

A scholar, who critically discusses the *ad hoc* tribunals' case law in which the Prosecution is found to have a right to fair trial, convincingly shows the problems that may arise from such an approach.⁸⁹ Indeed, the 'perception of the fair trial as a balancing exercise between the rights of the accused and the interests of the prosecution can only result in inequity in practice, considering the prosecution's already privileged position.'⁹⁰ Moreover, entering into a balancing exercise is dangerous, as it allows for the accused's rights to be outweighed by other factors.⁹¹ Another academic submits that 'application of the concept of a fair trial in favour of both parties is understandable', because the Prosecution acts on behalf of the international community and in the interest of victims.⁹² From this perspective, he argues, relying on an early ICTY Appeals Chamber decision, 'it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the

⁸⁷ *Jespers v. Belgium*, No. 8493, Report of the European Commission on Human Rights, 27 D.R. [1981] 61 at 87.

⁸⁸ ICTY, Decision on Prosecution Motion for Production of Defence Witness Statement, Separate Opinion of Judge Vohrah, *Prosecutor v. Tadić*, (IT-96-1-T), 27 November 1996.

⁸⁹ McDermott, *supra* note 67, pp 109-115; and Yvonne McDermott, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights Under International Criminal Law', in William A. Schabas, Yvonne McDermott, and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013), pp. 165-180.

⁹⁰ *Ibid.*, p. 111.

⁹¹ *Ibid.*

⁹² Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Brill, 2007), p. 276.

Prosecution beyond a strict compliance with those fundamental protections'.⁹³ However, a 'strict compliance' with the rights of the accused actually requires precisely that the accused be favoured, for example, in relation to the burden of proof, or generally in relation to the application of the principle of *in dubio pro reo*.⁹⁴

3. Concluding remarks

Procedural decisions can cause an impact upon an accused's fair trial rights, either by negatively affecting his or her defence team's ability to provide for an effective defence, or because a matter directly impinges on another fair trial right, such as the right to be tried without undue delay. If the impact amounts to undue prejudice, the request concerned should not be granted or the procedural action ought not to be permitted. In cases where a fair trial right would be violated, determining that prejudice arises to the accused is straightforward. However, if it concerns a weighing of probative value and prejudice, or an assessment of how much additional work a certain decision will cause, thereby potentially affecting the effectiveness of the defence, there is a lot of room for the bench to exercise discretion when considering whether the prejudice is undue. Such discretion is necessary since the level of prejudice will depend upon many factors that may change throughout the trial. For a request for late disclosure, the various factors to take into account include the amount of disclosure; the content and to what extent it relates to the acts and conduct of the accused or whether it relates to matters that witnesses have already testified about;⁹⁵ the time left before a witness related to the disclosure will appear; and many other issues that require a full understanding of the case and the specifics of the trial proceedings concerned.

The practice of the ICC shows that chambers often apply the same regime to adjudicate procedural requests by the Prosecution and the Defence. This enables the Prosecution to allege that it would suffer undue prejudice if the Defence request would be

⁹³ *Ibid*, quoting ICTY, Decision on the Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, (IT-95-14/1-AR73), 16 February 1999, para. 27.

⁹⁴ Incorporated in the Rome Statute in Articles 66(2) and 22(2), respectively. The principle of *in dubio pro reo*, as included in the Rome Statute, relates only to the definition of a crime, but as the ICTY Appeals Chamber has clarified, this principle is 'a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, [and therefore] applies to findings required for conviction, such as those which make up the elements of the crime charged: ICTY, Judgment, *Prosecutor v. Limaj et al.*, (IT-03-66-A), Appeals Chamber, 27 September 2007, para. 21.

⁹⁵ Meaning that they could not be cross-examined on the information contained in the disclosure, unless the witnesses would be recalled.

granted,⁹⁶ *inter alia*, by calling upon a right to fair trial for the Prosecution. The Prosecution's right to fair trial is said to derive from the principle of equality of the parties, or from the Prosecution's stated role in representing the victims and international community.

Treating the Prosecution as having to act in the interest of victims and thereby being entitled to a right to fair trial may be appropriate in relation to certain aspects of a case, such as requests for interlocutory appeals, or certain stages, such as during the investigation stage, when no actual case yet exists. However, it would generally be more appropriate to not take such an approach, as any decision that considered the Prosecution's (alleged) fair trial rights in denying all or part of the relevant Defence request will by way of its outcome have negatively affected the accused. Assessing whether the Prosecution will suffer prejudice will thus generally lead to a reverse prejudice to the accused.

The Prosecution must have an opportunity to properly present its case,⁹⁷ or to put it differently, it must 'not be unduly hampered in the presentation of its case',⁹⁸ but the rights of the accused must not be breached when doing so. If the Prosecution presents a strong case in an effective manner, this will have a negative impact on the accused but it is not unduly prejudicial, as the presentation of incriminating evidence is an inherent feature of criminal trials. Or, alternatively, if the Prosecution is prevented from presenting certain evidence, because doing so would violate the accused's fair trial rights or otherwise be unduly prejudicial to him or her (e.g., because disclosure took place too late or because the identity of a source or witness could not be provided to the Defence and the accused), the Prosecution is not unduly hampered, as upholding the rights of the accused cannot be contrary to a fair trial or the interests of justice.

⁹⁶ As shown above, the Prosecution may also, prior to being aware of the regime that the relevant chamber will apply to Defence requests, make submissions that indicate that in its view the Defence should be held to the same standard.

⁹⁷ See, e.g., ICTY, Decision on Prosecution's Request for Certification of Rule 73bis Issue for Appeal, *Prosecutor v. Milutinović et al.*, (IT-05-87-T), 30 August 2006, para. 10.

⁹⁸ ICTR, Decision on Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, *Prosecutor v. Zigiranyirazo*, (ICTR-2001-73-T), 16 November 2006, para. 18.