DEFENCE CHALLENGES IN TERMS OF "*EQUALITY OF ARMS*" BEFORE INTERNATIONAL COURTS♦

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The world rests on three pillars: on truth, on justice[,] and on peace

Rabban Simeon ben Gamaliel, (Abot 1, 18)[1]

Summary

The paper deals with issues that caused problems for the defence during the preparation and presentation of the case before the international criminal courts. Since equality of arms is broad concept and encompasses different guarantees and rights of the accused, it was necessary to curtail the content of the paper toward jurisprudence of ICTY, ICTR and ICC regarding different rules. Aiming at getting overall picture regarding defence challenges before international criminal tribunals and ICC, this paper refrains from an in-depth analysis of particular aspects of equality of arms. Notably, according author's opinion, each equality of arms' aspect deserves much deeper and kind-of jurisprudential approach to be fully analyzed in terms of clarification and resolving different points of view, values and argumentation.

A fair trial is the only means to do justice, that otherwise could not be done. Equality of arms should be inevitably understood as a necessary condition for assessing the proceedings as adversarial within common law criminal system's meaning and both principles are considered to be fundamental aspects of the right to a fair trial. Fair trial principle should be linked to the rule of law. Therefore in the paper, term "equality of arms" is used as a term with common meaning and significance in human right doctrine. The main ratio of this term is balance in the rights of parties during proceedings, equal opportunities, means and resources, budgetary issues for indigent defendants.

A fair balance is being struck between the competing rights of individuals suspected of violations of international humanitarian and human rights law, from one side, and the rights of the Prosecution in investigating and prosecuting suspected persons on behalf of the victims and the international community, from the other side. It is true that fair trial concept is fully provided by the statutes of the international courts, but legal text are not sufficient for having strong and effective defence from institutional point of view.

Unlike ICTY and ICTR created by UN Security Council, the Rome Statute adopted a state-oriented approach. There are issues related to unequal state cooperation depending upon the position of the accused, so that Tribunals emphasized rather procedural nature of equality of arms, by accepting notions from Prosecutor regarding equality of arms. However, there is material inequality between the prosecutor and the defence before international courts in respect of

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[1] M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1013&context=lcp.

preparation of the case, since defence is not an organ of the court, it lacks material, human and financial resources, has difficulties in undertaking proper investigations, lacks state cooperation. Prosecutor has whole machinery behind him – personnel, money, state cooperation, advantages in undertaken investigation years before the defence has be actually involved in the whole case. Due to this inequality, it is very difficult to justify interpretations that only equality before the court in respect of equal opportunity for presenting the case (s.c. formal or procedural equality) is enough for understanding the equality of arms as a principle that Prosecutor can be entitled with.

***Key words*:** equality of arms; fair trial; ICTY; ICTR; ICC; procedural fairness; contradictory

I. Introduction

Every accused is entitled to a fair trial that encompasses a number of component rights. The principle of equality of arms is an essential element of the fair trial concept and minimum threshold for impartial and consistent proceeding. Its roots refer back to the early Christian theologian and philosopher, St Augustine who has formulated this principle as *audi alteram partem* (hear the other party! listen to both sides!). The principle *audiatur et altera pars* (let us hear the opposite side! let the other side also have a hearing!) was supported by Roman philosopher Seneca[2], as well. While trying to examine the standing of the idea of this principle in the Greek and Roman worlds, there are interpretations that this principle has duality of purposes as a rule of justice and as a rule of wisdom. As to the right to equal and effective access to the court, one should hear both sides of a case, because otherwise it is unfair to the party unheard, from one hand, and the idea that one ought to hear both sides of a case, because otherwise one may make a mistake, on the other hand.[3] The modern conceptual development of the principle of fair trial, as the bedrock of procedural fairness, is present in most important international instruments on human rights - Universal Declaration of Human Rights, Article 10; International Covenant on Civil and Political Rights (ICCPR), Article 14; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [4], Article 6. While the concept of equality of arms is not specifically defined or mentioned in the Statutes of any international criminal tribunal or in any international human rights treaty, it is widely acknowledged to be a fundamental element of the right to fair trial principle and a scale through which the requisite procedural fairness in any criminal proceeding can be measured.

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[2] Seneca makes an accused person, prevented by a magistrate from making a speech, complain that even those accused of treachery to the state are given a hearing before being executed - *cum nec proditores inauditi pereant*, Seneca the Elder, *Controversiae*, exc. 6. 10.

[3] *Cf.* Daan Asser, *Audi et Alteram Partem*: *a Limit to Judicial Activity,* in: A.D.E. Lewis and D.J. Ibbetson (eds.), *The Roman Law Tradition*, Cambridge, Cambridge University Press, 1994, p. 211-2; Kelly, John M., "*Audi Alteram Partem; Note*", 1964, Natural Law Forum, Paper 84, http://scholarship.law.nd.edu/nd_naturallaw_forum/84.

[4] http://www.echr.coe.int/Documents/Convention_ENG.pdf.

Equality of arms plays pivotal role in the jurisprudence of the European Court on Human Rights (ECtHR). The European Commission first concluded on the principle of equality of arms in 1959[5] and 1963[6] and European Court of Human Rights in 1968.[7] ECtHR in 1970 have given the word of "*equity*" its etymological meaning of *"aequitas"*. Notably, it formulates the principle *"per a contrario"* judging that a trial would not be equitable if it would run in conditions likely to place a part in an unfair situation,[8] and gave explanation that this principle has a general nature and it hasn't received an absolute character: there is no need for the states to establish a strict procedural equality between the parties, but only make sure that the parties have a situation reasonably equal. What is important is that none of the parties has a privileged position during the trial, referring here to the prosecution.[9]

Although, this principle is not explicitly stipulated in the ECHR, it is understood as an inherent part of the right to a fair hearing and as a part of the wider concept of a fair hearing within the meaning of Article 6 of the ECHR. Due to an inherent inequality between parties in a criminal process, certain guarantees should have been provided for an accused person in order to elevate the defence to equal the position of the state. The equality of arms principle can be found in the Article 6(3),[10] which prescribes guarantees regarding '*everyone charged with a criminal offence'*. Regarding criminal cases where the character of the proceedings already involves a fundamental inequality of the parties, this principle of '*equality of arms*' is even more important.[11] Since it requires a '*fair balance'* between the parties, each party must be afforded a reasonable opportunity to present its case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent or opponents and every arguments or observations intended to advise or influence a court, should be

[5] *Szwabowicz v. Sweden*, App. No. 172/56, 434/58 and 911/60, 30 June 1959, 2 ECHR YB, p. 355.
[6] *Ofner and Hopfinger v. Austria*, App. No. 524/59 and 617/59, report of 23 November 1962, Yearbook Volume 6, 1963, p. 680; *Pataki and Dunshirn v. Austria*, App. No. 596/59 and 789/60, report of 28 March 1963, Yearbook Volume 6, 1963, p. 718.
[7] *Neumeister v. Austria,* App. No. 1936/63, Judgment of 27 June 1968, Series A, No. 8.
[8] *Delcourt v. Belgium*, App. No. 2689/65, Judgment of 7 January 1970, para. 18.
[9] *Hentrich v. France*, Decision from 22 September 1994, para. 7-8.
[10] ECHR, Article 6, Right to a fair trial, para. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court, http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[11] P. Van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights,* 2nd Ed., 1990, p. 319.

communicated to both parties.[12] The principle of equality of arms was observed when although the parties had not been allowed to appear in person each had been able to present its case in writing and,[13] both parties must be given equal opportunity in relation to the evidence tendered by the other.[14] The ECtHR have accepted a two-step approach for establishing a violation of equality of arms. Starting point is to establish actual lack of procedural or institutional balance and than to assess the consequences of the inequality toward the fairness of the whole proceedings. In contrary, if there were disadvantages that may tilt the balance a little bit in favour of the prosecution side but it in itself did not render the proceedings unfair as whole, there won't be violation of equality of arms.[15] Fairness is an essential element of any system of justice and without it justice cannot be done or be perceived to have been done. Only the rule of law can enable a fair trial system.[16] Equality of arms is a basic right in criminal trial and not a dispensable ideal to be approached in careful incremental steps.[17] The principle of equality of arms as a part of the right to a fair trial directly interacts with the principle of contradictory but, equality of arms shouldn't be confused with the principle of contradictory. The relation between these two principles must be clarified concerning the similarities, differences and their interactions.[18] Namely, the necessity of a contradictory debate is being strong guarantees in which the principle of equality of arms lies. Equality of arms supposes the possibility to access the information concerning the observations or documents presented by the other party. Contradictority should be understood as possibility to bring all relevant observations or documents presented by the other party, into public debate before the judge. Prof. Krapac clarifies that in the literature instead the right to contradictory proceedings is often referred to phrase '*right to adversarial proceedings*'. Although these are not identical terms, there is almost identical content of both terms in which the most important the right to be heard

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[12] *Neumeister v. Austria,* App. No. 1936/63, Judgment of 27 June 1968, Series A, No. 8, para. 22; *Delcourt v Belgium* (1970) 1 EHRR 355, para. 28; *Monnell v UK* (1988) 10 EHRR 205, para. 62; *Isgrò v Italy*, 21 February 1991, Series A, Vol. 194, para. 31; *Borgers v Belgium*, 30 October 1991, Series A, Vol. 214, para. 24; *Ankerl v. Switzerlan*, 23 October 1996, Reports 1996-V, pp. 1567-68, para. 38; *Nideröst-Huber v. Switzerland*, 18 February 1997, Reports 1997-I, p. 107-08, para. 23; *Kress v. France* [GC], no. 39594/98, para. 72, ECHR 2001-VI; *Barberà v. Spain,* (1988) 11 EHRR 360, para. 18.

[13] *Ekbatani v. Sweden*, (1988) 10 EHRR 510, para. 30.

[14] *Brandsetter v. Austria,* (1991) 15 EHRR 213, para. 67.

[15] *Kremzow v. Austria*, App. No. 12350/86, Judgment of 21 September 1993, para. 75; *GB v. France*, App. No. 44069/98, Judgment of 2 October 2001, para. 64-70; *Ernst and others v. Belgium*, App. No. 33400/96, Judgment of 15 July 2003, para. 61.

[16] Elise Groulx, *"Equality of arms": Challenges confronting the legal profession in the emerging international criminal justice system*, Oxford University Comparative Law Forum, (2006) Oxford U. Comp. L. Forum 3, p. 2, http://ouclf.iuscomp.org/articles/groulx.shtml.

[17] Tosin Osasona *"Equality of Arms" and its effect on the quality of justice at the ICC, A Contrario* International Criminal Law, Reflections and Commentary on Global Justice Issues, April 10, 2014, available at: http://acontrarioicl.com/2014/04/10/equality-of-arms-and-its-effect-on-the-quality-of-justice-at-the-icc/.

[18] Elisa Toma, *The Principle of Equality of Arms – Part of the Right to a Fair Trial*, Law Review International Journal of Law and Jurisprudence Online Semiannually Publication, Volume I, Issue 3, Jul.-Sept. 2011, pp. 1-12.

before judgment is taken.[19] Equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[20]

II. Equality of arms and international criminal courts

The integrity, legitimacy and acceptability of international criminal proceedings can be tested by compliance with human rights guarantees as the most reliable benchmark for fair international criminal justice before the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY) as *ad* hoc Tribunals with limited geographical and temporal competences, and International Criminal Court (ICC) as permanent court with ratified competence by states parties of the Rome Statute[21]. The criminal tribunals must respect the international human rights standards, both in order to spread human rights, and to guarantee their legitimacy.[22] Unlike national courts, which are monitored by specialized bodies,[23] ICTY, ICTR and ICC operate without monitoring of the fairness of their proceedings.[24] Preventing infringements of fair trial guarantees is one of the major concerns in the administration of international justice. International criminal procedure should ensure respect for individual and procedural rights of the accused and procedural quality of actions taken for preparation of the case as well as for presentation of the case before international criminal courts.[25] According to the ICTY Trial Chamber, the correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[26] The ICTY rules spell out the principle of due process of law and lay down guarantees ensuring fundamental fairness and

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[19] Davor Krapac, *Kazneno procesno pravo*, Knjiga prva: Institucije, IV izmenjeno i dopunjeno izdanje, Narodne Novine, Zagreb, 2010, p. 148.

[20] Stefania Negri, *Equality Of Arms - Guiding Light Of Empty Shell*, available at: http://books.google.mk/books?id=6K9MHONs9KcC&pg=PA13&lpg=PA13&dq=stefania+negri+equality+of+arms+guiding+light+of+empty+shell&source=bl&ots=n1DZu5k6rP&sig=RxucI7nTzUcLIcOU8WuGCJ5Pzsg&hl=en&sa=X&ei=YVmEVNSNennygPj6oDwDg&redir_esc=y#v=onepage&q=stefania%20negri%20equality%20of%20arms%20-%20guiding%20light%20of%20mpty%20shell&f=false.

[21] From the viewpoint of treaty law, the Rome Statute should be considered, qua a multilateral international treaty, Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, European Journal of International Law, 10 (1999), pp. 144–171, p. 145.

[22] Charles C. Jalloh/Amy DiBella, *Equality of Arms in International Criminal Law: Continuing Challenges, University of Pittsburgh School of Law*, Legal Studies Research Paper Series, Working Paper No. 2013-28, September 2013, pp. 251-287.

[23] Such as the ECtHR, regarding compliance of states with the ECHR, or the Human Rights Committee (HRC) regarding compliance of states with the ICCPR.

[24] J.P.W. Temminck Tuinstra, *Defence counsel in international criminal law*, Ph.D thesis, Faculty FdR: Amsterdam Center for International Law (ACIL), 2009, p. 2.

[25] Davor Krapac, *Međunarodno kazneno procesno pravo,* Oris postupka pred Međunarodnim kaznenim sudovima, Narodne Novine, Zagreb, 2012, p. 23.

[26] *Prosecutor v. Brđanin and Talić*, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003 para. 62.

substantial justice. Thus, they specify the principle of '*equality of arms'* that encompasses, *inter alia*, the right to legal counsel, if necessary at the expense of the Tribunal (RPE Rule 42); the right to a public hearing (RPE Rule 78); the right of the accused to test the prosecution evidence and present evidence on his own behalf (RPE Rule 85); the presumption of innocence (RPE Rules 62 and 87) as well as the right to be protected against self-incrimination (RPE Rule 90).

Lubanga case is first one tried by the ICC and is an opportunity to evaluate the concept of equality of arms in international criminal justice.[27] The ICC Appeals Chamber explained that where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by the Prosecution, it would be a contradiction in terms to put the person on trial. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.[28]

The ICTY Statute has adopted a largely common law approach to its proceedings, rather than the civil law approach prevailing in continental Europe and elsewhere.[29] At the trial, the prosecution and the defence have been put on the same footing: after confirmation of the indictment, the defence is entitled to collect and to have access to all relevant evidence; and both the Prosecution and the defence are reciprocally bound to disclose all documents and witnesses. Each party is entitled to cross-examine the witnesses presented by the other party. Thus the rights of the accused are fully safeguarded and the setting for a fair trial is created (rules 66-67).[30]

Although in ICC the common law system has been basically adopted, a number of fundamental elements typical of the civil law approach have been incorporated.[31] International criminal procedure is understood as '*conflict of traditions*'[32] since it is the result of a constant process of adaptation to the diversity, distinctness, and dynamism of its international context but in

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[27] *Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06, http://www.icc-cpi.int; Osasona, op.cit.

[28] *Prosecutor v. Lubanga*, AC, ICC, 21 October 2008, 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, para. 77-78, referring to the Appeal Chamber Judgment of 14 December 2006, para. 37 and 39.

[29] Prof. Damaška considers the term '*inquisitorial'* inappropriate and unfair with reference to the modern criminal procedure on the continent, Damaška, Mirjan, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, University of Pennsylvania Law Review, vol. 121, no. 3, 1972-1973, pp. 506-589, p. 561.

[30] Report of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991, Annual report, A/49/342, S/1994/1007, 29 August 1994,para. 71.

[31] Prosecutor as both a party to the proceedings and also an impartial truth-seeker or organ of justice, Article 54(1)(a); judge is dealing with preliminary matters so if the Prosecutor decides to initiate investigations *proprio motu* he needs the Chamber's authorization to conduct such investigation, Article 15(3); victims may take part in the proceedings, even at the pre-trial stage, and seek compensation or reparation so civil proceedings are made part and parcel of criminal proceedings; the Trial Chambers are entrusted with a pro-active role Article 64(5)(d); the accused has the right, during trial, 'to make an unsworn oral or written statement in his or her defence', Article 67(1)(h), Cassese, op.cit., p.165-166.

[32] Frederic Megret, *Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure*, March 4, 2009, UCLA Journal of International Law and Foreign Affairs, 2010, available at http://ssrn.com/abstract=1500459.

terms of bringing the common law and civil law traditions closer to each other, international exigencies clearly show the traditions can be partly dismantled, deconstructed, and reinvented.[33]

Taking into account the status and competences of the Prosecution office, the inevitable consideration is that in the current international adjudication the prosecution has much more success in gathering relevant evidence. This is due to fact that a Prosecutor charges the accused on behalf of the international community as well as due to the institutional advantage of the Office of the Prosecutor that is acting independently as a separate organ[34] in ICTY[35], ICTR[36] and ICC[37]. Therefore, the granting of immunity and the practice of plea-bargaining find no place in the rules since it remains entirely a matter for the Prosecutor to determine against whom to proceed as well as there is no investigating judge who collects evidence, so the initial task of inquiring into allegations of offences and obtaining the necessary evidence falls on the Prosecutor (Rules 39-43).

There are opposite interpretations whether the principle of equality of arms should be defined differently when applied in the context of international criminal tribunals, should it be understood as a notion in favor of both parties, and should it be adjust upon specific characteristics of international criminal courts. Although jurisprudence and interpretations of well-known principle of '*equality of arms'* should have been staring point for its interpretation before international criminal courts, there have been difference of opinion expressed as to whether the principle relates only to the position of the accused so that equality of arms provides merely that the accused is to be afforded the same rights as the Prosecution, or whether equality of arms relates to equality between both parties. Along with interpretations that the defence alone is able to invoke this principle since some privileges afforded to the defence are not available to the Prosecution,[38] and that equality of arms has been used as a tool for focusing attention on and advancing the interests of the defence in international criminal trials,[39] there are interpretations that finds not unreasonable to interpret equality of arms more extensively within international criminal procedures when it concerns the

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[33] *Cf.* Kai Ambos, *The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?*, December 14, 2011, International Criminal Justice: A Critical Analysis of Institutions and Procedures, pp. 429-503, M. Bohlander, ed., London, 2007, available at http://ssrn.com/abstract=1972236.

[34] Regarding Prosecutorial Strategy *Cf.* Kai Ambos/Ignaz Stegmiller, *Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy*?, Crime Law and Social Change, Volume 59, Issue 4, May 2013, pp. 415–437.

[35] Article 16, ICTY Statute, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[36] Article 15, ICTR Statute, available at: http://www.icls.de/dokumente/ictr_statute.pdf.

[37] Article 42, ICC Statute, available at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[38] J.P.W. Temminck Tuinstra, op.cit., p. 171.

[39] Maria Igorevna Fedorova, The Principle of Equality of Arms in International Criminal Proceedings, School of Human Rights Research Series, Volume 55, 2012, p.3.

position of the accused with respect to both procedural and substantive law,[40] as well as that equality of arms in adversarial structure of proceedings is based on the notion of the trial as a contest between the parties, so also the prosecutor is entitled not to be put in disadvantageous position.[41] It seems that the ICTY Appeals Chamber accepted a broader and more liberal interpretation of equality of arms than one accepted by the ECHR. However, due to completely wrong interpretation of ECHR Article 6(3), ICTY Trial Chamber in *Aleksovski* case concluded that application of the concept of a fair trial in favor of both parties is understandable because the Prosecution acts on behalf of and in the interests of the international community, including the interests of the victims of the offence charged and also has held that it is difficult to see how a trial could ever be considered to be fair where the accused is favored at the expense of the Prosecution.[42] There are similar interpretations where Trial Chamber has held that procedural equality means equality between the Prosecution and the defence, but to suggest an inclination in favor of the defence is tantamount to a procedural inequality in favor of the defence and against the Prosecution, and will result in inequality of arms.[43] According a dissenting opinion of judge Vohrah, which is in line with interpretation of ECHR Article 6(3) but was not accepted by the Chamber in case of *Delalic,* the application of the principle in criminal trials should be inclined in favor of the defence acquiring parity with the Prosecution in the presentation of the defence case to preclude any injustice against the accused.[44] This dilemma was overcome by ICC Statute Article 81(1)(b)(iv) which stipulates that under the ICC Statute, solely the defence, or the Prosecutor on the behalf of accused, may file as a ground of appeal any 'ground that affects the fairness or reliability of the proceedings or decision".

According prof. Cherif Bassiouni, the three main pillars of the international criminal justice system are: an independent judiciary, a prosecuting authority which guards public interests, and independent and effective defence counsel.[45] The Principle 14 from the UN Basic Principles on the Role of Lawyers[46] provide that lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by

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[40] Geert-Jan Alexander Knoops/Robert R. Amsterdam, *The duality of State cooperation within international and national criminal cases,* Fordham International Law Journal, Volume 30, Issue 2, 2006, p. 270.
[41] Cassese, op.cit., p. 384-385.
[42] *Prosecutor v. Aleksovski*, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, para. 25, http://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm.
[43] *Prosecutor v. Delalic*, IT-96-21, Decision on the Prosecution's Motion for an Order Requiring Advanced Disclosure of Witnesses by the Defense, 4 February, 1998, para. 48.
[44] *Prosecutor v. Tadic*, IT-96-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statement, 27 Nov. 1996, p. 7.
[45] Cited by Elise Groulx, op.cit., p. 24.
[46] Available at: http://www.unrol.org/files/UNBasicPrinciplesontheRoleofLawyers.pdf.

national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession taking into account their role as essential agents of the administration of justice (Principle 12, UN Basic Principles). Council of Europe underlines the fundamental role of lawyers in ensuring the protection of human rights and fundamental freedoms, as well as independence of lawyers as precondition for fair system of administration of justice.[47] However, the institutional basis for a truly independent body of defence lawyers is very much lacking in the statutes of international courts, even though the rights of the accused are clearly articulated in articles and rules of procedure but they remain as guarantees only on paper not in real international justice practice. This lack of independence, combined with scarce resources, creates an '*inequality of arms*' between the Prosecutor and the defence. Such institutional weakness can undermine the legitimacy of any criminal court over time and affect its credibility.[48] The defence of the suspect or accused is not, as such, part of the organisation of the Tribunal,[49] that's why support for defence counsel was rudimentary and, unfortunately, they were treated even with mistrust.[50] The defence has struggled to improve its secondary position.[51] Although one might expect that ICC have learned much from the tribunals, unfortunately it was not a case. The Rome Statute failed to address fully the role of defense counsel and it did not adequately provide as much equality as possible for defense counsel. [52] However, in order to address considered omissions in the Rome Statute, some specific actions have been taken by both the ICC and outside organizations.[53]

One has to agree that the international criminal justice system requires an independent legal profession including both defence and victims' counsel. Considering that counsel appearing before

[47] Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted on 25 October 2000.
[48] Elise Groulx, op.cit., p. 22.
[49] *Information booklet for ICTY witnesses*, Victims and Witnesses Section, 2007, p. 4, available at: http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf
[50] In the early days of ICTY, defence counsels were not allowed to freely access the ICTY building and had to be escorted to and from the courtrooms by ICTY's security, but these early misconceptions about the role and status of the defence have been remedied, and the position of defence counsel has improved significantly over the past years, John Hocking (Registrar), *Legal aid and defence support at the ICTY*, Meeting of Registrars of Final/Appellate, Regional and International Courts Ottawa, Canada, 14-16 April 2010, p. 6, available at: http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Registrar/100414_reg_hocking_ottawa.pdf.
[51] Fedorova, op.cit., p. 5.
[52] For all shortcomings, limitations or omissions see: *Filling the gap in the Rome Statute on defense*, The American Non-Governmental Organizations Coalition for the ICC, A program of the UN Association of the USA, August 30, 2005, p. 3, http://www.amicc.org/docs/Filling%20the%20Gap%20in%20the%20Rome%20Statute.pdf.
[53] Such as: establishment of the Defense Support Section under the Office of the Registry, the creation of an Office of Public Defense Counsel under Regulation 77 of the Regulations of the Court; provisions for the Registrar in relation to defense in the draft of the Regulations of the Registry, and protections for the defense in the Agreement of Privileges and Immunities, were all established with the interests of the defense in mind. In addition, lawyers and legal associations created the International Criminal Bar to provide a venue through which defense counsel may be represented before the ICC. *Cf.* Filling the gap in the Rome Statute on defense, The American Non-Governmental Organizations Coalition for the ICC, A program of the United Nations Association of the USA, August 30, 2005, p. 4, http://www.amicc.org/docs/Filling%20the%20Gap%20in%20the%20Rome%20Statute.pdf.

the ICTY come from various jurisdictions, and that the interests of justice require all counsel to adhere to the same code of professional conduct, there is a Code of Professional Conduct for Counsel Appearing before the International Tribunal Code.[54] However, the International Bar Association (IBA) contends that the absence of a prosecutorial professional code of conduct raises fairness concerns since all other ICC counsel are governed by such a code.[55] The absence of such a code could mean an absence of guidance to assist prosecution counsel who may have had no training in deontology or professional ethics, from knowing what behavior is or is not acceptable,[56] so IBA welcomes the Trial Chamber decision in the *Kenyatta* case, which ruled that the Code of Professional Conduct for defence counsel should, where applicable and to the extent possible, also apply to members of the Prosecution.[57] The situation has become much better by adoption of ICC Code of Conduct for the Office of the Prosecutor.[58]

A key element of the rule of law is maintaining a system of checks and balances that ensures that no single party, including judges and State agencies, can dominate legal proceedings. This should be done by incorporation of a "*third pillar"*[59] that will help to legitimize the new justice system and strengthen the rule of law by providing a formal voice for lawyers and enabling the protection of individual rights. Better institutional status of the defence counsels will enable overcoming the following issues:[60] 1) problems relating to the choice and qualifications of counsel; 2) the severe lack of training of defense counsel; 3) serious concerns arising from the payment of counsel, including so-called "*fee-splitting*;" 4) questions relating to discipline; and 5) the establishment of an effective bar association for defense counsel.

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[54] Adopted by the ICTY on 12 June 1997. Amended in 2002, 2006 and 2009. Available at: http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf. Similar Code of Professional Conduct for Defence counsel was adopted by ICTR on 14 March 2008, available at: http://41.220.139.29/Portals/0/English/Legal/Defence%20Counsel/English/04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf, as well as Code of Professional Conduct for counsel at ICC, adopted on 2 December 2005, ICC-ASP/4/Res.1, available at:http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf .

[55] *Witnesses before the International Criminal Court*, IBA ICC Perspectives, An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses, July 2013, p.25.

[56] *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-617-Red, Public Redacted Version of 'Application for Sanctions pursuant to Article 70 of the Statute against an OTP staff Member and request for steps to be taken to ensure the protection of defence witnesses' filed on (1 February 2013, 4 February 2013), Defence, at para. 19, www.icc-cpi.int/iccdocs/doc/doc1547770.pdf; *Cf.* Milan Markovic, *The ICC Prosecutor's Missing Code of Conduct*, Texas International Law Journal, Volume 47, Issue 1, 2011, pp. 201-236.

[57] *Prosecutor v Uhuru Mugai Kenyatta*, ICC-01/09-02/11-747, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, para. 16, Trial Chamber V(B), www.icc-cpi.int/iccdocs/doc/doc1599174.pdf

[58] OTP2013/024322, Entry into force since 5 September 2013, http://www.icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF.

[59] Elise Groulx, op.cit., p. 21.

[60] David Tolbert, The ICTY and Defense Counsel: A Troubled Relationship, New England Law Review, Vol. 37:4, 2003, pp. 975-986, p.977.

Also financial equality is very important for the defence since states and international tribunals are usually stringent in allocating financial resources to accused persons.[61]

The interpretation that the right to a fair trial embraced the principle of an equality of arms is accorded with the jurisprudence of the ECtHR and was adopted by ICTY Statute Article 21, ICTR Statute Article 20 and ICC Statute Article 67. The accused shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal; and (g) not to be compelled to testify against himself or to confess guilt. Aside all those guarantees, art. 67 from ICC Rome Statute stipulates also informing the accused about the content of the charges in a language which the accused fully understands and speaks (art. 67/1/a); communicate freely and in confidence (art. 67/1/b); the accused shall also be entitled to raise defences and to present other evidence admissible under this Statute (art. 67/1/e); assistance of a competent interpreter in a language which the accused fully understands and speaks (art. 67/1/f); the accused is entitled to remain silent, without such silence being a consideration in the determination of guilt or innocence; to make an un sworn oral or written statement in his or her defence (art. 67/1/h); and not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal (art. 67/1/i).

The principle of equality of arms between the parties in a criminal trial goes to the heart of the fair trial guarantee. The Chamber in case of *Tadić* has conceptualized the equality of arms in three ways:

- first, the right of the accused to have adequate time to prepare his defense and this right is at par with that possessed by the prosecution;

[61] *Prosecutor v Kayishema* Case No. ICTR 95-1-A, Appeals Chamber Judgment PP. 63-71 (June 1, 2001); *Prosecutor v Ojdanic* ICTY, IT-9937- PT, Final Assessment of the Accused's Ability to Remunerate Counsel, P. 14, 23 (June 23, 2004); ICTY Appeals Chamber decision of *Prosecutor v Oric* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, P. 7 (July 20, 2005).

- second, court engendered and enforced procedural equality of the parties before the Chamber and
- third, the adoption of protective measures including the grant of limited immunity from prosecution in form of safe conduct; the utilization of evidence through deposition and video conferencing link; the issuance of binding orders to state to produce evidence in its custody; utilizing the power in the form of subpoena, in compelling a witness to produce evidence for the defense and the possibility of the court conceptualizing that a fair trial is impossible in certain instances because of the interest and involvement of state parties.[62]

According ICTY Appeal's Chamber, equality of arms is one of the features of the wider concept of a fair trial that includes not only the need for an independent and impartial tribunal but also such things as the right of each party to call witnesses "under the same conditions as witnesses against him", an equal opportunity to present his case, and what is described as the fundamental right that criminal proceedings are adversarial in nature – defined as meaning the opportunity for both the prosecution and the accused to have knowledge of and comment on the observations filed or evidence adduced by either party. [63]

When explaining the legal basis for the establishment of the ICTY with UN Security Council Resolution 808(1993) and especially the rights of the accused, the Secretary General,[64] emphasized that it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings that are, in particular, contained in article 14 of the ICCPR. However, this statement was differently interpreted. For ICTR, the Report of the Secretary-General establishes the sources of laws for the Tribunal, so regional human rights treaties and the jurisprudence developed there under, are persuasive authority, which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal but they are authoritative as evidence of international custom.[65] Unfortunately, ICTY has transformed this axiom into theorem and from the Tribunal that should respect and implement internationally recognized rights of the accused it turned into an entity for interpretation of human rights context. ICTY rejected the idea that it, as a *sui generis* international forum, could be bound by that

[62] *Prosecutor v Tadic,* IT-94-1-A, Judgment, July 15, 1999, para. 44, 52-54.
[63] *Prosecutor v Kordic & Cerkez*, IT-95-14/2-a, Decision on application by Mario Cerkez for extension of time to file his respondent's brief, para 5, http://www.icty.org/x/cases/kordic_cerkez/acdec/en/10911BR316286.htm. *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, para. 23.
[64] *Report of the Secretary General*, S/25704, 3 May 1993, para. 106, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf
[65] *Prosecutor v. Barayagwiza,* ICTR-97-19-AR72, Decision, 3 Nov 1999, para. 40.

jurisprudence[66] with the explanation that because of its unique structure as an international Tribunal and because of the nature of the subject matter with which it dealt, universal human rights principles are not applicable to it in the same way in which they are applicable to municipal jurisdictions. In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused rights to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique framework and must interpret its provisions within its own legal context. International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.[67] ICTY Chamber's explanations about contextual approach to human rights principles should be inevitably understood as a euphemism for not recognizing the universal human rights principles and jurisprudence. This approach could be onerous for the defence and is completely unjustified having in mind the fact that ICTY is *sui generis* according its establishing not *sui generis* in virtue of not recognizing universal rights of the accused. Hence, procedural equality does not imply a denial of fundamental guarantees under the veil of so-called "*contextual approach*".

Procedural fairness is focused on equal opportunities not on reaching a verdict. It is obvious that ICTY judges are not sufficiently aware of necessity for balancing between the tendency for efficiency in the proceedings and protection of universally recognized human rights. The ICTY has been criticized for restricting international human rights standards in the interest of securing convictions.[68]

According the Tribunal, the principle of equality of arms must be given a broader interpretation due to following issues[69]:

- unlike domestic courts that had a capacity to control matters that could materially affect the fairness of the trial, the Tribunal is totally dependent upon the co-operation of states to hold its trials as it was states that were often in possession of evidence relevant to the trial and states could impede the efforts of counsel to secure that evidence;

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[66] *Cf.* Gabrielle McIntyre, *Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY*, The International Society for the Reform of the Criminal Law, 17th Annual Conference, Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps, Workshop 303 – Ethics, The Hague, Netherlands, 24-28 August, 2003.
[67] *Prosecutor v Tadic,* IT-94-1-A, Judgment, July 15, 1999; *Prosecutor v Tadic*, IT-94-1-A, Decision on Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 19.
[68] Joan Sloan *"The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look",* 1996, Leiden Journal of International Law, p. 479; Geert-Jan Alexander Knoops *"The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective",* 2005, Fordham International Law Journal, p. 1566.
[69] *Prosecutor v Tadic,* Appeal Judgment, 15 July 1999, pars 48-52.

- if the assistance of the Tribunal proved ineffectual, in that the party despite that assistance was still unable to obtain the evidence sought, that was a matter outside of the scope of the principle of equality of arms as a principle of procedural equality, although it was a factor that could go to the fairness of the trial.

III. Defence rights and guarantees regarding equality of arms

a. Adequate time and facilities (resources and financial allocations) for preparation of the case

Equality of arms often devolves into an issue of resources regarding preparation of the case. Accused should has adequate time and facilities to prepare his defence in accordance with Article 21(4)(b) ICTY Statute, Article 20(4)(b) ICTR Statute and Article 67(1)(b) ICC Statute. In accordance with Article 14(3)(b) ICCPR[70] the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms.[71] What is "*adequate time*" depends on the individual circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. There should be axiomatic interpretation that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial and this requirement should be applied to all the stages of the judicial proceedings. While it is conceded that the needs of the defence and prosecution are different and that the accused might not need as near as equal the resources of the prosecution, the allocation of funds to secure an experienced lawyer (or rather the lack of such funds), will definitely undermine the principle of equality of arms.[72] The right of an accused to have adequate time and facilities to prepare his defence does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the defence, such as the material equality of financial or personal resources.[73] However, one should bear in mind that the majority of accused at international

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[70] *Article 14 - Equality before the courts and the right to a fair and public hearing by an independent court established by law*, General Comment No. 13, HRI/GEN/1/Rev.9 (Vol. I), Human Rights Committee, 13 April 1984, para. 9.
[71] *Little v. Jamaica*, Communication No. 283/l988, U.N. Doc. CCPR/C/43/D/283/l988 (1991), 19 January 1988, para.8.3, http://www1.umn.edu/humanrts/undocs/html/dec283.htm.
[72] Rowland James Victor Cole, *Equality of Arms and Aspects of the Right to A Fair Criminal Trial in Botswana,* Ph.D Thesis, March 2010, p. 48.
[73] ICTR *Kayishema and Ruzindana*, Appeal Judgement, 1 June 2001, para. 67-69.

criminal courts are indigent, so the resources and facilities that are provided to them under the Legal Aid System are of prime concern. ICTY case law in considering the scope for application of the principle of equality of arms had held that at a minimum a fair trial must entitle the accused to adequate time and facilities for his defence under conditions which do not place him at a substantial disadvantage as regards his opponent.[74] Thus, without adequate resources, and without conducting their own investigations, accused could not effectively challenge the prosecution's case.

At the *ad hoc* Tribunals, defence counsels regularly complain that the Prosecution, as an organ of the tribunals, is far better off than the defence. There need to be some proportionality in terms of resources and facilities between the prosecution and the defence to achieve procedural equality in international criminal proceedings. Especially considering the fact that the prosecution has the advantage of *continuity of its staff members* who are appointed for a lengthy period, they can learn from their experiences in various cases and build a career conducting international criminal cases. Unfortunately, the defence counsel is appointed to particular case, so since many of them are "*first timers*",[75] there were problems in the courtrooms with shockingly poor performances by some defense counsel,[76] many times with respect to the examination of witnesses.[77]

Since the equality of arms is particularly important at the investigative stages, opportunity for *proper investigation* taken by the defence counsel is one of the prerequisites for fair trial. For effective investigative resources, the defence needs assets which improve the functioning capacity to search for, find and procure information and sources relating to the criminal charges against the accused[78]. In most cases the prosecution takes several years to gather evidence prior issuing an arrest warrant after collected sufficient evidence to indict a person and only after that the defence usually begins its investigations. Only when arrested or interrogated by the prosecution or police authorities, a person has a right to a defence counsel since an international criminal court will not assign a defence team before a person is arrested and it is certain that he will be tried by this court.[79] This is understandable having in mind the prosecutor's *onus probandi*, but one should be aware of the fact that this could hinder the defence in gathering evidence in favor of the defense case. Additionally, under Article 16 of the ICTY Statute, the prosecution has a mandate to be assisted in

[74] *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 6.
[75] J.P.W. Temminck Tuinstra, op.cit., p. 152-153.
[76] Tolbert, op.cit., p. 977; Judith A. McMorrow, *Creating norms of attorney conduct in International Tribunals: A case study of the ICTY*, Boston College International & Comparative Law Review, 30, (2007): 139-173.
[77] Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634 (1999), para. 210.
[78] Jalloh/DiBella, op.cit., p. 263.
[79] J.P.W. Temminck Tuinstra, op.cit., p. 155.

gathering of material by search and seizure warrants granted by the Tribunal pursuant to ICTY Rule 54. It is argued that there is no equality of arms between the defence and the prosecution, because the defence lacks sufficient resources to conduct separate and proper investigations, whereas the prosecution has extensive resources.[80] Due to such material differences between the parties, the defence counsel has much limited possibilities to undertake investigations by their own. Therefore, in order to meet the principle of equality of arms in its entire significance, the defence should be allowed assistance regarding its own investigator at the *locus delicti*,[81] the same is for visiting a crime scene, obtaining witnesses and evidence by the defense counsel[82] as well as, the necessity to enable defense counsel to enter the territory of a hostile country which unable the defence in verifying data submitted by the prosecution.[83]

There is important connection between adequate time and facilities for the preparation of the defence and Prosecutor's duty for *disclosure*. The defence argued that, often material was handed over to it by the Prosecution a very short time before the relevant witness gives evidence without any explanation provided as to the purpose of that material, so since the defence did not have an adequate time and facilities for the preparation this endanger the right of the accused to a fair trial as well as to a equality of arms.[84]

The Appeals Chamber has long recognized that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case, certainly in terms of procedural equity. However, the Trial Chambers are aware of the difficulties that parties face when collecting evidence on the territory of an uncooperative state. Therefore, under the ICTY Statute the principle of equality of arms has been given a *more liberal interpretation* than that normally upheld with regard to proceedings before domestic courts.[85] More liberal interpretation is due to the dependence of the international tribunal on state cooperation, due to the fact that international criminal courts have no autonomous enforcement agencies at their disposal to grant the applications of the defence and to put it on a par with the prosecution as well as due to the fact that conditions

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[80] *Prosecution v. Tadic*, Case No. IT-94-1-A, Judgement 15 July 1999, para. 30; *Prosecution v.Milutinovic et al*., Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, Milutinovic, Ojdanic and Šainovic, 13 November 2003, para. 11; *Kayishema and Ruzindana*, Case No. ICTR-95-1- T, Judgement, 21 May 1999, para. 56.

[81] The ICTR Appeals Chamber considered that the mere fact of not being able to travel to Rwanda is not sufficient to establish inequality of arms between the Prosecution and the Defence. The defence had failed to demonstrate that this deprived the accused of a reasonable opportunity to plead his case, *Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 72.

[82] Jalloh/DiBella, op.cit., p. 268.

[83] J.P.W. Temminck Tuinstra, op.cit., p. 155.

[84] *Prosecutor v. Mucić et al*., ICTY Case No.: IT-96-21-T, Decision on motion by the defendants on the production of evidence by the prosecution, 8 September 1997, para. 4.

[85] *Prosecutor v. Tadic,* Appeal Judgement, paras. 48, 50 and 52. Knoops, op.cit., p.1577; Fedorova, op.cit., p.209.

that may put the defence at a substantial disadvantage which are outside the court's control are excluded from the scope of the equality of arms principle. This implies that the principle of equality of arms should be subjected to teleological interpretation depending on the nature of the criminal proceedings.[86] In interlocutory decision on length of defence in *Orić case*, the Appeal Chamber held that this is not to say that an accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The 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 a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.[87]

The defense argued the curtailment of *financial resources* to accused persons in international criminal tribunals due to the fact that the accused persons would seek witnesses who are in far off countries with all difficulties to trace them. Therefore, the defence was allocated far fewer investigators and their efforts to secure witnesses remained not enough effective. The prosecution *de facto* benefits more than the defense as a result of the imbalance of financial resources and political powers.[88] The prosecutor's obligation for continuous disclosure of exculpatory evidence could also affects the defence as to the revisiting of particular witnesses which is inevitably connected with additional funding.[89] The defence has problems with access to important documents that are in possession of government officials who often refuse to cooperate with the defence. The jurisprudence of the tribunals has not been of assistance to the defence. Namely, in *Prosecutor v Milutinovic et al.*[90] the defence filed a motion seeking an order that the Registrar allocates additional funds in respect of pre-trial preparation in relation to one of the accused persons since there was an extension of the duration of the pre-trial stage. The defence argued that several particularities such as the scope of the case, the nature of the accused's defence, and the extended and complex legal issues involved, justified the request for additional funds. It is complicated, even impossible, for defence counsel to fulfill his duty to act diligently and promptly

[86] Knoops, op.cit., p.1577; Cassese, op.cit., p.164.
[87] ICTY Appeals Chamber decision of *Prosecutor v Oric* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, July 20, 2005, para. 7.
[88] Knoops/Amsterdam, op.cit., p.294.
[89] *Prosecution v. Milutinovic et al*., Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, Milutinovic, Ojdanic and Šainovic, 13 November 2003, para. 39.
[90] *Prosecutor v Milutinovic et al.,* Case No. IT-99-37, Decision on Motion for Additional Funds of Jul 8, 2003.

in order to protect the client's best interests without additional funds.[91] The Trial Chamber in denying the application has held that while accepting the Registrar's position that it is open to some flexibility in considering the allocation of additional funds, the defence should demonstrate exceptional circumstances or events beyond its influence if such requests are to be granted. The main finding of the Trial Chamber was that an extension of the duration of the pre-trial stage is not a sufficient reason for paying out additional legal aid funds unless justified by work which was not estimated when the original grant was made. A new *ICTY Legal Aid System*, replacing the old one in which lawyers for indigent accused were paid an hourly rate[92] with possibilities for "*fee-splitting system*"[93], was brought into force on 13 October 2000 and the Registrar allocates a fixed fund for each phase of the trial. Legal Aid Systems have been the ICTY's Achilles' heel and have generated considerably legitimate criticism.[94] Under this system, defense counsel has been paid a specified sum for each phase of the case, depending on the difficulty of the case (there are three categories of difficulties) in addition to certain expenses.[95] The ICTY's Legal Aid System is based on the principle that the accused and the Prosecutor must have equality of procedural arms, supported by an appropriate level of resources.[96] In *Prosecutor v. Kvočka et al.,* the Appeal Chamber has held that the Registrar has the primary responsibility in the determination of matters relating to remuneration of counsel in administrative fact-finding procedure so a judicial review of such an administrative decision is not a rehearing, nor an appeal. The accused bears the onus of persuasion since he must persuade the Chamber conducting the review (a) that an error of the nature described has occurred and (b) that such error has significantly affected the Registrar's decision to his detriment. If the accused fails to persuade the Chamber of either of these matters, the Registrar's

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[91] The duty to act diligently is among basic principles of codes of professional conduct: articles 3 and 11, The Code of Professional Conduct ICTY; Article 6, The Code of Professional Conduct ICTR; Article 5, The Code of Professional Conduct ICC.

[92] ICTY standard rate was $110 per hour, a maximum of 175 hours per month, plus certain office costs, travel expenses, etc., Directive on Assignment of Defence Counsel for the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/73/REV.9 , Tolbert, op.cit, p. 983.

[93] The defense counsel agreed to split his fee with the accused or his family. Defense counsels for Zoran Zigic allegedly used the practice of "*fee-splitting*" to funnel circa $175,000.00 to the accused and his family, enabling them to purchase 2 apartments, a business, 3 vehicles, 3 laptop computers, a nearly $35,000.00 renovation of his parents' home and travel for family members to The Hague costing $18,000.00, Tolbert, op.cit., p. 984.

[94] *Prosecutor v. Strugar*, ICTY. IT-01-42-PT, Decision of Defence Request for Review of Registrar's Decision and Motion for Suspension of all Time Limits, 19 August 2003, where defence counsel have objected to the Registrar's findings as to the appropriate 'categorization' of their case as well as to the resources accompanying such a classification, http://www.icty.org/x/cases/strugar/tdec/en/030820.htm. See: J.P.W. Temminck Tuinstra, op.cit., p. 154; Tolbert, op.cit., p.957.

[95] Tolbert, op.cit., p.983.

[96] Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 - Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system - Report of the Secretary-General (UN Doc. A/58/288), 12 August 2003, para. 4(e).

decision will be confirmed. If the accused has persuaded the Chamber of both matters, the Registrar's decision may be quashed and, if appropriate, the Chamber may also rule that legal aid should be granted or, where it is satisfied that the accused has the means to remunerate counsel partially, refer the matter again to the Registrar for him to determine the portion of the cost of having counsel for which the accused does not have the means to pay. [97] Consequently, the Trial Chamber in *Prosecutor v Milutinovic et al.*[98] have considered that the Trial Chamber cannot interfere in the Registrar's decision. The principle of equality of arms would be violated only if either party is put at a disadvantage when presenting its case. Thus, in the instant case, the Appeals Chamber was of the view that: the appellant has not shown how the Trial Chamber failed to address the imbalance of resources between the Prosecution and the defence and in that way violated the principle of equality of arms; the appellant cannot rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage; the Registrar misdirected himself when he affirmed in his submissions to the Trial Chamber that the actual duration of the pre-trial stage is not a relevant factor to take into account when allocating a lump sum under the Legal Aid System. However, the Appeals Chamber was of the view that the Registrar was correct to take the view that the amount of resources allocated to each defence team depends on factors such as the level of complexity of the case and the amount of work required to ensure an effective pre-trial preparation.[99] In *Prosecutor v Hadžihasanovic and Kubura* the Chamber pointed out that it is not up to it to take decisions in the context of a particular case that may alter the legal aid payment system of all cases.[100] The system of allocating flat fee payments to lawyers at the pre-trial stage, taking into account the complexity, should be interpreted in light of the need to ensure a fair trial for the accused and recognition of the limited resources available in the ICTY legal aid system. Defence counsels should be fully aware of and agreed to the existing system of allocation of funds to assigned counsel during the pre-trial phase before they accepted being assigned, including the basis for calculating the costs of legal representation, the billing arrangement, and the maximum allotment for the pre-trial stage according to the particular circumstances of the case. The Chamber noted that counsel who represents indigent accused was quite aware of the system of remuneration at the pre-trial stage and the maximum amount allocated depending on the complexity

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[97] *Prosecutor v. Kvočka et al.*, ICTY, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp40-e/kvocka.htm.

[98] *Prosecutor v Milutinovic et al. c*ase, IT-99-37, Decision on Motion for Additional Funds of Jul 8, 2003.

[99] *Prosecutor v Milutinovic et al. c*ase, IT-99-37, Decision on Motion for Additional Funds of Jul 8, 2003, para. 19-25.

[100] *Prosecutor v Hadžihasanovic and Kubura*, ICTY, IT-01-47-PT, Decision on joint defence oral motion for reconsideration of "Decision on urgent motion for *ex parte* oral hearing on allocation of resources to the defence and consequences thereof for the rights of the accused to a fair trial", 18 July 2003.

of the case. The ICTR Trial Chamber in *Prosecutor v. Kayishema and Ruzindana* has held that the rights of the accused and equality between the parties should not be confused with the equality of means and resources and that the rights of the accused shall in no way be interpreted to mean that the defence is entitled to the same means and resources as those available to the Prosecution.[101] As referred to in the ICTR Directive on Assigned Counsel, the Tribunal will meet costs relating to investigative steps and that a degree of inequality in resources for conducting investigations between the prosecution and the defence will be justified because of their differing roles.[102]

State cooperation within international criminal adjudication is of outmost importance. In accordance with tribunal's Statutes[103], states have the responsibility to cooperate with the *ad hoc* Tribunals in regard of investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States voluntarily decide upon becoming a party to ICC Statute by its ratification and afterwards shall fully cooperate with the ICC in investigations and prosecutions of crimes within the ICC jurisdiction[104]. Interrelation between State cooperation and equality of arms are understood as basic pillars of for the effectiveness of the practice of international criminal proceedings. Before international tribunals procedural equity is fully guaranteed, but seems an almost unachievable aim since States apply a form of selectivity as a function of their sovereignty.[105] State cooperation can take several different 'dimensions': (1) political in the sense of recognition, moral, financial and material support; and (2) legal in the sense of 'co-operation in criminal matters'.[106] There is a possibility for *assistance of the tribunal to access material* in accordance with ICTY/ICTR RPE Rule 54 and ICTY Rule 54*bis*[107]. The former is a general rule regarding orders and warrants, at the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. There are considerations existence of this rule is due to the great and actual inequality of the parties in

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[101] *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4) (b) of the Statute of the International Criminal Tribunal for Rwanda, 5 May 1997 and Judgment of May 21, 1999, para. 60.

[102] Directive on the assignment of defence counsel, Document prepared by the Registrar and approved by the Tribunal on 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003, 15 May 2004 and 15 June 2007, available at: http://41.220.139.29/tabid/97/default.aspx.

[103] ICTY Statute Article 29; ICTR Statute Article 28.

[104] ICC Rome Statute Part IX.

[105] Knoops/Amsterdam, op.cit., p. 261; Jalloh/DiBella, op.cit., p.282.

[106] Fedorova, op.cit., p.190; Sluiter, Göran, *International Criminal Adjudication and the Collection of Evidence: Obligations of States,* Doctoral dissertation defended at Utrecht University on 25 September 2002, School of Human Rights Research, v. 16, Antwerpen; New York: Intersentia, 2002, p.6.

[107] There is no similar rule in ICTR RPE.

their ability for identifying, locating and accessing evidence relevant to the case.[108] The latter prescribes competence of the Trial Chamber to issue orders directed to states for the production of documents. Disparity in access to evidence can appear if, from one side, states are reluctant to provide sensitive information or material to the defence by explanation for protection national security interests, but from the other side, states are comply more readily with prosecution requests for evidence. The inability of the defence to conduct meaningful on-site investigations is due to obstructive behavior by the state authorities as well as due to the lack of an institutional position of the defence within the framework of the international courts, which has resulted in difficulties in requesting state cooperation.[109] There are proposals if the inequality between the prosecution and defence would have remained disproportional, judges could compensate the defence by excluding prosecution evidence that was gained through the cooperation of a state authority, if these authorities consistently refused to cooperate with the defence.[110] There is Tribunal's case law where the State authorities gave it neither an effective opportunity to gain access to defence witnesses, nor to the key sites in the region where the alleged crimes were committed. The judges recognized that states can impede counsel's efforts to obtain the evidence in their custody.[111] However, they felt that a court has a limited role to ensure equality between the defence and the prosecution if the disparity results from external factors, such as a lack of state cooperation. However, the assistance by the Tribunal has subsidiary effect. There are three preconditions: first is specificity, the requesting party shall describe the requested documents or information in as much detail as possible, so the Appeals Chamber pointed out that there is a firm obligation placed upon those representing an accused person to make proper enquiries as to what evidence is available in that person's defence[112]; second is relevance, the requesting party must demonstrate that the evidence sought is of direct and important value in determining a core matter in the case and that the evidence is necessary for a fair determination of the matter.[113] The Tribunal will not permit the

[108] McIntyre, op.cit.
[109] Fedorova, op.cit., p.6.
[110] J.P.W. Temminck Tuinstra, op.cit., p. 168.
[111] *Prosecutor v. Tadic*, IT-94-1-A, Judgement, 15 July 1999, paras. 31 and 50.
[112] *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, para. 18, available at: http://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm. *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*, 17 November 2005; *Prosecutor v. Hadžihasanvić et al.*, IT-01-47-PT, Decision on Defence Access to EUMM Archives, 12 September 2003.
[113] *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-AR108*bis*, Decision on the Request of the Republic of Croatia for a Review of a Binding Order, 9 September 1999, para. 41

parties to conduct „*fishing expeditions*“[114] as an inquiry carried on without any clearly defined plan or purpose in the hope of discovering or gain useful information; and third is necessity - the requesting party must explain the steps that have been taken by the applicant to secure the State's assistance and demonstrates that the evidence sought cannot reasonably be obtained elsewhere.[115] Every party must prove due diligence in undertaken all necessary measures, activities or efforts to provide evidence but they remained unsuccessful as well as the party must demonstrate a legitimate forensic purpose - that it has done all that it could to access the material without any assistance. However, while interpreting the scope of due diligence, it is not required to exhaust all possible mechanisms before seeking intervention by the Tribunal.[116] ICC Statute Article 57(3)(a)&(b) authorizes the Chamber, at the request of the Prosecutor, to issue orders and warrants necessary for investigation purposes, while all measures have to be authorized and supervised by national authorities. Unfortunately, this provision can be on detriment of defence since there is no state duty to cooperate with the defence. In regard of equality of arms requirements, the defence can request ICC Chamber assistance in accordance with ICC Statute Article 57(3)(b).

b. Call, examine and cross-examine witnesses

The accused shall be entitled to call, examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. It is universal recognized right of the accused to test the prosecution evidence and present evidence on his behalf within fair trial standards. Similarly, in international courts, each party is entitled to call witnesses and present evidence as well as to comment on the evidence against him, and has the right to secure the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[117] The judges should be very careful while exercising those competences in every particular case. There is a violation of Article 14(3)(e) ICCPR where the trial judge refused to hear other witnesses on the ground that their testimony would be substantially the same as the other defence witnesses and in several other occasions the judge refused to hear evidence from other defence witnesses on the ground that the evidence was

[114] J.P.W. Temminck Tuinstra, op.cit., p. 170-1; ICTR, *Prosecutor v. Nzirorera et al.*, Decision on the Request to the Governments of United States of America, Belgium, France and Germany for Cooperation, ICTR-98-44-I, 4 September 2003; Fedorova, op.cit., p.198.
[115] *Prosecutor v Brdanin & Talic,* Decision on Interlocutory Appeal, 11 December 2002, para. 50; *Prosecutor v. Milutinović et al*., IT-05-87-PT, T. Ch., Decision on Second Application of Dragoljub Ojdanić for Binding orders pursuant to Rule 54*bis*, 23 November 2005, para. 24.
[116] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Proseper Mugiraneza's Motion Regarding Cooperation with the Republic of Burundi, 30 October 2008, para. 14.
[117] Article 14(3)(e) ICCPR; Article 21(4)(e) ICTY Statute; Article 20(4)(e) ICTR Statute; Article 67(1)(e) ICC Statute.

"irrelevant and immaterial", although defence believed that it was of crucial importance to the defence of alibi. [118]

There is a violation of equality of arms when the Trial Chamber did not correctly calculate the period of time and the number of witnesses that would have been allocated to the defense. Thus, if the Trial Chamber had allocated more time for defence case in the first instance, defence strategy might have been very different. According Appeal Chamber it would be fair to allow defence, should it so choose, to put those witnesses on again in order to fully address all issues that defence deemed necessary, but the Appeals Chamber cautioned the defense that it should not abuse this right, but should focus on the relevant issues of its case.[119]

There will be neither violated of accused right to a fair trial, nor the principle of equality of arms with implementation of the method that includes limitation of number of witnesses and amount of time for presenting the case by fixing the number of sitting days available to each party for presentation of its case and evidence plus enough time for cross-examination.[120]

One should bear in mind the fact that usually the number of prosecution witnesses exceeds the number of defence witnesses due to the Prosecutor's duty for establishing the guilt of the accused. When it is a strategic choice of the defence to call fewer witnesses than the prosecution, the principle of equality of arms is not violated, for there has been an equal opportunity to plead the case and to present evidence.[121]

The main finding of IBA[122] regarding ICC is that there is an absence of structural support by the Registry for defence teams in their efforts to assess the protection needs of their witnesses, both in terms of communication flow and technical assistance. Starting point was a dilemma whether a fair trial is possible if the defense is unable, due to a lack of support unit regarding defence witnesses help as well as lack of state cooperation, to carry out on-site investigations and contact potential witnesses or this is contrary to the principle of equality of arms. The Registry is not providing sufficient operational support for the protection of defence witnesses.Unlike the Office of the Prosecutor, that has developed internal expertise to assess the risks that an investigation and

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[118] Views of the Human Rights Committee, Optional Protocol to the International Covenant on Civil and Political Rights, *Francisco Juan Larrañaga v. Philippines*, Communication No. 1421/2005, U.N. Doc. CCPR/C/87/D/1421/2005 (2006), 14 September 2006, para, 2.8 and 7.7, available at: http://www1.umn.edu/humanrts/undocs/1421-2005.html

[119] ICTY Appeals Chamber decision of *Prosecutor v Oric* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, July 20, 2005, para 10.

[120] *Prosecutor v. Miloshevic*, ICTY Case No. IT-02-54, Order rescheduling and setting the time available to present the defence case, 25 February 2004, http://www.icty.org/x/cases/slobodan_milosevic/tord/en/040225.htm.

[121] J.P.W. Temminck Tuinstra, op.cit., p. 160.

[122] Witnesses before the International Criminal Court, IBA ICC Perspectives, An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses, July 2013, p. 33.

prosecution might pose to witnesses, namely its Operational Support Unit (OSU) within which is the specialized Protection Strategies Unit (PSU) with responsibility for witness security related issues, there is no discrete organizational structure to carry out risk assessments and support needs of defence witnesses. In practice, defence counsel carry out their own psycho-social and risk assessments of their witnesses for protection and submit these to the Victims and Witnesses Unit (VWU). This is problematic while counsels are not necessarily equipped to conduct professional risk assessments, and there is currently no section or staff within the Registry who will assist with such tasks. According IBA findings, these institutional and logistical deficits not only raise equality of arms issues between the defence and the prosecution, but may ultimately undermine the defence witnesses' right to appropriate protection. Therefore, it is necessary to establish a mechanism, or subsection of the Office of Public Counsel for Defence, similar to the Operational Support Unit to Prosecutors' Office, to assist the defence teams with assessing protection needs of witnesses and making necessary referrals to the VWU[123] and to appoint a focal point to coordinate defence requests for state cooperation on witness matters.[124] Therefore, although accused persons have the statutory right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, the full exercise of this right may be hindered by the international courts' inability to force potential defence witnesses to appear before the court and to testify. [125]

In ICTR, defense counsel has at various times accused the Government of Rwanda of impeding investigations by harassing and intimidating defense witnesses to prevent them from testifying.[126] In ICTY/R the presentation of evidence follows an adversarial model meaning that there are two cases (prosecutorial and defense case), each party presents its own evidence at trial and each party must be permitted to examine and re-examine the witnesses they call and to cross-examine the opposing party's witnesses.[127] Pursuant to ICTY RPE Rule 85, there are three types of

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[123] Information booklet for ICTY witnesses, Victims and Witnesses Section, 2007, http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf

[124] Witnesses before the International Criminal Court, IBA ICC Perspectives, An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses, July 2013, p.8.

[125] Witnesses before the International Criminal Court, IBA ICC Perspectives, An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses, July 2013, p.17.

[126] *Prosecutor v. Aloys Simba,* ICTR-01-76-T, Judgement and Sentence, 13 December 2005, para. 41-3, https://www1.umn.edu/humanrts/instree/ICTR/SIMBA_ICTR-01-76/SIMBA_ICTR-01-76-T.pdf; *Bagosora et al.* (ICTR-98-41-T), Defense Motion Concerning Alleged Witness Intimidation, 28 December 2004, para. 1.

[127] Although the adversarial system of collecting and presenting of evidence is accepted by the international courts, there are some inquisitorial competences typical for civil law legal systems of the Trial Chambers. Aside the possibility for judges to ask questions of witnesses at any time, in accordance with Rule 85 the Trial Chambers can call witnesses but it should be done only after the close of both the prosecution and defense cases.

examinations: (i) direct examination or so called "*examination-in-chief*" by the party calling a witness; (ii) cross examination by opposite party, and (iii) re-examination. As referred to in Rule 90(F) the Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time. For providing this competence of the Trial Chamber, there is a provision of ICTY RPE Rule 90(H)(i)/ICTR RPE Rule 90(G)(i), so that cross-examination shall be limited to the: (i)subject-matter of the evidence-in-chief; (ii) matters affecting the credibility of the witness; and (iii) subject-matter of the case, where the witness is able to give evidence relevant to the case for the cross-examining party even those evidence were not presented during examination-in-chief of that witness, while counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness. There is also discretionary competence of the Trial Chamber to permit enquiry into additional matters.

The Trial Chamber II of ICTR have determined that generally the use of prior statements during a witness's cross-examination as a method of challenging the credibility of that witness is allowed and should not be precluded if the statement is shown to be relevant and reliable.[128]

ICC Statute Article 64(8)(b) gives the presiding judge of the Trial Chamber complete discretion over the procedural model to be followed at trial since it prescribed that at the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute. Should the judge decline to set out the order of evidence presentation, ICC RPE Rule 140(1) authorizes the parties to reach their own agreement on the question and in case they can not reach the agreement, the judge have to issue directions. However, no matter what procedural model the judge chooses, in each case each party maintains the essential right to question the witnesses they call, and to question the witnesses their opponent calls. There is no precise provision regarding cross-examination in ICC Statute or RPE. However, there are several provisions regarding manner of witnesses interrogation. Within the meaning of ICC RPE Rule 140(2)(a,b and d), a witness may be questioned as follows: (a) a party that submits evidence has the right to question that witness (like ICTY/ICTR "*examination-in-chief*"); (b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the

[128] *Prosecutor v. Ndayambaje et al.,* ICTR4842-T, Decision on Kanyabashi's Oral Motion to Crose-Examine Ntahobali using Ntahobali'a Statements to Prosecution lnvestigators in July 1997, 15 May 200S(TC], para 60, ("Butare Decision").

witness and other relevant matters (much broader content than ICTY/ICTR cross-examination within the meaning of its limitations to content of examination-in-chief); and (d) The defence shall have the right to be the last to examine a witness. In the ICC first trial, the Trial Chamber issued instructions that permitted the party calling the witness to ask the first questions of the witness, with this questioning followed by questioning from the party not calling the witness.[129]

There is no preclusion in evidence proposals since there are possibilities for proposing new witnesses after commencement of the defence case as well as during the trial. Pursuant ICTY RPE Rule 73*ter*(D) and Rule 73*ter*(E) ICTR RPE, after commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called. The interests of justice is main reason for the Trial Chamber, during a trial, to may grant a defence request for additional time to present evidence in accordance with ICTY RPE Rule 73*ter*(F).

c. The Chambers' competence in deciding upon proposed evidence

The principle of equality of arms may be at stake where the defence is required to limit its number of witnesses solely to expedite the trial proceedings as well as if judges impose upon the defence stricter limits than on the prosecution regarding the number of witnesses or the amount of time.[130] There are several rules in ICTY RPE, ICTR RPE and ICC RPE as well as in ICC Regulation regarding the competence of the Chamber in deciding upon proposed evidence and minimizing delays at pre-trial and trial stage:

(i) Status conferences. Status conferences are tool for the courts to organize exchange between parties and to ensure expeditious trial proceedings and trial preparation (ICTY Rule 65bis(A)(i) and ICTR Rule 65 bis (A). Their purpose is to review the status of the case and to allow the accused to raise issues including those regarding his mental and physical health. Status conferences at ICTY are obligatory and shall be called within 120 days after initial appearance of the accused. At ICTR Status conferences are left to the discretion of the Chamber. The ICC Trial Chamber, that perform the duties attributed to the pre-trial judge or designated judge of the ICTY and ICTR respectively, promptly after it has been assigned a case shall hold a status conference in order to set a date for the trial according Rule 132. The status conferences can be hold as often as it sees necessary in order to confer with parties and facilitate the fair and expeditious conduct of the

[129] *Lubanga (ICC-01l04-01/06*-T-104-ENG), 16 January 2009, Combs, Nancy Amoury, "*Evidence*", College of William & Mary Law School, Faculty Publications, 2011, Paper 1178, available at: http://scholarship.law.wm.edu/facpubs/1178, p. 326.
[130] J.P.W. Temminck Tuinstra, op.cit., p. 160-161.

proceedings according Rule 132(2). In accordance with Regulation 54 at the Status conference, in the interests of justice for the purposes of the proceedings, the Trial Chamber may issue numerous orders regarding important procedural issues,[131] so it becomes clear that the status conferences at ICC are very similar to pre-trial conferences in the ICTY and ICTR.

(ii) Pre-trial conferences. As referred to in Rule 73bis, at the pre-trial conference, ICTY, ICTR, ICC Chamber has extensive powers to shape the Prosecutor's case regarding limitation of:

- witness list (if several witnesses are being called to prove the same facts (Rule 73bis(A)),
- time afforded for presentation of evidence (Rule 73bis(A)),
- the estimated length of the examination of witnesses (Rule 73 bis(B)).

The Trial Chamber determined that the appropriate method for limiting the length of the Prosecution case pursuant to Rule 73 *bis* is by fixing the number of sitting days available to the Prosecution to lead its evidence and in which to present his case.[132]

There is a criticism that these competences of the Trial Chamber or designated Judge are controversial since the Prosecutor is main investigator at international courts, it causes limitation of prosecutorial independence.[133] Undoubtedly, the high level of Chamber's control over cases and presentation of evidence seems closer to civil law systems and goes against the adversarial nature of the Tribunals.[134]

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[131] Regulations of the Court, ICC-BD/01-02-07, 26 May 2004, amendments entered into force 18 December 2007, http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf, the length and content of legal arguments and the opening and closing statements; a summary of the evidence the participants intend to rely on; the length of the evidence to be relied on; the length of questioning of the witnesses; the number and identity (including any pseudonym) of the witnesses to be called; the production and disclosure of the statements of the witnesses on which the participants propose to rely; the number of documents as referred to in Article 69(2) or exhibits to be introduced together with their length and size; the issues the participants propose to raise during the trial; the extent to which a participant can rely on recorded evidence, including the transcripts and the audio- and video-record of evidence previously given; the presentation of evidence in summary form; the extent to which evidence is to be given by an audio- or video-link; the disclosure of evidence; the joint or separate instruction by the participants of expert witnesses; evidence to be introduced under Rule 69 as regards agreed facts; the conditions under which victims shall participate in the proceedings; or the defences, if any, to be advanced by the accused. .

[132] *Prosecutor v. Miloshevic*, ICTY Case No. IT-02-54, Order rescheduling and setting the time available to present the defence case, 25 February 2004, http://www.icty.org/x/cases/slobodan_milosevic/tord/en/040225.htm.

[133] Katrin Ólöf Einarsdottir, *Comparing the Rules of Evidence Applicable Before the ICTY, ICTR and the ICC*, Meistararitgerð til Mag.jur.prófs í lögfræði, Lagadelid Háskóla Íslands, Febrúar, 2010, p. 24 and 28; Côté, Luc, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, Journal of International Criminal Justice, vol. 3, no. 1, 2005, pp. 162-186; Goldston, James A., *More Candour about Criteria, The Exercise of Discretion by the Prosecutor of the International Criminal Court*, Journal of International Criminal Justice, vol. 8, no. 2, 2010, pp. 383-406.

[134] Gideon Boas, *Developments in the law of procedure and evidence at the international criminal Tribunal for the Former Yugoslavia and the International criminal court*, Criminal Law Forum 12: 167-183, 2001, Kluwer Academic Publishers. It should be also mentioned that the time limitations in the Rules of procedure and evidence have been shortened several times with the purpose to speed up trials and pre-trial process and to minimize delays, Seven Annual Report of the ICTY, UN Doc. A/55/273, S/2000/777, para. 288.

(iii) Pre-defence conferences. Upon the discretion of the Trial Chambers in ICTY and ICTR pre-defence conferences could be held before the commencement of the defence's case in order to streamline it in accordance with Rule 73ter(A). If the Pre-defence Conference is held, the Chamber can order the defence to submit the admissions by parties and statements of other matters not in dispute, a statement of contested matters of fact and law, detailed witness list and a list of exhibits ICTR Rule 73ter(B). There are competences of the Chamber to order the defence to:

- shorten the estimated length of the examination-in-chief for some witnesses (ICTR Rule 73ter(C)and (D), ICTY Rule 73ter(C)) and
- reduce the number of witnesses (ICTR Rule 73ter(C)and (D)).

There is no specific rule regarding Pre-defence Conference in ICC but ICC Chamber may call a status conference and may order the defence on the same issues covered by Regulation 54[135].

The Trial Chamber determined that the same appropriate method for limiting the length of the Prosecution case pursuant to Rule 73 *bis* by fixing the number of sitting days available to the Prosecution to lead its evidence would be appropriate for determining the length of the Defence case. [136]

It should be noted that although Rule 73 *ter* gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the ICTY Statute be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the accused to set forth his case in a manner consistent with his rights. Plainly, before the defense begins, it may not be possible to predict with precision how much time will be necessary, thus, as Rule 73 *ter* allows for additional time to be granted later "*in the interests of justice*." The question, then, is whether, taking into account the complexity of the remaining issues, the amount of time and the number of witnesses allocated to the defense are reasonably proportional to the Prosecution's allocation and sufficient to permit accused a fair opportunity to present his case. In recalculating the period of time and the number of witnesses that will be allocated to the defense case, the Trial Chamber should include enough time to allow the accused person to begin presenting his case again, if that is his choice. If the Trial Chamber had allocated more time for defence case in the first instance, his strategy with the witnesses presented, in terms of the amount of time taken for examination, might

[135] See notes regarding Status conferences here above.
[136] *Prosecutor v. Miloshevic*, ICTY Case No. IT-02-54, Order rescheduling and setting the time available to present the defence case, 25 February 2004, http://www.icty.org/x/cases/slobodan_milosevic/tord/en/040225.htm.

have been very different. It is therefore only fair to allow the accused person to put these witnesses on again, in order to fully address all issues that he deems necessary. While such re-examinations will very likely re-cover some old ground, the Appeals Chamber cautions the defense that it should not abuse this right, but should focus on the relevant issues of its case.[137]

IV. Disclosure Regime

a. Prosecutor's duty for timely disclosure. International criminal tribunals require the disclosure of much of the evidence that will eventually be presented at trial. ICTY and ICTR rules on pre-trial disclosure steer a middle course between the broad and narrow disclosure frameworks prevailing in civil law legal system (where judges take primary control over the questioning and for such judicial questioning to be effective, judges must have substantial knowledge about the case) and common law jurisdictions (the parties are required to disclose little or no information to the judge or jury prior to trial because the judge or jury has little or no reason to possess that information prior to trial), respectively.[138] It is essential for the defence to have a clear and comprehensive view of the prosecution's strategy in order to prepare its case. There are specific rules in ICTY RPE, ICTR RPE and ICC Statute and RPE, regarding obligation of the Prosecution to disclose exculpatory materials in its possession to the defence. Prosecutor has more extensive obligations regarding disclosure of evidence than the defence since the Prosecution as an organ of the Tribunals and ICC is responsible for collecting both incriminating and exculpatory evidence in the case in order to seek the truth. The disclosure regime of the Tribunals does not permit an accused blanket access to materials in the possession of the prosecution. The accused is dependent on the prosecution as the main source of relevant evidence so this places an accused at a distinct disadvantage compared with the prosecution in preparing its case. Under the ECHR the court is obliged to ensure equality of arms, but according to the Tribunal prosecution should take care of equality of arms which indicates the powerless of the Tribunal in comparing with the dominance of the prosecution. There are interpretations that Tribunal has characterized the prosecution as a "*minister of justice*" with an overriding obligation of ensuring fairness in its proceedings.[139] This competences and role of the prosecution has been to the detriment of the accused. There are complains of the defence counsels that the Prosecution's failure to comply with disclosure obligations should be considered as a violation of fair trial and prejudices the rights of an accused or

[137] ICTY Appeals Chamber decision of *Prosecutor v Oric,* IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, July 20, 2005, para. 10.
[138] Combs, op.cit., p. 324.
[139] McIntyre, op.cit. *Prosecutor v Brdanin & Talic*, Decision on Interlocutory Appeal, 11 December 2002.

defendant so egregiously that it impacts on a court's adverse decisions and judgments of conviction against a defendant.[140] Those interpretations are in line with Tribunals case law and Appeals Chamber's consideration that the Prosecution's obligation to disclose exculpatory material is unequivocally essential to a fair trial."[141]

The ICTY/ICTR RPE Rule 66(A)(i) obligates the Prosecutor to disclose to the defence, in a language which the accused understands, copies of the supporting material which accompanied the indictment and is a material the Prosecutor relied upon to confirm the indictment against the accused. This obligation should be fulfilled within 30 days of the initial appearance of the accused. Copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, copies of all transcripts and written statements as well as copies of the statements of additional prosecution witnesses when a decision is made by the prosecutor to call those witnesses, pursuant ICTY Rule 66(A)(ii) should be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge or, pursuant ICTR Rule 66(A)(ii), it should be done no later than 60 days before the date set for trial. It is important to emphasize that disclosed material to the accused will not contain any information enabling the accused to identify the witness. The disclosure time limits are very important in virtue of "*sufficient time*" that enables defence to investigate particular witness for cross-examination purposes. It is a violation of the disclosure obligations of the Prosecution when the defense did not have adequate time and facilities for preparation after have received material from the Prosecutor a very short time before the relevant witness gave evidence.[142] Such a disclosure practice would have been assessed as meaningless and ineffective from defence standpoint. In accordance with ICC RPE Rule 76(1) and (3), The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

Under the ICTY/ICTR RPE Rule 66(B) and ICC RPE Rule 77, on defence request, the Prosecutor shall permit the defence to inspect books, documents, photographs and tangible objects

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[140] McIntyre, op.cit.; Beth S. Lyons, *Prosecutorial Failure to Disclose Exculpatory Material: A Death Knell to Fairness in International (and all) Justice*, 3rd International Criminal Defence Conference, "International Criminal Justice: Justice for Whom?" held in Montreal, Quebec, Canada, 29 September 2012.

[141] *Karemera et al*., ICTR-98-44-AR73.7, Appeals Chamber, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9; *Ndindiliyimana et al.,* ICTR-00-56-T, Trial Chamber, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12.

[142] *Prosecutor v. Mucić et al*., ICTY IT-96-21-T, Decision on motion by the defendants on the production of evidence by the prosecution, 8 September 1997, para. 4.

in the Prosecutor's custody or control, which is: a) material for the preparation of the defence; b) intended for use by the Prosecutor as evidence at trial or c) obtained from or belonged to the accused. With regard to the disclosure by the Prosecution of material falling within the terms of Rule 66(B), the Chamber has held that the material was provided upon a request of the accused made only a week prior to disclosure, the Prosecution responded promptly and did not violated its Rule 66(B) disclosure obligations. The Trial Chamber could not place a deadline on the disclosure of material falling under Rule 66(B) because the defence can make requests for such material at any stage.[143]

There is a possibility for the Prosecutor, in compliance with ICTY/ICTR Rule 66(C), to be relieved from an obligation to disclose some information with decision of the Trial Chamber sitting in camera, if one of the following pre-condition is met: a) the disclosure may prejudice further or ongoing investigations; b) the disclosure may be contrary to the public interest; or c) the disclosure may affect the security interests of any State.

The ICTY/ICTR RPE Rule 68, provides, *inter alia,* that the Prosecutor shall, as soon as practicable, disclose to the defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. The significance of the fulfillment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute. There are interpretations that Rule 68 is a statutory, procedural mechanism which is intended to "*level the playing field*" between the parties, but there are risks for not compliance with it based on two factors: who initially decides what is Rule's 68 material and the timing of disclosure. Both of them are determined by the Prosecution's discretion.[144] Indeed, the rationale behind Rule 68 was discussed by the Trial Chamber which held that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution and that the determination as to what material meets Rule's 68 disclosure requirements falls within the Prosecution's discretion.[145]

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[143] *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Additional Time to Prepare Cross-Examination of Momčilo Mandić, 2 July 2010, para.9, http://www.icty.org/x/cases/karadzic/tdec/en/100702_1.pdf. *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Trial Date, 12 June 2009, para. 43; *Prosecutor v. Lubanga Dyilo*, ICC- 01/04-01/06-718, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, PTC I, para. 4.

[144] The fundamental problem, in the case of the ICTR Prosecution and usually replicated in too many Prosecution offices elsewhere is that its conduct is driven not by an agenda to comply with the rule of law and to apply it equally, but to exercise its discretion in a manner which is accountable to a "higher power," i.e. politics. More details: Lyons, op.cit.

[145] *Prosecutor v. Blaškić,* IT-95-14, Decision on Production of Discovery Materials, 27 Jan. 1997, para. 50.1

The Prosecution is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgment made by and under the responsibility of the Prosecution.[146]

In accordance with the International Tribunal's jurisprudence, the test to be applied for discovery under Rule 68 has two steps: first, if the defence believes that the Prosecution has not complied with Rule 68, it must first establish that evidence other than that disclosed might prove exculpatory for the accused and is in the possession of the Prosecution; and second, it must present *a prima facie* case which would make probable the exculpatory nature of the materials sought.[147]

As a general proposition, where the defence seeks a remedy for the Prosecution's breach of its disclosure obligations under Rule 68, the defence must show cumulatively:

- that the Prosecution has acted in violation of its obligations under Rule 68 and
- therefore the defence's case suffered material prejudice.

In this context, in the *Krštić* Appeal Judgment, the Appeals Chamber held that if the defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal will examine whether or not the defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate.[148] If the defence satisfies a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber in addressing what is the appropriate remedy, has to examine whether or not the defence has been prejudiced by a breach of Rule 68 and rule accordingly pursuant to Rule 68bis.[149]The Appeals Chamber in *Blaškić case*, emphasizes that indeed, the Prosecution's obligation to disclose exculpatory evidence pursuant to Rule 68 continues after the trial judgment has been rendered, in a case and throughout proceedings before the Appeals Chamber.[150] In *Kordić & Čerkez case*, during Appeal proceedings it came to light that those particular documents were in fact in the possession of the Prosecution, but the Prosecution did not revealed this to the defence. The Prosecution has been unable to give the Appeals Chamber a reasonable explanation of its failure to disclose the material during trial other than to claim that as the defence application had been made *ex parte*, they were unaware that the documents were being sought. Those documents do contain material that reasonably falls within Rule 68 and should have

[146] *Prosecutor v. Brdanin and Talic,* Case No.: IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68*bis* and Motion for Adjournment While Matters Affecting Justice and a Fair Trial Can be Resolved, 30 Oct. 2002, para. 30.
[147] *Prosecutor v. Blaškić,* Decision, 27 January 1997, para. 50.2; *Prosecutor v. Brđanin and Talić,* Decision, 30 October 2002, para. 23.
[148] *Prosecutor v. Krštić,* Appeal Judgement, 19 April 2004, para. 153.
[149] *Prosecutor v. Brdanin & Talic,* Decision, 30 October 2002, para. 23.
[150] *Prosecutor v. Blaškić*, Decision, 26 September 2000, para. 32. Judgement, 29 July 2004, para. 267.

been disclosed by the Prosecution pursuant to its obligations, regardless of whether it was aware that the defence was seeking those documents.[151] In *Krštić* Appeal, the disclosure practices adopted by the Prosecution were inherently unfair. Part of the argument made is that although material of an exculpatory nature had been disclosed to the defence it was unaware that it was in possession of that material. This situation highlights the problems associated with the volume of documents involved in cases before the Tribunal, attempts by the prosecution to interpret its obligations under the Rules for disclosure narrowly. A narrow interpretation of the Rule would alleviate some of the burden on the prosecution and allow it to focus more of its attention on preparation of its case as a party to the proceedings.[152]

The most problematic rule of disclosure is Rule 68(v) that imposes a continuing obligation upon the prosecution to disclose all exculpatory material known to the prosecution notwithstanding the completion of the trial and any subsequent appeal. The prosecution is expected to continue to search for and disclose material that comes into its possession even after the completion of the trial for the purposes of any appeal pursuant to Rule 68.

According ICTR Appeals Chamber, Rule 68 creates a *'categorical obligation'*, so in the *Karemera et al*. case,[153] the Appeals Chamber held that the Prosecution violated its Rule 68 obligations since it did not disclose a document which contained some exculpatory material. There are interpretations that the material does not have to be in every word exculpatory to be covered by Rule 68, so the possibility that the material suggests guilt or innocence or affects the credibility of Prosecution evidence is enough to trigger the Prosecution's duty to disclose, but it is up to the defence to decide whether and how to use the disclosed material.[154] In the same case the Appeals Chamber[155] held that not every violation of the important obligation to disclose potentially exculpatory material, implicates a violation of an accused fair trial rights, warranting a remedy. If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves. The Appeals Chamber[156] also found that the EDS (Electronic Disclosure Suite) facilities cannot replace the Prosecution's disclosure obligations under Rule 68. In fact, the Appeals

[151] *Prosecutor v. Kordić & Čerkez,* Judgement, 17 December 2004.
[152] *Prosecutor v. Krštić,* Appeal Judgement, 19 April 2004, para. 153
[153] *Prosecutor v. Karemera et al*., ICTR-44-AR73.13, Appeals Chamber, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008, para. 12-14.
[154] Beth S. Lyons, op.cit.
[155] *Prosecutor v. Karemera et al.*, TC, ICTR, 19 October 2006 (Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution), para. 17, Kelly Pitcher, *Addressing Violations of International Criminal Procedure*, ACIL Research Paper 2013-14, Amsterdam Center for International Law, University of Amsterdam, available at www.acil.uva.nl and SSRN, p. 26.
[156] *Prosecutor v. Karemera et al*. Case No. ICTR-98-44-AR73.7, Appeals Chamber, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 10.

Chamber, affirming the Trial Chamber's finding that EDS fails to fulfill the important and expansive obligations under Rule 68, because the Rule 68 obligation to disclose extends beyond making available its entire evidence collection in a searchable format. A search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession.[157]

In accordance with ICC Statute Article 54(1)(a), the Prosecution is mandated to investigate incriminating and exonerating circumstances equally and in accordance the Article 67(2) has the duty to disclose to the defence as soon as practicable any evidence which shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide. Pursuant to ICC RPE Rule 83, the Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67(2).

b. Sanctions for non-disclosure. Since December 2001 there is a Rule 68*bis* in the ICTY RPE regarding imposition sanctions on a party due to failure to comply with disclosure obligations pursuant to the Rules. There is no similar provision in ICTR RPE.[158] Rule 68*bis* in the ICTY RPE provides that the pre-trial Judge or the Trial Chamber may impose sanctions *proprio motu* or at the request of either party. This provision has been criticized for being too broad.[159]

Prior Rule 68*bis* was included in the ICTY RPE, the Trial Chamber was powerless in sanctioning the Prosecution non compliance with Rule 68. The Trial Chamber in *Furundžija*[160] expressed its dismay at the conduct of the Prosecution, but while having no express powers of discipline over members of the Prosecution it refers the formal complaint to the Prosecutor to be dealt with as the Prosecutor fit, in the hope that no Trial Chamber will again be faced with a similar situation.

In the case of *Brđanin*,[161] the Trial Chamber held that if the defence satisfies the Trial Chamber that there has been a failure by the Prosecution to comply with Rule 68, the Trial Chamber in addressing the aspect of appropriate remedies will examine whether or not the defence has been prejudiced by non-compliance and will provide accordingly pursuant to Rule 68*bis*. In

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[157] Ibid., para. 10.
[158] Available at: http://ictr-archive09.library.cornell.edu/ENGLISH/rules/260600/6.html
[159] S. Zappalà, *'The Prosecutor's duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE'* (2004)2(2) *Journal of International Criminal Justice* 620, p. 627, cited by Pitcher, op.cit., p. 24.
[160] *Furundžija case*, The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, para. 12, TC, ICTY, 5 June 1998, http://www.icty.org/x/cases/furundzija/ .
[161] *Prosecutor v. Brđanin*, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to Be Imposed Pursuant to Rule 68*bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can Be Resolved, TC, ICTY, 30 October 2002, para. 23.

other cases, the Chamber has dismissed the defence applications with explanation that the defence did not suffered material prejudice from the disclosure violation.[162]

There were cases where Chambers have took a kind of remedial action by postponing the testimony of the witness affected by disclosure violations or suspended the proceedings to give the defence adequate time to deal with the voluminous disclosure.[163] There are interpretations that[164] probably '*the most severe remedy'* to have been handed down at the *ad hoc* Tribunals for disclosure violations in case of *Orić*[165] where Trial Chamber concluded that disclosure practice adopted by the Prosecution during the proceedings has not been satisfactory and recalls its observation that in the practice of the ICTY violations of Rule 68 is governed less by a system of sanctions, than by the Judges' definitive evaluation of the evidence. Therefore, the Trial Chamber indicated that Rule 68 violations will affect its definitive evaluation of the evidence presented by the Prosecution, and consider the possibility of drawing the reasonable inferences in favor of the Accused with respect to specific evidence which has been the subject of a Rule 68 violation.

In the case of *Orić*, in Decision on urgent defence motion regarding prosecutorial non-compliance with Rule 68[166] the defence addresses the Prosecution's failure to comply with its Rule 68 disclosure obligations regarding potentially exculpatory and 'other relevant material', the Trial Chamber, pursuant to Rule 68(i) and Rule 68*bis,* has issued two orders to the Prosecution: (i) to conduct a thorough and complete search for Rule 68(i) materials relevant to the defence and to provide the Trial Chamber with a declaration stating what searches have been made, where they have been made and the results of such searches, and (ii) the immediate disclosure of the material in question to the defence. In the same Decision, the Trial Chamber have invited the defence: (i) to indicate the names of any witnesses of the Prosecution that the defence may wish to call for further cross-examination and (ii) to indicate if it wishes to add to its proposed witnesses any further witnesses that it might which to produce to testify on matters related to the Rule 68(i) material that will be disclose by the Prosecution.

There is no similar article or rule in ICC Statute or RPE regarding sanctions for non-disclosure. However, there is ICC practice where defence argues that the Chamber should reduce

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[162] *Prosecutor v. Renzaho*, ICTR-97-31-T, Judgment and Sentence, 14 July 2009, para. 36-51.
[163] *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, para. 43; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motion, 11 November 2010, para. 40-41; *Prosecutor v. Karadžić*, IT- 95-5/18-T, Oral Decision, 3 November 2010, T.8907-8908; Fedorova, op.cit., p.293.
[164] K. Gibson/C. Lussiaà-Berdou, *'Disclosure of Evidence'*, in K.A.A. Khan et al. (eds), Principles of Evidence in International Criminal Justice (Oxford: Oxford University Press, 2010), p. 336, cited by Pitcher, op.cit., p. 24.
[165] *Prosecution v. Naser Orić,* Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68, 13 December 2005, para. 32 - 35, available at: http://www.icty.org/case/oric/4
[166] *Prosecution v. Naser Orić*, IT-03-68-T, Decision of 27 October 2005, http://www.icty.org/case/oric/4

the sentence of the accused on account of violations of fundamental rights during the trial. In *Lubanda* case[167], the defence suggested reducing of the sentence due to breach of accused right to adequate time and facilities for the preparation of his defence following disclosure violations by the Prosecutor. The Chamber did not evaluate these claims as *a priori* inadmissible, but stated that it does not find that these factors merit a reduction in sentence. *Argumentum a contrario*, there might be future cases where disclosure violations by the Prosecutor may cause reduction in sentence.

In practicing matters that fall within the Prosecution's discretion and duties during proceeding, especially due to the fact that duties and responsibilities of the Prosecutor differ and are broader than those of defence counsel, the Prosecutor should follow codes for professional conduct, as well.[168]

c. Disclosure from confidential source. There are numerous cases where the Prosecution receives some information from persons who should remain unknown for the defence. The ICTY, ICTR and ICC have almost identical rules regarding information received from a confidential source that and used only as a ground for getting additional relevant evidence. In accordance with ICTY/R Rule 70(B) and ICC Rule 82(1) with reference to ICC Statute Article 54(3)(e), since the evidence is only used to find additional evidence and is not intended for use at trial, the prosecutor may not disclose the origin or the initial information, and thus may not introduce it a trial, unless the person or entity which provided the information consents to such disclosure. Namely, notwithstanding the Prosecutor's obligation for disclosure, in accordance with Rule 70(B), the Prosecution should protect confidential information if the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused. If a person provides information on a confidential basis the identity of the informant and the general subject of the information provided cannot be disclosed without the consent of the provider. This rule confers on the prosecution a large measure of discretion in determining what confidential material should be disclosed to an accused. But, if Prosecutor decided to call a witness to introduce such information at

[167] *Lubanga*, TC, ICC, 10 July 2012 (Decision on Sentence pursuant to Article 76 of the Statute), para. 90.
[168] Standards of Professional Conduct for Prosecution Counsel ICTY and ICTR, 14.09.1999, http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf; In accordance with ICC Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23.04.2009, http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf, Regulation 55(1), Disclosure procedures stipulated that the Office shall establish standardized internal procedures to ensure prompt, reliable and efficient disclosure in accordance with technical protocols and standards.

trial, the Trial Chamber may not compel the witness to answer any question if the witness refuses on grounds of confidentiality.

This possibility can be to the detriment of the accused so that if the prosecution obtains exculpatory material confidentially it may just choose to disregard that material and not seek the consent of the provider to disclose the material. There is no mechanism by which the accused or the Trial Chamber can be made aware of that material. This is a major and not controllable competence of the Prosecutor that brings him in unjustified advantage. If analyzing this rule in connection with Rule 68 it remains unclear if the Prosecution can avoid obligation under Rule 68. Pursuant to Rule 68(iii), the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material that should be disclosed according Rule 68(i), to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.

Similar content with ICTY/R Rule 70 can be found in ICC Statute, Article 54(3)(e) so that the Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents. Such material may include information within the meaning of Article 67(2) of the ICC Statute, pursuant which the Prosecutor is obliged to disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. The use of Article 54(3)(e) of the Statute and consequently the provision of ICC RPE Rule 82, by the Prosecutor must not lead to breaches of his obligations *vis-à-vis* the suspect or the accused person. Therefore, whenever the Prosecutor relies on Article 54(3)(e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.[169] Where the Article 54(3)(e) material being withheld includes information within the meaning of Article 67(2), a conflict arises between the obligations of the Prosecutor to observe confidentiality agreements with information providers and to provide potentially exculpatory material to the defence. So, if the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to article 54(3)(e) of the Statute,

[169] *Lubanga*, AC, ICC, 21 October 2008 (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"), para. 2.

the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to article 67 (2) of the Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material. Therefore, in order to resolve conflicts between Article 54(3)(e) and Article 67(2), the Trial Chamber must have access to the material being withheld in order to determine whether it should be disclosed to the defence.[170] If the trial chamber is not granted such access, it will not be in a position to ensure a fair trial.

d. Disclosure and State's national security interests. There are competences of the Trial Chamber under ICTY RPE Rule 54*bis*[171] to provide the state cooperation and to assist the parties in regard to provide material for preparing the case. States may want to protect information for national security reasons in some cases. Thus, under Rule *54bis(E)(iii)*[172], on the grounds that disclosure would prejudice national security interests, the State may, within 15 days of issuing the order, apply by notice to the Judge or Trial Chamber to have the order for the production of documents set aside. In the notice, the State should specify the grounds of objection and basis upon which it claims that its national security interests will be prejudiced. Additionally, the state may request the Judge or Trial Chamber appropriate protective measures to be made for the hearing of the objection ((a) hearing in camera and *ex parte*; (b) allowing documents to be submitted in redacted form signed by a senior State official;or (c) no transcripts to be made of the hearing and that documents not further required by the Tribunal be returned directly to the State without being filed with the Registry or otherwise retained). The Judge or Trial Chamber may order the following protective measures for the hearing of the objection: (i) the designation of a single Judge from a Chamber to examine the documents or hear submissions; and/or (ii) that the State should be allowed to provide its own interpreters for the hearing and its own translations of sensitive documents.

The ICC Statute Article 72(1) should be applied in case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. There are interpretations that the ICC is prepared to compensate the defence when authorities are unwilling to cooperate.[173] Namely, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may

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[170] *Prosecutor v. Lubanga*, AC, ICC, 21 October 2008 (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"), para. 79.
[171] There is no similar rule in ICTR RPE.
[172] Amended 12 Apr 2001.
[173] J.P.W. Temminck Tuinstra, op.cit., p. 170-1.

undertake the following actions: (a) hearings *in camera* and *ex parte*; (b) order disclosure; (c) 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.

e. Defence disclosure.[174] – The defence obligation to disclose evidence is not as far-reaching as the Prosecutor's and the defence does not have to show all evidence until the start of the case. Unfortunately, there were unpleasant changes regarding defence disclosure at ICTY since 1994 when Rule 67 regarding Additional disclosure was adopted. ICTY RPE Rule 67 in 2003 stipulated for the defence the obligation to allow the prosecutor access to any books, documents, photographs and tangible objects which it intends to use as evidence at the trial which is in custody of the defence or under its control according Rule 67(A)(i). Since it amendments form 28th February 2008, ICTY Rule 67(A)(ii) requires the defence to provide the Prosecutor with copies of statements of the witnesses it intends to call to testify and other written statements taken under Rule 92*bis*, 92*ter* and 92*quater*.

Also the ICTR and ICC may order the defence to provide such copies. In accordance with ICC RPE Rule 78, the defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

The communications between the lawyer and the client can not be subject of defence disclosure in accordance with lawyer-client privilege from ICTY RPE Rule 97/ICTR RPE Rule 97(A)/ICC RPE Rule 73(1). There are exceptional cases where such communications can be disclosed: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

f. Additional evidence. Rule 115 governs the admission of additional evidence.[175] The accused is required to satisfy the Appeals Chamber that the evidence sought to be admitted was not available to him at trial, and that the interests of justice require its admission. To establish due diligence the accused must show that the evidence was not available to him at trial. The accused should demonstrate that the evidence sought to be admitted could probably have efected an identified finding of the Trial Chamber so that it could be said that there is a possibility that a miscarriage of justice occurred. If this second limb is not satisfied the evidence will not be admissible. What this approach also fails to consider is that if the evidence had been available to the

[174] Groulx, op.cit.
[175] McIntyre, op.cit.

accused at the time of trial he may have mounted a different defence, or taken a different approach to establish the defence raised.

In compliance with ICC RPE Rule 84 in order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64(3)(c) and 6(d), and article 67(2), and subject to article 68(5), make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Regarding additional evidence, there is competence of Trial Chamber similar with civil law legal system, so that it may order the production of additional or new evidence *proprio motu* (Rule 98). This will enable the Tribunal to ensure that it is fully satisfied with the evidence on which its final decisions are based. It was felt that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the parties' rights is minimal by comparison.[176]

V. Exclusion of evidence

a. Exclusion of evidence for ensuring fair trial. The correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[177] Therefore, there are several provisions connected with exclusion of evidence. Precise provision in ICTY RPE Rule 89(D) is in regard of exclusion of evidence for ensuring fair trial, so a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. At first glance, the term "*may*" refers to discretion of the Trial Chamber, this Rule should be interpreted so that once the Trial Chamber concluded that the probative value of the evidence is substantially outweighed, it *have to* decide for exclusion of that evidence. In *Prosecutor v. Mucić et al.,* the Trial Chamber held that it is a part of its duties, according to ICTY Statute Article 20, to ensure that a trial is fair and expeditious and therefore it can exclude any piece of evidence sought to be introduced by the Prosecution, if indeed it seeks to do so, without having

[176] Report of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991, Annual report, A/49/34, S/1994/1007, 29 August 1994,para. 73.
[177] *Prosecutor v. Brđanin and Talić*, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, para. 62.

given the defence the opportunity to examine that piece of evidence beforehand and thereby enable it to prepare a proper defence. It is also within its inherent power to control the conduct of proceedings so that to grant or reject an objection made by the defence to the admission of any piece of evidence which it claims it has not had sufficient time to examine.[178] There is also case law regarding exclusion of report on account of the fact that defence had no opportunity for cross-examination. In *Prosecution v. Kordić and Čerkez*,[179] the Trial Chamber held that the probative value of the evidence is so reduced that it is "substantially outweighed by the need to ensure a fair trial", i.e., to admit it at this stage of the proceedings would violate the accused's right to a fair trial. Since the defence would have no opportunity of cross-examining any witness about the reports, which are based on a variety of sources (sometimes anonymous), such reports were excluded as it would be contrary to Rule 89 (D) to admit them at the late stage of the proceedings. In the same case of *Kordić and Čerkez*, the Trial Chamber have found that many documents are to be excluded for one or more of the following reasons: (a) the document has already been admitted; (b) the material has already been produced in other proceedings before the International Tribunal and therefore was available to the Prosecution when it presented its case; (c) the material was not sufficiently significant to warrant admission at the late stage of the proceedings; (d) the material was cumulative and did not add to the voluminous material already in evidence; or (e) the material was based on anonymous sources or hearsay statements that were incapable of being tested by cross-examination in late stage of the proceedings.[180]

Similar content has ICTR RPE Rule 70(F) according which a Trial Chamber has power under Rule 89(C)[181] to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

In accordance with ICC Statute Article 69(4), the Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, 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, in accordance with the RPE. Since there is no term *'substantially outweighed'* relating to the probative value of evidence, this rule does not encompasses non-disclosure violence or any other misconduct in between the parties, but the solely orientation matter for the Trial Chamber to

[178] *Prosecutor v. Mucić et al*., ICTY Case No.: IT-96-21-T, Decision on motion by the defendant on the production of evidence by the prosecution, 8 September 1997, para. 9.
[179] *Prosecutor v. Kordić and Čerkez*, ICTY, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, para. 40.
[180] *Prosecutor v. Kordić and Čerkez*, ICTY, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, para. 39.
[181] ICTR RPE Rule 89(C): A Chamber may admit any relevant evidence which it deems to have probative value.

exclude the evidence is fulfilling its duty 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, pursuant ICC Statute Article 64(2).

b. Exclusion of improperly obtained evidence. ICTY/R RPE Rule 95 refers to exclusion of improperly obtained evidence so that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, so called *'a residual exclusionary provision'*[182] There are interpretations that Rule 89(D) provides for an exclusionary discretion, while the Rule 95 is mandatory in nature.[183] In *Prosecution v. Martić*,[184] the Trial Chamber held that statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted pursuant to Rule 95. If there are *prima facie* indicia that there was such oppressive conduct, the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained by oppressive conduct. It should be noted that the Rule 95 is connected to Rule 42 and Rule 43 regarding rights of the accused during questioning and recording of the questioning of accused, respectively. There are justified grounds for exclusion of evidence if some of basic rights have not been followed. Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the ICCPR and Article 6(3)(c) of the ECHR since these are the internationally accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial. In *Prosecutor v. Mucić et al.*,[185] The Trial Chamber have found extremely difficult for a statement taken while interviewing of the accused person without prior access to counsel with violation of Rule 42 to fall within Rule 95 since it protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability. However, the Trial Chamber decided to exclude from evidence several statements made by the accused to police officers. There is ICTY case law regarding violation of Rule 43 that caused exclusion of evidence. In *Prosecution v.*

[182] ICTY *Prosecutor v. Mucić et al*., Decision on Zdravko Mucic's motion for the exclusion of evidence, IT-96-21-T (RP D5082-D5105), 2 September 1997; ICTR *Prosecution v. Musema*, ICTR-96-13, Proceedings - Evidentiary Matters, 27-01-2000.
[183] A. Alamuddin, *'Collection of Evidence'*, in K.A.A. Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010) 284; A. Zahar/G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008) 380, cited by Pitcher, op.cit., p. 15; Combs, op.cit., p. 328.
[184] *Prosecutor v. Martić*, ICTY, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, para. 9.
[185] *Prosecutor v. Mucić et al.,* ICTY, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence), 2 September 1997, para. 43.

Halilović[186] the Trial Chamber have found that Rule 43 is a fundamental provision to protect the rights of a suspect and an accused and is a safeguard for a full and accurate reflection of the questions and answers during the interview and thus enables the parties and the Trial Chamber to verify the exact wording of what was said during the interview. The Trial Chamber held that Rule 43 provides for audio and video-recording of the interview of suspects and aims at ensuring the integrity of the proceedings, *inter alia,* by providing for an instrument to ascertain voluntaries of a statement and the adherence to other relevant safeguards as provided for in Rule 42 and Rule 95. Since the Rule 43 was not applied at the time of taking the Statement and the accused had not chosen to waive his right to remain silent during trial, the Trial Chamber have found that the admission of the statement would infringe upon the accused's right to a fair trial and decides not to admit the statement into evidence. In *Prosecutor v. Mucic et al.*,[187] where it was held that a violation of Rule 43 may lead to exclusion of a statement, if, pursuant to Rule 43, at some stage during a break in the recording further information was obtained from the accused and that such information formed the basis of subsequent questions, would amount to an irregularity in the procedure. There is a case law regarding ICTR RPE Rule 95, as well. In *Prosecution v. Karemera et al.,*[188] the Trial Chamber held that there was substantial doubt as to the reliability of the interview, so it have concluded that admission of the interview into evidence would be antithetical to and seriously damage the integrity of the proceedings.

More comprehensive seems to be ICC Statute provision of Article 69(7), according which evidence obtained by means of a violation of ICC Statute or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. The Article 69(7) does not imposes the automatic exclusion of obtained evidence so it should be interpreted within the meaning of ICC RPE Rule 63(3) - a Chamber shall rule on an application of a party or on its own motion concerning admissibility when it is based on the grounds set out in Article 69(7). There are critics regarding the formulation of Article 69(7) that appears to imply that not all violations of internationally recognized human rights will seriously damage the integrity of the proceedings.[189]

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[186] *Prosecution v. Halilović*, ICTY, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005, paras. 24 and 26.
[187] *Prosecutor v. Mucic et al.*, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalic, 9 October 1996, para. 15.
[188] Prosecution v. *Karemera et al.*, ICTR, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, paras. 31-32.
[189] Zahar/Sluiter, op.cit., p. 382, cited by Pitcher, op.cit., p. 21.

VI. Conclusion

Although jurisprudence and interpretations of equality of arms was starting point for establishing of international criminal courts, there is interpretation that goes in contrary of universally recognized interpretations of equality of arms. Due to the dependence of the international tribunals on state cooperation, the principle of equality of arms has been given a more liberal interpretation by the Tribunals Chambers than that normally upheld with regard to proceedings before domestic courts. State cooperation with Tribunals cannot be invoked on the basis of procedural equity, but only on the basis of difficulties that the party has faced during preparation of the case (access to documents, files, evidence, witnesses, crime scene investigation etc.). Problems with state cooperation are fully overcome with the state ratification of the Rome Statute.

One have to agree with P. Van Dijk and G.J.H. van Hoof, that regarding criminal cases where the character of the proceedings already involves a fundamental inequality of the parties, this principle of '*equality of arms'* is even more important. The necessity for existence of international tribunals is caused by the gap between the right to make war (*jus ad bellum*) and the obligation to comply with humanitarian law during the war (*jura in bello*). No one is aloud to commit war crimes during the war.

For creation a healthy criminal justice system, the concept of a "*fair trial*" must be understood to include a strong and independent defence. Imperative for credibility of international justice is to ensure the full participation of defence lawyers as key actors of the third pillar. The prevalence of the principle of equality of arms in the protection of individual rights of accused persons should be understood as an indispensable safeguard against abuse of procedural powers, so judges, prosecutors and legal professionals should check and balance each other during the proceedings.

Adequate resources inevitably affect the principles of fair trial and equality of arms. During the proceeding before international criminal courts, equality of arms will be respected and fulfilled by overcoming disadvantage of one party against its opponent and by providing an equal manner in presenting evidence. It is acceptable and justified to impose kind of procedural consequences in the

name of equality of arms due to disparity between the prosecution and the defence Generally speaking, the prosecution and defence at international courts enjoy very different investigative resources, significant difference in the investigative resources available that lead defence lawyers to complain of the inequality. Disadvantages between the parties regarding lacking of institutional status, personnel and funding are inevitable, since the Office of the Prosecutor as an independent body has huge resources, personnel and funds, and enjoys much greater freedom and ability to identify and access relevant material than the accused, and the disclosure regime imposed on the prosecution had been unable to restore the balance between the parties and the defence does suffer from an inequality of arms in the presentation of the defence case. The team of defence of indigent accused persons depend for funds on the Registrar, and there were defense allegations toward the Registrar for not deciding properly regarding the scope of the case, extended and complex legal issues as well as the nature of the defence. The Registrar is the only authority in a position to protect the public interest and ensure that the Code of Conduct and other rules relating to the legal aid system are properly followed and enforced. Thus, it is essential that the Registrar keep firm control over the creation of Code of Conduct and its application as well as issues relating to qualifications and discipline of defense counsel. Nonetheless, in view of the limited resources of the Registrar and the positive contribution to be made by practitioners, it is important for defense counsel to play a role in these matters.

Since the defense was lacking adequate facilities to prepare its case, this disparity between the parties damages the credibility of the international criminal justice system. Additionally, defence teams were comprised by fewer members than prosecution teams and have fewer resources and facilities at their disposal to prepare and present their cases. In most cases at the Tribunal an accused argued, if not during trial preparation, inevitably on appeal, that he has been denied equality of arms with the prosecution and that the trial against him was an unfair one. The factors that the accused pointed to in support of this allegation relate to the disparity between the resources accorded to the prosecution and the defence, and the practical advantages accorded to the prosecution by virtue of its institutional structure as an organ of the Tribunal. In most instances the complaints made by an accused were that he was prevented from securing evidence that should have been available to him, and or that evidence that should have been disclosed to him by the prosecution pursuant to its disclosure obligations was not so disclosed.

A common criticism of *ad hoc* tribunals has been the disparity in the allocation of resources and insufficiency of funds allocated to the defence. Significant improvements have been made

however as these tribunals strive to maintain their credibility. The lesson to be learnt from these tribunals is that resources are a fundamental pillar of the equality of arms principle.

Judges at international criminal courts increasingly control the manner of proceedings. To ensure that trials will not last forever, judges may limit the number of witnesses that the defence may call. Sometimes, the Court's inability to secure the attendance of crucial witnesses may be a factor to be taken into account in determining the overall fairness of proceedings at the international criminal courts. Limitations may give rise to a violation of the principle of equality of arms if judges impose upon the defence stricter limits than on the prosecution regarding the number of witnesses or the amount of time for preparation of cases.

At the end we have to agree with prof. Damaška[190] in virtue of dependence of the international judiciary on the whims of international and domestic policy. This dependence arises primarily from the lack of effective international institutions, human resources and willing to carry out the decisions of international criminal judges. Without cooperation and support to countries they are really helpless judges - can not ensure the presence of suspects, obtain evidence and to carry out the imposed sentence. States decide upon cooperation and support of the international criminal courts based on an assessment of their own security, economic, reputation and other interests. In the absence of the pressure of powerful actors in the international community even poor countries are able to ignore the court's decision. For these reasons, strict and consistent rule of law in the field of international criminal justice is still unattainable ideal and pure illusion.

[190] Mirjan Damaška, *Pravi ciljevi međunarodnog kaznenog pravosuđa*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 15, broj 1/2008, p. 13-33.

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