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THE FRACTURED RELATIONSHIP BETWEEN FAIRNESS, THE RIGHTS OF THE ACCUSED, AND DISCLOSURE AT THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

The permanent International Criminal Court (ICC), established to prosecute ‘the most serious crimes of international concern’¹ and thereby to assist in ending impunity for such crimes,² is the pinnacle of efforts to ensure accountability for violations of international humanitarian law. This chapter examines how accountability for violations of international humanitarian and criminal law is affected by the way disclosure is undertaken in ICC trials. Disclosure of information relevant to the trial is closely linked to ensuring the procedural rights of an accused, and the fairness of the trial process. Here, I argue that the way disclosure is undertaken at the ICC does not give the rights of the accused ‘full respect’. Whilst procedural rules should reinforce the rights of an accused and ultimately the principle of a fair trial, in reality, the current situation of disclosure at the ICC demonstrates the disconnections between procedural rules, rights, and trial fairness. This chapter commences by setting out how the rules that govern disclosure at the ICC are connected to trial fairness and the rights of an accused. The chapter then moves to an analysis of the disclosure regime at the ICC, with particular reference to recent trials at the ICC, namely the cases of *The Prosecutor v Lubanga*³ and *The Prosecutor v Katanga and Ngudjolo Chui*.⁴ These cases reveal that disclosure rules are being applied in a way that permits non-disclosure – in particular, of exculpatory material – by both the prosecution, and victims’ representatives. This non-disclosure may have problematic implications for the rights of an accused, and ultimately the fairness of the trial. As trials are a key mechanism to ensure accountability for violations of

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¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (*‘Rome Statute’*) art 1.

² *Ibid* Preamble.

³ *Prosecutor v Lubanga* (International Criminal Court, Trial Chamber I, Case No. ICC-01/04-01/06).

⁴ *Prosecutor v Katanga* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-621).

international humanitarian and criminal law, the disconnections between rules, rights, and fairness are an important area of examination. A fracturing of procedural rules, rights, and fairness in these trials may pose difficulties for accountability for such violations.

II. FAIRNESS, RIGHTS, AND DISCLOSURE RULES: INTERLINKING AND MUTUALLY ENFORCING ASPECTS OF INTERNATIONAL CRIMINAL TRIALS?

Trial Chambers have a responsibility to ensure trials are ‘fair and expeditious and [...] conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.⁵ In order to ensure such a trial, procedural rules (including the body of rules that governs how disclosure is effectuated)⁶ must be applied in a way consistent with the accused’s rights. In this way, trial fairness, the rights of an accused, and the procedural rules that govern the conduct of a trial, are interlinked; and in theory, mutually reinforcing. It is worth quoting Salvatore Zappalà at length on this point, as he articulates the link between accountability mechanisms of trial, procedural rules, and the rights of an accused:

Respecting the rules to establish the truth requires full consistency with rights of the accused; these must be seen as an essential component of accurate and truthful fact finding on which punishment is premised. If only one of these rights is violated, in only one aspect, in only one instance, the whole process loses credibility and is likely to fail in its objective of properly establishing the truth and of imposing just punishment.⁷

The rights of an accused are protected at the ICC by Article 67 of the *Rome Statute*. These rights are closely modelled on international human rights obligations in the International Covenant on Civil and Political Rights,⁸ and are also protected in the Statutes of other international criminal institutions.⁹ The rights of an accused thus have at least three roles: first, they are an integral part of the ICC’s governing document; second, they form human rights guarantees; and third, they are also ‘part and parcel of the epistemological mechanism for fact finding in criminal proceedings’.¹⁰ Of the several rights the accused enjoys under

⁵ *Rome Statute* art 64(2).

⁶ International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) (*ICC Rules*) Rules 76-84; *Rome Statute* arts 61, 64, and 67. The *ICC Rules* and the *Rome Statute* to be read conjunctively; see Lars Büngener, ‘Disclosure of Evidence’ in Christoph Safferling (ed), *International Criminal Proceedings* (Oxford, 2012), 352.

⁷ Salvatore Zappalà, ‘The Rights of Victims v. the Rights of the Accused’ (2010) 8 *Journal of International Criminal Justice* 137, 145.

⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

⁹ See, eg, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) art 20.

¹⁰ Zappalà, above n 7, 145.

Article 67 of the *Rome Statute*, there are two rights that are particularly affected by disclosure: the right to know the case alleged by the prosecution,¹¹ and the right to time and facilities to prepare a defence.¹² These rights are to be enjoyed ‘in full equality’,¹³ and thus, disclosure is also closely connected with the principle of equality of arms. Christoph Safferling refers to a ‘kaleidoscope of rights’, which includes ‘moral principles’ such as the equality of arms, as well as particular precise rights which provide the individual with a ‘realizable legal claim’.¹⁴ In Safferling’s kaleidoscope, these are constitutive of ‘fairness’.¹⁵

The right ‘to be informed promptly and in detail of the nature, cause and content of the charge’¹⁶ is closely related to disclosure, because in order to be so informed, the accused must receive disclosure of material that outlines these aspects of the charge. Without receiving such disclosure, the accused cannot know what the prosecution’s case is, and therefore what case they must meet. As Lars Büngener correctly points out, the information on the charges generally refers more to the indictment or document containing the charges; disclosure relates to a broader category of information, which includes ‘pieces of evidence and factual information which go beyond the contents of an indictment’.¹⁷ There is hence a distinction between the charges themselves, and the broader category of disclosable material, which would include witness materials, documents sought to be tendered, and potentially exculpatory materials. This information will form the basis for how the prosecution will set out its case, and what evidence might exist to support its attempt to establish guilt beyond a reasonable doubt. Disclosure of this information is therefore closely connected to an accused’s presumption of innocence¹⁸ and the ability of the defence to challenge the prosecutions’ case.

The accused’s rights to know the case, and to time and facilities to prepare a defence, are closely linked.¹⁹ Disclosure affects both these rights, and how they interact. Without disclosure, a defendant will not know the prosecution case they are expected to address, and thus will not be able to adequately prepare. It is for this reason that Colleen Rohan argues that prosecution disclosure ‘is the sole means for affording the accused adequate time and

¹¹ *Rome Statute* art 67(1)(a).

¹² *Rome Statute* art 67(1)(b).

¹³ *Rome Statute* art 67.

¹⁴ Christoph J M Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2001) 30-31.

¹⁵ *Ibid*, 31.

¹⁶ *Rome Statute* art 67(1)(a).

¹⁷ Büngener, above n 6, 347.

¹⁸ *Rome Statute* art 66.

¹⁹ See Büngener, above n 6, 347.

facilities in which to investigate that evidence and prepare to meet it at trial'.²⁰ International criminal defence lawyer Wayne Jordash also notes the close connection between timely disclosure and the ability to prepare a defence case, particularly in complex cases concerning years of armed conflict and involving allegations of complex modes of liability.²¹ He points out that:

The devil of a Prosecution and Defence case is in the detail provided by this disclosure. The smallest of details may prove important and the more that are available at an early stage the better. This aids the taking of instructions, detailed investigations, the planning of overall strategy, and trial management, including efficient and focused court sessions.²²

Because the accused enjoys the presumption of innocence and need not run an affirmative defence case (but can simply put the prosecution's case to proof), time and facilities to prepare a defence includes an ability to run investigations, and to be able to address the prosecution's evidence and case theory from the commencement of trial.²³ Time and facilities to prepare a defence should not, therefore, be understood as only relevant to running a defence phase of the trial: rather, the right applies to trial readiness. Disclosure must be provided in a manner that allows it to be integrated into a defence case from the outset; if it is not, the utility of the information could be limited, and there may be a negative impact on the accused's time and facilities to prepare – both in relation to examination of particular witnesses, and to the overall case.

The accused should be able to enjoy these rights 'in full equality'.²⁴ The principle of equality of arms includes that neither party is placed at a material disadvantage *viz* the other party, with regards to information.²⁵ Disclosure regulates the relationship between the parties, through requiring a party with an informational advantage to provide that information to the other party. Such informational parity should ensure that the trial is not an 'ambush'.²⁶ Disclosure of information between the parties is therefore integral to the right to equality of arms between the parties, and as Masha Fedorova argues, without access to necessary

²⁰ Colleen Rohan, 'Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?' in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2013), 289. See also Wayne Jordash, *Fairness of Karadzic trial in question* (4 October 2010) International Justice Tribune, <<http://www.rnw.nl/international-justice/article/fairness-karadzic-trial-question>>

²¹ Jordash, above n 20.

²² *Ibid.*

²³ Rohan, above n 20, 290-291.

²⁴ *Rome Statute* art 67.

²⁵ See Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia, 2012), 233-302.

²⁶ *Ibid.*

information, ‘a meaningful equality of arms cannot be sustained’.²⁷ While disclosure obligations exist for both the prosecution and the defence,²⁸ such obligations tend to be more onerous on the prosecution. This is for two main reasons: first, the burden of proof rests on the prosecution, meaning they bear primary responsibility for gathering the evidence (and then disclosing it to the defence); and second, the prosecutor ‘enjoys massive advantages in the facilities for the gathering of evidence’.²⁹ These resources – including investigators, search warrants, the ability to initiate investigations, and certain powers that accompany the status of a prosecutorial office³⁰ – are usually far in excess of those available to the defence, and grant the prosecution ‘superior, and sometimes even sole access to this material’.³¹ The ability to obtain material thus necessitates a degree of ‘equalising’ between the parties,³² and prosecution disclosure obligations exist, in part, to redress the imbalance between the parties.³³ Disclosure obligations thereby operate to ensure the principle of equality of arms.

The ICC has taken further steps to ensure equality of arms, by placing a burden on the prosecutor to investigate incriminating and exonerating circumstances alike, and to disclose all evidence to the defence that appears relevant to both the defence and the prosecution cases.³⁴ This provision, however, reinforces the need for appropriate disclosure: the prosecutor’s duty to investigate exonerating material is only effective if the potentially exculpatory material is disclosed to the defence. As the below analysis will show, the emerging practice of the ICC permits non-disclosure of exculpatory material – which may pose a particular challenge for the full and proper utility of this requirement.

The relationship between disclosure and the rights of an accused is therefore a strong one. As trials are key accountability mechanisms for violations of international humanitarian and criminal law, the relationship between these constituent elements of trial is an important area of enquiry when we examine accountability for such violations. This chapter moves from the theoretical to the practical, with an examination of the relationship between trial fairness,

²⁷ Ibid 233-234.

²⁸ For an examination of defence disclosure obligations, see Kate Gibson and Cainnech Lussiaà-Berdou, ‘Disclosure of Evidence’ in Karim A.A. Khan, Caroline Buisman, and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010) 306, 338-344.

²⁹ Büngener, above n 6, 350.

³⁰ Ibid; Fedorova, above n 26, 234.

³¹ *Prosecutor v Kordić and Čerkez (Decision on Appellant’s Notice and Supplemental Notice of Prosecution’s Non-Compliance with its Disclosure Obligations Under Rule 68 of the Rules)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-95-14/2, 11 February 2004) [17].

³² Fedorova, above n 25, 234.

³³ Gibson and Lussiaà-Berdou, above n 28, 306.

³⁴ *Rome Statute* arts 54(1)(a) and 54(1)(f).

rights, and rules in relation to the way disclosure is undertaken at the ICC. While there may be other areas of disclosure practices that may be concerning, such as disclosure provided in an untimely manner, this chapter focuses solely on matters of non-disclosure at the ICC.

A. Non-Disclosure at the ICC: The Role of Victims, and The Use of Confidentiality Agreements By Prosecutors

Despite the importance of disclosure outlined above, the ICC's *Rules* – and their implementation by Trial Chambers – permit an environment of non-disclosure. Here, I examine two emerging issues: first, the non-disclosure of exculpatory material in the possession of the prosecution; and second, the lack of clarity around the disclosure responsibilities of Victims' Representatives, and potential non-disclosure of material (including potentially exculpatory material) in the possession of the victims. As a result, the ability of the accused to construct an effective defence is limited, and they may be at an informational disadvantage. The rules permitting non-disclosure also curtail the ability of Trial Chambers to manage the informational disparity and the relationships between the participants of the trial. This environment of non-disclosure at the ICC may therefore have a significant effect on the rights of the accused to know the case and to time and facilities to prepare a defence, as well as the principle of equality of arms. This demonstrates a fracture between the procedural rules governing disclosure, and the rights of the accused. Rather than being mutually reinforcing, the ability of prosecutors and victims to withhold disclosure means that procedural rules permit an environment where the rights of the accused are restricted, rather than such rules being undertaken in a way that ensures the trial is undertaken with 'full respect' for the accused's rights. While trials are a key accountability mechanism for violations of international humanitarian and criminal law, they are presently being conducted in a way that allows these disconnections between procedural rules, rights, and trial fairness.

1. Non-Disclosure of Exculpatory Material held by the Prosecutor

The first major issue is non-disclosure of potentially exculpatory material in the prosecution's control. Given the importance of disclosure, outlined above, restrictions on disclosure must be strictly limited and non-disclosure must be properly viewed as the exception rather than the rule.³⁵ However, the ICC's disclosure rules include several provisions that allow for non-

³⁵ Bernhard Kuschnik, 'International Criminal Due Process in the Making: New Tendencies in the Proceedings Before the ICC' (2009) 9 *International Criminal Law Review* 157, 166; Büngener, above n 6, 361.

disclosure of material.³⁶ There is concern at how these provisions for non-disclosure reconcile with the necessity for prosecution disclosure to the defence of exculpatory materials.

Article 67(2) of the *Rome Statute* places an obligation on the prosecutor to disclose potentially exculpatory material in its possession to the defence as soon as practicable.³⁷ The fact that this provision is part of the Article in the *Rome Statute* that governs ‘Rights of the accused’ is demonstrative of the centrality of exculpatory material to the accused’s rights. This has been further reinforced by ICC Trial Chambers, who have ruled that the right to a fair trial includes an entitlement to disclosure of exculpatory material.³⁸ Exculpatory material is that which, in the prosecution’s view, ‘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’.³⁹ In case of any doubt as to the application of this provision, the Court will decide.⁴⁰ Yet while the disclosure of potentially exculpatory material is therefore mandated under the disclosure rules, is formulated as constitutive of the rights of the accused, and is understood by Trial Chambers as integral to a fair trial, the ICC’s governing laws also establish permission for such materials to be withheld. Article 54(3)(e) of the *Rome Statute* (read conjunctively with Rule 82 of the *ICC Rules*) provides for non-disclosure of material that the prosecution has obtained under confidentiality arrangements with sources, and that is to be used solely as ‘springboard’ information to generate new evidence.⁴¹ This can only be introduced into evidence after the consent of the provider has been given, and there has been ‘adequate prior disclosure to the accused’.⁴² These provisions – on the one hand,

³⁶ Kuschnik, above n 35, 166. Non-disclosure may occur due to the material being an ‘internal document’, that it may ‘prejudice further ongoing investigations’ of the OTP; that non-disclosure ensures the confidentiality of the material; that non-disclosure is aimed to ‘protect the safety of witnesses and victims and members of their families’; or that the material may be withheld if it relates to the ‘steps that have been taken’ by the OTP to either ensure the confidentiality of the information, or the protection of the witnesses, victims, and members of their families. See *ICC Rules*, r 81.

³⁷ *Rome Statute*, art 67(2).

³⁸ *Prosecutor v Lubanga (Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 June 2008) (*‘Lubanga Decision on the Consequences of Non-Disclosure of Exculpatory Materials’*) [34].

³⁹ *Rome Statute* art 67(2). See also *Lubanga Decision on the Consequences of Non-Disclosure of Exculpatory Materials* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 June 2008) [59].

⁴⁰ *Rome Statute* art 67(2).

⁴¹ *ICC Rules* r 82 (which regulates non-disclosure pursuant to *Rome Statute* art 54(3)(e)).

⁴² *Ibid.*

necessitating disclosure of exculpatory material; on the other, permitting its non-disclosure – have been described as constituting a ‘collision course’ present in the *Rome Statute* itself.⁴³

The challenge of necessitating disclosure of exculpatory material, but permitting the non-disclosure of some materials, has been the subject of litigation in both the *Lubanga* and *Katanga* cases. In the *Lubanga* case,⁴⁴ the use of information from intermediaries gathered under Article 54(3)(e) and the non-disclosure of exculpatory evidence led to a stay in proceedings: a measure that was closely linked to the rights of the accused and the fairness of the trial.⁴⁵ This stay in proceedings has been used as evidence to support an argument that Trial Chambers put ‘weight on fairness and impartiality, rather than speediness when conducting the trials’.⁴⁶ The stay in proceedings does demonstrate the commitment of that Trial Chamber to ensuring that the defence received the necessary information. This may be seen as a positive indicator, that the Trial Chamber is prepared to do ‘anything it takes’ to ensure the defence receives the material it requires, that the rights of the accused are upheld, and that the fairness of the proceedings is not compromised. Thus on one interpretation, the stay could be seen as a positive step for the position of the rights of the accused and the fairness of the trial with regards to the procedure governing the conduct of the trial.⁴⁷ In the absence of disclosure rules being complied with in a way that reinforces the rights of the accused and trial fairness, the trial cannot be permitted to continue.

However, there is another way of viewing the *Lubanga* stay of proceedings, and an overly optimistic interpretation should be cautioned against. As a preliminary point, it should be remembered that while ultimately the defence gained the initially undisclosed material, this

⁴³ Christian M De Vos, ‘Case Note: Prosecutor v Lubanga. ‘Someone Who Comes Between One Person and Another: *Lubanga*, Local Cooperation and the Right to a Fair Trial’ (2011) 12 *Melbourne Journal of International Law* 217, 231.

⁴⁴ The details of the Decisions in the *Lubanga* case have been thoroughly addressed by other authors; see, eg, De Vos, above n 43; Sabine Swoboda, ‘The ICC Disclosure Regime – A Defence Perspective’ (2008) 19 *Criminal Law Forum* 449, 459; Rachel Katzman, ‘The Non-Disclosure of Confidential Exculpatory Evidence and the *Lubanga* Proceedings: How the ICC Defence System Affects the Accused’s Right to a Fair Trial’ (2009) 8 (1) *Northwestern Journal of International Human Rights* 77; Sara Anoushirvani, ‘The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo’ (2010) 22 (1) *Pace International Law Review* 213.

⁴⁵ *Lubanga Decision on the Consequences of Non-Disclosure of Exculpatory Materials* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 13 June 2008).

⁴⁶ Kuschnik above n 36, 185. See also Anoushirvani, who argues that the Trial Chamber’s ‘emphasis on a defendant’s right to a fair trial is highlighted in its decision imposing the stay, serving to further legitimise its decision and its role as an impartial international criminal tribunal’ (Anoushirvani, above n 44, 224).

⁴⁷ See eg Anoushirvani, who argues that ‘By imposing a stay on the proceedings, the ICC is emphasizing the importance of a fair trial’ (Anoushirvani, above n 44, 222).

was 'at the cost of resources, time and extended custody for Mr Lubanga'.⁴⁸ In addition, the stay in proceedings demonstrates a significant challenge for the Trial Chamber: that they were unable to regulate the relationship between the parties, uphold procedure, and ensure the rights of the Accused and the fairness of the trial, by any less radical means. A stay in proceedings is a significant step for a Trial Chamber to take, and will not be entered into lightly. It is *prima facie* incompatible with a Chamber's statutory responsibility to ensure an expeditious trial.⁴⁹ It is not satisfactory that, in order for the Trial Chamber to ensure trial safety, they must stop proceedings. Here, the fact that the Trial Chamber had to go to such measures to ensure some acceptable level of informational parity between the parties demonstrates the flaws in the present system.

The proceedings in *Lubanga* are precedent for the fact that a prosecutor cannot use the provision of Article 54(3)(e) to gather materials in a widespread manner and not disclose them. In that case, the prosecutor received over 50% of its documentary evidence on condition of confidentiality.⁵⁰ The Trial Chamber deemed this broad use of Article 54(3)(e) in the *Lubanga* case to be incorrect.⁵¹ However, it is still possible for a prosecutor to gather exculpatory material and not disclose it to the defence under this provision. There remains an inherent tension in the *Rome Statute* between the provisions to gather material under confidentiality agreements, and to disclose exculpatory material to the defence. While the *Lubanga* stay of proceedings shows that the widespread use of confidentiality agreements is incorrect, and shows how seriously Trial Chambers view the right of the accused to disclosure of exculpatory material, it also demonstrates how difficult this tension in the *Rome Statute* can be for Trial Chambers to resolve. Their role to properly regulate the relationships of the parties, and to give full respect to the rights of the accused, are both limited by this permission of non-disclosure of exculpatory material.

An examination of the *Lubanga* case reveals that non-disclosure of exculpatory materials in the possession of the prosecutor has been a significant issue in the way disclosure is undertaken at the ICC. Non-disclosure of material due to confidentiality agreements under

⁴⁸ Peter Morrissey, 'Applied Rights in International Criminal Law: Defence Counsel and the Right to Disclosure', in Gideon Boas, William A. Schabas and Michael P. Scharf (eds), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar, 2012) 68, 90.

⁴⁹ *Rome Statute* art 64(2).

⁵⁰ Swoboda above n 44, 463.

⁵¹ *Lubanga Decision on the Consequences of Non-Disclosure of Exculpatory Materials* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-1401, 13 June 2008).

Article 54(3)(e) has continued to be problematic in the case of *Katanga*,⁵² which shows that the internal inconsistencies in the *Statute* remain challenging. In spite of the accepted importance of disclosure of exculpatory material, there is nonetheless an environment of non-disclosure, permitted by the rules. Trial Chambers are limited in their ability to manage this, without resorting to the extreme measure of a stay of proceedings. Significant questions are raised around how the rights of an accused can be given full respect in a trial environment that explicitly permits exculpatory materials to be withheld. In turn, the connection between the procedural rules and the accused's rights starts to show a splintering.

2. *Non-Disclosure by Victims*

The second major issue emerging from the current disclosure regime at the ICC is the non-disclosure of material (both exculpatory and incriminating) held by victims' representatives. Unlike earlier international criminal institutions, where victims could only participate in international criminal trials as witnesses,⁵³ the ICC provides scope for victims to 'participate' in trials. The novel system of increased victim participation brings with it as yet unresolved questions about the management of information and disclosure, as well as the regulation of the disclosure relationship between the trial participants. Mirjan Damaška has noted the tension between this increased role for victims, the fairness of trial, and the rights of the accused, when he argued that 'the greatest stress on considerations of fairness toward the defendant comes from the ennobling ambition of [the ICC] to place justice for victims at the heart of [its] mission'.⁵⁴

⁵² *Prosecutor v Katanga (Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-621, 20 June 2008) [3]–[6].

⁵³ Zappalà, above n 7, 137–8. For a more comprehensive examination of the role of victims participants in ICC proceedings than what is practicable in the current chapter, see: Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475; Claude Jorda and Jérôme de Hemptinne, 'The status and role of the victim', in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, (Oxford University Press, 2002) 1387; Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 315; Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 *Leiden Journal of International Law* 485; Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 *Michigan Journal of International Law* 777; and Jo-Anne Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court regarding the Victims' Right to Participate' (2010) 23 *Leiden Journal of International Law* 629.

⁵⁴ Mirjan Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2001) 36(2) *North Carolina Journal of International Law and Commercial Regulation* 365, 372.

While increased victims participation need not necessarily be prejudicial to the rights of the accused,⁵⁵ the broader issue of the appropriate balance between the rights of the accused and the interests of the victims can be examined in the framework of the application of particular procedural rules. Here, the rules governing disclosure provide an examination of how victims' participation is conducted, and whether the rights of an accused are afforded 'full respect'.

Victims' Representatives are not a party to the trial,⁵⁶ and they are fundamentally motivated by different aims than the prosecution.⁵⁷ However, under Rule 68(3), where the 'personal interests' of the victims are affected, the Court shall permit the views and concerns of victims to be presented and considered at an appropriate stage of the proceedings.⁵⁸ This will be done in a manner 'not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.⁵⁹ In this way, while there is no specific right for victims to present evidence, they may apply to the Trial Chamber to do so.⁶⁰ It is likely that victims would have standing on matters of disclosure.⁶¹ Yet while they enjoy these abilities, Victims' Representatives do not hold the same duties or responsibilities of disclosure as do prosecutors.⁶² There is no duty of Victims' Representatives to undertake disclosure in the ICC's procedural framework.⁶³ As the *Lubanga* Trial Chamber reinforced, the disclosure regime only applies to prosecutors: there is 'no positive obligation ... on the other organs of the Court, the defence or the participants to disclose exculpatory material to the defence under Article 67(2) of the *Statute*, Rule 76 or Rule 77 of the *Rules*'.⁶⁴ The *Katanga* Trial Chamber noted the lack of obligation

⁵⁵ Zappala, above n 7, 139.

⁵⁶ See *Situation in the Democratic Republic of the Congo (Decision on the Application for Participation in Proceedings of VPRS I, VPRS 2-3-4-5-6)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04, 17 January 2006) [51], quoting from *Berger v France (Judgment)* (ECHR, App No 48221/99, 3 December 2002) [38] and *Perez v France (Judgment)* (ECHR, App No 47287/99, 12 February 2004) [68].

⁵⁷ Morrissey argues that 'they are concerned to shield their clients from trauma, to have their story told and accepted, and to secure justice for the victims' (Morrissey, above n 48, 83).

⁵⁸ *Rome Statute* art 68 (3).

⁵⁹ *Rome Statute* art 68 (3).

⁶⁰ *Prosecutor v Katanga (Decision on the Modalities of Victim Participation at Trial)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-1788, 22 January 2010) ('*Katanga Decision on Victims Participation*') [105].

⁶¹ Morrissey above n 48, 95.

⁶² *Prosecutor v Katanga (Judgment on the Appeal of Mr Katanga against the Decision of the Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 11, 16 July 2010) ('*Katanga Appeals Decision on Victims Participation*') [85].

⁶³ Büngener notes that 'the procedural framework of the ICC does not foresee [a duty to disclose material], which is also the main reason why the Chambers of the Court have answered this question in the negative' (Büngener, above n 6, 372-373).

⁶⁴ *Prosecutor v Lubanga (Decision on the defence application for disclosure of victims applications)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04- 01/06-1637, 21 January 2009), [10].

for Victims' Representatives under the ICC's *Statute* and *Rules*, and further noted that given the lack of a specific right for victims to present evidence, there can be no duty on the victims to disclose evidence.⁶⁵ This is true regardless of whether the evidence in their possession is incriminating or exculpatory.⁶⁶ This approach was approved by the Appeals Chamber.⁶⁷ Yet in spite of its acceptance by both Trial and Appeals Chambers, such non-disclosure is questionable. As Christine van den Wyngaert, writing extra-judicially, has noted '[t]his might strike some as odd: how can victims have a right to tender incriminating evidence without a corresponding duty to disclose exculpatory material?'⁶⁸

The lack of disclosure obligations means that information which comes under the possession or control of Victims' Representatives may never be provided to the parties – and in particular, to the defence. Victims are not entitled to conduct investigations in order to establish the guilt of the accused, as this would effectively make them second prosecutors and would 'be prejudicial to the rights of the Defence, the principle of equality of arms and the requirements of a fair trial'.⁶⁹ However, victims are able to undertake investigations 'in order to collect information with a view to establishing the existence, nature and extent of the harm suffered'.⁷⁰ This ability to undertake investigations could result in key material being under their control.⁷¹ Indeed, Victims' Representatives may have even greater access to such materials than prosecution staff, as a result of their role to represent victims. The accused does not then have any access to this material, and given the lack of disclosure obligations on the victims, there is no requirement for them to disclose this material to the defence – regardless of whether the material is incriminating or potentially exculpatory.⁷² The problematic nature of this is further reinforced by the fact that, unlike the prosecution, victims are not under an obligation to be objective.⁷³

In the *Katanga* case, the Appeals Chamber noted the prosecutor's responsibility to investigate exonerating and incriminating circumstances equally, under Article 54(1)(a) of the *Rome*

⁶⁵ *Katanga Decision on Victims Participation* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-1788, 22 January 2010) [105].

⁶⁶ *Ibid.*

⁶⁷ *Katanga Appeals Decision on Victims Participation* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 11, 16 July 2010).

⁶⁸ Van Den Wyngaert, above n 53, 488.

⁶⁹ *Katanga Decision on Victims Participation* (International Criminal Court, TC II, ICC-01/04-01/07-1788, 22 January 2010) [102].

⁷⁰ *Ibid* [103].

⁷¹ *Ibid* [102]-[103].

⁷² *Katanga Appeals Decision on Victims Participation* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 11, 16 July 2010) [83].

⁷³ Büngener, above n 6, 373.

Statute, and therefore considered that it would be reasonable for the prosecutor's investigation to extend to discovering any exculpatory evidence in the possession of the victims.⁷⁴ This information would then have to be disclosed to the accused under Article 67(2) of the *Statute* and Rule 77 of the *ICC Rules*.⁷⁵ However, this approach is predicated on an assumption that the prosecutor will become aware of the existence of this information. There is no guarantee that the prosecutor will discover this information: it may remain solely under the control of, and knowledge of, the victims. There is no legal obligation on the victims to inform the prosecution of such material, or its existence. Indeed, it is difficult to see why Victims' Representatives who have control over exculpatory material would make this known to the prosecution. As aforementioned, the motivations of the Victims' Representatives are different from those of the prosecutor; such motivations may not align with exculpatory material being investigated by the prosecutor. Indeed, it may be in the interests of victims to withhold that information.

As a result, Victims' Representatives may hold exculpatory material which the defence cannot access, and which the victims are under no obligation to provide to the defence (or to notify the prosecutor of, for subsequent investigation and disclosure). The potential impact of this on the accused's right to time and facilities to prepare their case is significant. If the defence cannot access material which suggests their innocence or undermines the credibility of a prosecution witness against them, their ability to mount an effective defence is curtailed. This situation also poses problems for the role of the Trial Chamber to regulate the informational relationship between the prosecution and defence, and to ensure equality of arms between the parties. While the victims are not a party to the trial, they may hold information which affects the prosecution case. For example, the non-disclosure of information which goes to undermine the credibility of a prosecution witness may place the prosecution's evidence at an advantage which the defence could have challenged, had it had access to the exculpatory material. In the absence of an obligation on Victims' Representatives to disclose any exculpatory material in their possession or under their control, the ability of a Trial Chamber to manage this aspect of the disclosure regime and the informational relationship between the parties will be limited.

⁷⁴ *Katanga Appeals Judgment on Victims Participation* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 11, 16 July 2010) [81].

⁷⁵ *Ibid.*

There is also no clear guidance around the responsibility of Victims' Representatives to provide disclosure of incriminating documents they themselves seek to rely upon in the proceedings. The Ngudjolo Chui defence team in the *Katanga* case argued that allowing victims to lead incriminating evidence would be to effectively make victims a second prosecutor.⁷⁶ This argument shows the concern held by some defence teams, regarding equality of arms issues and the ability of victims to lead this evidence. In the *Lubanga* case, the Trial Chamber held that 'victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist in the determination of the truth'.⁷⁷ This approach has been reiterated by the Appeals Chamber,⁷⁸ and by other Trial Chambers.⁷⁹ However, the Trial Chamber did not provide guidance as to whether the victims would need to disclose any documents to the defence before seeking to tender them. This issue was appealed, but the Appeals Chamber also failed to provide a Decision on this point. Instead, the Appeals Chamber remitted the issue to the Trial Chamber to decide on a case-by-case basis, noting that the Trial Chamber 'could rule on the modalities for the proper disclosure of such evidence before allowing it to be introduced'.⁸⁰

In the *Katanga* case, the Appeals Chamber found that the Trial Chamber may request the victims to submit evidence that was not previously disclosed to the accused.⁸¹ The Appeals Chamber specifically noted that this was not incompatible with the accused's right to a fair trial.⁸² If victims are authorised to present evidence, it is for the Trial Chamber to set the modalities of disclosure 'and to decide on the measures required to safeguard the fairness of the trial, given the need to respect the rights of the accused, but also the interests of the victims'.⁸³ The *Katanga* Trial Chamber specified a procedure for Victims' Representatives to tender documentary evidence, which would involve making a written application to the Trial

⁷⁶ *Prosecutor v Katanga* (Defence for Mathieu Ngudjolo, 'Application to Determine the Modalities of the Participation of Victims at the Trial Stage'), (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 13 January 2009) [47].

⁷⁷ *Prosecutor v Lubanga (Decision on Victims' Participation)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [108].

⁷⁸ *Prosecutor v Lubanga (Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06 OA 9 OA 10, 11 July 2008) ('*Lubanga Judgment of Appeal on Victims Participation*').

⁷⁹ *Katanga Decision on Victims Participation* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-1788, 22 January 2010) [81].

⁸⁰ *Lubanga Judgment of Appeal on Victims Participation* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06 OA 9 OA 10, 11 July 2008) [100].

⁸¹ *Katanga Appeals Judgment on Victims Participation* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 11, 16 July 2010) [55].

⁸² *Ibid.*

⁸³ *Katanga Decision on Victims Participation* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-1788, 22 January 2010) [107].

Chamber regarding the documents they intend to present, showing their relevance and ‘how they may contribute to the determination of the truth’.⁸⁴ The application, and the documents, ‘must be notified to the parties ... for their observations’.⁸⁵ Such a procedure, however, does not require the disclosure of the actual document to the parties: simply the ‘notification’ of the document. Non-disclosure of the actual material is therefore still permitted under this procedure. The Chamber will only authorise the presentation of evidence ‘provided that it is not prejudicial to the Defence or to the fairness or impartiality of the trial’.⁸⁶

In the *Katanga* decision, the Appeals Chamber also acknowledged the link between disclosure processes, material held by victims, and defence resources. They ruled that, in the case where a Trial Chamber requests the victims to submit evidence that was not previously disclosed to the accused, the Trial Chamber must order disclosure of this material to the accused ‘sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused’s right to a fair trial, in particular the right ‘to have adequate time and facilities for the preparation of the defence’’.⁸⁷ This is the correct approach. Nonetheless, concerns about the effect of victims participation on defence resources, and thereby the defence’s time and facilities to prepare their case, goes beyond the question of disclosure of material held by the victims. Another concern is around victim participation on disclosure issues, and their potential standing to make submissions in this regard. While victims are not intended to act as a second prosecutor, defence teams face two opponents with the capacity to make submissions on disclosure issues. In the course of responding to such submissions from victims as well as prosecutors, ‘defence resources are stretched, time is wasted and disclosure is compromised’.⁸⁸ This also poses significant issues for the equality of arms in the proceedings.⁸⁹

There is therefore a multitude of issues regarding the role of victims and non-disclosure of material to the parties (particularly the accused), and these issues may be cumulative. It may be that victims hold exculpatory material which they do not disclose; seek to rely on incriminating documents which they have not previously disclosed; and can intervene in disclosure matters while speaking to the guilt of the accused. The impact of these issues on

⁸⁴ Ibid [99]

⁸⁵ Ibid.

⁸⁶ Ibid [101].

⁸⁷ *Katanga Appeals Judgment on Victims Participation* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 11, 16 July 2010) [55].

⁸⁸ Morrissey, above n 48, 95.

⁸⁹ See Swoboda, above n 44, 462.

the rights of the accused to time and facilities to prepare a defence, to know the case, and to equality of arms, has the potential to be significant. The ‘splintering’ that we have witnessed between rules, rights, and fairness, in relation to prosecution non-disclosure of exculpatory material, now deepens. In light of this non-disclosure by victims, we can notice what we might call a ‘fracturing’ between these trial elements of rules, rights, and fairness.

These two issues of non-disclosure of information by victims and prosecution pose challenges for the rights of the accused to time and facilities to prepare their case, to know the case against them, and for the principle of equality of arms. If an accused cannot access potentially exculpatory material in the possession of either the Victims’ Representatives, or the prosecution, they are at an informational disadvantage in the case; and are at a disadvantage in terms of preparing their defence. These rules contribute to an environment where the rights of an accused are limited rather than given ‘full respect’; and the implementation by Trial Chambers of these rules facilitates such an environment. These two issues also demonstrate the difficulties Trial Chambers face in attempting to regulate the relationships between the parties at trial. The rules permitting non-disclosure curtail the ability of Trial Chambers to manage the informational parity between the parties. It has been shown that there is a fracture between the way the disclosure is undertaken – namely, that it may be withheld – and the rights of the accused, which are limited by this, rather than reinforced.

III. FAIRNESS, RIGHTS, AND DISCLOSURE RULES: DISCONNECTED AND FRACTURED ASPECTS OF INTERNATIONAL CRIMINAL TRIALS?

The rules that govern the disclosure regime at the ICC, and their application by Trial and Appeals Chambers, provide a particular area of enquiry about the interaction of procedural rules, the rights of the accused, and the overall fairness of the trial. In theory, these three elements are mutually dependent: a Trial Chamber has a responsibility to ensure a trial that is fair, and conducted with ‘full respect’ for the rights of an accused; this respect is ensured through processes governed by rules. Specifically, there is a clear connection between disclosure rules and trial fairness, and it has even been said that disclosure is ‘arguably the most important mechanism for ensuring that the accused receives a fair trial’.⁹⁰

⁹⁰ Gibson and Lussiaà-Berdou, above n 28, 306.

However, as this chapter shows, there are two emerging issues with how disclosure is undertaken at the ICC, which suggests a fracturing between these procedural rules and the rights of an accused. The disclosure rules, and their application by Chambers, permit an environment of non-disclosure to the defence by both prosecutors and victims. There are significant implications for an accused's rights – in particular, to time and facilities to prepare a defence, and to know the case against them – as well as the principle of equality of arms. The ability of Trial Chambers to protect and promote the rights of the accused, and to regulate the relationships between the parties, is curtailed in this trial environment. The above may be further evidence of the claim made by Kate Gibson and Cainnech Lussiaà-Berdou, that Chambers 'regularly recall the importance of disclosure as a fundamental component of fair trials', but that nonetheless, 'the effectiveness of the fair trial safeguards contemplated by the disclosure regime in the rules has been reduced'.⁹¹ The question then becomes how this lack of 'full respect' for the rights of an accused ultimately affects the fairness of the trial.

ICC trials are a key mechanism for ensuring accountability for violations of international humanitarian and criminal law. Yet the way that disclosure is being undertaken in these trials – facilitating a fracturing of procedural rules, rights, and fairness – may pose difficulties for accountability for such violations. The ICC's mission, to end impunity for 'the most serious crimes of international concern', is not assisted by trials that fail to adhere to their most fundamental requirement: that they are 'fair [...] and conducted with full respect for the rights of the accused'.⁹²

⁹¹ Ibid, 313.

⁹² *Rome Statute* art 64(2).