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## **INTERPRETATION OF “EQUALITY OF ARMS” IN JURISPRUDENCE OF AD HOC TRIBUNALS AND ICC**

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### **ABSTRACT**

Principle of equality of arms is part of fair trial concept, which encompasses several guarantees linked to the defence opportunities during the criminal procedure. The accused person is entitled to a fair trial. Balance of rights between the parties is bedrock for procedural fairness and the judge has to perform his competence in providing all necessary preconditions as for the trial to be fair.

There are differences between interpretation and implementation of equality of arms in the jurisprudence of European court on human rights (ECtHR) and international criminal courts (ICTY, ICTR and ICC). Decisions of ECtHR are much more similar with domestic understanding of equality of arms as reasonable opportunity of the defence to present the case without disadvantages vis-à-vis the prosecutor, due to inherent inequity between the parties.

When analyzing proceeding before the ad hoc Tribunals, there is “more liberal interpretation” of this principle, which allowed the Prosecutor to invoke equality of arms, as well. ICTY Trial Chamber in Aleksovski case concluded that application of the concept of a fair trial in favor of both parties is understandable because the Prosecution acts on behalf of and in the interests of the international community, including the interests of the victims of the offence charged and also has held that it is difficult to see how a trial could ever be considered to be fair where the accused is favored at the expense of the Prosecution. This interpretation has been justified with dependence of the international Tribunals on state cooperation and due to the fact that international criminal courts have no autonomous enforcement agencies at their disposal. Fortunately, ICC Statute considered equality of arms as solely afforded to the defence, or to the Prosecutor on the behalf of accused.

### **INTRODUCTORY REMARKS**

The integrity, legitimacy and acceptability of international criminal proceedings can be tested by compliance with human rights guarantees as the most reliable benchmark for fair international criminal justice. Fairness is an essential element of any system of justice and without it justice cannot be done or be perceived to have been done. The correct balance must be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law (*Prosecutor v. Brđanin and Talić*, Decision, 3 October 2003, para. 62). Only the rule of law can enable a fair trial system (E. Groulx (2006), 2). Equality of arms is a basic right in criminal trial and not a dispensable ideal to be approached

in careful incremental steps (T. Osasona (2014)). Every accused is entitled to a fair trial that encompasses a number of component rights. The principle of equality of arms is an essential element of the fair trial concept and minimum threshold for impartial and consistent proceeding. While trying to examine the standing of the idea of this principle in the Greek and Roman world, there are interpretations that this principle has duality of purposes as a rule of justice and as a rule of wisdom. As to the right to equal and effective access to the court, one should hear both sides of a case, because otherwise it is unfair to the party unheard, from one hand, and the idea that one ought to hear both sides of a case, because otherwise one may make a mistake, on the other hand (D. Asser (1994), 211-2; J.M. Kelly (1964), Paper 84). Equality of arms plays pivotal role in the jurisprudence of the European Court on Human Rights (ECtHR). The European Commission first concluded on the principle of equality of arms in 1959 (*Szwabowicz v. Sweden*) and 1963 (*Ofner and Hopfinger v. Austria; Pataki and Dunshirn v. Austria*) and European Court of Human Rights in 1968 (*Neumeister v. Austria*). ECtHR in 1970 have given the word of “equity” its etymological meaning of “*aequitas*”. Notably, it formulates the principle “*per a contrario*” judging that a trial would not be equitable if it would run in conditions likely to place a party in an unfair situation (*Delcourt v. Belgium*), and gave explanation that this principle has a general nature and it hasn’t received an absolute character: there is no need for the states to establish a strict procedural equality between the parties, but only make sure that the parties have a situation reasonably equal. What is important is that none of the parties has a privileged position during the trial, referring here to the prosecution (*Hentrich v. France*).

Preventing infringements of fair trial guarantees is one of the major concerns in the administration of international justice. International criminal procedure should ensure respect for individual and procedural rights of the accused and procedural quality of actions taken for preparation of the case as well as for presentation of the case before international criminal courts (D. Krapac (2012), 23). Unlike national courts, which are monitored by specialized bodies (such as the ECtHR, regarding compliance of states with the ECHR, or the Human Rights Committee (HRC) regarding compliance of states with the ICCPR), ICTY, ICTR and ICC operate without monitoring of the fairness of their proceedings (J.P.W.T. Tuinstra (2009), 2). International criminal procedure is understood as ‘*conflict of traditions*’ since it is the result of a constant process of adaptation to the diversity, distinctness, and dynamism of its international context but in terms of bringing the common law and civil law traditions closer to each other, international exigencies clearly show the traditions can be partly dismantled, deconstructed, and reinvented (F. Megret (2009); K. Ambos (2011)).

The principle of equality of arms between the parties in a criminal trial goes to the heart of the fair trial guarantee. The Chamber in case of *Tadić* has conceptualized the equality of arms in three ways: first, the right of the accused to have adequate time to prepare his defense and this right is at par with that possessed by the prosecution; second, court engendered and enforced procedural equality of the parties before the Chamber and third, the adoption of protective measures including the grant of limited immunity from prosecution in form of safe conduct; the utilization of evidence through deposition and video conferencing link; the issuance of binding orders to state to produce evidence in its custody; utilizing the power in the form of subpoena, in compelling a witness to produce evidence for the defense and the possibility of the court conceptualizing that a fair trial is impossible in certain instances because of the interest and involvement of state parties (*Prosecutor v Tadic*, Judgment, 1999, paras. 44, 52-54).

## 1. CONTEXTUAL APPROACH TOWARD EQUALITY OF ARMS

When explaining the legal basis for the establishment of the ICTY with UN Security Council Resolution 808(1993) and especially the rights of the accused, the Secretary General, emphasized that it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings that are, in particular, contained in article 14 of the ICCPR (*Report of the Secretary General* (1993), para. 106). However, this statement

was differently interpreted. For ICTR, the Report of the Secretary-General has established the sources of law for the Tribunal, so regional human rights treaties and the jurisprudence developed there under, are persuasive authority, which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal but they are authoritative as evidence of international custom (*Prosecutor v. Barayagwiza*, Decision, 3 Nov 1999, para. 40.). Unfortunately, ICTY has transformed this axiom into theorem and from the Tribunal that should respect and implement internationally recognized rights of the accused it turned into an entity for interpretation of human rights context. ICTY rejected the idea that it, as a *sui generis* international forum, could be bound by that jurisprudence with the explanation that because of its unique structure as an international Tribunal and because of the nature of the subject matter with which it dealt, universal human rights principles are not applicable to it in the same way in which they are applicable to municipal jurisdictions (G.McIntyre (2003)). In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused rights to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique framework and must interpret its provisions within its own legal context. International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence (*Prosecutor v Tadic*, Judgment, 15 July 1999; *Prosecutor v Tadic*, Decision, 10 August 1995, para. 19). ICTY Chamber's explanations about contextual approach to human rights principles should be inevitably understood as a euphemism for not recognizing the universal human rights principles and jurisprudence. This approach could be onerous for the defence and is completely unjustified having in mind the fact that ICTY is *sui generis* according its establishing not *sui generis* in virtue of not recognizing universal rights of the accused. Hence, procedural equality does not imply a denial of fundamental guarantees under the veil of so-called "contextual approach".

Procedural fairness is focused on equal opportunities not on reaching a verdict. It is obvious that ICTY judges are not sufficiently aware of necessity for balancing between the tendency for efficiency in the proceedings and protection of universally recognized human rights. The ICTY has been criticized for restricting international human rights standards in the interest of securing convictions (J.Sloan (1996), 479; G.J.A.Knoops (2005), p. 1566).

According the Tribunal, the principle of equality of arms must be given a broader interpretation due to following issues: a) unlike domestic courts that had a capacity to control matters that could materially affect the fairness of the trial, the Tribunal is totally dependent upon the co-operation of states to hold its trials as it was states that were often in possession of evidence relevant to the trial and states could impede the efforts of counsel to secure that evidence; b) if the assistance of the Tribunal proved ineffectual, in that the party despite that assistance was still unable to obtain the evidence sought, that was a matter outside of the scope of the principle of equality of arms as a principle of procedural equality, although it was a factor that could go to the fairness of the trial (*Prosecutor v Tadic*, Appeal Judgment, 15 July 1999, paras. 48-52).

Confessions for institutional disparities can be found in some ad hoc Tribunals' decision. Namely, the ICTR Trial Chamber in *Prosecutor v. Kayishema and Ruzindana*, (Order on the Motion by the Defence Counsel 5 May 1997 and Judgment, 21 May 1999, para. 60), has held that the rights of the accused and equality between the parties should not be confused with the equality of means and resources and that the rights of the accused shall in no way be interpreted to mean that the defence is entitled to the same means and resources as those available to the Prosecution.

## 2. JUDICIAL COMPETENCE REGARDING EQUALITY OF ARMS

Under the ECHR the court is obliged to ensure equality of arms, but according to the Tribunal the prosecution should take care of equality of arms which indicates the powerlessness of the Tribunal in comparing with the dominance of the prosecution. There are interpretations that Tribunal has characterized the prosecution as a “*minister of justice*” with an overriding obligation of ensuring fairness in its proceedings (*Prosecutor v Brdanin & Talic*, Decision, 11 December 2002). This competences and role of the prosecution has been to the detriment of the accused. There are complains of the defence counsels that the Prosecution’s failure to comply with disclosure obligations should be considered as a violation of fair trial and prejudices the rights of an accused or defendant so egregiously that it impacts on a court’s adverse decisions and judgments of conviction against a defendant (B.S.Lyons (2012)). Those interpretations are in line with Tribunals case law and Appeals Chamber’s consideration that the Prosecution’s obligation to disclose exculpatory material is unequivocally essential to a fair trial (*Karemera et al.*, ICTR, Appeals Chamber, 30 June 2006, para. 9; *Ndindiliyimana et al.*, Decision, 22 September 2008, para. 12).

ICC Statute Article 64(8)(b) gives the presiding judge of the Trial Chamber complete discretion over the procedural model to be followed at trial since it prescribed that at the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute. Should the judge decline to set out the order of evidence presentation, ICC RPE Rule 140(1) authorizes the parties to reach their own agreement on the question and in case they can not reach the agreement, the judge have to issue directions. However, no matter what procedural model the judge chooses, in each case each party maintains the essential right to question the witnesses they call, and to question the witnesses their opponent calls.

*Lubanga* case (*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06) was the first one tried by the ICC and was an opportunity to evaluate the concept of equality of arms in international criminal justice. The ICC Appeals Chamber explained that where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by the Prosecution, it would be a contradiction in terms to put the person on trial. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped (*Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor, 10 June 2008, paras. 77-78).

## 3. MORE LIBERAL INTERPRETATION OF EQUALITY OF ARMS

There are opposite interpretations whether the principle of equality of arms should be defined differently when applied in the context of international criminal tribunals, should it be understood as a notion in favor of both parties, and should it be adjust upon specific characteristics of international criminal courts. Although jurisprudence and interpretations of well-known principle of ‘*equality of arms*’ should have been staring point for its interpretation before international criminal courts, there have been difference of opinion expressed as to whether the principle relates only to the position of the accused so that equality of arms provides merely that the accused is to be afforded the same rights as the Prosecution, or whether equality of arms relates to equality between both parties. One shall agree with interpretations that the defence alone is able to invoke this principle since some privileges afforded to the defence are not available to the Prosecution and that equality of arms has been used as a tool for focusing attention on and advancing the interests of the defence in international criminal trials (J.P.W.T.Tuinstra, op.cit., p. 171; M.I.Fedorova (2012), p. 3). However, there are interpretations that finds not unreasonable to interpret equality of arms more extensively within international criminal procedures when it concerns the position of the accused with respect to both procedural and substantive

law, as well as that equality of arms in adversarial structure of proceedings is based on the notion of the trial as a contest between the parties, so also the prosecutor is entitled not to be put in disadvantageous position (G.J.A.Knoops/R.R.Amsterdam, (2006), p. 270).

It seems that the ICTY Appeals Chamber accepted a broader and more liberal interpretation of equality of arms than one accepted by the ECHR. However, due to completely wrong interpretation of ECHR Article 6(3), ICTY Trial Chamber in *Aleksovski* case concluded that application of the concept of a fair trial in favor of both parties is understandable because the Prosecution acts on behalf of and in the interests of the international community, including the interests of the victims of the offence charged and also has held that it is difficult to see how a trial could ever be considered to be fair where the accused is favored at the expense of the Prosecution (*Prosecutor v. Aleksovski*, Decision, 16 February 1999, para. 25). There are similar interpretations where Trial Chamber has held that procedural equality means equality between the Prosecution and the defence, but to suggest an inclination in favor of the defence is tantamount to a procedural inequality in favor of the defence and against the Prosecution, and will result in inequality of arms (*Prosecutor v. Delalic*, Decision, 4 February, 1998, para. 48). According a dissenting opinion of judge Vohrah, which is in line with interpretation of ECHR Article 6(3) but was not accepted by the Chamber in case of *Delalic*, the application of the principle in criminal trials should be inclined in favor of the defence acquiring parity with the Prosecution in the presentation of the defence case to preclude any injustice against the accused (*Prosecutor v. Tadic*, Separate Opinion of Judge Vohrah, 27 Nov. 1996, para. 7.).

The Appeals Chamber has long recognized that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case, certainly in terms of procedural equity. However, the Trial Chambers are aware of the difficulties that parties face when collecting evidence on the territory of an uncooperative state. Therefore, under the ICTY Statute the principle of equality of arms has been given a *more liberal interpretation* than that normally upheld with regard to proceedings before domestic courts (*Prosecutor v. Tadic*, Appeal Judgement, paras. 48, 50 and 52; G.J.A.Knoops (2005), p.1577; Fedorova, op.cit., p.209). More liberal interpretation is due to the dependence of the international tribunal on state cooperation, due to the fact that international criminal courts have no autonomous enforcement agencies at their disposal to grant the applications of the defence and to put it on a par with the prosecution as well as due to the fact that conditions that may put the defence at a substantial disadvantage which are outside the court's control are excluded from the scope of the equality of arms principle. This implies that the principle of equality of arms should be subjected to teleological interpretation depending on the nature of the criminal proceedings (Knoops, op.cit., p.1577; A. Cassese (1999), pp. 144–171, p.164.). In interlocutory decision on length of defence in *Orić case*, the Appeal Chamber held that this is not to say that an accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides (Appeals Chamber decision, 20 July 2005, para. 7).

The main dilemma is whether equality of arms relates only to the position of the accused so that merely the accused is to be afforded the same rights as the OTP, or whether it relates to equality between both parties. This dilemma was overcome by ICC Statute Article 81(1)(b)(iv) which stipulates that under the ICC Statute, solely the defence, or the Prosecutor on the behalf of accused, may file as a ground of appeal any 'ground that affects the fairness or reliability of the proceedings or decision'.

#### 4. STATE COOPERATION AS EXTERNAL FACTOR

*State cooperation* within international criminal adjudication is of outmost importance. In accordance with tribunal's Statutes (ICTY Statute Article 29; ICTR Statute Article 28), states have the responsibility to cooperate with the *ad hoc* Tribunals in regard of investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States voluntarily decide upon becoming a party to ICC Statute (Rome Statute Part IX) by its ratification and afterwards shall fully cooperate with the ICC in investigations and prosecutions of crimes within the ICC jurisdiction. Interrelation between State cooperation and equality of arms are understood as basic pillars of for the effectiveness of the practice of international criminal proceedings. Before international tribunals procedural equity is fully guaranteed, but seems an almost unachievable aim since States apply a form of selectivity as a function of their sovereignty (Knoops/Amsterdam, op.cit., p. 261; C.C.Jalloh/A.DiBella (2013) pp. 251-287, p. 282). State cooperation can take several different 'dimensions': (1) political in the sense of recognition, moral, financial and material support; and (2) legal in the sense of 'co-operation in criminal matters' (Fedorova, op.cit., p.190; S.Göran (2002) p.6.). There is a possibility for *assistance of the tribunal to access material* in accordance with ICTY/ICTR RPE Rule 54 and ICTY Rule 54bis. The former is a general rule regarding orders and warrants, at the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. There are considerations existence of this rule is due to the great and actual inequality of the parties in their ability for identifying, locating and accessing evidence relevant to the case. The latter prescribes competence of the Trial Chamber to issue orders directed to states for the production of documents. Disparity in access to evidence can appear if, from one side, states are reluctant to provide sensitive information or material to the defence by explanation for protection national security interests, but from the other side, states are comply more readily with prosecution requests for evidence. The inability of the defence to conduct meaningful on-site investigations is due to obstructive behavior by the state authorities as well as due to the lack of an institutional position of the defence within the framework of the international courts, which has resulted in difficulties in requesting state cooperation (Fedorova, op.cit., p.6). There are proposals if the inequality between the prosecution and defence would have remained disproportional, judges could compensate the defence by excluding prosecution evidence that was gained through the cooperation of a state authority, if these authorities consistently refused to cooperate with the defence (J.P.W.T.Tuinstra, op.cit., p. 168). There is Tribunal's case law where the State authorities gave it neither an effective opportunity to gain access to defence witnesses, nor to the key sites in the region where the alleged crimes were committed. The judges recognized that states can impede counsel's efforts to obtain the evidence in their custody (*Prosecutor v. Tadic*, Judgement, 15 July 1999, paras. 31 and 50). However, they felt that a court has a limited role to ensure equality between the defence and the prosecution if the disparity results from external factors, such as a lack of state cooperation. However, the assistance by the Tribunal has subsidiary effect. There are three preconditions: first is specificity, the requesting party shall describe the requested documents or information in as much detail as possible, so the Appeals Chamber pointed out that there is a firm obligation placed upon those representing an accused person to make proper enquiries as to what evidence is available in that person's defence (*Prosecutor v. Aleksovski*, Decision on prosecutor's appeal, 16 February 1999, para. 18; *Prosecutor v. Milutinović et al.*, Decision, 17 November 2005; *Prosecutor v. Hadžihasanvić et al.*, Decision, 12 September 2003); second is relevance, the requesting party must demonstrate that the evidence sought is of direct and important value in determining a core matter in the case and that the evidence is necessary for a fair determination of the matter (*Prosecutor v. Kordić and Čerkez*, Decision, 9 September 1999, para. 41). The Tribunal will not permit the parties to conduct „fishing expeditions“ as an inquiry carried on without any clearly defined plan or purpose in the hope of discovering or gain useful information (J.P.W.T.Tuinstra, op.cit., p. 170-1; *Prosecutor v. Nzirorera et al.*, Decision, 4 September 2003; Fedorova, op.cit., p.198); and third is necessity - the requesting party must explain the steps that have been taken by the applicant to secure the State's assistance and demonstrates that the

evidence sought cannot reasonably be obtained elsewhere (*Prosecutor v Brdanin & Talic*, Decision, 11 December 2002, para. 50; *Prosecutor v. Milutinović et al.*, Decision, 23 November 2005, para. 24). Every party must prove due diligence in undertaken all necessary measures, activities or efforts to provide evidence but they remained unsuccessful as well as the party must demonstrate a legitimate forensic purpose - that it has done all that it could to access the material without any assistance. However, while interpreting the scope of due diligence, it is not required to exhaust all possible mechanisms before seeking intervention by the Tribunal (*Prosecutor v. Bizimungu et al.*, Decision, 30 October 2008, para. 14). ICC Statute Article 57(3)(a)&(b) authorizes the Chamber, at the request of the Prosecutor, to issue orders and warrants necessary for investigation purposes, while all measures have to be authorized and supervised by national authorities. Unfortunately, this provision can be on detriment of defence since there is no state duty to cooperate with the defence. In regard of equality of arms requirements, the defence can request ICC Chamber assistance in accordance with ICC Statute Article 57(3)(b).

## 5. DISCLOSURE FROM CONFIDENTIAL SOURCES

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

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

Similar content with ICTY/R Rule 70 can be found in ICC Statute, Article 54(3)(e) so that the Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents. Such material may include information within the meaning of Article 67(2) of the ICC Statute, pursuant which the Prosecutor is obliged to disclose to the defence evidence in the Prosecutor's possession or control which he or she believes

shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. The use of Article 54(3)(e) of the Statute and consequently the provision of ICC RPE Rule 82, by the Prosecutor must not lead to breaches of his obligations *vis-à-vis* the suspect or the accused person. Therefore, whenever the Prosecutor relies on Article 54(3)(e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial (*Lubanga*, Judgment on the appeal of the Prosecutor, 21 October 2008, para. 2). Where the Article 54(3)(e) material being withheld includes information within the meaning of Article 67(2), a conflict arises between the obligations of the Prosecutor to observe confidentiality agreements with information providers and to provide potentially exculpatory material to the defence. So, if the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to article 54(3)(e) of the Statute, the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to article 67 (2) of the Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material. Therefore, in order to resolve conflicts between Article 54(3)(e) and Article 67(2), the Trial Chamber must have access to the material being withheld in order to determine whether it should be disclosed to the defence (*Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor, 21 October 2008, para. 79). If the Trial chamber is not granted such access, it will not be in a position to ensure a fair trial.

## 6. CONCLUSION

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

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

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

Adequate resources inevitably affect the principles of fair trial and equality of arms. During the proceeding before international criminal courts, equality of arms will be respected and fulfilled by overcoming disadvantage of one party against its opponent and by providing an equal manner in presenting evidence. It is acceptable and justified to impose kind of procedural consequences in the name of equality of arms due to disparity between the prosecution and the defence Generally speaking, the prosecution and defence at international courts enjoy very different investigative resources,



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

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

A common criticism of *ad hoc* tribunals has been the disparity in the allocation of resources and insufficiency of funds allocated to the defence. Significant improvements have been made however as these tribunals strive to maintain their credibility. The lesson to be learnt from these tribunals is that resources are a fundamental pillar of the equality of arms principle.

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

ICC should be estimated as a huge step forward due to several issues from its rules and jurisprudence:

- ❖ if the fair trial cannot be held, the trial has to be terminated;
- ❖ regarding overcoming of obstacles that Tribunals had with state cooperation which was understood as external factor;
- ❖ abandoning the more liberal interpretation of *equality of arms*, so that its scope is closely linked only to the position of the accused not to the both parties;
- ❖ protect the accused person regarding discretion power of the Prosecutor to decide upon disclosing to the defence exculpatory material that was obtained confidentially.

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