

Fair Trial Rights under the Rome Statute from a Prosecution Perspective
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Introduction

Fair trials have intrinsic value for many reasons. They are essential to the sane application of international criminal law, just as they are in the administration of domestic criminal justice. The outcome of a fair trial has credibility and enhances respect for the rule of law. A fair process serves the truth-finding function of a trial and offers greater assurance that the final judgment will be accurate. Justice is done and seen to be done.

The International Criminal Court (ICC) was established to help “put an end to impunity” for the “most serious crimes of international concern” through “effective prosecution”.² This objective must be achieved, however, through a process that is fair. In an often volatile, violent and dangerous world, the ICC offers the promise of an independent, impartial and fair administration of international criminal justice. This guarantee enhances the Court’s credibility and improves its ability to deter mass atrocities.

This short paper examines the role that the Prosecutor of the ICC must play in support of the fair trial rights guaranteed by the Rome Statute. Considering the statutory guarantee through a Prosecution lens will serve not only to identify the fundamental rights associated with the guarantee, but to underscore the significance of the Prosecutor’s role in upholding them. It emphasizes, moreover, the responsibility of the Prosecutor to contribute to the ability of the Trial Chambers to conduct fair and expeditious trials that will determine the truth.

The concept of fair trial rights transcends the scope of the rights of accused persons, however, to encompass as well the interests of victims and witnesses, the right of the Prosecutor to fairness, and societal interest in fair trials. All of these aspects of the right to a fair trial will be touched upon below, but the particular focus will be upon the role of the Prosecutor in upholding the rights of the accused under the Rome Statute.

Fair trial guarantee

Fair trial rights at the ICC have their foundation in the Rome Statute and the jurisprudence of the Court. Moreover, these rights are a reflection of the protection for fair trial rights that international law provides generally through international human rights instruments, for instance, the provisions in articles 9 (3) and 14 of the *International Covenant on Civil and Political Rights* (ICCPR, 1966), as well as regional human rights treaties, such as the *European Convention on Human Rights* (1950), the *American Convention on Human Rights* (1969), and the *African Charter on Human and Peoples’ Rights* (1981). As a value

¹ The contribution of George Mugwanya, Appeals Counsel (Research) in the Office of Prosecutor at the ICC (The Hague, Netherlands), in ideas and legal research was indispensable to the production of this paper, which is the result of a happy collaboration.

² See ICC Statute, paragraphs 5 and 6 of the Preamble.

fundamental to any system of international criminal justice, therefore, a fair trial has long been recognized as essential.

The Rome Statute enshrines the right to a fair trial in, among other provisions, article 64 (2). This provision requires the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Similar provisions were made in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The Rome Statute fair trial guarantee embraces the rights of the accused, but also the interests of victims and witnesses and the right of the Prosecutor to fairness. ICC Pre-Trial Chamber I has defined “fairness” in broad terms:

The 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.”³ Equity of the proceedings entails equilibrium between the parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the Chamber, 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).⁴

The guarantee of a fair trial attracts, in turn, a cluster of supporting rights inuring to the benefit of the accused, a complex of duties meant to secure the well-being of victims and witnesses, and the protection of the ability of the Prosecutor to fulfil her mandate under the Rome Statute. All of these will be touched upon below, but with emphasis upon the Prosecution’s obligations toward the Defence.

Attributes of the Prosecutor with a bearing on the fair trial guarantee

The Rome Statute requires the Prosecutor and Deputy Prosecutor to have certain attributes relating to independence, separate nationalities, character, competence and experience, fluency in French or English, and impartiality.⁵ The Prosecutor is also to ensure, among other things, the highest standards of integrity in her staff.⁶ Two vital qualities of the Prosecutor, and by extension her staff, are thus *independence* and *impartiality*. Such qualities

³ Citing I.C.J. *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 60, para. 71.

⁴ Situation in the Democratic Republic of Congo, *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*, ICC-01/04-135-Teng, 31 March 2006, para. 38.

⁵ ICC Statute, article 42.

⁶ ICC Statute, article 44.

have obvious importance for the Prosecutor's obligation to "[f]ully respect the rights of persons arising under [the Rome Statute]."⁷

Thus, the Rome Statute directs the Prosecutor in the exercise of her duties and powers of investigation to establish the truth by extending the investigation to cover all facts and evidence relevant to the assessment of whether there is criminal responsibility under the Statute. In doing so, she is to "investigate incriminating and exonerating circumstances equally."⁸ In other words, the Prosecution is to seek to establish the truth on the basis of the collection of evidence that presents a clear and balanced picture. Such an approach is a reflection of the qualities of impartiality and independence that the Prosecution must display.

While the Prosecution must discharge the responsibility just described competently and in good faith, this does not mean that the Defence may wait passively for the Prosecution to deliver exonerating evidence. Quite the contrary. The Defence has a concurrent obligation to investigate its case. The Prosecutor will not have violated her obligation to establish the truth simply because relevant evidence was discovered by the Defence and not by the Prosecution.⁹

While remaining independent and impartial in the discharge of her mandate, however, the Prosecutor is, like the Defence but unlike the Judges, a party to proceedings before the ICC. She brings charges against accused persons believing, on the evidence, in their culpability. She is entitled to make the case for conviction before the Chambers of the Court.

As an advocate, moreover, the Prosecutor enjoys, *within bounds*, some latitude in making her case when addressing a Trial Chamber. To take but one instance in the trial process, the following observation concerning the closing address of prosecuting counsel to a jury in a domestic criminal trial setting, which may be adapted to the circumstances of the ICC (if "Prosecution counsel" is read for "Crown counsel" and "Judges" for "Juries"), is apposite:

A closing address is an exercise in advocacy. It is a culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate, is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation.¹⁰

Furthermore, the Prosecutor has a duty to respect and protect the security interests and well-being of victims and witnesses, who have concerns which may sometimes clash with the

⁷ ICC Statute, paragraph 54 (1) (c).

⁸ ICC Statute, paragraph 54 (1) (a); see generally the Prosecutor's duties and powers with respect to investigations under article 54.

⁹ See, for example, *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on Prosecution's application for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, paras. 87-88; *Prosecutor v. Banda*, ICC-02/05-03/09, Public redacted "Decision on the 'Defence Request for Termination of Proceedings,'" 30 January 2014, para. 48.

¹⁰ Observations of Justice David Doherty, of the Court of Appeal for Ontario, Canada, in *R. v. Daly*, [1992] O.J. 1504 (C.A.). Justice Doherty was careful to emphasize that rhetorical passion must not, however, exceed the bounds of fairness to the accused.

interests of the accused.¹¹ The Prosecutor must balance these conflicting interests in the conduct of her cases.

The Prosecutor is thus not neutral in the proceedings. Nevertheless, she is not merely pre-occupied with securing a conviction at all costs. She must conduct herself fairly in a way that fully respects the rights of the accused. In the words of Judge Shahabuddeen of the ICTR Appeals Chamber:

The Prosecutor ...is not required to be neutral in a case; she is a party. *But she is not of course partisan.* ...[W]hile a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel 'ought to bear themselves in the character of ministers of justice assisting in the administration of justice.'¹²

Judge Shahabuddeen's description of the role of the Prosecutor finds similar expression in domestic criminal law settings, the classic statement in Canada, for example, being that of Justice Rand in the Supreme Court case of *Boucher*, who observed:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and justness of judicial proceedings.¹³

At the international level, the *Kupreskic* Trial Chamber came to the same view about the role of the Prosecutor, emphasizing the responsibility she had to assist the Trial Chamber to discover the truth:

The Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also

¹¹ ICC Statute, articles 54 and 68.

¹² *Barayagwiza* (ICTR-97-19-AR72), Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 68 [emphasis added].

¹³ *Boucher v. The Queen*, [1955] S.C.R. 16, at 23-24. (For "Crown" read "Prosecution" and "jury" read "Chamber" – and today it would have been equally appropriate to speak of "her function" as prosecutor.)

exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting.¹⁴

Thus, both inside and outside the courtroom prosecuting counsel at the ICC must bear in mind the constraints that are placed upon them as a consequence of the special role the Prosecutor plays in international criminal justice. The watchword is “fairness”.

The Prosecutor must diligently and effectively prosecute cases, but must do so in a manner that promotes fairness, in its broadest sense, to the accused. Consistent with her duty of objectivity under article 54 of the Rome Statute, she should only bring a case when satisfied that there is credible evidence of guilt. She should not, however, express publicly her belief in the guilt of the persons against whom she brings charges; at most, she can only affirm to the public her preparedness to prove guilt. Expressing belief in guilt would infringe the right to a fair trial because it would be prejudicial to the presumption of innocence.¹⁵

In sum, the Prosecutor is not a partisan bent on securing conviction by any means. While she is a party to proceedings who is entitled to press her case to its legitimate ends, she is also responsible to the accused and other participants in the trial to do so fairly. Her ultimate responsibility is to present all of the relevant evidence in an honest way to assist the Trial Chamber to discover the truth.

To reinforce the responsibilities of Prosecution counsel, the Prosecutor included provisions in the *Code of Conduct* that she promulgated for her Office which underscore the duties of independence and impartiality and the Prosecution’s role in promoting fairness. The Code draws together into one document provisions from a number of sources governing staff conduct, as well as ICC case law holding that some features of the code of professional conduct for defence counsel also apply to the Prosecution.

The basic rules contained in the *Code of Conduct* were summarized in the Strategic Plan 2012-15 of the Office of the Prosecutor and this summary includes, among others, the following guiding principles for Prosecution staff:

- respect and regard for, and adherence to, the Rome Statute and Rules of Procedure and Evidence (RPE);
- conduct that befits the status of international civil servants and displays the highest standards of integrity, independence, impartiality, professionalism and confidentiality;

¹⁴ *Prosecutor v. Zoran Kupreskic et al.*, IT-95-16-T, Decision on Communication between the Parties and Their Witnesses, 21 September 1998, (unnumbered) para. 7(ii).

¹⁵ See, generally, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber Decision on the Request for Disqualification of the Prosecutor, 12 June 2012.

- respect for human rights and fundamental freedoms, the principle of equality before the law, the presumption of innocence *and the right to a fair trial*.¹⁶

Obligations of the Prosecutor respecting the right of the accused to a fair trial

The Rome Statute secures to accused persons a number of important rights that serve to protect the fundamental right to a fair trial. From the perspective of the accused, the ability to make full answer and defence to the charges is an essential feature of a fair trial. The obligations of the Prosecution toward the Defence relate in significant ways to the ability of the accused to make full answer and defence, and thus to the fairness of the trial. A cluster of rights for the benefit of the accused and concomitant obligations binding the Prosecutor thus serve to support a fair trial, and confer a pivotal role in this respect upon the Prosecution.

The most fundamental right underlying all of the others is the right of the accused to be presumed innocent until the Prosecutor proves his or her guilt to the requisite standard of proof beyond reasonable doubt in a fair, impartial and public trial.¹⁷ Even as a party in an adversarial proceeding, the Prosecutor is required to uphold this fundamental right, so essential to the successful administration of criminal justice. A number of the obligations that the Prosecution must discharge to the Defence may be seen to exist as a function of the presumption of innocence that benefits an accused person.

The presumption of innocence is displaced upon proof of guilt beyond reasonable doubt. To protect the right of the accused to make full answer and defence – to resist the effort of the Prosecution to discharge its onus – the Rome Statute makes provision for the ability of the accused to receive a fair trial, by securing to him or her, in article 67, the right:

- to be informed promptly and in detail of the nature, cause and content of the charges in a language the accused “fully understands and speaks”;¹⁸
- to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of his or her choosing in confidence;
- to be present at the trial, to conduct the defence in person or through legal assistance of his or her choosing, to be informed of this right and of the right to have legal assistance assigned, if the interests of justice require, at the expense of the Court;¹⁹

¹⁶ See Strategic Plan 2012-15, paragraph 10 [emphasis added]. See too *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, paras. 11-17.

¹⁷ ICC Statute, articles 64, 66 and 67. (See too, generally, Judge Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, Berkeley Journal of International Law Publicist, (vol. 3, 2009), pp. 5-7.)

¹⁸ This right is stronger than that guaranteed, for example, by paragraph 14 (3) (a) of the ICCPR, which only requires that the person be provided with the charges in a language which he or she *understands*: see *Prosecutor v. Katanga*, Judgment on appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, para. 49.

¹⁹ The right to be present is separate from the *obligation* to be present during the trial imposed on the accused by article 63 (1) of the ICC Statute. See *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11 OA5, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on

- to examine witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf, and to raise defences and present other evidence admissible under the Rome Statute;
- to have the assistance free of cost of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented in court are not in a language the accused fully understands and speaks;
- not to be compelled to testify or confess guilt and to remain silent without such silence being a consideration in the determination of guilt or innocence;
- to make an unsworn statement in his or her defence; and
- not to suffer the reversal of the burden of proof or an onus of rebuttal.²⁰

Thus, an accused on trial at the ICC has the right to know the charges, have the assistance of counsel, challenge the Prosecution evidence, present defence evidence, understand the proceedings and evidence, and remain silent, among other rights.²¹ The provision guarding against a reversal of the onus of proof goes hand in hand with the presumption of innocence and the burden of proof that the Rome Statute casts upon the Prosecution.

To enable the effective exercise of most of the rights just listed, timely disclosure by the Prosecution is essential. Disclosure is an obligation that accords with the Prosecutor's responsibility to investigate all facts and evidence relevant to the assessment of criminal responsibility and to investigate incriminating and exonerating circumstances equally. It is also fundamental to a fair trial. It is one of the most onerous duties that the Prosecution has.

Mr. Ruto's Request for Excusal from continuous Presence at trial," 25 October 2013, paras. 49-54. A disruptive accused may be removed, pursuant to article 63 (2), and the right guaranteed in article 67 is subject to this provision: see paragraph 67 (1) (d).

²⁰ ICC Statute, article 67. The Rules of Procedure and Evidence (RPE) reinforce the statutory provisions; for example, Rule 73 protects privileged communications.

²¹ Fairness protections apply, however, at all stages of the criminal process – see *Situation in the DRC*, ICC-01/04, Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, paras. 35-36. During *investigation*, the right to be informed of the grounds for belief that the suspect committed a crime is provided for in article 55 (2) (a). A *warrant for arrest* or a *summons to appear* issued pursuant to article 58 must similarly contain, among other information, the name of the person, the crimes alleged and a concise statement of facts which are alleged to constitute the crimes. Upon surrender to the Court, an *initial appearance* must be held pursuant to article 60, where the Pre-Trial Chamber must satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed. At the *confirmation of charges* hearing, the suspect must be afforded the same right. Thus, pursuant to article 61 (3), within a reasonable time before the confirmation hearing, the person must be provided with a copy of the document containing the charges (DCC), on which the Prosecutor intends to bring the person to trial, and be informed of the evidence on which the Prosecutor intends to rely at the confirmation hearing.

Its competent and timely discharge contributes immeasurably to the ability of the Trial Chamber to ensure that the trial is fair and expeditious.

Under the Rome Statute and RPE, the Prosecutor is obliged to make timely disclosure to the Defence of the evidence the Prosecution will rely upon at trial, including witness statements. The Prosecutor is also required to disclose any evidence in her possession or control which she believes shows or tends to show the innocence of the accused, or mitigate the accused's guilt, or which may affect the credibility of prosecution evidence. In addition, the Prosecution must make available for inspection by the Defence materials in the possession or control of the Prosecutor that are material to the preparation of the defence, or which the Prosecution intends to use in evidence at the confirmation hearing or trial, or that were obtained from or belonged to the person charged.²²

The *Lubanga* Appeals Chamber interpreted the scope of the duty described above broadly: the disclosure obligation is not limited to *evidence*, but encompasses any relevant *information*, as long as it is within the possession or control of the Prosecutor. Such an interpretation is necessary in order to protect a fundamental right of accused persons in proceedings before the ICC.²³ At ICTY and ICTR, the obligation of the Prosecution to disclose information helpful to the Defence was not considered to be a secondary one, but “as important as the obligation to prosecute.”²⁴ The ICC Prosecutor must take the same approach.

The obligation to disclose is, nevertheless, subject to some restrictions. One such restriction is designed to protect documents or information obtained by the Prosecution on condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents. This provision has been strictly construed.²⁵

The Rome Statute also makes provision for the protection of national security information, but the invocation of national security to block disclosure can be challenged and become the subject of scrutiny by the Trial Chamber. In the event of non-disclosure, the Trial Chamber “may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances,” and thus preserve the fairness of the trial.²⁶ The confidentiality of third party information or documents receives similar treatment.²⁷ The legislation envisions as one potential remedy for the inability to disclose the possibility of obtaining the same information from a different source or of adopting measures, such as

²² ICC Statute, articles 64, 67 and 68; RPE, Rules 76-84.

²³ See *Prosecutor v. Lubanga*, 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”, 21 October 2008, paras. 34, 42 and 43; *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5 A 6, Decision on Mr. Lubanga’s request for disclosure, 11 April 2013, para. 10.

²⁴ *Ndindabahizi v. Prosecutor*, Appeal Judgment, para. 72 (ICTR); *Kordic and Cerkez*, Appeal Judgment, para. 242 (ICTY).

²⁵ ICC Statute, paragraph 54 (3) (e); *Lubanga* decision of 21 October 2008 (cited above), at para. 42.

²⁶ ICC Statute, article 72.

²⁷ ICC Statute, article 73.

redactions, to protect legitimate interests in confidentiality while making relevant evidence available to the Trial Chamber.

The Court is bound to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.²⁸ Disclosure may put the security of victims and witnesses or that of their families at grave risk. In such situations, the Prosecutor may withhold disclosure prior to the commencement of trial, but submit summaries of evidence or information, provided such measures are exercised in a way that is not prejudicial to or inconsistent with the right of the accused to a fair and impartial trial.²⁹ A Trial Chamber may also adopt protective measures, such as authorizing the non-disclosure of the identity of witnesses and victims prior to the commencement of trial.³⁰ Thus, the Trial Chamber must ensure that the trial is conducted with full respect for the rights of the accused, but also with due regard for the protection of victims and witnesses – and so too must the Prosecutor. In the conduct of her cases, she must often balance the competing interests of the accused in disclosure and of victims and witnesses in security, and may seek the assistance of the Chamber in this regard.

There are also public interest restrictions on disclosure. For example, it is not in the interests of justice for the Prosecution to have to reveal details of on-going investigations or to disclose its operational or investigative methods. Such matters will not normally be subject to disclosure or, if disclosure of some information is necessary to ensure the fairness of the trial, it may be delayed to avoid harm to the Prosecutor's ability to fulfil her mandate to investigate and prosecute.³¹ In addition, internal work product of the Office of the Prosecutor must remain confidential and is protected against disclosure.³²

Notwithstanding the curbs on disclosure described above, the ICC disclosure regime is fundamental to the guarantee of a fair trial. Disclosure has a significant impact upon the ability of the accused to make full answer and defence to the charges. As noted, it is a system in which the Prosecutor plays a pivotal role. She must be sensitive to the interests and well-being of victims and witnesses, as well as to other legitimate confidentiality concerns, yet be scrupulously respectful of the rights of the accused. Indeed, it is difficult to imagine how a Trial Chamber could ensure that a trial is fair and expeditious without the full cooperation of the Prosecution in matters of disclosure. Competent and efficient handling of disclosure issues by the Prosecution contributes not only to a trial that is fair to the accused, but assists the Trial Chamber to administer justice efficaciously to establish the truth.

The right to adequate time and facilities for the preparation of the defence is corollary to the principle of “equality of arms”. ICC Pre-Trial Chamber II, however, has given the principle of equality of arms broader scope by linking it to the principle of fairness, observing in this regard that

²⁸ ICC Statute, article 68; RPE, Rules 85-88. See too article 54 for the duties in this respect of the Prosecutor.

²⁹ ICC Statute, article 68 (5); RPE, Rules 76 (4) and 81.

³⁰ ICC RPE, Rule 81 (4).

³¹ See ICC RPE, Rule 81(2)-(6).

³² ICC RPE, Rule 81 (1).

[f]airness is closely linked to the concept of “equality of arms,” or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.³³

Nevertheless, just as the *ad hoc* tribunals and international human rights courts have found,³⁴ equality of arms under the Rome Statute does not mean that Defence and Prosecution must have the same resources. Rather, the principle of equality of arms requires procedural equality. Prosecution and Defence must have the same procedural rights, and be able to conduct their cases under conditions that will not mean that one of them is at a substantial disadvantage *vis-à-vis* the other.³⁵

The right to have adequate time and facilities to prepare to make full answer and defence is one that the Prosecution supports indirectly, by discharging disclosure obligations in a timely way, through the clarity of its pleadings, and in like ways.

It is insufficient, however, for the Defence to allege speculatively that the right to have adequate time and facilities to prepare the defence will likely be violated, for example, by the manner in which the Chamber admits evidence during trial; the accused must demonstrate a clear violation for the Chamber to be justified in intervening. Thus, in *Bemba* the Defence claimed that the omnibus admission into evidence of all items of evidence on the Prosecutor’s list of evidence meant that it had to investigate and seek to defend against large swathes of evidence, which might ultimately be disregarded by the Chamber. This had the potential, the Defence argued, greatly to increase the scope of its investigation. In rejecting this submission, the Appeals Chamber held it was speculative, since at that stage it was impossible to assess the impact of the Trial Chamber’s decision on the right to have adequate time and facilities to prepare the defence. In the Appeals Chamber’s view,

[I]t is not unusual that prior to the beginning of trial, the defence does not know on which evidence the Court will eventually rely and which evidence will be ruled inadmissible. Therefore, irrespective of the approach the Trial Chamber takes to admission of evidence, Mr. Bemba must, at this stage of the proceedings expect that all evidence listed on the Revised List of Evidence might be used against him and prepare his defence accordingly.³⁶

³³ *Situation in Uganda*, ICC-02/04-01/05, Decision on Prosecutor’s application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrant of Arrest Under Article 58, 19 August 2005, para. 30.

³⁴ See, for example, for the ICTR, *Prosecutor v Kayishema and Ruzindana*, Appeals Chamber Judgment, 1 June 2001, paras. 63-71; for the ICTY, *Prosecutor v. Milutinovic et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003.

³⁵ See ICC-02/04-01/05, just cited above, at para. 30.

³⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386 OA5 OA6, Appeal 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 of materials contained in the prosecution’s list of evidence”, para. 67.

The right of the accused to be informed promptly and in detail of the nature and content of the charges³⁷ is protected first and foremost in the document containing the charges (DCC).³⁸ This places an onus upon the Prosecution to draft the DCC in clear language that informs the Defence of the case it has to meet and the Pre-Trial Chamber, and eventually the Trial Chamber, of the matters that must be determined. The DCC does not preclude the possibility of changes in the legal characterization of the facts in the course of the trial, without a formal amendment to the charges, via Regulation 55, as long as those underlying facts and circumstances remain unchanged.³⁹ However, the more flexible approach to the pleading of alternative modes of individual criminal responsibility in the DCC that is now apparent at the confirmation stage at the ICC may make recourse to Regulation 55 rare.

The DCC must plead the facts material to the allegations against the accused, but not the evidence by which the allegations are to be proven. It follows that the right to be informed of the charges is not a function of when the Trial Chamber rules on admissibility of evidence (it is sufficient for the accused to be provided with the DCC and a list of the evidence the Prosecutor intends to rely on during trial).⁴⁰

Nor does the notice requirement mean that the accused must be served with *all* documents in a language he or she fully understands and speaks; the obligation covers only those documents which are essential to the preparation of the defence to the charges.⁴¹ However, unlike other international human rights instruments, such as ICCPR article 14 (3) (a), which require that the person be provided with the charges in a language which he or she *understands*, ICC article 67 (1) (a) requires more, namely, disclosure “in a language which the accused *fully understands and speaks*.” According to the Appeals Chamber, the presence of the word “fully” is intended to grant to an accused before the ICC rights of a higher degree: “[T]here must be a difference between an entitlement to a language one understands or speaks (or simply understands) and a language one fully understands and speaks.”⁴²

Trial Chambers are enjoined to ensure that trials are both fair and *expeditious*.⁴³ The right to an expeditious trial is more than a mere a component of a fair trial, but a vehicle to ensure the proper administration of justice. As the ICC Appeals Chamber has held,

³⁷ ICC Statute, article 67 (1).

³⁸ Under Court Regulation 52, the DCC shall include (a) the full name of the person and any other identifying information; (b) a statement of the facts, including the time and place of the alleged crime, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) a legal characterization of the facts to accord with the crimes under article 6, 7 or 8 and the precise forms of participation under articles 25 and 28.

³⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-225 OA 15 OA 16, Appeal Judgment of Regulation 55 Appeal, 8 December 2009, para. 84.

⁴⁰ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386 OA5 OA6, Appeal 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 of materials contained in the prosecution’s list of evidence,” 3 May 2011, paras. 63, 64.

⁴¹ *Prosecutor v Bemba*, Decision on Defence’s Request Related to Language Issues in the Proceedings, 4 December 2008, para. 12.

⁴² *Prosecutor v. Katanga*, Judgment on appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages,” 27 May 2008, para. 49.

⁴³ ICC Statute, article 64 (2).

Expediitousness is ...an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused. For this reason, article 64 (2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious.⁴⁴

Moreover, in the Chamber's view,

...an expeditious trial is beneficial to victims. It ensures them of receiving justice and of going on through a healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence. Unreasonable delay in commencing or finalising a trial may also diminish public interest and public support for, and cooperation with the Court.⁴⁵

While article 64(2) imposes the duty to ensure the conduct of a fair and expeditious trial on the Trial Chamber, the parties and participants must play a role too. Thus, in the *Katanga and Ngudjolo* case, the Appeals Chamber held:

Expediitousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants. As regards the accused person, where he or she is represented by counsel, the Code of Professional Conduct of Counsel enjoins counsel to represent him or her expeditiously with the purpose of avoiding unnecessary delay in the conduct of the proceedings.⁴⁶

The Prosecution contributes to expeditiousness in many ways: through timely disclosure,⁴⁷ clear drafting of the DCC and other pleadings, proper preparation of witnesses, efficient presentation of evidence, keeping the trial focused upon essential matters, and so on. As a party in adversarial proceedings, the Prosecutor has a perhaps unique duty to assist the Trial Chamber in the discharge of its own responsibilities.

While expeditiousness is an important component of a fair trial, it should be noted that it cannot justify a deviation from statutory requirements: for example, expeditiousness cannot

⁴⁴ *Prosecutor v Katanga and Ngudjolo*, ICC-01-/04-01/07, Judgment on Unlawful Detention and Stay of Proceedings (12 July 2010), at para. 47.

⁴⁵ *Prosecutor v Katanga and Ngudjolo*, just cited, at para. 45.

⁴⁶ *Prosecutor v Katanga and Ngudjolo*, just cited, at para. 43.

⁴⁷ See, for example, the power of the Trial Chamber to order disclosure and impose time limits for its accomplishment: ICC RPE, Rule 84.

justify a Trial Chamber’s “omnibus” admission of evidence, as opposed to the assessment of the admissibility of each item of evidence allowing the parties to be heard on the issue.⁴⁸

There are other provisions in the Rome Statute relating to the conduct of a fair trial, for example, the necessity for the Trial Chamber to weigh probative value against prejudicial effect in ruling on the admissibility of evidence,⁴⁹ or to reject evidence obtained in violation of the Rome Statute or internationally recognized human rights, if the violation casts substantial doubt on the reliability of the evidence or its admission would seriously damage the integrity of the proceedings.⁵⁰ These other features of the guarantee of fairness, however, are not the focus of this paper – although it should be noted, with respect to the latter provision, that the Prosecutor’s *Code of Conduct* enjoins her counsel against using such evidence at trial.

Crimes falling within the jurisdiction of the Rome Statute are to be deterred through effective prosecution. The Prosecutor has, therefore, a heavy responsibility toward the victims of such crimes, communities affected by mass atrocities, and the international community as a whole.

Nonetheless, as seen above, the Prosecutor also has obligations she must discharge with respect to the accused. As a final observation on this aspect of her duties, it is noteworthy that the framers of the Rome Statute, anxious to ensure that justice is done, chose to empower the Prosecutor to appeal on the ground of procedural error, error of fact, error of law, or any other ground affecting the fairness or reliability of the proceedings or decision, not only on behalf of the Prosecution, *but also on behalf of the convicted person.*⁵¹ To conclude, this is a sure indication of the expectation that the Prosecutor will conduct herself in the character of a minister of justice assisting in the administration of justice.

Obligations of the Prosecutor toward victims and witnesses

The obligation of the Prosecutor to protect the interests of victims and witnesses has already been mentioned, especially in relation to disclosure. It is a heavy responsibility, given the very real security risks to which victims and witnesses cooperating with the ICC are exposed in the situations the Prosecutor investigates. In fulfilling disclosure obligations to the Defence, the Prosecutor may seek protective measures for the safety of witnesses and victims from the Chambers.⁵²

The Rome Statute requires the Prosecutor to take appropriate measures to ensure the effective investigation and prosecution of crimes within the ICC’s jurisdiction. In doing so, she must respect the interests and personal circumstances of victims and witnesses and take into

⁴⁸ *Prosecutor v. Bemba*, Judgment on the appeals against the decision on the admission of evidence, ICC-01/05-01/08-1386 OA 6, 3 May 2011, para. 55.

⁴⁹ ICC Statute, article 69 (4).

⁵⁰ ICC Statute, article 69 (7).

⁵¹ ICC Statute, article 81.

⁵² See ICC RPE, Rule 87.

account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.⁵³

The Court, generally, must see to the safety and well-being of victims and witnesses.⁵⁴ The principal responsibility for ensuring witness and victim security and well-being rests with the Victims and Witnesses Unit (VWU) established by the Registrar, who is a neutral organ of the Court.⁵⁵ VWU attends to the needs of prosecution and defence witnesses equally.

The Office of the Prosecutor and the Registry, by providing a continuum of services (each within its own sphere of responsibility under the Rome Statute), achieve synergies to ensure the safety and welfare of witnesses and the victims of mass crimes. The protection of victims and witnesses is essential to the ability of the Trial Chambers to secure the evidence they need to determine the truth.

The participation of victims in proceedings before the ICC, provision for which is a notable feature of the Rome Statute, is beyond the scope of this paper.

The right of the Prosecutor to fairness

The Prosecutor is also entitled to be treated fairly in proceedings before the ICC, pursuant to article 64 (2) of the Rome Statute.⁵⁶ 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. No party, including the Prosecutor, is to be put at a disadvantage in presenting its case.⁵⁷

Accordingly, the Prosecutor is entitled to equality of treatment within the framework of adversarial proceedings. As ICC Pre-Trial Chamber I has noted, with reference to jurisprudence from the European Court of Human Rights,

the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed even by an independent member of the national legal service, with a view to influencing the court's decision.⁵⁸

⁵³ ICC Statute, articles 43 (6) and 54 (1) (b).

⁵⁴ ICC Statute, articles 64, 68, 69 and 70.

⁵⁵ ICC Statute, article 43 (6); RPE, Rules 16-19 and 85-88.

⁵⁶ ICC-02/04-01/05-90-US-Exp (reclassified by ICC-02/04-01/05-135), para. 24.

⁵⁷ *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on the Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25; *Prosecutor v. Jadranko Prlic et al.*, Case, IT-04-74-AR73.4, Decision on the Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution, 6 February 2007, para. 24; *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para.13; *Prosecutor v. Tadić* Appeal Judgment, IT-94-1-A, 15 July 1999, para. 48.

⁵⁸ Situation in the Democratic Republic of Congo, *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*, ICC-01/04-135-Teng, 31 March 2006, footnote 52, citing ECHR judgments in: *Morel v. France*, Judgment of 6 June 2000, Application No. 34130/96, para. 27; *Apeh*

Furthermore, the Prosecutor must be allowed to exercise her powers and duties fully, including at the investigation stage, since “[w]ithin the context of the Statute, respect for the fairness of the proceedings with regards 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.”⁵⁹ The Prosecution must, at trial, “be granted the genuine ability to present [its] case and to be apprised of and comment on the observations and evidence submitted to the Court that might influence its decision.”⁶⁰

This right should extend to the Prosecutor’s ability to question witnesses comprehensively in the presentation of her case, and to tender her evidence free of outside hindrance or interference with witnesses.⁶¹ Indeed, the obligation of States Parties to cooperate with the ICC and to assist the Prosecutor in her investigations and prosecutions, if need be with the assistance of the Trial Chamber, serves to protect the right of the Prosecutor to exercise her powers and fulfil her mandate under the Rome Statute.

The Defence has certain obligations of disclosure to the Prosecution. It must give prior notice of alibi, if alibi is being raised as a defence.⁶² Failure to give notice will not preclude the accused from raising the defence.⁶³ However, failure to give timely notice should be taken into account when the Trial Chamber comes to assess the credibility of the alibi.

Similarly, the Defence must give notice if it intends to raise any defence going to mental disorder, intoxication, self-defence, or duress, as defined in article 31 (1).⁶⁴ If the accused proposes to rely upon what might be called a “novel defence”, based in law, as a ground for excluding criminal responsibility, the Defence is obliged to give timely notice of this too.⁶⁵

The Defence is also obliged to permit the Prosecutor to inspect material in the possession or control of the Defence that it intends to use as evidence at the confirmation hearing or trial.⁶⁶

All of these provisions ensure not only that the Prosecution has a fair chance to respond, but enhance the ability of the Trial Chamber to assess the evidence correctly following a proper debate on the merits of the defence.

Uldozotteinek Szovetsege and others v. Hungary, Judgment of 5 October 2000, Application No. 32367/96, paras. 39-42.

⁵⁹ Situation in the Democratic Republic of Congo, *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*, ICC-01/04-135-Teng, 31 March 2006, para. 39.

⁶⁰ ICC-02/04-01/05-90-US-Exp (reclassified by ICC-02/04-01/05-135), para. 24. See too *Oric* Appeal Decision on Admissibility of the Evidence, para. 7: “[T]he Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond reasonable doubt.”

⁶¹ Dissenting Opinion of Judge Pikis and Judge Nsereko in ICC-01/04-01/07-776OA7, para. 18.

⁶² ICC RPE, Rule 79 (1) (a).

⁶³ ICC RPE, Rule 79 (3).

⁶⁴ ICC RPE, Rule 79 (1) (b); Statute, article 31 (1).

⁶⁵ ICC RPE, Rule 80; Statute, articles 31 (3) and 21.

⁶⁶ ICC RPE, Rule 78.

Societal interest in a fair trial

The States Parties had as an objective in establishing the ICC to punish the perpetrators of the most serious crimes of concern to the international community as a whole, since such atrocities shock the conscience of humanity and pose a threat to the peace, security and well-being of the world.⁶⁷ There is thus a strong societal interest in a trial on the merits of cases that come before the ICC. In light of the foregoing discussion, a trial on the merits means a *fair* trial on the merits of the case.

In the context of alleged abuse of process, the ICTY Appeals Chamber recognized “the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”⁶⁸ The ICTR Appeals Chamber accepted this view in a case where serious violations of the rights of the appellant were also alleged to have occurred; the Chamber refused to set aside jurisdiction.⁶⁹ While these decisions confirm the interest of the international community in a trial on the merits, they also reflect societal interest in a fair trial for all of the reasons invoked earlier.

Fair trials have intrinsic value, since they ensure outcomes that have credibility and enhance respect for the rule of law. A fair process serves the truth-finding function of a trial and offers greater assurance that the final judgment will be accurate. In cases where the most serious crimes of concern to humanity are alleged to have been committed, justice must be done and be seen to be done.

Conclusion

In conclusion, the concept of fair trial rights under the Rome Statute embraces the interests of all parties and participants in proceedings before the Court. The accused must be able to make full answer and defence for the process to be fair and its outcome accurate and credible. Victims and witnesses must enjoy security so that they may testify freely and contribute to the ability of the Trial Chamber to ascertain the truth. The Prosecutor must receive a fair hearing and be permitted to adduce her evidence free of interference, so that the Trial Chamber has everything before it that it needs in order to determine the truth.

It has been rightly said that

[t]he function of the ICC goes beyond that of an ordinary criminal court. Given the kind of situations that might be the subject of a trial, the parties and the Court have the additional duty to clarify as much as possible the historical facts of the case.⁷⁰

⁶⁷ See Preamble to the ICC Statute.

⁶⁸ *Prosecutor v. Dragan Nikolic*, Decision on Interlocutory Appeal concerning Legality of Arrest, IT-94-2-AR73, 5 June 2003, at para. 30.

⁶⁹ *Kajelijeli v. Prosecutor*, Appeal Judgement, ICTR-98-44A-A, 23 May 2005, at para. 206.

⁷⁰ Donald K. Piragoff, “Evidence,” in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, (Verlag C.H.Beck oHG, 2008), p. 1321.

However, the focus of a criminal trial must ultimately be upon the guilt or innocence of the accused, and so the truth that the Trial Chamber must finally determine is the truth about the guilt or innocence of the accused. The matter comes down to whether or not the Prosecution, in a fair and expeditious trial, has proved the guilt of the accused beyond a reasonable doubt. If so, then the Trial Chamber's judgment and sentence serve to end impunity for the worst crimes.

In respecting the rights of the accused to a fair trial, and in being sensitive to the needs of victims and witnesses, the Prosecutor not only fulfils the letter of the law, but upholds the values that the law enshrines.

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