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Audiatur et altera pars: The principle of equality of arms in international criminal proceedings

DISSERTATION

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To all those who contributed
mentally and physically

Abbreviations

ACHR	American Convention on Human Rights
App.	Application
art.	Article
ASP	Assembly States Party
CBF	Committee on Budget and Finance
CoE	Council of Europe
DSS	Defense Support Section
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
e.g.	exempli gratia
EoA	Equality of Arms
etc	et cetera
et al.	et alii
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IRMCT	International Residue Mechanism for Criminal Tribunals
KSC & SPO	Kosovo Specialist Chambers and Specialist Prosecutor's Office
OPCD	Office of Public Counsel for the Defense
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
p.	page
par.	paragraph
RPE	Rules of Procedure and Evidence
SC	Security Council
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon

UDHR	Universal Declaration of Human Rights
UN	United Nations
v.	versus
WWII	World War II

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Abstract

The concept behind the EoA can be traced way back in many centuries and in different forms, hidden behind other concepts. One of the most ancient ones is reflected in the Latin proverbs *libra justa justitiam servat* and *audiatur et alter pars*. The need for justice and the triumph of truth could only be acceptable if the accused was treated with minimum standards of equality against the powerful state authorities.

The equilibrium is the goal of the universe and so it is for judicial systems. No matter the type of them, the accused, as the person in the spotlight, needs all means to prepare his case in a most efficient and unimpeded way, since his personal liberties are at stake. Human rights' legal framework compel the courts and tribunals, through numerous institutions and provisions, not to treat the accused in disadvantage vis-à-vis the Prosecution.

But when theory is embodied into practice, the jurisprudence shows that difficulties arise, since different dynamics from different factors collide. States, victims, public order, political agendas and evidence are some of the dynamics that have an impact on the proceedings, transforming the court into an arena where opposite interests are engaged to a legal tug-of-war.

***Keywords*:** International criminal proceedings, equality of arms, triple nature, right to a fair trial, preparation of Defense

Aim and Structure of the Dissertation

This dissertation will focus on the principle of Equality of Arms in the international criminal proceedings, beginning from the 1990s where the ad hoc tribunals where created in Yugoslavia and Rwanda. Adopting the triple nature of EoA, the dissertation will be divided into three parts. Part I introduces the principle to the readers and through a human-rights-related presentation, we move on to the procedural aspect of EoA. Part II and Part III could have been examined in the same part, however it was preferable to present the core of the proceedings (the disclosure of evidence) with regard to the pre-trial and trial stages and leave the 'material' scope in a distinct Part.

The dissertation focuses upon the position of the principle of EoA as a lens through which the fairness of a trial is promoted. This lens is imbued with jurisprudence from the ECtHR and its ancestor (the European Commission of Human Rights) which has given the first hunches and perhaps elements of the definition of the principle of EoA. For the practical deployment of the principle, case law of the ad hoc tribunals, the ECCC, the SCSL and the ICC is presented, with the latter being in the epicenter of the dissertation, as it is the only international criminal court with a (potentially) universal jurisdiction for the most serious crimes (namely genocide, war crimes, crimes against humanity and the crime of aggression) perpetrated after 1st of July 2002, when the Statute of Rome entered into force.

The research is based on library originated sources, articles, decisions of judicial bodies and institutional legal framework (statutes, regulations etc). Through the reference to case law from former criminal judicial bodies, we can examine the differences in the approach of the position of the accused, without however finding *panacea*. New challenges arise and the proceedings follow the dynamics. Moreover, through the whole dissertation, the use of the masculine third-person pronoun (that stands for 'he') under no circumstances implies any discrimination based on gender or sex but it is used for the sake of economy of language and the convenience on following the essence of the writing.

PART I

The substantive nature of EoA

Chapter 1

Introduction to the EoA: From part of a right to a distinct one?

The concept behind the EoA can be traced way back in many centuries and in different forms, hidden behind other concepts. One of the most ancient ones is reflected in the latin proverb *libra justa justitiam*[1] *servat*, which means *a just balance preserves the justice*. There can't be a more depicting way to illustrate that proverb than looking at Lady Justice, an allegorical personification of the moral force in judicial systems[2]. Her being blindfolded and with a pair of balance scale on hand demonstrate the need for justice to be fair and impartial and not prejudiced against any participant in the trial. As it can be noticed, the idea of a fair justice is a trace within human being's nature, even with regard to the afterlife, such as the Egyptian Goddess Maat or the Greek deities Themis and Dike.

A more distinct form of EoA is given by the proverb *audi alteram partem* or *audiatur et altera pars* which is translated as *hear the other side*. It is relevant to the aforementioned proverb and it gives the specific content of the balance that needs to be maintained during a trial. As the principle shows by the words used, it speaks of a equality with regard to the available arms in a battle, therefore we can trace a primitive legal concept of the principle in the Laws of England, where the two parties (dressed in armor and having the same weapons at hands) of a trial used to battle in order to settle a difference in front of a court. Other traces can be found during the reform of the German criminal system, where the principle was referred as *Waffengleichkeit (=having the same weapons)*[3].

In 1948, a landmark for the human rights takes place. The General Assembly of the UN accepts the UDHR, a legal milestone which refers to all human beings, with no reservations with regard to religion, political structure or culture. Drawing the inspiration of article 10 of the UDHR and in the aftermath of WWII, the CoE drafted in 1950 the Convention for the Protection of Human Rights and Fundamental Freedoms

[1] There is also the Roman Goddess Justitia, introduced by Emperor Augustus.
[2] www.en.wikipedia.org/wiki/Lady_Justice
[3] Fedorova, M.I. (2012), p.1.

(or as it is used to be called as ECHR) and on 3 September 1953 the latter enters in force.

The article 6 of the ECHR in short speaks of the right of the accused to have an impartial and fair trial and that everyone should be given minimum rights (with regard to time, facilities, information, evidence, legal assistance etc) so as not to be in a disadvantageous position against their opponent. In addition, the concept of EoA was obvious in the case law of the European Commission of Human Rights (the ancestor of the European Court and with an obligatory procedure until 1998 for the admissibility of individuals' applications in order to reach the Court) in criminal[4] and civilian proceedings[5]. What was expressed by the Commission is that:

> (…) what is generally called 'the equality of arms' that is the procedural equality of the accused with the public Prosecutor [and] is an inherent element of the 'fair trial'. (…), since in any case it is beyond doubt that the wider and general provision of a fair trial, contained in par (1) of Article 6 [of the ECHR], embodies the notion 'equality of arms'.[6]

Moreover, the ECtHR itself dealt with the matter and stated that the EoA is one of the features of the wider concept of a fair trial and that each part must be afforded reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent[7].

Apart from the international character of criminal proceedings that the ECHR offers, the modern (purely) international criminal justice is served mainly by the ICC. Before the ICC there were the *ad hoc* ICTY and ICTR, with a specific mandate of the SC of the UN with time and geographical restrictions. ICTY and ICTR are now replaced by IRMCT[8] and alongside with the ICC, there are the (internationalized) ECCC[9] and KSC & SPO[10] with specific missions. With regard to international human rights case law, the principle of EoA is present at the determination of the position of the Defense.

However, EoA is a principle not only for the amelioration of the position of the accused but also of that of the Prosecutor. Someone would argue that the Prosecutor is

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[4] *Ofner and Hopfinger v. Austria*, App. No. 524/59 and 617/59, report of 23 November 1962 & Pataki and *Dunshirn v. Austria*, App. No. 596/59 and 789/60, report of 28 March 1963.
[5] *X v. Sweden*, App. No. 434/58, 30 June 1959.
[6] *Pataki and Dunshirn v. Austria*, App. No. 596/59 and 789/60, report of 28 March 1963.
[7] *Foucher v. France*, 10/1996/629/812, Council of Europe: European Court of Human Rights, 17 February 1997.
[8] https://www.irmct.org/en.
[9] https://www.eccc.gov.kh/en.
[10] https://www.scp-ks.org/en.

the persona in which the power of the State is illustrated and that the power he possesses, levitates him in a more advantageous position than the suspect, with the latter's being informed only after the indictment while the Prosecutor has evidence and information even years before. This argument would be, without any doubt, correct if we would speak only about domestic criminal justice since the Prosecutor is regarded as an organ of the state. But when it comes to international criminal proceedings, the situations is different.

The international Prosecutor of the ICC, for instance, represents the global community in the goal of fighting against impunity[11], but when it comes to affiliation[12] with a state, there is a lack of it. By representing the community does not automatically mean that each country is willing to cooperate with the Court, in order to facilitate the investigations and the proceedings in general upon its ground. In every case and with the mediation of the Registry, there is a constant effort to achieve an agreement with the involved countries, so as the OTP to continue freely its work.

That could explain the opinions that have expressed by people involved with the OTP, such as Luis Moreno-Ocampo[13], a former and the first Prosecutor of the ICC, who has stated that *(…) a fair trial in this setting is not just about Defense rights, which I respect, it is also about Prosecutor's rights, for instance to have witnesses, who are not killed or threatened.* In the same direction, some years before the ICC was created, the Appeals Chamber in the case Prosecutor v. Tadic before the ICTY mentioned that '*the principle of equality of arms should be given a more liberal interpretation than that given in a national setting considering the dependence of the international tribunal on state cooperation'*[14].

But is this liberal approach dangerous or even conceivable in the international criminal proceedings? Could we say that the international Prosecutor does not differ much from the domestic counterpart? The Prosecution, as an integrated organ of the Court, is seen more credible to the eyes of another state or the police forces that monitor a crime scene. It is the legitimacy that a recognized institutional power is equipped with, alongside with certain coercive powers provided within the statutes, that contribute to

[11] Statement of ICC Prosecutor, Fatou Bensouda, on pre-election violence and growing ethnic tensions, 9 Oct 20, available in www.icc-cpi.int.
[12] Fedorova, M.I. (2012), p.3.
[13] Statement of Luis Moreno-Ocampo, Documentary "In the Dock: Defense Rights at the ICC", International Bar Association's Human Rights Institute (May 2011), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4e508b25-6827-477a-99b9-565344c6cff2
[14] *Prosecutor v. Tadić* (Appeals Chamber Judgment) ICTY, IT-94-1-A, 15 July 1999, par. 52.

a better cooperation between the Prosecutor and the uncooperative states while it is sometimes impossible for the Defense to achieve such a cooperation.

In addition, despite the difficulties that the Defense must overcome, such as actions in the core of Defense (e.g. on-site investigations, testimonies of witnesses etc), there is the general public opinion that is shaped by the media. In addition, the accused is against a state or multiple states[15]. No one can deny that, no matter the verdict, Thomas Lubanga's[16] defamation is a reality, due to the first verdict of the ICC. But when the *vox populi*, even guided by external forces, convicts someone as a criminal without a trial, how much room is left for the Court to achieve a completely impartial and uninfluenced outcome? How secure is the right of the accused to be presumed innocent and how can the possibility of searching for a scapegoat be omitted? Is EoA inherent to a fair trial but also is inequality inherent in the structure of the Courts, making the former a utopic goal? All these questions are some who set the bet that all systems of justice have to win, with integrity and professionalism.

What is obvious from the above is that the core element of a trial is to be fair. But this wordage is very broad in its application. This leaves room for the various courts and tribunals to interpret, according to different factors in a case by case basis. The width of this broad scope however is being limited, and thus safeguarded, by principles and other general notions. The EoA, therefore, can be a lens through which the requisite procedural fairness in any criminal proceedings can be ascertained[17].

In this point of the analysis, it is worth referring to Cassese's[18] point of view who spoke of two distinct notions of EoA. On the one hand we have the case law of the ECtHR which has developed the concept of maintaining the balance by helping the accused reach a better or more advantageous position than the Prosecution, with the latter normally being better equipped for the collection of the evidence. On the other hand, due to the prevalent adversarial elements of the mixed legal system[19] in international criminal proceedings, both of the parties[20] (e.g. Prosecutor and accused)

[15] Dr. Bengusu, O. (2019), p.47.
[16] International Criminal Court to deliver its first verdict next month, https://news.un.org/en/story/2012/02/40507229, (29 February 2012).
[17] Toney, Reymond J. (2002), p. 438.
[18] Cassese, A. (2008), p. 384-385.
[19] Further discussion in Chapter 3 of Part I.
[20] In its General Comment No.32 on Article 14: Right to equality before courts and tribunals and to a fair trial (Ninetieth session 23 August 2007), the HRC expresses the same (controversial) view, by claiming that the EoA follows from the general right of the equality before courts and tribunals, thus attributing

must have the same rights, therefore the Prosecutor is also entitled not to be put in a disadvantageous position.

In the next two Chapters, there will be an effort to analyze these two notions that give the impression that in some cases they could clash. In Chapter 2, we will focus on the interaction of the EoA with the Human Rights framework and on how the latter has contributed to define or at least interpret the principle. In Chapter 3, the position of the principle in different procedural models will be presented so as to conceive the difficulties in ensuring the real equality of arms, offering us the best introduction for Part 2, to a more concentrated point of view at the procedural nature of the principle in practice.

Chapter 2
Human Rights and EoA

2.1. Overview

At present, the EoA is not a right but a principle, which penetrates other rights in order to ensure the balance through a trial. The right with which it seems to have the strongest connection/interaction is the right of a fair trial, so strong that the EoA is considered to be the most important criterion[21] of a fair trial and it goes to the heart of it[22]. What is important is that the right to a fair trial (and alongside all the other rights and principles that are attached to the former) has to be applied from the beginning of the proceedings, namely the investigations (pre-trial) stage, the main phase of the hearing (trial) and the appeal (post-trial) stage, because of the fact that activities which affect the suspect are created from the very beginning[23].

However, the international criminal courts and tribunals are not parties in the numerous human rights pieces of legal framework, such as international/regional treaties, charters, conventions etc, with the latter being binding only for the member states. Though, it can be assumed that the fact that courts and tribunals provide human rights within their proceedings and with the effect of the customary and general

same procedural rights to all parties and in the same time any distinction may not disadvantage the accused.

[21] Nowak, M. (2009), p.321.

[22] *Prosecutor v. Tadić*, (Appeals Chamber Judgment) ICTY, IT-94-1-A, 15 July 1999, par. 44.

[23] Nowak, M. (2009), p. 244.

international law, there is a well-accepted obligation to comply with the human rights as provided by international treaties.

To support this view, a glimpse on the statutes of modern courts can be helpful. Article 21 (1) of the Rome Statute for the ICC, Rule 72bis of the RPE of the SCSL and (despite the different nature of it) article 38(1) of the ICJ are some examples of the determination of the applicable law, where there is a full respect by the civilized nations of the internationally recognized standards regarding the rights of the accused at all stages of the proceedings[24].

The case law of the ECtHR also confirms that point of view, where the fairness of the trial should be interpreted in the light of the function they have in the proceedings, by explaining that the article 6 of the ECHR is not defining a strict notion of the fair trial, but that in par 3, there are minimum rights enumerated (not exhaustively) which create a wide concept of conformity to the general standard of a fair trial[25].

2.2. Fairness of a Trial

The fairness of a trial (without having a definition) embodies many guarantees and general principles, with a holistic view of promoting and securing human rights. Therefore, in the following sections, we will try and elaborate the interaction of the EoA with other rights[26] that constitute as a whole the right to a fair trial.

2.2.1. Promptly informed about the arrest or detention

During the pre-trial stage, it is essential for the accused to be informed about the arrest and/or detention with regard to allegations against him. This is stated not only in the ECHR[27] and in the ICCPR[28] but also in the case law of the ECtHR[29]. The factors that appear in this context is the kind of information and the language in which it is provided.

[24] UNSC Res 808 (3 May 1993) UN Doc s/25704, par.106.
[25] European Commission, *Nielsen v. Denmark*, App. No. 343/57, Report of 15 March 1961, par. 52 & *Can v. Austria*, App. No. 9300/81 Report of 12 July 1984, par. 480 – ECtHR, *Barbera, Messegué and Jabardo v. Spain*, App. Nos. 10588/83, 10589/83, 10590/83, Judgment of 6 December 1988, par. 68 & *Kostovski v. Netherlands*, App. No. 11454/85, Judgment of 20 November 1989, par. 39.
[26] Rights with no or small interaction with EoA will not be addressed (e.g. Trial by a Competent independent and impartial tribunal, Retroactive application of criminal Law, prohibition of double jeopardy)
[27] Article 5(2) = Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
[28] Article 9(2) = Anyone who is arrested shall be informed at the time of the arrest of the reasons of his arrest and shall be promptly inform of any charges against him.
[29] *Fox, Campbell and Hartley v. UK*, App. No. 12244/86; 12245/86 and 12383/86, 30 Aug 1990, par 40.

A language that the suspect understands is a weapon for him. If it is not provided, then he is deprived of his right to defend himself properly, since understanding and examining the evidence, witnesses etc., will be an obstacle. This obstacle is provisioned to be addressed through external contribution, by being entitled to have free assistance of an interpreter[30], the services of whom should be available only if the suspect/accused is genuinely unable[31] to understand the language used by the court[32].

Having assessed the factor of the language used, then the suspect is entitled to be informed about all the facts that are relevant with his case. No matter the fact that there are arguments that the provisions are effective only in oral proceedings, the ECHR has signified that there has to be a translation or interpretation of all those documents or statements in the proceedings instituted against him which is necessary for him to understand in order to have the benefit of a fair trial[33]. This information consists of an exact legal description of the offence (nature) and all of the relevant facts underlying it (cause) and should be sufficient for the preparation of the Defense.

So, when the suspect/detained/accused is informed in a language that he understands all these evidence and documents that support the charges against him, then he with/or his legal representor will be ready to prepare his defense in an equal position with the Prosecutor.

2.2.2. Promptly appeared before a judge and equally treated by Law

'Anyone who is arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power' state article 9(3) of the ICCPR and article 5(3) of the ECHR. The delay between the detention and the appearance before a judge must be the most limited one and the promptness is a case by case examined factor. The judge is the organ which will safeguard the rights of the accused, since an illegal delay of detention violates other rights as well, such as the expeditiousness of the trial and subsequently the equality of arms cannot be applied.

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[30] Article 14(3) of the ICCPR and article 6(3)(e) of the ECHR as well in case law e.g. *Mattoccia v. Italy*, App. No. 23969/94, Judgment of 25 July 2000, par. 60.
[31] *Cadoret et Bihan v. France*, UN HRC 11 Apr 1991, Communication No. 221/1987 and 323/1988, UN Doc CCPR/C/41/D/221/1987, par. 5.6.
[32] *Dominique Guesdon v. France*, UN HRC 25 July 1990, Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986, par. 10.2.
[33] *Luedicke Belkacem and Koc v. Germany*, App No 6210/73; 6877/75 and 7132/75, Judgement of 28 November 1978, par. 48

While EoA applies to individuals who have opposite interests[34], the right to be treated equally by Law can be applied even to individuals within the same party, e.g. between accused persons or witnesses. The meaning of the right to be treated equally before Law is that the law (and generally the proceedings) is applied to everyone without any discriminations, regardless of sex, origins, sexual orientation, political beliefs, religion and many other criteria that exist and separate the human race. Equal access should be granted to everyone, even to the accused who is charged with the most heinous crimes.

Therefore, the interaction of the EoA with this right of equality before Law or rather the right of non-discrimination is limited. The latter does not only apply to human rights law[35], stricto sensu, but also is a part of the international humanitarian law[36]. Equal treatment in equal situations. Thus, differential treatment is excused only on reasonable and objective criteria[37].

2.2.3. Legal and prompt assistance (and the Right to adequate time and facilities)

The vast majority of the accused has no knowledge on the legal system and its operation. The EoA, thus, compels the courts and tribunals to entitle the accused with legal aid, which must be effective and under certain circumstances can be free of charge, as well. This interaction, therefore, has also a material point of view. More details about the material nature of EoA will be presented in Part III.

In this section, we will highlight the interaction of the EoA with the provisions of relevant main legal pieces of framework, such as the ICCPR and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment.

Article 14(3)(d) of the ICCPR states that :

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (…) (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;

[34] Trechsel, S. (2005), p.96.
[35] Dr. Bengusu, O. (2019), p.20.
[36] See provisions in UDHR, African Charter in Human and Peoples' Rights, American Convention on Human Rights, ECHR, conventions on the Rights of the Child, Geneva Conventions and its Protocols and many others.
[37] *Waldman v. Canada*, UN HRC 3 Nov 1999, Communication No 694/1996 UN Doc GAOR A/55/40 (vol.ii) 97-98 par.10.6

> 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 (…).

Within the text, the interaction of EoA (full equality) with the right for legal assistance becomes obvious. The accused chooses freely his representor and when he is not able to do so, the court assigns one for him[38]. However, the counsel must be effective, since it is in the interests of justice to find the truth and not create a scapegoat, just to suppress global feeling. The efficiency is achieved only if the accused and/or his lawyer has the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case, if they believe it to be unfair[39].

The relevant Body of Principles for Detention states that the detained person can communicate and consult with his counsel[40] and have adequate time and facilities to prepare his defense; his counsel may be within sight but not within the hearing of a law enforcement official; and all these rights can be restricted only under exceptional circumstances (however *incommunicado* detention is against human rights[41]) in order to maintain security and good order and nothing from this procedure can be used as evidence against the detained unless they are connected with a continuing or contemplated crime[42].

What is strange and it is worth a reference is that the ECHR does not explicitly entitle the accused with the right to communicate with his counsel[43]. However, the ECtHR has stated that:

> (…) this right is set forth, within the Council of Europe, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (annexed to Resolution (73) 5 of the Committee of Ministers) (...) The Court considers that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such

[38] *Estrella v. Uruguay*, UN HRC 29 March 1983, Communication No 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 par.10

[39] UN HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, available at: https://www.refworld.org/docid/453883f90.html [accessed 27 December 2020]

[40] See also Principle 15 of the Body of Principles, where the communication with family or counsel cannot be delayed for more than a matter of days.

[41] *Extebarria Caaballero* and *Ataun Rojo* cases where Spain has found guilty of violating article 3 of ECHR.

[42] Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988) Principle 18

[43] Legal Assistance is provisioned in article 6 of the ECHR.

> surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective[44].

For the complete aspect of the interaction of EoA with the right for legal aid, we need to examine the material nature of it, as well[45]. The adequacy of legal aid is supplemented by rules and regulations of the courts and the tribunals as well as another right, the right to adequate time and facilities, making this connection strong not only to guarantee the right to an efficient Defense but also for the purpose of protecting the physical and mental integrity of the detained person.

2.2.4. Right to be presumed innocent and to remain silent/prohibition of self-incrimination

The core element of a democratic law system is the presumption of innocence of the accused. This is, perhaps, the most important right in a fair trial (especially in criminal trials) and it is a right that needs to be interpreted in such way so as to guarantee rights which are practical and effective as opposed to theoretical and illusory[46].

Treating an accused with a prejudiced manner removes most of his vital trial rights, negates the need to give arms and makes it impossible to obtain a fair trial by creating inequalities. Infringements can be attributed not only to judges but also to other organs of authority, such as police officers, media etc[47]. That is why this right (as the majority of them) should be present from pre-trial proceedings until the end of post-trial stage.

Article 14(2) of the ICCPR and article 6(2) of ECHR speak of the right to presumption of innocence with the provision being included in the statutes of courts and tribunals[48]. The onus (burden of proof) lies on the Prosecution with the Defense being able to doubt any evidence and charge against. The conviction is reachable only if it is a decision made beyond reasonable doubt (and not absolute certainty).

Relevant to this right is the right of the accused to remain silent and that his behavior is forbidden to be used as proof for his self-incrimination. The accused is informed about the charges only after the indictment while the Prosecution works on a

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[44] *S. v Switzerland,* App. No. 12629/87 & 13695/88, Judgement of 28 Nov 1991, par. 48.
[45] See Part III.
[46] *Airey v Ireland,* App. No. 6289/73, Judgement of 9 Oct 1979, par. 24 & *Artico v. Italy,* App. No. 6694/74, Judgement of 13 May 1980, par. 33.
[47] Dr. Bengusu, O. (2019), p.27.
[48] Some examples are article 66 of Rome Statute, article 21 of the ICTY Statute and article 20 of the ICTR Statute.

case long before. Silence is provided for the accused since the Prosecution is the party that needs to convince the judges that the charges are genuine and fruitful.

While article 14(3)(g) of the ICCPR states about the right not to be compelled to testify against himself or to confess guilty, there is no similar provision to ECHR. However, in *John Murray v. UK* case[49] the ECtHR that there *"can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6."*[50]

What is more, the same Court has stated that the decision of an accused to remain silent could have some implications, such as an adverse inference, but restricted these inferences to the common-sense ones, with regard to the evidence that are available, in a case by case basis, to the judge[51].

In addition, parts of different bodies of framework[52] determine what is to be done with the use of evidence that is obtained against Human Rights Law. With slight differentiations, it is stated that evidence which are believed, on reasonable grounds, to have been obtained through methods that violate human rights, are inadmissible, unless they are used against the author of those methods.

The treatment of the accused as innocent and the absence of any coercion to abstract self-incriminating evidence (including illicitly obtained evidence) are compatible with the EoA. Any direct or indirect physical or psychological pressure (even the unexcused situation where the accused wears handcuffs when there is no danger if they are removed) poisons the EoA, transforming the suspect into a premature convict, thus demolishing the foundation of democratic societies.

2.2.5. Right to a fair (public) hearing in a trial within reasonable time[53] which concludes in a reasoned judgement

The voice of the accused is to be heard throughout the proceedings, from the detention to the verdict. He is the one who challenges the arguments of the Prosecutor in a legal tug-of-war to find the truth. This means that both of the opposite parties should be

[49] *John Murray v. UK*, App. No. 18731/1991, Judgment of 8 Feb 1996, par.45.
[50] However , the Court states the right to silence cannot be considered an absolute right.
[51] *Condron v. UK*, App. No. 35718/1997, Judgement of 2 May 2000, par. 62.
[52] Guideline 16 of the Guidelines on the Role of the Prosecutor, article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 10 of the American Convention to Prevent and Punish Torture
[53] See Part II for a spot-on point of view of the interaction of expeditiousness within the trial stage.

treated equally and have the chance to present their case during a fair hearing. Both the ICCPR[54] and the ECHR[55] provisions include this prerequisites with the case law of the ECtHR[56] and the UN HRC[57] pinpointing that when it comes to capital punishments, all the guarantees are to be met so as no exceptions from achieving a fair hearing to be allowed.

Two other elements that affect the preparation and the presentation of the case are the publicity of the hearings and the right to have a trial within reasonable time and without undue delay. Both are important for the EoA to be present during a trial, since they have an impact on the final verdict.

On the one hand, if there are no derogations or special circumstances, the hearing will be conducted orally and publicly[58]. Such derogations can be imposed when, for the reasons of moral or public order (*ordre public*), national security, interests of the juvenile of people concerned or their private life, the court has the opinion that a public hearing would prejudice the interests of justice. The interpretation as such has to be as narrowed as possible, because publicity is one of the main characteristics of a trial, in order to be reasoned and legitimate.

On the other hand, ICCPR and ECHR[59] state that each person has the right to be heard within reasonable time. The meaning of the factor time has two notions: reasonable time taken to come to trial stage but also the length of the proceedings, signifying the importance of the beginning and the end of the proceedings, both in first instance and on appeal[60]. The time limit begins when the suspect is informed about proceedings that include charges against him or the day that he is charged, arrested or committed for trial[61] and ends when the decision becomes final[62] (end of trial stage or appeal stage, if an appeal is filed).

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[54] Article 14(1).
[55] Article 6(1).
[56] *Botten v. Norway*, App. No. 16206/1990, Judgement of 19 February 1996, par.53.
[57] *A. Thomas v. Jamaica*, UN HRC 31 March 1992, Communication No 272/88, UN Doc GAOR A/47/40, par.13.
[58] Article 14(1) of the ICCPR and article 6(1) of the ECHR.
[59] Article 14(3)(c) of the ICCPR, article (6)(1) of the ECHR; African Charter article 7(1)(d) and American Convention article 8(1) as well.
[60] UN HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, available at: https://www.refworld.org/docid/453883f90.html [accessed 27 December 2020]; *E. Pratt and I. Morgan v Jamaica*, UN HRC 6 Apr 1989, Communications No 210/1986 and 225/1987, UN Doc GAOR A/44/40 par. 13.3.
[61] *M. and B. Hill v. Spain*, UN HRC 2 Apr 1997, Communication No 526/1993 UN Doc GAOR A/52/40 par.12.4.
[62] *Kemmache v. France*, App. Nos. 12325/86 & 14992/1989 Judgement of 27 Nov 1991, par.59.

The ECtHR, with regard to the length of the proceedings, held that the reasonable time spent is to be assessed on a case by case examination, taking into consideration in particular the complexity of the case, the applicant's conduct and that of the competent authorities[63]. As to the conduct of the applicant, the Court has held that the article 6 of the ECHR does not require a person charged with a criminal offence to cooperate actively with the judicial authorities. However, it is very marginal since the situation is altered if the behavior displays any determination to be obstructive[64].

Moreover, each judgement of a trial must be reasoned, showing the details on which the judges relied. There is no expressed provision in the main pieces of Human Rights Law, however the HRC and the ECtHR have stated that for the proper administration of justice and due to the interaction with the right to appeal, a convicted person is entitled to have access to all reasons used for the decisions of the courts and tribunals[65], with variations on which extent this right applies[66].

Therefore, it seems that the publicity and expeditiousness of the trial play an important role in assessing the accused in an equal position within the proceedings. All the state parties to the treaties that provide with these rights are obliged to organize a judiciary system with overall minimum standards, in a way that these rights can be effectively ensured[67].

2.2.6. Right to appeal & Compensation for miscarriage of justice

After all the aforementioned safeguards, there are cases that seem to have (or at least that is what the party that files an appeal claims) some deficiency and need to be reviewed by a higher rank tribunal. Regardless of the severity of the crime, the right to appeal[68] ensures that at least two levels of high ranked and experienced judges will examine the case. Exceptions[69] from the right to appeal may be excused when the crime

[63] *Yagci and Sargin v. Turkey*, App. Nos. 16419/90 &16426/90, 8 June 1995 par 58.
[64] Idem, par 66.
[65] *V.Francis v. Jamaica*, UN HRC 24 March 1993, Communication No 320/88, UN Doc GAOR A/48/40 par. 10.5.
[66] Garcia Ruis v Spain App 30544/96 (ECHR 21 Jan 99) par.26.
[67] That is why factors such as "difficult economic situation" of a state Party have not been regarded by the HRC as an excuse for not complying with the ICCPR, see also *B. Lubuto v Zambia*, UN HRC 31 Oct 1995, Communication No 390/1990, UN Doc GAOR A/51/40 par. 7.3.
[68] Article 14(5) of the ICCPR, article 2 of Protocol No 7 to the ECHR, article 7(1)(1) of the African Charter, At 8(2)(b) of the American convention.
[69] Article 2(2) of Protocol No 7 to the ECHR.

is of minor character, when the conviction comes from the highest tribunal or in cases in which the person concerned was convicted following an appeal against acquittal.

When it comes to the review of a case, all aspects should be re-evaluated. Legal, material and procedural notions play an important role to the finalization of the judgement, thus making them appealable. What needs to be considered is that most of the rights of a fair trial are in effect in the appeal stage, therefore the proceedings continue to have impact on the accused.

And what happens when the decision becomes final but there is a reasonable ground on miscarriage of justice? Both the ICCPR[70] and the ECHR[71] *ipsis litteris* provide that:

> 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.'

So, when the miscarriage of justice is attributed to the conduct of the accused, no compensation is entitled. Moreover, according to HRC[72] no compensation is due if the conviction is set aside by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice[73]. Therefore, EoA is promoted through this indirect relevance due to the fact that this right can be used as a tool for ensuring the protection of the accused, by setting more layers of protection.

Chapter 3

The Criminal process perspective of EoA

3.1. Introduction

The legal framework and the jurisprudence on Human Rights show that the EoA, along with the interaction with other factors in the international criminal proceedings, set the

[70] Article 14(6).
[71] Article 3 of Protocol No 7.
[72] UN HRC, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).
[73] *Paavo Muhonen v. Finland*, UN HRC 8 Apr 1985, Communication No. 89/1981, UN Doc. CCPR/C/OP/2.

minimum standards[74]. However, rights and principles are not operating autonomously in the proceedings, rather they are affected by the nature of the procedural system in which they exist.

In this chapter, we will take a short glimpse of the two prevalent legal systems, the adversarial and the inquisitorial systems, and the compatibility of the EoA with each system, allowing us to form stable theoretical foundations so as to continue our analysis with the procedural nature of EoA in part II.

Each system refers to a different legal tradition, with its origins hundreds or thousands years ago, encompassing the present of the time they were created, the human beliefs, the political situations, the religious influence etc. The current tendency[75] is that these notions should be updated and reinvented through mutual interaction (theory of convergence), due to the dynamic nature of legal systems. That is why the analysis to come, will be just a photo of the traditional characteristics of the two systems.

3.2. Adversarial and Inquisitorial Systems

The Black's Law Dictionary of 1999 describe these two terms as following[76]: the adversarial or adversary proceedings involve a dispute between active and unhindered opposing parties contesting each other to put forth a case before an independent decision-maker. By contrast, inquisitorial proceedings involve a judge who conducts the trial, determines what questions to ask and defines the scope and the extent of the inquiry.

The adversarial model was developed in the common law tradition countries, such as England, Ireland, Wales, the United States of America, Canada and Australia (Anglo-Saxon system). The general trait of the system is the division of responsibilities between the decision makers and the parties. The procedural process is upon the litigants while the decision maker remains passive. The two parties contest each other (partisan advocacy) to resolve the dispute and the judge, who has to be impartial, decides, as a *tabula rasa* umpire, who is to be acquitted and who convicted.

On the other hand, the inquisitorial system (which in context has nothing to do with the Holy See's Inquisition[77]) is a system which was developed in the European

[74] Fedorova, M.I. (2012), p.69.
[75] Idem, p.93.
[76] Idem, p.94-96
[77] Any other relations could be the object of another dissertation.

countries (continental system) and which changed type after the mid-19th century to a mixed or reformed system. The two distinct institutions are the accusatorial and the – pure – inquisitorial one, with the former having the Prosecutor's charge as a prerequisite for investigatory activities and the limit on the scope of inquiries, while the latter has no restrictions on fact finding activity[78].

If we could refer to the two systems with an ideal type, they would have the following elements:

- In the adversarial system a) the proceedings are controlled by the two parties, b) the judge is a passive, tabula rasa[79] decision maker, c) the litigant parties (Prosecutor and accused) are present and challenge the version of the opposite side (cross-examination) and d) all the evidence is presented during the trial, therefore the trial stage is the main part of the proceedings, in which the guilt and in afterwards, the sentence are determined[80].
- In the inquisitorial system a) the proceedings are controlled by the judge, who is the one who questions the witnesses and is responsible for the presentation of the evidence, b) the judge examines the evidence that was collected by the Prosecutor and if it is enough, the case is examined during a trial; otherwise the proceedings come to a halt, c) the Prosecutor is an independent institution who collects all the necessary material in the case file (dossier) and d) the basis of the trial is the material collected in the pretrial stage, therefore it seems that the pretrial stage is more or at least equally important, as it is the basis upon which the trial stage can commence[81].

What seems obvious is that each system reflect the social perception[82] of the role of the state authorities in its citizen's lives. If the authorities want to be more coercive and have an active role in the disputes, then the inquisitorial system is preferable. On the contrary, if the state remains reactive and intervenes when it is needed and asked to, then the adversarial system is applied.

[78] Fedorova, M.I. (2012), p.97.
[79] With no prior knowledge of the evidence.
[80] Fedorova, M.I. (2012), p.98-99.
[81] Idem, p.99-100.
[82] Damaška has analyzed the ideal types of the two systems, which are shaped by the interaction of two considerations: the form of officialdom of the legal order (hierarchical or coordinate) and the goals of justice (implementation of policy or conflict resolution), in Damaška, M. (1986), p.181.

3.3. The existence of the EoA within the two (or is there really one?) legal systems

As it has already been mentioned, the modern concept of the EoA seems to be not so different from the adversarial principle that the case law of the ECtHR has offered[83]. All parties should be treated equally and have equal rights and obligations, because the decision maker has to hear both of the sides not only because it is unfair not to do so but also because otherwise one may make a mistake[84]. With the inquisitorial system, there are no two parties. It is the active judge who asks and presents evidence (collected by the Prosecutor) so the EoA may seem incompatible.

So, is EoA possible to exist only in adversarial systems and if yes, what happens with the ICC which is said to apply an inquisitorial system? What should be mentioned first is that it was not clearly accepted that the accused is in a vulnerable position, since there was little reference to national legislation, such as in the United States, Canada etc[85]. A few cases of national courts spoke of a non-symmetrical proceeding, when it comes to a criminal Prosecution[86]. And that is because there were arguments that the defense is responsible only to counter (and not prove) any charges of the Prosecutor while the latter's prerogative is to investigate, charge, prosecute and prove criminal facts beyond reasonable doubt[87].

In modern times, it is generally recognized that in a criminal trial, there is an inherent inequality between the parties, with regard to the state power, the supplies available and also the fear of the conviction, because the failure of the Prosecution has no personal impact on its team, other than the impact on the credibility on behalf of the court. However, a failed Defense can lead to the imprisonment of the accused, even if he has committed no crime (substantial truth) but he just failed in proving so (procedural truth).

So, instead of achieving an equality of arms, some experts argued[88] that the goal should be the balanced empowerment of both parties, but this opinion was criticized as too simplistic. Others[89] spoke of reciprocal and non-reciprocal procedural devices, with

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[83] *Brandstetter v. Austria*, App. Nos 1170/1984; 12876/87 & 13458/87, Judgement of 28 August 1991, par 66-67.
[84] Fedorova, M.I. (2012), p.107.
[85] Idem, p.110.
[86] *US v. Tucker*, 249 FRD 58 SDNY 2008 February 2008
[87] Fedorova, M.I. (2012), p.113.
[88] Idem.
[89] Idem, with references to Silver (1990), p.1039.

the EoA to be applied in the former; however, there are non-reciprocal advantages for the accused that need to be safeguarded, such as the prompt information or the right to legal aid.

What seems to be acknowledged is that the rights with which the accused is entitled, is to equate his position to that of the Prosecutor. The debate comes then, whether or not this empowerment or compensation (it depends on the perspective) is proportionate and relevant to the role of each party, a debate that can be the main topic of a scientific symposium.

So, having ensured or at least acknowledged that the accused is by nature in a vulnerable position, why do we bother to examine the EoA in the inquisitorial process of the ICC, for instance, since there are no two parties to contest and therefore no two sides to be treated equally? That would be sensible to ask, if the inquisitorial system was the same as it first was introduced. But in the modern era, the continental system seems to be an evolved form of its classical predecessor[90].

After the separation of the judging and the prosecuting authorities[91], the European reforms, under the influence of European Human Rights Law, gave a more adversarial character to the inquisitorial system: the presentation of evidence by two opposing sides[92]. Elements of the civil proceedings were transplanted to the criminal ones, creating a mixed system and therefore opposition[93] between the different legal schools (Anglo-Saxons and continental).

Moreover, when it comes to the case law of the ad hoc tribunals or the ICC, it becomes obvious that is no longer important whether the system is adversarial or inquisitorial or mixed but whether the goals of the tribunals are accomplished and the minimum fair trial standards are met. This is the opinion of Kai Ambos, who spoke of the need to accept the *sui generis*[94] system of the international criminal proceedings, expressing the belief that both of the systems are not preserved pure.

The lack of purity becomes obvious if we consider the following argument: both of the adversarial and inquisitorial systems are inquisitorial since the pre-trial stage begins with actions of the state (the police and the Prosecution) and both are accusatorial/adversarial since there is an active judge who decides among two versions

[90] Fedorova, M.I. (2012), p.121.
[91] France and Germany, see in Summers S. (2007), p. 31-32.
[92] Fedorova, M.I. (2012), p.122 & Summers S. (2007), p. 29.
[93] Fedorova, M.I. (2012), p.123.
[94] Ambos, K. (2003), p. 3-4 & MacCarrick, G. (2005), p.41.

of the story, the one formed by the Prosecution through the evidence and the one of the Defense. Therefore, Ambos believes that the divide has only historic reasons to be maintained in modern debates and that the procedure before the ICC has structural elements of 'both of the systems', although the beginning of the era of the international criminal proceedings was more related to the adversarial system[95].

With regard to the EoA, he distinguishes the proceedings into two parts, the pre-trial and the trial phase. In the former, where the civil law's adversarial approach is applied, the EoA is present between the Prosecutor and the Defense. The Defense team, apart from the fact that enters the proceedings in a much later stage of the pre-trial phase, there are other difficulties which create obstacles, such as the lack of resources, the poor gathering of evidence, the (almost) impossibility of the cooperation of the Defense team with States or other institutions, such as secret services[96] etc. On the other hand, in the trial phase, what seems to be imperative is that the presiding judge must have an active role, to avoid delays created by the other two parties and promote fair trial guarantees, reaching for the truth.

In this truly mixed system of international criminal proceedings, where there seems to have three parties (judge, Prosecution and Defense), the equilibrium between the two opposing sides (Prosecutor and defense) before the interventionist judge can only be the access of the Defense to the evidence of the Prosecutor. Therefore, it is time to move on to the second nature of the EoA and perhaps the most vital one, the procedural aspect of the functioning of the courts and tribunals, where all the aforementioned theoretical arguments and beliefs are set into action by the protagonists in the proceedings.

PART II

The procedural nature of EoA

Introduction

No matter how important the theoretical conversations are and how much they contribute to the evolution of the institutions, it is the practice within the courts and tribunals which show the real reflection of the implementation of theory. In the

[95] Report of the ILC on its 46th session, Draft Statute of the ICC, 2-5-1994/22-7-1994 General Assembly, 49th Session, supp. No 10, UN-Doc. A/49/10
[96] Ambos, K. (2003), p.36

following 3 Chapters, we will examine the procedural impact of EoA within the proceedings of the ICC, due to its role as the main international criminal court. References to other international criminal institutions, such as the *ad-hoc* tribunals, will be made only when there is a need to highlight a situation through their case-law.

Chapter 1

Pre – trial action and issues

Without belittling the importance of the human perspective and the interaction of EoA with other rights, when it comes to a trial, it is worth examining the proceedings that are unfold. As it is mentioned in Part I, the principle of EoA has a crucial role to each of the three stages of a criminal trial. The Pre-trial stage is the stage where all the evidence (incriminating and exonerating) is gathered and which ends with the confirmation of charges. It is, thus, the stage in which the court is supplied with the mostly available material in order the judges to decide whether or not the accused is innocent or not. From this side, it seems to be of high importance for the development of the proceedings.

In this chapter, we will deal with two debated issues: a) the investigative activities of the Prosecutor and the Defense and b) the state cooperation, as the essential element of the existence of the criminal proceedings.

1.1. Investigative activities of the Prosecutor and the Defense

The OTP of the ICC is an independent organ of the Court and, for the first time, it has been given the mandate, by an ever-growing number of States, to independently and impartially select situations for investigation where atrocity crimes are or have been committed on their territories or by their nationals[97]. Article 13(c) of the ICC Statute speaks of the three explicit ways of how the Prosecutor deals with a case: a) after a referral of a situation by a State Party[98], b) the Prosecutor *proprio motu* on the basis of information on criminal jurisdiction[99] and c) after a referral of the SC under the Chapter 7 of the Charter of the UN.

Moreover, articles 53 to 61 form the boundaries of the investigation and prosecution powers of the organs of the Court during the Pre-trial phase. The

[97] www.icc-cpi.int/about?otp (accessed in 6 January 2021).
[98] Article 14 of the ICC Statute.
[99] Idem, article 15.

Prosecutor, however, is not alone in this journey of gathering evidence and forming a case. The Pre – Trial Chamber has the role of the supervisor who, when needed, 'approves' or reviews the actions of the Prosecutor, with regard to matter of legitimacy. That happens when a warrant of arrest or a summons to appear need to be issued[100], when the Prosecutor claims of a unique investigative opportunity[101] and of course when the charges have to be confirmed[102], so as the hearing part to commence.

The Prosecutor has a dual nature[103]. On the one hand is an administrator of justice in that he investigates and prosecutes suspects of the most serious international crimes and on the other hand, due to the adversarial notion of the ICC, is a party 'against' the Defense team, both of whom narrate their point of view for the case at stake. Therefore, there has to be an equilibrium between these two notions, since the obligation of the Prosecutor is to search for the truth, thus disclosing[104] relevant evidence to the other two participants of the proceedings, the judges and the Defense.

When it comes to EoA, it is being said that the accused is in an inherently unequal position. The Prosecutor is far better of the Defense[105], due to the abundant resources and manpower, time for preparation, support by the international community and overall due to its institutionalized operation. The access of the Defense to evidence is so much restricted, even impossible, not to mention that it happens long after the Prosecution first acquired the evidence. Therefore, the Defense team has little chance of getting evidence to exonerate the accused, setting the faith upon the Prosecutor, who is obliged to provide both with incriminating and exonerating evidence. In addition, it can request from the Pre-Trial Chamber to issue an order for receiving help for the preparation of the case, according to the Article 57 (3) (d) of the ICC Statute and the Rule 116 of RPE, where it is provisioned that the Chamber may hear also to the views of the Prosecutor, enhancing therefore the link (or even the dependence) between the Defense and the Prosecutor.

To ease these differences, Article 48 (4) of the ICC Statute provides that the *counsel, experts, witnesses or any other person required to be present at the seat of the*

[100] Idem, article 58.
[101] Idem, article 56
[102] Idem, article 61.
[103] Cassese, A. (1999), p. 162 & Fedorova, M.I. (2012), p. 144.
[104] Further examination of the disclosure of evidence on Chapter 2.
[105] *Prosecutor v. Tadic* (Appeals Chamber Judgement) ICTY-94-1-A (15 July 1999) par. 38; *Prosecutor v. Milutinovic, Ojdanic and Sainovic* (Appeals Chamber, Decision on Interlocutory Appeal on Motion for additional Funds) ICTY-99-37-A73.2 (13 November 2003) par. 6; *Prosecutor v. Kayishema and Ruzindana* (Trial Chamber Judgment) ICTR 95-1-T (21 May 1999) par. 56 at p.29.

Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court. But this provision in practice is not enough. Access of private lawyers who search for truth and may interfere with internal affairs, divulging the secrets of state or other problematic operations, are not welcome in tangled situations. The current framework, however, is an evolution from these in ICTY and ICTR, with the Defense team even arguing that the state police forces were used by Prosecution to direct their action, due to his coercion[106].

Another problematic aspect of the EoA is the numerical differences and the experience gap caused by this institutionalized operation of the Court. The stable and long-term presence of staff members in the OTP succeeds in a continuity in the criminal proceedings, and thus accumulated experience[107]. On the other hand, and as it will be examined in Part III, legal aid is an occasional selection of lawyers who are called to defend an accused, even for the first time in international proceedings.

This limited access to evidence puts the Defense at a substantial disadvantage vis-à-vis the Prosecution. However, due to the fact that the evidence exist within the territorial jurisdiction of states (member of the ICC statute or not), in conjunction with the prevalent presence of state power all over the operations of the ICC (such as the complementarity of the ICC to the domestic criminal proceedings, the request of States for the initiation of investigations by a referral to the Prosecutor, the influence of State's behavior with regard to the admissibility of a case as much as the influence of the operation of the Court through the Assembly of States etc) raise the factor of state cooperation to a level of high importance.

1.2. State Cooperation

Despite the universality of the UN and agreement of states to fight impunity and atrocities[108], it seems that there is a lack of political will to bring criminals to justice. The courts and tribunals are transformed into political arenas, where different political

[106] *Prosecutor v. Gotovina et al.,* Decision on Gotovina Defense Appeal Against 12 March 2010 Decision on Request for Permanent Restraining Orders directed to the Republic of Croatia, IT-06-90-AR73.5, 14 February 2011, par. 49 [Gotovina Defense Immunity Appeals Decision]; *Bagosora et al v. Prosecutor*, Decision on Aloys Ntabakuze's Motion for Injunctions against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, ICTR-98-41-A, A. Ch., 6 October 2010, par. 1-4 [Bagosora et al. Defense Immunity Appeals Decision].
[107] Dr. Bengusu, O. (2019), p.62.
[108] Triffterer, O. & Ambos, K. (2015), p. XVI

(alongside with social, religious etc) currents may clash. The reality, however, shows that the territorial integrity and political safety worth more than taking steps to fight calamities or malevolent people, who want to commit crimes of great scale, maybe with the excuse that there will be always be wars and that not one person can save the world; points of view that reflect the downfall of human race, with regard to solidarity and human rights.

Therefore, states, which are an important indirect player throughout the proceedings, have two ways of participating, the political and the legal cooperation[109]. On the one hand, states are the players in the global chessboard and participate in international politics. This political position gives them the power to (or even not to) recognize and stigmatize criminals and support (morally, financially and materially) any efforts which deal with criminal justice, among other domains. On the other hand, the legal cooperation is seen through assistance with regard to the transfer or surrender of the accused, investigations and production of the evidence and enforcement of sentences. Of this tripartite contribution, we will examine the second notion, that of the contribution to the investigation and evidence, since this notion is influenced by the EoA.

Between the ICC and its ancestors, we notice that there is a different framework with regard to the responsibilities of states - members for cooperation. For instance, article 29 of the ICTY Statute and article 28 of the ICTR Statute provide *ipsis litteris* that the States shall cooperate with the Tribunals in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law, referring (not exhaustively) to some requests with which they should comply without undue delay (such as taking testimonies, arrest or detention of suspects etc). On the contrary, the regime in ICC creates a general obligation for States to cooperate, states which are members to the Rome Statute. The ICC does not have the coercive power of the ad hoc tribunals which were set through the provisions of Chapter VII of the Charter of the UN.

What is more, article 98(2) of the Rome Statute provides that there cannot be a request by the Court for cooperation if the Member State, by accepting the request, would infringe international obligations with regard to diplomatic immunities law or international agreements with other States. Fortunately, both in ICTY/ICTR and ICC

[109] Sluiter, G. (2002), p. 6.

there is a provision where there can be a report to SC, when a State fails to comply with a request to cooperate[110]. Case law of the ICTY and ICTR[111] has shown that the request for cooperation must be specific (specification of the required material, documents, information), relevant and necessary for a fair determination of the matter at stake (no 'fishing' expeditions are allowed[112]) while a similar (more detailed) provision is included in article 96(2) of the Rome Statute[113].

With regard to the EoA, both parties[114] can request from the Pre-Trial chamber to issue an order for a state to cooperate. Through the case law[115], the chambers approach the request to a state in the name of the Court on behalf of a party, only when a certain threshold is met and only as a last resort. Both Prosecution and Defense should take steps in approaching the authorities of the state, in which jurisdiction the evidence and information belong, before applying for a request from the Chamber (or the Registry in advance)[116].

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[110] Rule 7*bis* ICTY/ICTR RPE, see e.g. *Prosecutor v. Blaškić*, Appeals Chamber Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14, 29 October 1997, par. 33 & Prosecutor v. Tadić, Appeals Chamber Judgement, IT-94-1-A, 15 July 1999, par. 51. Within regard to the ICC, Article 87 (5) and (7) of the Rome Statute, see also e.g. *Prosecutor v. Hurun* ("Ahmad Hurun") *and Abd-Al-Rahman* ("Ali Kushayb"), the Trial Chamber Decision on Public Document Informing the United National Security Council about the lack of cooperation by the Republic of Sudan, Situation in Darfur, Sudan, in the case of the ICC-02/05-01/07, 25 May 2010, par.52.

[111] Rule 54bis ICTY, see e.g. *Prosecutor v. Blaškić*, Appeals Chamber Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, IT-95-14, 29 October 1997, par. 32; *Prosecutor v. Bagosora et al.*, Request of Trial Chamber to the government of United States of America for cooperation, ICTR-98-41-T, 10 July 2002; *Prosecutor v. Nahimana et al.*, Trial Chamber Decision on the motion to stay the proceedings in the trial of Ferdinand Nahimana, ICTR-99-52-T, 5 June 2003, par. 11; *Prosecutor v. Bagosora et al.*, Trial Chamber's Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, ICTR-98-41-T, 10 March 2004, par. 4; *Prosecutor v. Bagosora et al.*, Trial Chamber Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, ICTR-98-41-T, 31 October 2005, par. 2.

[112] *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.

[113] See also the interaction with the Rule 116 RPE in ICC. In cases, *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Defense's Application pursuant to Article 57(3)(b) of the Statute to Seek Cooperation of the Democratic Republic of Congo (DRC), ICC-01/04-01/07-444, 25 April 2008 [Katanga and Ngudjolo Chui Decision on Article 57(3)(b) request]. It is worth examining the dissenting opinion of Judge Anita Usaka (par.5).

[114] Article 57 of the Rome Statute

[115] *Prosecutor v. Simba*, Decision on Matters Related to Witness KDD's Judicial Dossier, ICTR- 01-76-T, 1 November 2004, par.3; Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on the Defense Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan, ICC-02/05-03/09-95, 17 November 2010, par.15-17.

[116] IBA Report on the Fairness at the ICC, 2011 p.40.

One thing that is concluded is that the weakened position of the Defense reflects on the power of access to evidence in comparison with the Prosecution, creating therefore another debated topic: is each party obliged to disclose evidence to the other party and what impact has this on EoA? This is the subject of the following chapter, in which we will examine the process where the two parties help each other for the presentation of the case.

Chapter 2

Disclosure of Evidence

International criminal courts and tribunals deal with very serious crimes, therefore their decisions must be – more than ever – legitimate and just. The decisions are based on evidence that is gathered by the two parties, each of which try to present their point of view in order to remove (the Prosecution) or to create (the Defense) reasonable doubt. Due to the complexity and the seriousness of the crimes, the process of gathering evidence is very difficult in conjunction with the obstacles presented in the previous chapter. What is left is that both of the parties, which acknowledge the difficulties, can help each other by divulging material and evidence that has in its possession, so as to help the judge reach for a judgement by which the accused will either be found guilty or not. This outcome, which in practice affects only the accused (besides the general belief upon justice), leads us to examine the topic of disclosure of evidence with a point of view which is a little in favor of the accused, without however omitting referring to obligations of the accused and legal provisions which support and enhance the investigative role of the Prosecution.

2.1. Obligations of the Prosecution

Due to the fact that one of the two natures of the Prosecutor is to promote judicial legitimacy and reach for the truth, he has a general obligation to disclose all possible evidence to the Defense. The latter enjoys the right to a fair trial, which at most encompasses the best possible preparation for the case and the ability for preparation depends on the access on the necessary information against the accused. Without this access, there is a violation of EoA.

On the contrary with the ad hoc tribunals, where the Prosecution shall disclose to the Defense all the supporting material (rules 66 - 70 of the ICTY/ICTR RPE

provided for exceptions) accompanying the indictment during the Pre-trial stage[117] or facilitate the Defense to inspect documents and information on the possession of the Prosecution[118], the regime in ICC is different, since the relevant rules separate the process into two phases: the phase before the confirmation of charges and the phase during the Pre-trial stage.

2.1.1. Pre - Confirmation phase

One of the most vital articles of the ICC Statute is article 61. This article speaks of the confirmation of charges, an innovative and unique process which sets a big threshold before the trial. In this process, the Pre-trial Chamber holds a hearing in order to assess whether the Prosecution has provided enough proof to establish substantial grounds that the accused should be tried[119]. As a new institution, there are disadvantages in its operation, however the confirmation process, at its ideal form, creates one more layer of protection of the accused.

Before the hearing, article 61(3) states that *within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.* Relevant to this article is the Rule 121(3) of the RPE of the ICC which states that t*he Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days[120] before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.* The Pre-trial Chamber plays a substantial role since it is the in-between link of the two parties (it takes measures for witnesses and victims, too[121]) and for that

[117] *Prosecutor v. Krajišnik and Plavšić*, Trial Chamber's Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65, 66(B) and 67(C), IT-00-39 & IT-00-40/1, 1 August 2001; *Prosecutor v. Casimir Bizimungu et al.,* Trial Chamber's Decision on Jerome Clement Bicamumpaka's motion requesting recall of prosecution witness GFA; disclosure of exculpatory material; and to meet with witness GFA, ICTR-99-50-T, 21 Apr 2008, par.12-13; see also Liakopoulos, D. (2019) at footnote 73.

[118] Rule 66(A) and (B)ICTY,ICTR and SCSL RPE

[119] The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project October 2015, American University, Washington, College of Law.

[120] (Note of the author) When it comes to amended charges, this obligation is reduced to 15 days [Rule 121(4) of RPE].

[121] Article 57(3)(c) of the ICC Statute.

reason *all evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber*[122].

What becomes obvious is that in this Pre-hearing phase, there is not a guideline for which evidence should be disclosed. There is not an obligation for the Prosecution to present all incriminating proof which will be used in the hearings[123], since the obligation is limited only on the evidence on which the Prosecutor will *rely* (to support the charges) during the hearing.

2.1.2 Pre – Trial Stage

In this stage, the Prosecution's obligations are separated into three categories: the disclosure of exculpatory evidence, the disclosure *stricto sensu*[124] and the facilitation of the inspection by the Defense[125]. All of them interact with the EoA, since they are three ways for the Defense to be 'compensated' due to the less powerful position of their party but the one that applies directly to the principle is the disclosure of exculpatory evidence.

Exculpatory evidence is considered, in article 67(2) of the Statute, *evidence in the Prosecutor's possession or control which he 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* and *in case of doubt as to the application of this paragraph, the Court shall decide*.

From the wording used, it seems that article 67(2) is more of right of the accused than an obligation of the Prosecution. No matter what it is, as soon as the evidence is in possession or under the control of the Prosecution with his belief about the exculpatory nature of it, he needs to provide the accused with these evidence. With regard to the moment of the disclosure, the Statute refers to 'as soon as practicable[126]', with the case law stating that that set timing depends on the moment when the Prosecution identifies

[122] Rule 121(2)(c) of the RPE.
[123] Dr. Bengusu, O. (2019), p.81.
[124] Rule 76 of the RPE (& Rule 112 which deals with the process of recording of questioning); *Prosecutor v. Lubanga Dyilo*, Pre-trial Chamber's Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006, par.93-106.
[125] Rule 77 of the RPE; Prosecutor v. Lubanga Dyilo, Trial Chamber's Decision on the scope of the prosecution's disclosure obligations as regards Defense witnesses, ICC-01/04-01/06-2624, 12 November 2010, par.10.
[126] Any delaying behavior of the Prosecutor to identify the practicability could be regarded as a misconduct and thus the Defense or the court itself could invoke article 71 to impose sanctions on the Prosecutor.

this practicability[127], revealing a debated topic about the time of completion of the investigations.

However, the case law of the ICC itself has differentiations. While in *Prosecutor v. Lubanga* case, the judges found satisfying that the Prosecutor had disclosed the 'bulk of the exculpatory evidence'[128] (therefore, allowing Prosecutor to continue investigations after the confirmation of charges), in the *Mbarushimana* case the judges changed the mentality of the Chamber and turned to a totality rule for the disclosure of all the potentially exonerating evidence and evidence which is material to the preparation of the Defense[129], pushing the Prosecution claiming that a inequality is created at the expense of the Prosecution.

2.2. Obligations of the Defense

Due to the adversarial nature of the trial and the fact that the EoA is a principle that applies to both parties, the Defense has also obligations with regard to the disclosure of evidence, according to three Rules of RPE. Prior to the confirmation hearing, the Defense has no obligations; instead the accused has one possibility. According to article 61(6) of the ICC Statute, the person may present evidence, challenging the evidence presented by the Prosecutor. The relevant Rule is Rule 121(6) which states:

> If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay. The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.

However, the practice has shown that it is better for the Defense to "keep its arms" for the stage after the confirmation of charges. In the *Prosecutor v. Thomas Lubanga Dyilo* case, the Defense team presented two witness statements as evidence, invoking article 61(6), but realized that it was a mistake and tried to withdraw the

[127] *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber's Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006, par.132.
[128] *Prosecutor v. Lubanga Dyilo*, Pre-trial Chamber's Decision on the Confirmation of Charges, ICC-01/04-01/06-803-EN, 29 January 2007, par. 154.
[129] *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber's Decision on issues relating to disclosure, ICC-01/04-01/10-87, PTC I, 30 March 2011, par. 5 and 10.

statements, without success, since *each item subject to such a process is part of the record of the case*[130].

Two other Rules that supplement the regime of the Defense's obligation to disclose evidence are Rules 78 and 79 of the RPE.

The former Rule envisages that *the Defense shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the Defense, which are intended for use by the Defense as evidence for the purposes of the confirmation hearing or at trial*. This passage, mirroring the content of rule 77 of the RPE, does not extend to the witness statements that the Defense intents to present at the confirmation hearing. However, according to Rule 122(1) of the RPE, the Defense must file the original statements of such witnesses, along with electronic copies, in the record of the case before the start of the confirmation hearing, extending thus the Rule 78 to the witness statements[131].

The latter Rule sets the disclosure obligation with regard to the alibi of the accused [Rule 79(1)(a)] or lack of his criminal responsibility [Rule 79(1)(b)]. Alibi stands for any information (established by witnesses or any other evidence) which shows that the accused was not at the place and time of the alleged crime. The frame for lack of criminal responsibility of the accused is set in article 31(1) of the Statute and includes insanity, intoxication, proportionate Defense against an imminent and unlawful use of force and threat of imminent death or bodily harm.

The obligations set for the Defense have been criticized in a way that the arms of the accused are disclosed to the Prosecutor and thus the position of the Defense is in disadvantage. This is the point of view of the Defense, because early disclosure of the evidence means disclosing evidence prior to fully knowing the case the accused has to answer to, violating the EoA by empowering the Prosecutor and weakening the Defense. However, we should keep in mind that the principle of EoA is not an absolute 'right' of the accused and only of his. The equality requires two sides to be treated equally, giving the right to the Prosecution to demand equal treatment. That is why obligations of the Defense are accepted since they are regarded to ensure the fairness and efficiency of the proceedings.

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[130] *Prosecutor v. Lubanga Dyilo*, Pre-trial Chamber's Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006 par.72 – 76.
[131] Idem, par.43, 134 – 136.

2.3. Restrictions and Redactions

However, it isn't only the proceedings that are to be ensured but also the interests of other participants, such as victims and witnesses, especially with the evolved participation of the former in the ICC proceedings.

The legal basis for restrictions on disclosure and the application of redactions is provided by Rules 81 and 82 of the RPE. These Rules includes numerous situations, where disclosure seems to be not the best option, due to balancing interests. Some of these situations are production of information through internal work; cases when witnesses and (by analogy[132]) other information providers[133] are to be protected in order to provide the court with evidence; when material or information are obtained through the establishment of confidential agreements[134]; when it is national security information that needs to be protected[135]etc.

The redaction regime is a manufactured, by Chambers of the Court, process where any redactions need to be justified and authorized individually under the provisions of the Statute[136], in order to avoid any delay of the commence of the trial. The redaction protocol is annexed (on a case by case basis[137]) to the decision of the Court, where general principles and details are included to elaborate the redaction regime which will be applied to the case.

The Court follows a three-step test[138] in assessing any Rule 81(2) or rule 81(4) request: (i) whether the disclosure of the information in question to the Defense (as opposed to disclosing the information to the general public) would pose an objectively justifiable risk to the protected person (or interest); (ii) whether the protective measure is necessary, including whether there it is the least intrusive measure necessary to

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[132] *The Prosecutor v. Germain Katanga*, Appeals Chamber's Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorization to Redact Witness Statements", ICC-01/04-01/07 (OA), 13 May 2008, par. 55-59, 67 and 71.

[133] And the members of their families, according to the Rule 81(4).

[134] If the provider of the information consents, the disclosure is allowed according to Rule 82(1).

[135] Article 72 of the ICC Statute.

[136] See e.g. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber's Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11 {'Ruto Redaction Decision'), par. 9; *The Prosecutor v. Germain Katanga*, Appeals Chamber's Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorization to Redact Witness Statements", ICC-01/04-01/07 (OA), 13 May 2008, par. 70.

[137] Latest (accessed in 5 Jan 2021) case law ICC Decision on the Prosecutor's Request for postponement of the Confirmation Hearing and related deadlines, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), par. 34; See also Chaitidou, E. (2019).

[138] Triffterer, O. & Ambos, K. (2015), p. 1509-1510.

protect the person (or interest) concerned; and (iii) whether any such measure is proportionate in view of the prejudice caused to the suspect and a fair and impartial trial'. The redaction process is conducted on an ex parte basis[139].

Due to their nature and their impact on the ability of the Defense to prepare for the case, restrictions and redactions should be exceptional and limited, or else the Defense is deprived of a full disclosure, which is a prerequisite to an effective and efficient preparation. No matter who participates in the proceedings (witnesses, victims etc), as article 68(1) dictates to the Prosecutor that the measures taken to protect those categories *shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*, it is the accused who is at stake. EoA obliges the Chamber to interpret the rules and provisions on a case by case basis in order to support, or at least not to be detrimental against, the evidentiary rights of the accused[140].

Chapter 3

EoA and examination of witnesses

What becomes apparent so far, is that each trial is a balance of interests and factors with the ultimate goal for the accused not to be in a disadvantageous position. Deliverance of justice, quick suppression of public unrest, political debates, reparations for the victims, conviction of the criminals and security of human rights are some of the variables in the equation the (criminal) judge is called to solve. In this chapter, we will take a small glimpse of two issues which surround the person(s) in the spotlight, during the trial stage, and which have a strong interaction with EoA: the examination of the witnesses and the impact of it on the expeditiousness of the trial. The former appoints the heart of the trial stage, where 'alive' evidence is examined while the latter highlights the fragile equilibrium between the rights of the accused and the development of the proceedings.

3.1. Direct and cross-examination

During the Trial stage, the voice of the accused is heard. If the process has been equally deployed, the Defense team has fearlessly and efficiently analyzed the indictment, examined the supporting material, pinpointed the legal and factual issues and gathered

[139] Rule 81(2) of the RPE
[140] Dr. Bengusu, O. (2019), p.111-112.

evidence. Therefore, they have now a theory of the case, which they have to support through further examination of evidence and mostly of witnesses. Article 67(1)(e) of the Rome Statute entitles the accused with the right to examine witnesses on his behalf and against him.

There are two main processes of examining the witnesses: direct examination and cross-examination. The difference between the two phases is on the link between the questioner and the responder. Direct examination[141] (or examination-in-chief) is the phase where the party questions its own witnesses while cross-examination is the phase where either party questions the other party's witnesses[142]. Regulation No.54 of the Regulations of the ICC provides that the Trial Chamber can issues numerous orders, with regard to the mode and order of the examination of witnesses (and generally the presentation of evidence). What is important, and here attaches the EoA, is that all measures taken must be proportionate to both parties and not detrimental to the accused, who is (by definition) in a less 'abundant', with regard to evidence and resources, position.

The preparation of the defense does not include only access to evidence and resources. The Defense team should prepare a plan, so as to make the examination much easier and help the judge understand their arguments. Despite the fact that the Prosecutor has the onus of proof, the Defense team is also responsible to prove their case. During the direct examination, each party should ask simple questions so as to elaborate the reason and the utility of the witness' presence in the proceedings. A successful direct examination leaves no room for a cross-examination, since all matters would have been settled.

However, after one party has finished examining its witness, the other party has the right to cross-examine the same witness. The role of the cross examination is to counter the evidence presented by the other party. This type of examination is the opposite of the dossier approach of a pure inquisitorial system[143] approach[144]. There are two forms of cross-examination: the constructive and the destructive. While the former uses the witness as a means to elicit new facts and meanings, the latter one focuses on

[141] The cross-examination is considered a cornerstone for the common law trial model, sometimes even called '*the greatest legal engine ever invented for the discovery of truth*', see Wigmore, J. - H. (1940). § 1367.
[142] Dr. Bengusu, O. (2019), p.156-158.
[143] See Part I.
[144] *Prosecutor v. Kardic et al.*, Trial Chamber's Decision on the Prosecution application to admit the Tulica Report and Dossier into Evidence, ICTY-91-14/2-T, 29 July 1999, par.23.

decomposing the opponent's arguments and create doubt (especially this is the cause of Defense against allegations). The whole process must be deployed with professionalism and ethics, despite any antagonistic or gentle flavor of the examiner. Questions have to be targeted in order to promote the plan of each party.

New issues can be introduced to cross-examination, without being limited by the issued discussed in direct examination. However, if new material arises, the party which had introduced the witness and first examined him during direct examination, has the right to re-direct examine him, so as to clarify facts. Moreover, the party that introduces a witness can declare him as hostile (or adverse)[145], if the latter is unwilling or unsympathetic or generally does not support the case by not providing the expected testimony. The calling party may ask this type of witness's leading questions, including questions pertaining to the witness's credibility. When the calling party has finished its examination, the opposing party may conduct its cross-examination[146].

3.2. Witnesses and expeditiousness of the proceedings

Despite the overall important contribution of the witnesses' examination, the whole process can be time consuming. Without the proper management of time (not only by the Trial Chamber but also by both of the parties), further delays can happen at the expense of the fairness of the trials[147]. It is a difficult equation to solve, since if there are restrictions in the presentation of witnesses and evidence overall by refusing additional information to be presented, then there is the possibility of the Appeal Chamber[148] to overthrow a decision of the Trial Chamber. Therefore the proceedings would be prolonged, through a re-trial before a different Trial Chamber[149], causing repercussions to the cost and to the credibility of the Court, since delay in the

[145] Maliti, T. (2015), see also *Prosecutor v. Bosco Ntaganda*, Trial Chamber's Decision on the conduct of proceedings, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, 2 June 2015, par.47.
[146] *Prosecutor v. Bosco Ntaganda*, Trial Chamber's Decision on the conduct of proceedings, Situation in the Democratic Republic of the Congo, ICC-01/04-02/06, 2 June 2015, par.21.
[147] *Prosecutor v. Milosevic*, Trial Chamber's Decision on Two Prosecution Requests for Certification of Appeal against Decision of the Trial Chamber, ICTY-02-54-T, 6 May 2003; *Prosecutor v. Jean Pierre Bemba Gombo*, Trial Chamber's *Public* with regard to the Prosecution's Request for Leave to Appeal the Trial Chamber's Oral Ruling Denying Authorization to Add and Disclose Additional Evidence after 30 November 2009, ICC-01/05-01/08, 14 December 2009, par. 20.
[148] Articles 81-85 of the ICC Statute
[149] *Prosecutor v. Jean Pierre Bemba Gombo*, Trial Chamber's *Public* with regard to the Prosecution's Request for Leave to Appeal the Trial Chamber's Oral Ruling Denying Authorization to Add and Disclose Additional Evidence after 30 November 2009, ICC-01/05-01/08, 14 December 2009, par. 30.

administration of justice diminishes the credibility of the responsible judicial body and the judicial system overall.

Moreover, in order for an issue to affect the fair and expeditious conduct of the proceedings, the case law of the ICC states that it must be actual and significant and not have a hypothetical impact or have a minor/inconsequential effect[150]. So it depends on the capabilities of the Chamber to handle the requests of the parties, with regard to the witnesses.

As mentioned before, expeditiousness is one of the crucial elements of a trial, as it attaches to the fairness of the proceedings. EoA has a strong interaction with the factor of time as presented in Part III, where the impact of the participation of victims on the right of the accused to prepare his case is examined. The accused is the person around whom the proceedings develop. 'Justice' and 'fairness' compel judicial systems to operate with the (theoretically accepted) mentality that the conviction of an innocent is a greater harm than the release of a guilty person[151]. This person's preparation is the ultimate goal, so as the two parties to be presented equally in front of an impartial judge, in the search of the truth. These are the 'arms' at the disposal of the parties and the proceedings seem to demand specialized knowledge. The accused can attend the proceedings in person or through legal assistance[152], with the latter being the ideal concept of transition to the examination of the material nature of EoA.

PART III: The material nature of EoA

Chapter 1

The regime of legal aid[153]

But how justice could be served if the accused could not afford to pay for the legal representation? The, by default, discrepancies between the resources and facilities of the Prosecution and those of the Defense have always been a reason to express the disagreement of the former's superiority. Many courts, domestic and international ones,

[150] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber's Decision on the Prosecution's Application for leave to Appeal Oral Rulings on Clarifying Inconsistencies in prior Statements and Partial Hostility, ICC-01/04-01/07-1958, 11 March 2010, par. 20-23.
[151] Fedorova, M.I. (2012), p.82 (footnotes 71-72).
[152] Art 67(1)(d) of the ICC Statute and Rule 21 of the RPE.
[153] See also IHL Database research on rule 100 of customary international humanitarian law (element of which rule is free legal representation).

have taken measures to minimize that inequality. Articles[154] of treaties and statutes that are infused with the right of access to justice show that a fundamental requirement in the protection of an individuals' access to justice is the provision of legal aid to those considered to be indigent and thus, unable to afford assistance in their Defense before the Court. Although accused persons are equipped (at least it is provisioned) with the enjoyment of the fair trial provisions without discrimination on the basis of property, indigent accused are placed at a disadvantage vis-a-vis accused who have sufficient means to retain counsel privately[155].

However, it is not unanimously accepted that the tribunals should provide assistance to the accused without assessing criteria and that the rights of the accused should in no way be interpreted to mean that the Defense is entitled to the same means and resources as available to the Prosecution[156]. That decision of the ICTR in *Kayishema and Ruzindana* case is completely contrary to the concept of EoA. It may refer to the non-existent relationship between the EoA and the financial resources (issues about the latter will be addressed in the next chapter) but it depicts that whenever the factor of budget is at stake, rights of the Defense are fragile.

1.1. Assessment criteria of indigence

Assistance means providing means like manpower and assets that affect the finite budget of the Court, thus the budget reflects the ability and capacity of the judicial body to provide the accused with aid for his Defense. So, it is vital to set some criteria, in order to create an equilibrium between the viable operation of the Court and the fulfillment of the parties' rights.

The criteria which are set out in the international law system (usually the nation states automatically assign legal aid to the accused[157]) refer to the ability or not of the accused to pay, by own means, the Defense counsel that will be the representor to the proceedings. If the accused does not have such means, he will be deemed 'indigent' and will be eligible for legal aid. But what is precarious is that setting out limitations may affect the access to justice, therefore violating the equality of arms.

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[154] Article 6 of ECHR, article 14 of ICCPR: see also articles 20(4)(b) ICTR Statute, 17(4)(b) SCSL Statute, 67(1)(b) ICC Statute, 14(3)(b) ICCPR, 6(3)(a) ECHR and 8(2)(b) ACHR.
[155] Cassese, A. (2008), p.492.
[156] *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, ICTR 95-1-T, 21 May 1999, par.20.
[157] Dr. Bengusu, O. (2019), p.120.

The onus of proof of indigence is placed upon the accused to show that he has insufficient means and therefore he should be deemed indigent before the court. But the criteria about indigence seem to be slightly different between the courts and tribunals.

- In the ECtHR, the applicant of legal aid is required to complete a form of declaration stating their income, capital assets and any financial commitments in respect of dependents or any other financial obligations.[158]
- In the ICTY, the applicants are required to provide information on their own financial assets, such as income, bank accounts, real and personal property and the assets of the spouse or any other person with whom they habitually reside[159]. It is remarkable that in 2002 an Investigation Office was established in order to help the Court by inquiring into the applicant's means and assets and subsequently informing the Registry, in order the latter to come to a conclusion as to the declaration of the applicant as indigent or not.
- The ICTR and SCSL have a similar policy with the ICTY. An applicant will be deemed indigent if he has insufficient means to pay for his Defense, taking into account movable or immovable property, assets with direct or indirect enjoyment as well as the assets of the spouse or any other person with whom they habitually reside.
- Similar to its own "predecessors", the ICC has its own investigation mechanism. The DSS of the Registry conducts an investigation and gather information about the financial assets and income of the applicant (monthly disposable means and obligations to dependents). After the investigation, the DSS presents the findings to the Registry with the latter to come to a conclusion within 30 days[160].

Do these criteria pose a threat on the equality of arms? The answer would be yes, if the system could be regarded as prejudiced. But these limitations to one extent safeguard the rights of the accused. It is not uncommon for abuses of the provisions of the courts and tribunals. In the case of *Bemba Gombo*, the accused didn't disclose on a full report his assets and income and he was wrongly (unofficially) granted full legal aid. After an additional financial investigation, it was revealed that the accused had intentionally covered up his properties. The pre-trial chamber ordered the Registry to

[158] Rule 107 (former rule 102) of the Rules of Court of ECtHR.
[159] See also Remuneration Policy for Persons Representing Indigent Accused in Trial Proceedings before the International Residual Mechanism for Criminal Tribunals adopted in 2016 and revised in 2019 (the amounts of money were readjusted in 31 December 2020).
[160] ICC Interim Report on Different Legal Aid Mechanisms before International Jurisdictions, ICC-ASP/7/12, 19 August 2008, released in the 7th session of 14-22 November 2008, par.14.

work with Portuguese officials (they had presented details about Bemba's assets after a request of the court) to establish a monthly payment from Bemba's frozen bank account to pay defense costs and support his family[161], thus correcting the wrong decision.

Therefore, taking into account that the budget is limited, it is important to ensure that legal aid is provided only to genuinely indigent people. Otherwise, there is a possibility that another (genuinely indigenous) applicant may be denied or disadvantaged.

1.1.1. Partial indigence

For the advantage of the accused and with regard to the budgetary capacity, the ICTY created a new system of legal aid, the declaration of the accused as partial indigent. This means that if the Registry finds that the accused is able to pay part of his Defense costs, it will indicate which costs should be covered by the accused and which ones by the tribunal, assuring that these costs will not exhaust the household's financial means.

The partial legal aid mechanism was invented in 2001[162] during the *Prosecutor v. Delalic* case[163]. No provisions about partial indigence were made in the ICTY Directive's initial entry into force. During the trial, it became obvious that the accused (who was considered at the beginning of the trial as non-indigent) didn't have the means to be consistent with his obligation to pay for the defense costs. This problem was solved with an amendment to the Directive on the Assignment of Defense Counsel (No.1/94)[164] and the partial legal aid was a reality to the judicial system.

1.1.2. Re – evaluation of indigence

But what is presently unclear (in full indigence as well) is what the court will decide upon the possibility of a negative development in the assets of the accused. For instance, should the accused be considered not indigent and kept paying with his own means the

[161] *Prosecutor v. Jean Pierre Bemba Gombo*, Pre-Trial Chamber's Public Document on Registrar's Decision on the Application for Legal Assistance Paid by the Court Filed by Mr. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 25 Aug 2008.
[162] In ICC, the provision is stated in regulation 84 of the Court.
[163] Dr. Bengusu, O. (2019), p. 124.
[164] https://www.icty.org/en/content/legal-aid-faqs, see also articles 6 and 12 of the Directive on the Assignment of Defense Counsel (No.1/94) as it is amended in 29 June 2006. In addition, it is worth examining the different remuneration policies of IRMCT in https://www.irmct.org/en/Defense-counsel-qualifications, in the section Legal Aid Policies (accessed in 10 January 2021)

Defense costs, what if the proceedings lasted longer resulting in the inability of the accused to pay? Indigence determination is made in a pre-trial calculation, almost ignoring a possibility of change of the situation[165].

One solution could be that the court should stop the proceedings and re-evaluate the financial condition of the accused. But such a halt could affect the expeditiousness of the trial, violating the right for a trial without undue delay. And a *post hoc* declaration of the accused as indigent what could mean for the funds already paid? Could a compensation be given to counter the expenses? Such provisions are not yet to be found[166].

1.2 Appointment of the Defense Counsel

After the declaration of the accused as indigent, a Defense counsel is assigned to the case, on behalf of the accused. Basically, the counsel is the team of experts who will use the 'arms' of the accused[167]. So, it is utmost important for the accused to be represented by a counsel which is efficient and its quality meets the standards of the international criminal proceedings. Otherwise, the arms of the accused would be 'blank', widening the gap of the inequality with the Prosecutor.

1.2.1 Criteria for the assessment and allocation of the Counsel

Despite the fact that in tribunals, such as SCSL and ECCC[168], there were created Defense offices[169], this solution was rejected for the ICC. The current system in the ICC is the one where private practitioners are appointed for indigent accused persons that come before the court. The Registry provides a number of services to support the work of Defense teams, including facilitating the protection of confidentiality, providing support during the investigations activities conducted in the field, assisting arrested persons, persons interviewed by the Prosecution and the accused to obtain legal advice and the assistance of legal counsel. The Court also facilitates the necessary facilities for the Defense teams to prepare for cases, and other logistical support. Within the Court, Defense teams can also benefit from assistance of the OPCD. The OPCD, established

[165] Dr. Bengusu, O. (2019), p. 125.
[166] Idem, p.126.
[167] Idem, p.127.
[168] Report of States Parties on options for ensuring adequate defense counsel for accused persons, ICC-ASP/3/16, 17 August 2004
[169] Fedorova, M.I. (2012), p. 344-347.

by Regulation of the Court 77, is an independent office and falls within the Registry solely for administrative purposes.[170]

This independence is a prerequisite for carrying out the mandate to substantively assist the teams with legal research and advice and advance submissions on behalf of unrepresented suspects or on specific issues. Such independence allows the Office to work without being subjected to pressure of any kind and preserves attorney-client privilege.

The current allocation system is the listed one. It would be against the interests of the accused and those of justice if the Court would be open to any lawyer around the globe, to take part in trials where the most ferocious crimes fall within the jurisdiction. Usually the Registry bears the burden of the drawing up of the list[171]. The defense counsel can also be consisted of experts out of the pre-determined list, but they must have the same qualifications as those eligible to be placed in the list. Non-indigent people can appoint their own counsel which, under any circumstances, meet the criteria set by the court for the Defense counsel.

The constant amendment of the qualifications shows that the tribunals take into consideration of the impact of the need for efficiency of the counsel on the rights of the accused. This efficiency can be achieved through the establishment of high standards with regard to the conduct or the experience of the 'listed ones'.

- For the ad hoc tribunals as well as the Mechanism itself, the qualifications are set in the Directive on the Assignment of Defense Council[172]. The nominees must possess competence in the noted areas of the law, have at least seven years legal experience and must not be found guilty in any criminal proceedings or being sanctioned for a breach of his professional code of conduct by a national or international bar association.

- For the ICC, according to Regulation 83(1) of the Regulations of the Court, the Registry should have a list for the qualified Defense counsels who are willing to be assigned and another list also for legal assistants and investigators[173]. The criteria are set in Regulation 67 which refers to Rule 22 of the Rules of Procedure and Evidence, where experience and no conviction record are included[174].

[170] https://www.icc-cpi.int/about/Defense
[171] Article 21 of ICC RPE, article 45 of ICTR RPE; On the Contrary in ECCC bestows this duty on DSS.
[172] Directive on the Assignment of Defense Counsel, IRMCT/5, 14 November 2012.
[173] See also Regulations 122 kai 124 of the ICC Registry.
[174] Dr. Bengusu, O. (2019), p. 128.

Setting criteria is in favor of the accused since they are to strengthen his rights and facilitate the judicial work. It is not adequate for the Court just to offer (fully or partially free of charge) a legal advisor along with assistants, investigators and the administrative staff. What is needed is that the Defense Counsel is ensured to work efficiently and capably on behalf of the accused and the major developments in the years of the tribunals and courts' operation show that adding an increase to the qualifications needed, create a clearer path for qualitative proceedings.

1.2.2. Has the accused any opinion on his Counsel?

There is a saying where whoever cannot pay cannot choose and a similar situation is applied in the international criminal proceedings. The accused has a choice but a limited one and it depends on the court to meet slight differences[175].

- In the ICTY, the non-indigent individuals can choose freely whomever wants to work for the fees paid by the court while the indigent ones are obliged to choose from the list set by the court[176].
- Both in ICTY and ICTR, the indigent individuals choose three counselors from the list and the Registry has the final say in the allocation. This is considered to be a risk, since the Registry is a part of the Court, therefore the decision may not be impartial.
- In ICC, the person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list[177].

So, what if the accused is not satisfied with the counsel and thinks that his interests are not represented? The ICC and the ICTR[178] have a provision where "Under exceptional circumstances, at the request of the suspect or accused or his counsel, the chamber may instruct the Registry to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the

[175] Dr. Bengusu, O. (2019), p. 131-132.
[176] *Prosecutor v. Prlic et al.*, Appeals Chamber's Decision on Appeal by Bruno Stojic against Trial Chamber's Decision on Request for Appointment of Counsel, IT-04-74-AR73.1, 24 November 2004, par.19.
[177] Rule 21 of the ICC RPE.
[178] Rule 45(H) of the ICTR RPE.

proceedings". The ICTY on the other hand allows the withdrawal of the counsel "in the interests of the justice"[179].

In the case law, this phrase can be traced in the *Prosecutor v. Ntakirutimana* case[180], where the defendant claimed that his counselor didn't promote his interests, since he was suspected to have connections with the present at the time government of Rwanda. His claim was not found that fulfilled the prerequisite of "exceptional circumstances" and he was denied the removal of the counselor. On the other hand, the case law of European Court notes that when a determination is to be made in "the interest of justice", the following criteria should be looked at; the potential length of imprisonment or severity of penalty at stake for the accused, the legal and factual complexity of the case and the ability of the accused to defend himself personally[181].

Like other general expressions, "exceptional circumstances" and "interests of justice" have not be defined, with the excuse of being a dynamic tool at the hands of the court. So, the court has the duty to ensure that the reasons for the withdrawal request are understandable, acceptable and genuine[182], in order for the equality to be maintained.

Chapter 2

Money makes the world go round and so makes the tribunals and courts do

As it is aforementioned, the budget of the court influences the potential of the protection of the accused against a more powerful Prosecution. In courts and tribunals, there are thousands of people who work directly or indirectly and receive a payment. Each day of operation costs money to the states that are responsible to pay.

For instance, the ICC as the main and fully operative international criminal court, is financed by the nations that are members to the Rome Statute (ASP). The amount which each states pays is determined according to each country's ability to pay, with regard to national income and population. The budget which was agreed for 2020

[179] Article 20 of the Directive on the Assignment of Defense Counsel (No.1/94), as it is amended in 29 June 2006.
[180] *Prosecutor v. Gerard Ntakirutimana*, Chamber's Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr, ICTR 96-17-T, 18 June 1997.
[181] See cases before the ECtHR in *Guide on Article 6 of the ECHR- Right to a fair trial (criminal limb)*, updated in 31 August 2020, par 451-458.
[182] Dr. Bengusu, O. (2019), p. 132.

was 145 million euros while for 2021 over 148.250.000 euros[183], slightly and dynamically increased within the years.

The term 'budget' was first introduced by William Pace[184], the Convenor of the Coalition for an International Criminal Court since its founding in 1995 and with an active role in the fields of international justice and human rights. The process of deciding the budget for any given year begins with a proposed budget offered by the court. A body of independent finance experts created by the ASP called the CBF reviews the proposed budget and compiles a report for the ASP that contains recommended changes to the court's proposed budget. The ASP considers the proposed budget and the CBF report and then decides on the budget for the upcoming year during its annual meeting[185]. The indicators with which the amount is decided are with regard to the scheduled or at least estimated workload of the next year and they refer to the activity of trials, analysis and investigations, administrative support, premises, funds for victims and witnesses and the staff which is responsible for the translation during the proceedings[186].

2.1. The interaction of ICC's budget with legal aid

If the EoA was genuinely infused within the operation of the ICC, the allocation of the budget to legal aid should be compared with that of the Prosecution[187]. The Defense Counsel is not a distinct organ of the ICC, therefore it has not its own separate allocation of funds. The amount of money which is to be allocated to legal aid is pooled together with funds allocated the Registry. The Registry is responsible for three main categories of services:

- **Judicial support**, including general court management and court records, translation and interpretation, counsel support (including lists of counsel and assistants to counsel, experts, investigators and offices to support the Defense and victims), the detention center, legal aid, library services, support for victims to

[183] Resolution of the Assembly of States Parties on the proposed program budget for 2021, the Working Capital Fund for 2021, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2021 and the Contingency Fund ICC-ASP/19/Res.1, 16 December 2020.
[184] Dr. Bengusu, O. (2019), p. 117.
[185] Ford, S. (2014), p. 1-2.
[186] Idem, p. 5.
[187] See also the opposite opinion about the irrelevance of EoA with regard to financial resources in Chapter 1 of the present Part (*Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, ICTR 95-1-T, 21 May 1999).

participate in proceedings and apply for reparations, for witnesses to receive support and protection;

- **External affairs**, including external relations, public information and outreach, field office support, and victims and witness support; and

- **Management**, including security, budget, finance, human resources and general services[188].

This in effect means that the Defense would only receive limited resources and support from the Registry, as the issues related to the Defense are not their priority. The portion of funds for legal aid could be decreased under the burden of the effort to support and compensate victims, leaving the accused unprotected, with no efficient arms against the Prosecution, which has its own budget, allocated for its own needs and only those. Therefore, the inequality of the accused is a matter of money and administration of the Registry.

And because of that close connection of legal aid with the budget, any change at the latter influences drastically the former. There are numerous efforts to persuade the ASP for an increase of the court's budget. However, after the economic crisis and the not so persuasive [189] work of the ICC (amongst others, the collapse of the case of Kenyatta, the acquittal of Jean-Pierre Bemba Gombo, Russia's decision to remove the signature from the Statute, the decision of Trump's administration to pose sanctions on the Prosecutor and the head of the Office of the Prosecutor's Jurisdiction, Complementarity, and Cooperation Division) make those efforts extremely difficult to be fruitful.

It is more obvious when someone notices the different approach of the problem; to increase the budget, the court should increase its workload while the other side claims that, in order to increase the workload, we should increase the budget. What is left out, however, is that in this loop of discussions and expertness the accused is trapped, having constraints on his arms (and with the principle of the equality diminished). All we should have in mind that each decision has an impact on people, especially on those who are found to be suspect/accused, those who are treated with hatred by the

[188] https://www.icc-cpi.int/about/Registry

[189] Cluskey, P. (2017), Funding cut may curb International Criminal Court, article in https://www.irishtimes.com/news/world/europe/funding-cut-may-curb-international-criminal-court-1.2968407.

international community until proven innocent; let us give them at least the chance to present themselves on equal terms and show that the interests of justice are not prejudiced. The fundamental rights of the accused and the principles that accompany them should be safeguarded.

2.2. Does the accused depend on the Registry's good will?

Besides the fact that funds allocated for the legal aid depend on the Registry's decision, thus making the accused somehow feel dependent or at least not independent, the ICC'S RPE have other provisions for the Registry's duty to facilitate the position of the accused. Rule 20 states that:

> (…) the Registry shall organize the staff of the Registry in a manner that promotes the rights of the Defense, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registry shall, inter alia: (...); (b) provide support, assistance, and information to all Defense counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the Defense;(…); (e) Provide the Defense with such facilities as may be necessary for the direct performance of the duty of the Defense; (…)[190]

From this point of view, the accused shall be offered an equal basis to defend himself against the dominant Prosecution. The latter has manpower resources which include lawyers, investigators, administrative personnel and other staff. Its staff members are full time UN or ICC employees with their facilities afforded with the same building as the court, in which they have the chance to work and devote themselves from the beginning of a case. On the other hand, the Defense team is formed after the indictment, its members are appointed on a temporary basis and the resources are limited. They are essentially a foreign part of the proceedings, as external advisors who are considered to be an obstacle at the administration of international justice, for the fact that they represent a suspect for the most malicious crimes at a large scale.

Illustrative of the situation of the prejudiced position of the accused even for the simplest matters in the proceedings can be traced in case law. The different approach of ICTR about equality, that the latter does not compel an equality of resources, has already been mentioned. But what is remarkable is that the same approach seemed to be present at the ICTY as well, where at the *Prlic et al.* case[191], the Trial Chamber with its Decision on the use of a Laptop, rejected the request of the accused for an

[190] See also article 6 of the ECHR.
[191] *The Prosecutor v. Prlic et al.*, Trial Chamber's Decision on the Oral Request of the Accused Jadranko Prlic for Authorization to Use a Laptop, IT-04-74-T, 29 June 2006.

authorization to use his personal laptop, with the excuse that his lawyer had one in the courtroom and concluded that equality of arms did not require the same financial or technical resources *["must not be taken literally"],* and *"therefore the right of the accused set out in Article 21(4)(b) of the Statute and the principle of equality of arms have been respected and that there is no reason to grant the first request of the Accused [the use of a laptop]".* The decision seems problematic[192] and against the principle of EoA.

What is dangerous though, is that, in theory (e.g. provisions in statutes) the principle of equality of arms compels the courts (each one through its own mechanisms) to remove any inequality between the vulnerable accused and the Prosecution. However, what really seems to be happening in practice is that the structure itself of the courts places the Defense at a prejudicial position. And since the ICC is, at present, the only representor of the international criminal proceedings with a – potential - global jurisdiction, the international community hopes that all these difficulties are signs of the early stages of its operation and that disputes which affect the proceedings in their core (such as the position of the accused) will be prioritized to be settled.

Chapter 3

So many participants, so little time

With regard to the material nature of the EoA, the one corollary would be the facilities and the monetary issues that are described in the previous chapters, alongside with the interaction with the legal aid. The other part is the factor of time, the untamed power that is never enough. The right for the accused to have sufficient/adequate time to prepare the Defense is being provisioned in numerous treaties and statutes[193]. The difficulty in the equation in which the other factor is the right for an expeditious trial

[192] It seems more problematic, if we take into account the dissenting opinion of the presiding judge Jean-Claude Antonetti who shared Volrah's opinion in Tadic "*that the right to equality of arms is more generally a right of the accused because the Judges must ensure that the person being prosecuted, who is the most vulnerable person at the trial, is not disadvantaged in the conduct of his Defense*.", Dissenting Opinion of Judge Antonetti to the Trial Chamber's Decision on the Oral Request of the Accused Jadranko Prlic for Authorization to Use a Laptop, IT-04-74-T, 29 June 2006, par. 9.

[193] Article 105, third paragraph of Third Geneva Convention; Article 72, first paragraph of Fourth Geneva Convention; Article 67(1)(b) of the ICC Statute; Article 21(4)(b) of the ICTY Statute; Article 20(4)(b) of the ICTR Statute; Article 17(4)(b) of the Statute of the Special Court for Sierra Leone; Article 14(3)(b) of the ICCPR; Article 6(3)(b) of the European Convention on Human Rights; Article 8(2)(c) of the American Convention on Human Rights; Principles 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and many more. (Data accessed from ICRC Database on the Rule 100 of customary IHL).

has been analyzed in part II. What is going to be in short presented here is the impact of the innovatively introduced[194] by the ICC (then included in STL, ECCC and KSC legal framework[195] as well) institution of victims' participation in the proceedings, on the right of the accused to prepare his Defense.

Although the suffering and damage sustained by victims are real and must be recognized, we should bear in mind that the role of the criminal justice is ultimately to maintain law and order. It is not an instrument to ensure that the severity of sentences reflects the suffering of individuals, although it is on this suffering that the victims' demands are based[196]. The system punishes people for the fact that they have breached the law, not for the fact that they have inflicted trauma as perceived subjectively.

From the three courts above, we will mainly focus on the ICC because of its universality, as mentioned before. The victim's provisions as a one of the most notable aspects within the Rome Statute[197] include recognition, participation, protection, reparations and a Trust Fund[198]. The inclusion of these provisions has been declared a 'high-water mark' by placing victims at the 'heart of the proceedings'[199].Until the establishment of the ICC, the victims could participate only as witnesses[200]. Arguably, it seems prejudicial to the rights of the accused[201] in allowing victims to participate in the proceedings.

But it wasn't always as such. Opinions about the necessity of the participation of victims were expressed during the operation of the *ad hoc* tribunals of the UN[202]. Their exclusion was justified with regard to the mandate of the tribunals, their nature and the structure of the procedural system (accusatorial ones do not usually use victims' participation) and not because of the fear of limiting the rights of the accused[203].

In addition, the draft team of the ICC Statute was compelled to include as an institution the participation of victims due to the fact that firstly[204] there was a widespread recognition of the significance of their access to justice, as underlined in

[194] Mekjan, J. & Varughese, M. (2005), p. 16-18.
[195] Conference Report of the Nuremberg Forum in 2017, *10 Years after the Nuremberg Declaration on Peace and Justice - The Fight against impunity at a crossroad*, p. 14-15.
[196] Rauschenback, M. & Scalia, D. (2008), p. 449-450.
[197] Trumbull, C. - P. IV (2008), p. 778-780.
[198] Moffett, L. (2015), p. 2-3.
[199] Report of the OPCV, *Helping victims make their voice heard* (2010).
[200] Cassese, A. (2009), p.562.
[201] Trumbull, C. - P. IV (2008), p. 787-788 at footnote 69.
[202] Triffterer, O. & Ambos, K. (2015), p. 1684.
[203] Zappala, S (2010), *The Rights of Victims v. the Rights of the Accused* in J. Int'l Crim Just 8.137.
[204] Stahn, C & Olasolo, H. & Gibson, K. (2006), p. 220-224.

the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law and the Proposed Guiding Principles for Combating Impunity for International Crimes and secondly their interests might be different between the Prosecutor and the states' interests in admissibility or jurisdiction proceedings[205].

However, the ICC has a number of legitimate objectives. Such objectives are the right of a fair trial of the accused, the victims' right to participate in proceedings, the fair trial rights of the Prosecutor and an applicable Court procedure. In order to maintain the equilibrium, which is dynamic and more objectives could be added, there is a provision within the Statute[206]. Article 68(3) states:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Therefore, it seems that the rights of the defendant have always to be more important and therefore the victims do not become real parties to the proceedings.

In *Lubanga* case, with regard to the victims' applications to participate in the appeal against the confirmation of charges, Patricia Annick Mongo, a duty counsel, highlighted a number of defense concerns about the excessively general nature of the applications to participate at all proceedings' stages by arguing that since victims' interests only centered on reparations, and reparation issues only arise during the trial stage, victims' participation should not take place in the Pre-Trial stage and certainly not in an appeal at the Pre-Trial stage[207]. In the same case, the judges supported a two-step analysis[208]: first, they stated that Rule 85 RPE requirements have to be verified, and explained that independent evidence are unnecessary to verify the information included by the alleged victim in the application form; subsequently, once assessed

[205] Mahfud, J. (2019), p. 36.
[206] Idem, p. 31.
[207] *The Prosecutor v. Lubanga Dyilo*, Appeals Chamber Public Document (by Duty Counsel) on the corrigendum to the Response to the application by victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorization to participate in the appeal proceedings relating to the decision on the confirmation of charges, ICC-01/04-01/06-901-Corr-tEN, 16 May 2007.
[208] Zago, G. (2014), The Role of Victims at the International Criminal Court: Legal Challenges from the Tension between Restorative and Retributive Justice in Diritto Penale Contemporaneo, p.6.

whether an individual is a victim under Rule 85 RPE, the next step consists in determining whether the victim's personal interests have been affected. If the Chamber recognizes the applicant the status of victim, the latter is allowed to present its "views and concerns"[209].

Moreover, the delay of victims' status verification in conjunction with the increased number of applications could cause the postponement[210] of the verdict of the trial that might be detrimental to the accused rights and as a consequence, there would be a smaller number of prosecutions which is causing perpetrators continuing committing atrocities and therefore the ICC is not able to achieve its main goal of ending impunity.

No matter what, in our times, the case law states, nothing hinders the future's judges from interpreting the provisions in a different direction. Each case has its own characteristics, therefore a case by case interpretation could be the solution. Against this solution, there may be arguments which could support the view that, if we let the whole process in a case by case scenario, then the accused will not feel safeguarded against any malevolent and prejudiced judges, who will choose to help victims find their justice, at the expense of the rights of the accused. The balance is fragile. Even treaties and the legal framework have ambiguities. For instance, the use of different words in the article 6 (2) (b) of '*adequate'* in the English version and of '*nécessaires'* in the French version of the ECHR, with regard to the time and the facilities of the accused, is one of the examples that contribute with oxygen in this fire of debated opinions.

What should be kept in mind is that in the epicenter of the proceedings is the suspect and all the procedure should be orientated to the acquittal or the conviction of the suspect. Therefore, in author's view, the victims' participation should be limited to the point where they are a distinct kind of weapon in the Prosecutor's 'stash of arms' and not a distinct protagonist, thus being transformed in a second Prosecutor and a second 'enemy' of the accused.

[209] Idem, p.7.
[210] Kaoutzanis C. (2010). *Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight against Impunity and Victim Participation* in U.C. Davis Journal of International Law & Policy 17, p.129-130.

Conclusions – Thoughts for the Future

On our way to a humane and civilized society, we come across with crimes and atrocities that are opposite to our post-primitive nature. All wars and conflicts encompass death and crimes. All victims and their families deserve justice, as justice is considered to be the divine power which brings everything into an equilibrium. That is why judicial systems were developed, to convict the criminals and restore order. But when it comes to the global level, things get slightly more complicated, due to the interaction of many factors.

The complexity of the crimes, the public condemnation, obstacles to the provision of evidence and the dependence on political agendas (through UN funding etc) are some of the elements that put pressure upon the operation of judicial bodies. The latter are commissioned to deliver justice but not at all costs. Fairness and human rights must be preserved, or else monstrosities can happen. No matter which judicial system is applied, the core aim is whether accused persons are guilty of international crimes, by adhering to international fair trial norms[211].

In order to ensure fairness, all participants (Defense, Prosecution and victims) have to be equally treated, however, at present, only the accused and the Prosecutor alongside with the judges are considered to be parties to the proceedings. Victims' position has profoundly upgraded since the establishment of the ICC, but do not yet constitute a party. That is why the principle of EoA focuses only on the two parties that need to be treated equally, in all aspects.

With regard to the aspects of the EoA, this essay tried to elaborate the triple nature of the principle, namely the substantial, the procedural and the material one. We tracked EoA from a theoretical point of view to its implementation in practice. Through case law, not only of the prevalent international criminal court but also of its predecessors (internationalized, such as the ad hoc tribunals, SCSL, ECCC) and of course the ECtHR which, among other institutions, safeguards the Human Rights Law, we realize that it is difficult to apply always the EoA.

EoA is regarded as a lens, through which the judges are required to weigh different vectors in order to come to a conclusion. What becomes obvious is that the

[211] Jackson, J. (2009), p.22.

accused is in an inherent disadvantageous position vis-à-vis the Prosecution, due to differences to resources, facilities and time. Therefore, the EoA has this triple nature, so as to equalize and 'compensate' the accused, so as he to be fully and equally prepared to present his case.

With regard to the substantial nature, we examined the presence of EoA throughout the judicial history. From ancient times to modern ones, we see it developing from a 'sidekick' of the right to a fair trial to a more independent principle, with the community agreeing that there is more potential to it. We also examined the interaction of the principle with the different criminal systems (adversarial and inquisitorial) which divide is considered to be leftovers of old times. Nowadays, international criminal proceedings seem to have introduced elements of both of the systems in order to create something modern and better.

Next, we moved on to the examination of the procedural nature, dealing with matters that have a more illustrated view of the real need for equality. The strong interactive connection of the two parties, through the regime of disclosure of evidence and examination of witnesses and of the two parties with external participants (state cooperation) creates a dynamic equation, which is delicate to solve. The accused is in a constant effort of taking advantage of all possible arms (legal aid, funds from Registry, facilities with regard to resources and time) in order to elevate his position to the most equal one, even when new challenges arise, such as the more and more participatory role of victims.

But this is the situation for the time being. The ICC, with less than 20 years of operation, seems to still try to find its steps to its institutional cause, the fight against impunity and atrocities. Through these years, the case law expresses different approaches to the EoA, with all expressing the (need for a) prevalent and dynamically developing position of the principle in the proceedings. That can happen whether through an institutionalization of the Defense office (like in STL) so as to achieve structural and financial independence or through the upgrade of the principle of EoA to a distinct right, which will complement the right to a fair trial. My professors in the MA program claim that the jurisprudence of the present is the law of tomorrow. Evolution is yet to come.

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