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**ICC & ICL Programme
Discussion Paper Series**

Offences against the administration of justice and fair trial considerations before the International Criminal Court

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About the Programme

The International Bar Association (IBA) commenced its International Criminal Court (ICC or the ‘Court’) Programme in 2005.

The Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals, and encourages the legal community to engage with the work of these courts. The IBA’s work includes the thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the rights of defendants, impartiality of proceedings and development of international justice.

Based at the Peace Palace in The Hague, the IBA’s ICC and international criminal law (ICL) Programme acts as an interface between the courts and global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers, and collaborating with key partners on specific activities to increase the engagement of the legal community on ICC and ICL issues.

Programme information is disseminated through regular reports, expert discussions, workshops and expert legal analysis on issues relevant to our mandate.

Methodology

The IBA’s monitoring work and research is complemented by consultations with key legal professionals, including court officials, academics and legal researchers, non-governmental organisations, individual counsel and diplomatic representatives.

This paper forms part of the Programme’s *Discussion Paper* series, and presents the Programme’s analysis on an ICL theme or topic relevant to the mandate. It reflects the IBA’s monitoring of developments and jurisprudence up to 20 May 2017.

The Discussion Paper was researched, written and reviewed by the legal staff of the IBA’s ICC & ICL Programme: Kate Orlovsky, Programme Researcher, and Aurélie Roche-Mair, Programme Director. IBA interns Carlos Correa, Daniel Eck, Pascale Langlais, Fiona Lau and Meg Tollitt provided invaluable research assistance. The paper was further reviewed by senior-level IBA officials, including IBA Executive Director Dr Mark Ellis and senior lawyers with relevant expertise.

The IBA expresses its gratitude to all persons who graciously participated in consultations for this Discussion Paper. The IBA also thanks and acknowledges the Open Society Justice Initiative for sharing its background research on witness interference with the IBA Hague Office.

List of acronyms and abbreviations

Article 70	Article 70 of the Rome Statute
ASP	Assembly of States Parties
Court	International Criminal Court
IBA	International Bar Association
ICC	International Criminal Court
ICCBA	International Criminal Court Bar Association
ICL	international criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
OPCD	Office of Public Counsel for the Defence
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations

Introduction

Article 70 of the Rome Statute of the International Criminal Court (ICC or the ‘Court’) ‘seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims’ right to justice and, generally, the Court’s ability to fulfil its mandate’.¹ Among other crimes, Article 70 aims to protect witnesses from interference in the form of intimidation, corruption and threats. The ICC’s jurisprudence has interpreted Article 70(1) (c) of the Rome Statute as proscribing ‘any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness, inducing the witness to falsely testify or withhold information before the Court’.²

In light of the centrality of witnesses to ICC proceedings, Article 70 is a crucial provision that criminalises, and thus has the potential to deter, behaviour that can seriously undermine ICC proceedings. As the International Bar Association (IBA) has emphasised, witness issues are complex and multifaceted, often taking place out of the public eye.³ They entail the cooperation and support of multiple organs and actors within the Court, as well as states. Witness issues also bring a fair trial dimension, notably as the prosecution and defence have equal rights to call and examine witnesses, and due to the need to balance considerations of witness protection while upholding the fundamental rights of the accused.

Recent research by the Open Society Justice Initiative identified witness interference as a widespread phenomenon in ICC cases with significant implications. It notably asserted that ‘witness interference can undermine the rule of law, obstruct the court’s truth-finding function, and distort case outcomes, leading to wrongful convictions or acquittals’.⁴ The Open Society Justice Initiative research showed that allegations of witness interference were made in eight out of nine cases that have proceeded to the trial stage at the ICC.⁵ The main types of witness interference that have been alleged include intimidation, bribery to encourage witnesses not to testify or to provide false testimony, coaching and disclosing personal information of protected witnesses.⁶

As this Discussion Paper shows, the ICC’s framework for addressing witness interference and other offences against the administration of justice differs in some respects from that of other international criminal tribunals. However, the issue of witness interference is not unique to the ICC, and other international criminal tribunals have exercised jurisdiction over a range of similar issues. The International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively), the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) have all adjudicated allegations of witness interference and other forms of contempt. In

1 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2123, Decision on Sentence Pursuant to Article 76 of the Statute, 22 March 2017, para 19.

2 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-749, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute, 11 November 2014, para 30; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1989-Red, Judgment Pursuant to Article 74 of the Statute, 19 October 2016, para 43.

3 IBA, *Witnesses before the International Criminal Court*, July 2013; IBA, *Evidence Matters in ICC Trials*, August 2016.

4 Open Society Justice Initiative, *Witness Interference in Cases before the International Criminal Court*, November 2016, p 5, www.opensocietyfoundations.org/sites/default/files/factsheet-icc-witness-interference-20161116.pdf accessed 19 May 2017.

5 *Ibid*, pp 2–3.

6 *Ibid*, pp 3–4.

this Discussion Paper, the IBA takes into account selected cases before those tribunals as points of comparison for ICC procedure and practice.

In accordance with its mandate to monitor issues of fairness and equality of arms at international criminal courts and tribunals, the IBA's ICC & ICL Programme has been closely monitoring developments of the interpretation and application of Article 70 at the ICC. To date, the Court has issued one judgment on Article 70 charges, in October 2016. In the *Bemba et al* case, Trial Chamber VII found Jean-Pierre Bemba Gombo, two members of his defence team and two associates guilty of corruptly influencing 14 defence witnesses, and presenting their false evidence to the Court in the *Bemba* main case.⁷ In addition to the *Bemba et al* case, two Article 70 arrest warrants are outstanding against Walter Barasa, Paul Gicheru and Philip Bett for alleged corrupt influencing of witnesses in the *Ruto and Sang* case in the Kenya Situation.⁸

At the time of writing, there has been a significant amount of litigation on the fairness of Article 70 procedures, addressing, *inter alia*, the use of *ex parte* and confidential proceedings; the timing and scope of disclosure to the defence; the overlap between the members of the prosecution working on the Article 70 and 'main' cases; and the overlap between proceedings before pre-trial and trial chambers involved. Objections were also raised about the scope of access by the prosecution to the accused's communications from the detention unit, including privileged communications with counsel. Many of these issues have been put before the Appeals Chamber, in the appeals against the judgments in the *Bemba* and *Bemba et al* cases, which remain under consideration.⁹ While the Appeals Chamber considers the issues before it in those cases, some similar issues are playing out in other cases where allegations of witness interference have arisen.

Based on a review of the public record of relevant cases, consultations with ICC practitioners and comparative analysis of practices at other international criminal tribunals, the IBA offers this Discussion Paper as an opportunity to review and encourage discussion on some of the jurisprudence and procedures that have developed for Article 70.

Chapter 1 sets out the procedures for trying these crimes at various international criminal courts and tribunals, and makes a brief survey of the contempt cases that came before these institutions. It then provides background for the ICC's jurisdiction over the crime of offences against the administration of justice, and sets out some considerations for fairness in Article 70 proceedings. Chapter 2 begins with an overview of two significant contempt investigations at the ICC, and then looks in more detail at the distinct structure presented by the ICC's legal framework, placing the discretion to prosecute Article 70 matters with the Prosecutor, and the oversight of investigations with a pre-trial chamber. Chapter 3 seeks to bring into focus some selected issues relating to due process and the rights of the accused, which have a clear impact on the fairness of proceedings. Finally, Chapter 4 focuses on some of the lessons learnt and future considerations for Article 70 investigations and cases.

7 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1989-Red, Judgment Pursuant to Article 74 of the Statute, 19 October 2016, pp 455–457.

8 ICC, *Prosecutor v Walter Osapiri Barasa*, ICC-01/09-01/13-1-Red2, Warrant of Arrest for Walter Osapiri Barasa, 2 August 2013, paras 3–5; ICC, *Prosecutor v Paul Gicheru & Philip Kipkoech Bett*, ICC-01/09-01/15-1-Red, Decision on the 'Prosecution Application under Article 58(1) of the Rome Statute', 10 March 2015, paras 14–18. See also n 4 above, p 4.

9 See, eg, ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3434-Red, Public Redacted Version of Appellant's Document in Support of the Appeal, 28 September 2016 ('*Bemba* Article 5 Appellant's Document'); ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2144-Red, Defence Document in Support of the Appeal, 4 May 2017; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2143-Red, Appeal Brief, 15 May 2017. At the time of writing this Discussion Paper, the other documents of appeal were not available in the public record.

Chapter 1: Offences against the administration of justice in international criminal courts and tribunals

I. Defining and distinguishing offences against the administration of justice

In examining the procedures used by the ICC to address witness interference through Article 70 investigations and prosecutions, this Discussion Paper looks at a small piece of a larger issue. As outlined below, witness interference is only one possible act included within offences against the administration of justice. The Court's legal framework also contains additional provisions to address other offences, for example, within the categories of misconduct and serious misconduct. This chapter presents an overview of what offences against the administration of justice are and are not so as to delineate and focus the issues raised in this Discussion Paper.

This chapter seeks to place this discussion in the context of both the ICC's legal framework, and also the law and practice of other relevant international criminal tribunals.

The scope of Article 70

A range of activities are covered by Article 70 of the Statute, all of which fall under the broad umbrella of activities that threaten the integrity of the judicial process. Together, these offences aim to protect three core elements of the administration of justice: the evidence, witnesses and Court officials. In the first category, offences include giving false testimony, presenting false evidence or tampering and interfering with the collection of evidence. In the second category, Article 70 prohibits corruptly influencing, obstructing or interfering with the testimony of a witness and retaliating against a witness. Finally, the third category includes the offences of intimidating, impeding, corruptly influencing or retaliating against a Court official and accepting a bribe as an official of the Court. Sanctions in case of a conviction may be a term of imprisonment not exceeding five years, a fine or both.¹⁰ Such offences are categorised as crimes and have also been referred to as 'contempt of court' in other contexts.¹¹ In this Discussion Paper, the terms 'offences against the administration of justice' and 'contempt of court' are used interchangeably to refer to the broad category of crimes.

Addressing and distinguishing misconduct within the ICC framework

The ICC's legal framework clearly distinguishes offences against the administration of justice from misconduct or breach of duty. While the regime for offences against the administration of justice is contained in Article 70 and its related rules in the ICC Rules of Procedure and Evidence (ICC RPE),¹² procedures for misconduct are included in multiple places within the Court's legal framework.

¹⁰ Rome Statute, Art 70 (3).

¹¹ See, eg, the ICTY RPE, Art 77.

¹² ICC RPE, Rules 162–169.

Article 71 of the Statute lays down sanctions for misconduct in the courtroom, addressing two types of wrongful behaviour: disrupting the hearing and deliberately refusing to comply with the Court's directions.¹³ Sanctions are of a non-criminal nature¹⁴ and may include, *inter alia*, removal from the courtroom, a fine or a ban on attending the proceedings.¹⁵ If the person committing misconduct is an official of the Court, a defence counsel or a legal representative of victims, sanctions may also take the form of a temporary prohibition on exercising their functions.¹⁶ A strict interpretation of Article 71 suggests that presence is required, and that it does not cover behaviour outside the courtroom.¹⁷ By contrast, Article 70 covers a broader spectrum of offences that can be committed both inside and outside the courtroom.

The Code of Professional Conduct for counsel (the 'Code'),¹⁸ adopted in accordance with Rule 8 of the ICC RPE, provides a specific disciplinary regime for misconduct committed by counsel.¹⁹ Violating or attempting to violate provisions of the Court's legal framework that impose a substantial ethical or professional duty, assisting or inducing another person to commit one these acts, or failing to comply with a disciplinary decision, all constitute misconduct pursuant to Article 31 of the Code. The disciplinary procedure is overseen by a disciplinary board²⁰ and possible sanctions include an admonishment, public reprimand, fine or temporary or permanent suspension of the right to practice before the Court.²¹ It is worth noting that, while the *Bemba et al* case discussed in this Discussion Paper presents an example of offences committed by defence counsel, in fact, such misconduct to an actionable level has been rare in international criminal tribunals. Zyberi cites one case of removal from the list of assigned counsel in the ICTY's 20-year history, and several cases at the ICTR, most of which were based on financial irregularities.²²

The Code of Conduct for the OTP (the 'OTP Code')²³ addresses unsatisfactory conduct defined as conduct not compatible with the Staff Rules of the ICC,²⁴ Code of Conduct for Staff Members²⁵ or Code of Conduct of Investigators.²⁶ The OTP Code refers to the Staff Rules of the ICC for disciplinary measures, which may be imposed by the Prosecutor.²⁷

13 Rome Statute, Art 71(1). Rule 77 of the Rules of Procedure and Evidence of both the ICTY and ICTR contain similar provisions.

14 Goran Sluiter, 'Offences Against the Administration of Justice' in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) p 445.

15 ICC RPE, Rules 170 and 171(1).

16 ICC RPE, Rule 171(2).

17 Antonio Cassese, Paola Gaeta and John RWD Jones, ed, *The Rome Statute of the International Criminal Court: a commentary – Volume II* (Oxford University Press 2002) p 1311. See also, Otto Triffterer and Kai Ambos, ed, *Commentary on the Rome Statute of the International Criminal Court* 3rd edn (CH Beck 2016) p 74 and William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2016) pp 1111–1112.

18 ICC, ASP, *Code of Professional Conduct for Counsel*, ICC-ASP/4/Res.1, 2 December 2005. Art 1 sets that the Code applies to any counsel practising before the ICC: defence counsel, legal representative for witnesses, witnesses, counsel acting for states and *amici curiae*.

19 ICC, *Code of Professional Conduct for Counsel*, c 4.

20 *Ibid*, Art 38(1).

21 *Ibid*, Art 42(1).

22 Gentian Zyberi, 'Dealing with professional misconduct by counsel', in Colleen Rohan and Gentian Zyberi, ed, *Defence Perspectives on International Criminal Justice* (Cambridge University Press 2017) p 117.

23 ICC OTP, *Code of Conduct for the Office of the Prosecutor*, 5 September 2013. According to c 1, s 1(1), the Code applies to all Members of the Office. Prior to the adoption of the OTP Code, no ethical document specifically regulated the conduct of members of the OTP, unlike judges and counsel practising before the ICC (see Lawrence Pacewicz, 'Introductory Note to International Criminal Court Code of Conduct for the Office of the Prosecutor', 5 September 2013).

24 ICC, ASP, *Staff Rules of the International Criminal Court*, ICC-ASP/4/3, 25 August 2005.

25 ICC, Registry, *Code of Conduct for Staff Members*, ICC/AI/2011/002, 4 April 2011.

26 ICC, Registry, *Code of Conduct for Investigators*, ICC/AI/2008/005, 10 September 2008.

27 ICC, *Code of Conduct for the Office of the Prosecutor*, para 75.

Misconduct or breach of duty by a judge, the Prosecutor, the Deputy Prosecutor, the Registrar or the Deputy Registrar

Sanctions for serious misconduct or serious breach of duty committed by judges, the Prosecutor, Registrar and their respective deputies are addressed in Article 46 of the Statute. Serious misconduct committed in the course of official duties is defined as behaviour that is ‘incompatible with official functions and which causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court’.²⁸ Such behaviour may include disclosing *sub judice* information where such disclosure is prejudicial to the proceedings or a person, concealing information that could have precluded them from holding office, and abusing their judicial office in order to obtain favourable treatment.²⁹

Serious breach of duty occurs when a person is grossly negligent in the performance of their duties and may include failing to comply with a well-founded request of disqualification or repeatedly causing unwarranted delay in judicial proceedings.³⁰ The sanction for such behaviour is removal from office.

Disciplinary measures may also be imposed on a judge, the Prosecutor, the Deputy Prosecutor, the Registrar or the Deputy Registrar for misconduct ‘of a less serious nature’, such as interfering with the exercise of the functions of judges, the Prosecutor, Registrar or their respective deputies, and for repeatedly failing to comply with requests from a presiding judge or the presidency.³¹ Such measures may include a reprimand or pecuniary sanction.³²

The Code of Judicial Ethics also provides guidelines to judges as to ethical and professional standards in the performance of their duties but does not specifically encompass an additional disciplinary regime for misconduct.³³

Issues of non-cooperation or non-compliance

It is also important to note that offences against the administration of justice arise from conduct that triggers individual criminal responsibility³⁴ and is punishable before a court.³⁵ This distinguishes offences against the administration of justice from non-cooperation or non-compliance, which refers to a state’s failure to fulfil its obligations to cooperate with the Court, thereby preventing the ICC from exercising its functions and powers.³⁶ Non-cooperation implicates state responsibility instead of individual criminal responsibility.³⁷ Article 87(7) of the Rome Statute provides that a chamber may

28 ICC RPE, Rule 24(1) (a). Rule 24(1) (b) addresses behaviour outside of the course of official duties that is of a grave nature, which causes or is likely to cause serious harm to the standing of the Court.

29 ICC RPE, Rule 24(1).

30 ICC RPE, Rule 24(2).

31 ICC RPE, Rule 25(1); Rome Statute, Art 47.

32 ICC RPE, Rule 32.

33 ICC, *Code of Judicial Ethics*, ICC-BD/02-01-05, 9 March 2005.

34 ICC RPE, Rule 163(1) specifies that the Statute and the Rules shall apply *mutatis mutandis* to proceedings pursuant to Art 70. See also ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1989-Red, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para 54.

35 Rome Statute, Arts 70(3) and (4).

36 Rome Statute, Art 87(7).

37 Antonio Cassese, Paola Gaeta and John RWD Jones, ed, *The Rome Statute of the International Criminal Court: a commentary – Volume II* (Oxford University Press 2002) p 1635.

make a finding of non-cooperation, which is then referred to the relevant supervisory body, such as the United Nations (UN) Security Council or the ICC Assembly of States Parties (ASP).³⁸

II. Comparing the legal frameworks

International criminal tribunals: ICTY, ICTR, SCSL and STL

At the ICTY and ICTR, the tribunals' jurisdiction over contempt was not explicitly included in the Statutes, but was set out in the Rules of Procedure and Evidence (RPE), and was significantly amended and made more detailed over time. In the original version of the ICTY RPE adopted by the judges, the scope of the Tribunal's jurisdiction over contempt was limited to a witness refusing to answer a question.³⁹ After several amendments and revisions, the scope was greatly broadened and came to include offences such as witness interference, disclosure of confidential information and failure to comply with a subpoena.⁴⁰ Article 77 of the ICTR RPE was subject to fewer changes, but nevertheless encompasses the same broad spectrum of offences.⁴¹

The power to prosecute contempt was stated to be an 'inherent power' of the institution in the ICTY RPE, which was confirmed by early jurisprudence of the Tribunal.⁴² ICTY judges found that the Tribunal's jurisdiction to determine its own jurisdiction is essential to its functioning,⁴³ and that the power to prosecute and punish offences of contempt derives from the Tribunal's power to ensure that the exercise of its jurisdiction is not frustrated and its basic judicial functions are safeguarded.⁴⁴

The ICTR has taken a slightly different approach to its jurisdiction over crimes of contempt. While making reference to the ICTY's interpretation on the matter, ICTR judges held that the Tribunal had a 'statutory jurisdiction' over contempt.⁴⁵ This interpretation was favoured notwithstanding the absence of provisions to that effect in its Statute. Jurisdiction over crimes of contempt was also included in the RPE of the SCSL and STL, as falling under the 'inherent power' of the Court.⁴⁶

At the ICTY, ICTR, SCSL and STL, the power to initiate proceedings for contempt rests with chambers, which may direct the Prosecutor to investigate and, in certain circumstances, prosecute the alleged acts. Each of those tribunals also includes a specific provision to deal with a potential conflict of interest, by providing for the chamber to direct the Registrar to appoint an *amicus curiae* or independent prosecutor, if the chamber determines that the Prosecutor has a conflict of interest

38 Art 87(7) provides that the Court 'may refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'. The ICTY established a similar mechanism, where it found that the Chamber had an inherent power to make a finding of non-cooperation, which was to be reported to the UN Security Council (see ICTY, *Prosecutor v Tihomir Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 34).

39 ICTY, Rules of Procedure and Evidence, 11 February 1994, Art 77.

40 See, eg, ICTY RPE, Rev.3, 29 June 1995, Art 77; ICTY RPE, Rev.11, 25 July 1997, Art 77; ICTY RPE, Rev.12, 12 November 1997, Art 77; ICTY RPE, Rev.22, 13 December 2001, Art 77.

41 ICTR, Rules of Procedure and Evidence, 29 June 1995, Art 77; ICTR RPE, 27 May 2003, Art 77.

42 See ICTY, *Prosecutor v Duško Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, paras 13–19.

43 *Ibid*, para 18.

44 ICTY, *in the case against Florence Hartmann*, IT-02-54-R77.5, Judgment on Allegations of Contempt, 14 September 2009, para 18. See also ICTY, *Prosecutor v Zlatko Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para 30 and ICTY, *Prosecutor v Ivica Marijačić & Markica Rebić*, IT-95-14-R77.2, Judgment, 27 September 2006, para 23.

45 ICTR, *Prosecutor v Pauline Nyiramasuhuko et al*, ICTR-98-42, Decision on the Prosecutor's Further Allegations of Contempt, 30 November 2001, para 7.

46 ICTY RPE, Rule 77; ICTR RPE, Rule 77; SCSL RPE, 31 May 2012, Rule 77; STL RPE, STL-BD-2009-01-Rev.9, 3 April 2017, Rule 60*bis*.

with respect to the relevant conduct.⁴⁷ As discussed in Chapter 2, chambers have ordered the appointment of *amicus curiae* prosecutors in situations where there may be a conflict of interest, but also to conserve the prosecution's resources and ensure that proceedings both are and appear to be impartial.

The legal frameworks also vary in respect to which judge or chamber presides over contempt proceedings. At the SCSL, for example, the President of the Special Court (or Residual Special Court) has the authority to 'deal with the matter summarily' or refer the matter to the appropriate authorities of Sierra Leone, as well as to direct the Prosecutor of the Special Court to investigate and prosecute, leading to proceedings before the President, or a trial or appeals chamber of the Special Court.⁴⁸ At the STL, any proceedings for contempt are heard by a contempt judge appointed from a roster by the President of the Tribunal.⁴⁹ At the ICTY and ICTR, contempt cases were heard by full panels of three trial judges, and five appeals judges.⁵⁰

The ICC

The ICC's legal framework explicitly includes jurisdiction over contempt in the Statute, while still setting it apart from the 'core crimes' of genocide, war crimes and crimes against humanity included in Article 5. Article 70 of the Statute does not use the 'inherent power' formulation, instead stating that the Court 'shall' have jurisdiction over a specific set of offences. ICC RPE Rules 162–169 provide further direction on the Court's jurisdiction and procedures for investigating and prosecuting these crimes.

It is worth noting that the 'inherent powers' of a court, as a legal concept, is not explicitly articulated in the ICC's Statute, while it has been widely recognised before other international courts. The ICC itself has nevertheless made references to its inherent powers in relation to, among others, the concept of abuse of process.⁵¹ For example, in the *Lubanga* case, when the prosecution failed to disclose exculpatory evidence, Trial Chamber I relied on the concept of abuse of process to stay proceedings as a sanction for this misconduct.⁵²

One of the most significant distinctions in the ICC's framework for offences against the administration of justice is the role given to the Prosecutor. At the ICC, under RPE Rule 165, investigations may be initiated by the Prosecutor on the basis of information communicated by a chamber or 'any reliable source'. As discussed in Chapter 2, jurisprudence interpreting Article 70

47 See, notably, ICTY RPE and ICTR RPE, Rule 77(C) (ii).

48 SCSL RPE, Rule 77(C).

49 STL RPE, Rule 60*bis*(C).

50 ICTY RPE and ICTR RPE, Rule 77(E) and (K).

51 See, eg, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2) (a) of the Statute of 3 October 2006, 14 December 2006, paras 36–39.

52 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 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, 13 June 2008; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2143, Decision Adjourning the Evidence in the Case and Consideration of Regulation 55, 2 October 2009; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 and Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010.

has held that the OTP is the sole organ of the Court that can initiate prosecutions under Article 70.⁵³ There is also no specific provision addressing conflict of interest or the appointment of *amicus curiae* in the context of contempt matters. Further analysis of ICC practice on this point is developed in Chapter 2.

As of 2015, the ICC Regulations of the Court have been provisionally amended to allow Article 70 cases to be brought before a single judge of the pre-trial chamber and trial chambers for pre-trial and trial proceedings, rather than a full panel of three judges, and for appeals to be heard by a panel of three rather than five judges.⁵⁴ The Rome Statute also provides that the Court may request a State Party to exercise jurisdiction in its place.⁵⁵

III. An overview of selected contempt cases at international criminal courts and tribunals

Contempt cases at the ICTY, ICTR, SCSL and STL

A review of the contempt cases tried by international criminal courts and tribunals shows that the majority of the cases relate to the disclosure of confidential information and witness interference. Persons prosecuted for contempt have included persons already facing trial for core crimes, defence team members or associates, witnesses, journalists and government officials. The ICTY prosecuted approximately 25 cases for contempt, most of which dealt with disclosure of confidential information. Significant cases at the ICTY included those arising out of the *Blaškić*⁵⁶ and *Šešelj*⁵⁷ cases. In *Blaškić*, three cases of contempt were brought against three journalists and an official of the Croatian government for disclosing confidential information on protected witnesses.⁵⁸ In *Šešelj*, three cases of contempt were brought against the accused, Vojislav Šešelj, for disclosing confidential information about protected witnesses in a book and on a website.⁵⁹ A number of contempt cases also arose from the *Haradinaj et al* case, which dealt with allegations including witness interference, refusal to testify and disclosure of confidential information.⁶⁰ Other contempt offences prosecuted at the ICTY include failing to comply with a subpoena, giving false testimony and presenting false evidence.⁶¹

53 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3114, Decision on the Request of the Defence in Relation to Investigations Conducted Pursuant to Article 70 of the Statute, 17 June 2014, para 19. See also ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-350-Red2-ENG, p 15, lines 15–18.

54 ICC, Regulations of the Court, ICC-BD/01-01-04, 26 May 2004, amended on 6 December 2016, Regulation 66bis.

55 Rome Statute, Art 70 (4) (b); ICC RPE, Rule 162(4).

56 ICTY, *Prosecutor v Radoslav Blaškić*, IT-95-14.

57 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67.

58 ICTY, *Prosecutor v Josip Jović*, IT-95-14 and 14/2-R77; ICTY, *Prosecutor v Ivica Marijačić and Markica Rebić*, IT-95-14-R77.2; ICTY, *Prosecutor v Domagoj Margetić*, IT-95-14-R77.6.

59 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.2; ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.3; ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.4. The Court has also faced different types of contempt offences in the context of the *Šešelj* case, including failure to comply with a subpoena (see ICTY, *Prosecutor v Šešelj*, IT-03-67-R77.1-I) and witness interference (see ICTY, *In the Case Against Petar Jojić et al*, IT-03-67-R77.5).

60 In order, ICTY, *Prosecutor v Astrit Haraqija and Bajrush Morina*, IT-04-84-R77.4; ICTY, *Prosecutor v Shefqet Kabashi*, IT-04-84-R77.1; ICTY, *Prosecutor v Baton Haxhui*, IT-04-84-R77.5.

61 See, eg, ICTY, *In the Contempt Case of Berko Zečević*, IT-95-5/18-R77.1; ICTY, *Prosecutor v Zuhdija Tabaković*, IT-98-32/1-R77.1 and ICTY, *Prosecutor v Jelena Rašić*, IT-98-32/1-R77.2.

The ICTR tried approximately five contempt cases, the majority of which relate to witnesses accused of giving false testimony. Significant cases arose from the *Nyiramasuhuko et al.*,⁶² *Kamuhanda*⁶³ and *Karemera et al.*⁶⁴ cases, in which allegations of false testimony were made against prosecution witnesses.⁶⁵ Other allegations of contempt investigated at the ICTR included witness interference and disclosure of confidential information.⁶⁶

The SCSL prosecuted seven contempt cases, which arose from the *Alex Tamba Brima et al* and the *Charles Taylor* cases. Five cases alleged witness interference by relatives and associates of the accused in the respective main cases.⁶⁷ The two other cases pertained to the disclosure of confidential information.⁶⁸ Two of those cases involved multiple accused: three accused in *Independent Counsel v Margaret Fomba Brima et al* and four accused in *Independent Counsel v Hassan Papa Bangura et al*.

The STL has prosecuted two contempt cases to date. Both cases arose from the STL's main case, *Ayyash et al.*,⁶⁹ and dealt with the disclosure of confidential information about protected witnesses. In these cases, charges were brought against journalists, as well as against legal persons; that is, a television station and newspaper.⁷⁰

Offences against the administration of justice at the ICC

At the ICC, offences against the administration of justice have been charged in three cases⁷¹ involving eight individuals,⁷² five of whom have gone to trial and been convicted. The three Article 70 cases arose from two main cases, *The Prosecutor v Bemba*⁷³ and *The Prosecutor v Ruto & Sang*.⁷⁴ Because of the relatively small number of core crime cases that have gone to trial at the ICC, individuals charged with contempt have made up a significant portion of individuals who have gone to trial.

The Prosecutor v Bemba et al – a multiple defendant case that gave rise to the Court's first trial judgment interpreting Article 70 – was relatively complex. Mr Bemba was convicted, together with his lead defence counsel, a member of his defence team and two associates, of participating in a common plan to influence 14 defence witnesses. The case relied on a significant amount of digital

62 ICTR, *Prosecutor v Pauline Nyiramasuhuko et al*, ICTR-98-42.

63 ICTR, *Prosecutor v Jean de Dieu Kamuhanda*, ICTR-95-54A.

64 ICTR, *Prosecutor v Edouard Karemera et al*, ICTR-98-44.

65 ICTR, *Prosecutor v Pauline Nyiramasuhuko et al*, ICTR-98-42-T, Confidential Decision Following *Amicus Curiae* Report Related to Allegations of Contempt of the Tribunal and False Testimony of Witness QA, 2 September 2011 and ICTR, *Prosecutor v GAA*, ICTR-07-90-R77, Judgment and Sentence, 4 December 2007; ICTR, *Prosecutor v Edouard Karemera et al*, ICTR-98-44-T, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonnyunkiza for False Testimony, ICTR-98-44-T, 29 December 2006.

66 ICTR/MICT, *In the Matter of Deogratias Sebuzweze and Maximilien Turinabo*, MICT-13-40-AR90 and MICT-13-41-AR90; ICTR, *Prosecutor v Leonidas Nshogoza*, IT-07-91.

67 In chronological order: SCSL, *Independent Counsel v Margaret Fomba Brima et al*, SCSL-2005-2; SCSL, *Independent Counsel v Anifa Kamara*, SCSL-2005-03; SCSL, *Independent Counsel v Eric Koi Senessie*, SCSL-2011-01; SCSL, *Independent Counsel v Hassan Papa Bangura et al*, SCSL-2011-02; SCSL, *Independent Counsel v Prince Taylor*, SCSL-2012-02.

68 SCSL, *Independent Counsel v Brima Samura*, SCSL-2005-01; SCSL, *In the Matter of Contempt Proceedings Arising from the Case of The Prosecutor v Charles Ghankay Taylor*, SCSL-2012-01.

69 STL, *Prosecutor v Salim Jamil Ayyash et al*, STL-11-01.

70 STL, *In the Case Against Al Jadeed SAL and Karma Mohamed Tahsin Al Khayat*, STL-14-05; STL, *In the Case Against Al Akhbar SAL and Ibrahim Mohamed Ali Al Amin*, STL-14-06.

71 ICC, *Prosecutor v Walter Osapiri Barasa*, ICC-01/09-01/13; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13; ICC, *Prosecutor v Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15.

72 Walter Osapiri Barasa, Paul Gicheru, Philip Kipkoech Bett, Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido.

73 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

74 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

evidence, including call data records, recordings and financial records. It dealt with novel legal issues interpreting Article 70 and arising from the close connection of the allegations to the Article 5 case. The ICC also has two outstanding arrest warrants for Article 70 charges against three individuals who remain at large in Kenya: Walter Barasa, Paul Gicheru and Philip Kipkoech Bett.

The OTP has also investigated the activities of other accused persons who have been or are currently on trial and in the custody of the ICC, for example, Bosco Ntaganda, Thomas Lubanga Dyilo, Mathieu Ngudjolo Chui and Dominic Ongwen, each of whom the prosecution has alleged to be engaged in activities that might qualify for prosecution under Article 70, in particular, attempting to corruptly influence or interfere with witnesses.⁷⁵ At the time of writing this Discussion Paper, however, these Article 70 investigations have not resulted in public charges against another accused in ICC detention, and proceedings with respect to investigating allegations of contempt have been for the most part conducted on a confidential and *ex parte* basis. The public record of the cases outlines some of the concerns raised by the prosecution to the pre-trial chambers and trial chambers, and these concerns have formed the basis for restrictions on the accused persons as further discussed below.

Aside from allegations made by the OTP, the defence and chambers have raised Article 70 allegations concerning prosecution witnesses or intermediaries, for example, in the *Katanga and Ngudjolo*, *Lubanga*, *Kenyatta* and *Ruto and Sang* cases. In the *Katanga and Ngudjolo* case, both accused alleged that prosecution witnesses had lied and that intermediaries improperly influenced witnesses.⁷⁶ In the *Lubanga* case, Trial Chamber I communicated to the OTP that intermediaries may have persuaded, encouraged or assisted witnesses to give false evidence in the case, resulting in the OTP appointing an independent counsel to investigate, as discussed in Chapter 2.⁷⁷ In the *Kenyatta* case, the defence alleged that certain prosecution witnesses had committed offences under Article 70, and while the Prosecutor withdrew the charges, the Trial Chamber recalled that it retained jurisdiction over any possible Article 70 violations.⁷⁸ In the *Ruto and Sang* case, defence counsel alleged Article 70 violations by prosecution witnesses and intermediaries, as discussed in Chapter 2.⁷⁹

IV. Fairness and Article 70 proceedings

The requirement for fair trials is clearly set out in the ICC's legal framework and is consistent with well-established international norms.⁸⁰ The fairness of a trial results not from the application of a single norm or practice, but is achieved by implementing multiple components. As McDermott

75 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1616, Public 'Prosecution's Communication of Disclosure of the Disclosure of Evidence Obtained Pursuant to Article 70', 7 November 2016; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1200-Conf-Exp, Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the Regulations of the Court to Prohibit Mathieu Ngudjolo's Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees, 12 June 2009; ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-482-Red, Public Redacted Version of 'Request for an Order that Mr Ongwen Cease and Disclose Payments to Witnesses and that the Registry Disclose Certain Calls Made by Mr Ongwen', 24 June 2016, 12 July 2016.

76 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3265-Corr2-Red, Conclusions finales de Mathieu Ngudjolo, 8 November 2012, paras 338, 1065, 1068–1070, 1103–1104, 1157, 1204; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, 29 June 2012, paras 460–461, 466–467, 480–481, 503.

77 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para 483.

78 ICC, *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-822-Red, Defence Application for a Permanent Stay of Proceedings due to Abuse of Process, 10 October 2013, para 68; ICC, *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges Against Mr Kenyatta, 13 March 2015, para 10.

79 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2028-Red, Public Redacted Version of 'Ruto defence request to appoint an *amicus* prosecutor', 2 May 2016, paras 5–10.

80 Rome Statute, Art 64(2); International Covenant on Civil and Political Rights, Art 14; European Convention on Human Rights and Fundamental Freedoms, Art 6; American Convention on Human Rights, Art 8; and African Charter on Human and Peoples' Rights, Art 7. See also IBA, *Fairness at the International Criminal Court*, August 2011, pp 9, 18 and 40.

writes, whether the theoretical basis of fairness is derived from the goal of procedural justice, process legitimacy or the rule of law, key common features can be identified: ‘adjudicators should be neutral and impartial; the law must be applied equally and consistently; the accused should have an effective defence, meaning that they should have the opportunity to put their side of the case forward; the process should be as open and transparent as possible; and the law and procedure should be clear and fully articulated in advance of the trial.’⁸¹

International criminal courts and tribunals including the ICC are held to the highest standards of fairness, for reasons that include their role as international standard setters and, in this capacity, their ability to influence domestic legal systems, and as an important component of establishing and maintaining their own legitimacy.⁸² The ‘highest standards of fairness’ can be summarised as ‘full respect for the rights of the accused as established by international human rights standards and repeated in the statutes of the tribunals in a manner that is consistent with principles of fairness, such as neutrality, equality, and consistency’.⁸³

In this regard, evaluating the fairness of proceedings takes into account not only the protection of statutory rights, but whether the Court gives meaning to ‘full respect’ by applying additional safeguards when possible. As the IBA has noted, the rights of the accused enumerated in Articles 66 and 67 of the Rome Statute are framed as ‘minimum guarantees’ and are not an exhaustive list of rights.⁸⁴ In addition to these, human rights such as privacy and liberty have been recognised by international criminal courts and tribunals, and codified, for example, in rules on privileged communications and provisional release.⁸⁵

Article 70(2) of the Statute makes clear that the same standards of procedural fairness apply to Article 5 and Article 70 proceedings. This provision states that ‘the principles and procedures governing the Court’s exercise of jurisdiction over offences under [Article 70] shall be those provided for in the Rules of Procedure and Evidence’,⁸⁶ and that, unless otherwise provided, ‘the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in Article 70’.⁸⁷ No exceptions are made for the minimum guarantees of Articles 66 and 67.

The elements and guarantees on fairness in the context of Article 70 are of utmost importance for this discussion, as the cases that have come before the Court to date present a particular situation where several accused in custody facing trial for Article 5 crimes have been alleged to be directly involved in Article 70 offences.

Protecting the procedural rights of an accused charged with or on trial for Article 5 crimes, and at the same time being investigated for Article 70 offences, presents challenges that require particular attention. A person in the Court’s custody has restrictions on their privacy, communications and movements that make them more vulnerable during an investigation, compared with a person not in custody. As a suspect under investigation, the individual does not have the same due process

81 Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press 2016) p 31.

82 *Ibid*, c 5: ‘Setting the Highest Standards of Fairness, or Just “Fair Enough”?’. See also UN, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, A/50/22, 1995, para 129.

83 See n 81 above, p 34.

84 IBA, *Fairness at the International Criminal Court*, August 2011, p 19.

85 See n 81 above, p 33.

86 Rome Statute, Art 70(2).

87 ICC RPE, Rule 163(1).

protections under the legal framework.⁸⁸ However, considerations of fairness still apply, and special attention must be given to the rights of accused persons already facing trial. As the Appeals Chamber has stated: ‘[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of articles 55 and 54 (1) (c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial.’⁸⁹

Evaluating the application of due process guarantees falls to the chambers and, in particular, the trial chamber, which is mandated to ensure the fairness of trial proceedings. As noted by Trial Chamber I in the *Lubanga* case, ‘[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (Article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges’.⁹⁰ While Article 70 matters arising from a trial may initially be raised before a trial chamber, trial chambers have directed the prosecution to address requests for investigative measures to a pre-trial chamber, in accordance with the statutory framework. This separation of oversight between the trial and pre-trial chambers has resulted in two tracks of proceedings. To facilitate the investigation, and as allowed under the Statute, both the trial and pre-trial chambers have applied exceptions to the rights of the accused in conducting Article 70 investigations, including permitting extended *ex parte* proceedings, delayed disclosure and the waiver of lawyer-client privilege through the ‘crime-fraud exception’.⁹¹ Further examination is necessary with regard to how these exceptions are applied, and what impact they may have on the overall fairness of proceedings.

88 Art 55 of the Rome Statute provides for the rights of a suspect during an investigation, while Art 67 sets the rights of an accused during trial.

89 ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para 11.

90 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 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, 13 June 2008, para 88.

91 See Chapter 3.

Chapter 2: Investigating and prosecuting Article 70 offences: practice, comparison and lessons learnt

Proceedings for contempt and offences against the administration of justice, with some notable exceptions, are generally lower profile than proceedings for the core crimes prosecuted by international criminal courts and tribunals. This is due to a number of factors. Primarily, these crimes are of a lesser gravity, and often are dealt with in confidential proceedings, in particular when witness interference is among the allegations. However, it is clear that jurisdiction over such offences is key to the completion of the Court's primary mandate, therefore making it important to analyse how they are being conducted and how they impact the overall work of the institution.

This chapter first provides an overview of the two most prominent Article 70 investigations to date, in the *Bemba* and *Ntaganda* cases. The IBA has done extensive research into the public record to examine procedural steps taken at the ICC to investigate and prosecute Article 70 allegations. Some of the procedural steps noted by the IBA have been referenced in the public record, but the details remain confidential, including at times the factual and legal basis for a given application or decision. As noted throughout this Discussion Paper, a number of issues have been put before the Appeals Chamber. In light of its mandate to interface with the legal community in The Hague, the IBA has also benefitted from consultations with practitioners, allowing additional insight into areas of interest and concern for the legal community. By outlining some of the key procedural steps taken, focusing on those that may be the subject of discussion and debate on a policy level, the IBA hopes to provide a basis for discussion and analysis of both the legal framework and its interpretation to date.

This chapter then focuses on the main distinction between the ICC and other tribunals, namely that the Prosecutor has the discretionary mandate to investigate and prosecute these offences. Finally, it provides some analysis of the implications of the ICC's structure for addressing Article 70 offences, looking at the prosecution's role as well as the roles of the pre-trial and trial chambers, in particular, in relation to supporting fair trials through their oversight of investigations and trial proceedings.

I. Article 70 investigations in the *Bemba* and *Ntaganda* cases

The Prosecutor v Jean-Pierre Bemba Gombo

The trial against Jean Pierre Bemba Gombo for Article 5 crimes began in November 2010, before Trial Chamber III. In June 2012, the prosecution received an anonymous tip alleging interference with defence witnesses, which prompted the opening of an Article 70 investigation. In November 2012, after the defence had already started its presentation of evidence in August 2012, the

prosecution made a confidential and *ex parte* request to Trial Chamber III, in which it requested registry records of payments to defence witnesses.⁹² This request was granted.⁹³

In March 2013, the prosecution formally notified the Trial Chamber that it was investigating possible Article 70 offences. The notification was made by a confidential and *ex parte* filing that outlined in detail the prosecution's suspicions that 'close associates of [Mr Bemba], members of the defence team, and possibly the Accused himself are involved in a scheme to provide benefits to defence witnesses in exchange for false testimony and false documents'.⁹⁴

Trial Chamber III presided over early but crucial stages of the prosecution's Article 70 investigation, including an important *ex parte* status conference on 9 April 2013.⁹⁵ During this status conference, the prosecution discussed the feasibility of future investigative measures to address suspected Article 70 violations with the Trial Chamber and registry. The prosecution told the Trial Chamber that it had information, which it had requested from Western Union,⁹⁶ that money had been advanced to defence witnesses, which the prosecution noted, seemed relatively large in amount and therefore 'can be a motivation for a witness not to tell the truth'.⁹⁷ Among other things, the prosecution requested that the Trial Chamber allow access to recordings of Mr Bemba's telephone communications from the detention unit for specific periods, in order to 'confirm [its] suspicions'.⁹⁸ At this stage, and perhaps in contrast to the broader level of access that was later allowed, the prosecution informed the Trial Chamber that it had a 'clear idea' of what it was looking for and was not 'seeking to carry out a random listening exercise which would be a fishing expedition'.⁹⁹ While the status conference was *ex parte*, the absence of any representation for the rights of the defence was discussed and raised as a concern, in particular by the registry.¹⁰⁰

On 26 April 2013, the Trial Chamber redirected the prosecution's requests for access to material, finding that further requests relating to an Article 70 investigation should be heard by the Pre-Trial Chamber.¹⁰¹ Trial Chamber III also declined to rule on the request for access to the recordings. Judge

92 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/2412, Prosecution's Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr Jean-Pierre Bemba Gombo, 15 November 2012; ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/2441, Registry's Observations relating to the 'Decision Requesting the Registry's Observations on the Prosecution's Request Relating to Article 70 Investigations', 26 November 2012.

93 Following the prosecution's request, Trial Chamber III requested observations from the registry. In response, the registry not only gave its observations, but also directly addressed the prosecution's request. The Chamber thus found that a decision on the request was no longer required (see ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2421, Decision Requesting the Registry's Observations on the Prosecution's Request Relating to Article 70 Investigation, 19 November 2012; ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2441, Registry's Observations Relating to the 'Decision Requesting the Registry's Observations on the Prosecution's Request Relating to Article 70 Investigations', 20 November 2012; ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2461, Decision on the Registry's Observations on the Prosecution's Request Relating to Article 70 Investigations, 3 December 2012).

94 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2548-Red3, Public Redacted Version of 'Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence', 20 March 2013, ICC-01/05-01/08-2548-Conf-Exp, 19 May 2014, para 1.

95 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T303-Red-Eng, Transcript, 9 April 2013, ('Bemba Transcript of 9 April 2013').

96 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2548-Red4, Public Redacted Version of 'Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence', 20 March 2013, ICC-01/05-01/08-2548-Conf-Exp, 7 July 2014, paras 3–4 and 11–19.

97 *Bemba Transcript of 9 April 2013*, p 29, lines 21–25, p 30, lines 1–2.

98 *Ibid*, p 5, lines 16–18.

99 *Ibid*, p 23, lines 14–16.

100 *Ibid*, p 12, lines 23–25.

101 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2606-Red, Public Redacted Version of 'Decision on the Prosecution's Request Relating to Article 70 Investigation' of 26 April 2013, 2 May 2014.

Tarfusser was appointed as Single Judge of the Pre-Trial Chamber, who then made further rulings on the Article 70 investigation as outlined below.¹⁰²

While the Trial Chamber redirected the investigation to the Pre-Trial Chamber, the information that the Trial Chamber was exposed to has been raised as an issue in the appeal in the *Bemba* Article 5 case on the grounds that the Trial Chamber could be prejudiced by the material shared by the prosecution.¹⁰³ By the time the Trial Chamber redirected the prosecution's requests to the Pre-Trial Chamber, the prosecution had been investigating for nine months, and had informed the Trial Chamber of a number of the measures it had taken, including the requests to Western Union and state authorities to gather information in that investigation. The Trial Chamber was also made aware of the prosecution's plans to request authorisation to have access to communications of Mr Bemba from the detention centre, as well as those of his legal team.

When the investigation was transferred from the Trial Chamber to the Single Judge, the records, many of which were later made public in redacted form, show that a significant number of novel legal and procedural issues remained to be determined. The Single Judge dealt with these issues in a number of rulings that for the first time interpreted procedures for an Article 70 investigation involving an accused also detained and on trial by the ICC.¹⁰⁴ Again, these rulings were made during the *ex parte* portion of the proceedings and, as a result, they did not reflect any input or arguments from the perspective of the defence and, once issued, were not subject to appeal or review.¹⁰⁵ Many of the issues, however, implicated the fundamental rights of the accused, as further discussed in Chapter 3, and therefore were challenged at later stages of the proceedings.¹⁰⁶

The Single Judge also set some important parameters for the Article 70 investigation, setting it apart from the proceedings in the main case and clarifying that the Pre-Trial Chamber's orders were made under the broad powers it had under Article 57(3) (a) of the Statute. This provision states that, at the request of the Prosecutor, the Pre-Trial Chamber may 'issue such orders and warrants as may be required for the purposes of an investigation'. As such, Judge Tarfusser wrote that 'the proceedings triggered by the Prosecutor's Request are to be regarded as separate and autonomous vis-à-vis those relating to the case of the *Prosecutor v Jean-Pierre Bemba*'.¹⁰⁷ Having established that the Pre-Trial

102 ICC, *Situation in the Central African Republic*, ICC-01/05-T2-Conf-Exp-Eng, Transcript, 30 August 2013; ICC, *Situation in the Central African Republic*, ICC-01/05-T4-Conf-Exp-Eng, Transcript, 10 October 2013.

103 In its Appeals Brief, the defence contends that the exposure of the Trial Chamber to the content of multiple *ex parte* submissions made by the OTP – to which the defence did not have the opportunity to respond in order to correct or clarify the facts – indubitably had a prejudicial impact on the Trial Chamber's perception of the defence as a whole (*Bemba* Art 5 Appellant's Document, paras 59–75).

104 In a series of decisions made between May 2013 and February 2014, the Single Judge decided that the registry should provide the prosecution with the complete log of all telephone calls placed or received by the accused while in ICC detention, as well as with any non-privileged calls; the registry should facilitate the prosecution's contact with limited defence witnesses for the purposes of its investigation; the prosecution could seek access to call logs and recordings of Mr Bemba's counsel and legal team from Belgian and Dutch authorities; and that an independent counsel should be appointed to review those conversations for privileged material, and to submit the prosecution 'relevant portions of any and all such calls that might be of relevance for the purposes of the investigation' (see ICC, *Situation in the Central African Republic*, ICC-01/05-46-Red-Exp, Decision on the 'Prosecution's Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70', 8 May 2013, p 8; ICC, *Situation in the Central African Republic*, ICC-01/05-50, Decision on the 'Registry's Observations pursuant to Regulation 24bis of the Regulations of the Court on the Implementation of the "Decision on the Prosecutor's 'Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70'"', 27 May 2013, p 8; ICC, *Situation in the Central African Republic*, ICC-01/05-52-Red2, Decision on Prosecutor's 'Request for Judicial Order to Obtain Evidence for Investigation Under Article 70', 3 February 2014, pp 7–8).

105 In this regard, it is worth noting that, once the investigation was made public, the defence for Mr Bemba in the Article 70 case sought leave to appeal the *ex parte* decisions of the Single Judge, almost a year after they were issued, on the basis that the Single Judge had overstepped his authority in providing access to the conversations (see ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-170, 10 February 2014).

106 *Bemba* Art 5 Appellant's Document.

107 ICC, *Situation in the Central African Republic*, ICC-01/05-50, Decision on the 'Registry's Observations pursuant to regulation 24bis of the Regulations of the Court on the implementation of the "Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70'"', 27 May 2013, para 9.

Chamber was engaged in supervising an investigation separate from the trial, the Single Judge permitted the prosecution access to the complete log of all telephone calls made by Mr Bemba in ICC detention, and any recordings of non-privileged calls requested. The issue of any limited time period or specificity in the prosecution's request, along the lines of the prosecution's initial request to the Trial Chamber, did not appear to be a requirement in the context of the investigation.

The registry had raised a number of legal issues relating to the procedure, in particular about the need to appoint an ad hoc counsel to protect the interests of the defence at the early stage of the investigation. The registry's request was rejected by the Single Judge.¹⁰⁸ Likewise, the Single Judge ruled that there was no need to appoint an independent counsel to review non-privileged material. The Single Judge determined that representation issues did not apply at the investigation stage, stating that '[o]nly once, and if, the Prosecutor will have determined that there are reasonable grounds to believe that an offence has indeed been committed, will the relevant suspect be entitled to rely on the assistance of counsel of his or her choice'.¹⁰⁹ These points are further developed in Chapter 3, as is the legality of providing the privileged and non-privileged conversations to the prosecution throughout the proceedings.

The Prosecutor v Bosco Ntaganda

The trial against Bosco Ntaganda for crimes allegedly committed under Article 5 of the Statute commenced before Trial Chamber VI in September 2015. However, issues relating to witness interference allegations began in the pre-trial period. Mr Ntaganda came into the Court's custody in March 2013. In August 2014, the prosecution requested Trial Chamber VI to place restrictions on Mr Ntaganda's contacts, alleging that Mr Ntaganda was using his communications from the detention centre to share confidential information about prosecution witnesses with contacts in the Democratic Republic of the Congo, for the purpose of witness intimidation and interference.¹¹⁰ In December 2014, the Trial Chamber imposed restrictions on Mr Ntaganda's telephone and visitor privileges, informed him that his conversations may be actively monitored, and ordered the registry to review and report on recorded conversations that had been passively monitored, per detention centre regulations, from the time he came into ICC custody.¹¹¹ The subsequent registry reports to the Chamber were provided to the defence in full and then to the prosecution in redacted form.¹¹²

Based on the registry's reports, in March 2015 the Trial Chamber found that Mr Ntaganda had abused his communication privileges, and placed a number of additional restrictions on his communications and visitors. At that time, Mr Ntaganda was notified pursuant to Regulation 101(3)

108 *Ibid*, para 10.

109 *Ibid*.

110 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-349-Red3, Public Redacted Version of 'Prosecution's Urgent Request for Measures Under Regulation 101(2) of the Regulations of the Court', 8 August 2014, 15 January 2016.

111 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-410-Conf-Exp-Corr, Corrected Version of 'Decision on the Prosecution Request for Restrictions on Contact and the Defence Request for Access to Logs', issued on 8 December 2014, 16 February 2015.

112 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-504-Conf-Exp, First Report on the Post-Factum Review of the Phone Conversations Made by Mr Ntaganda, 10 March 2015.

of the Regulations of the Court that non-privileged conversations would be actively monitored by the registry.¹¹³ The legal framework for monitoring communications is further discussed in Chapter 3.

On 13 August 2015, the prosecution filed a separate, confidential, *ex parte* request before Pre-Trial Chamber II in relation to an investigation under Article 70, and also requested Trial Chamber VI to transfer information relevant to witness interference to the Pre-Trial Chamber.¹¹⁴ Relying on the broad investigative powers of the Pre-Trial Chamber under Article 57(3) of the Statute, the prosecution sought access to the entirety of Mr Ntaganda's non-privileged telephone conversations, as well as detention centre call logs and visitor logs for both Mr Ntaganda and Mr Lubanga, from the time Mr Ntaganda arrived in ICC detention in March 2013.¹¹⁵ This request was granted on 18 September 2015, and the prosecution received the complete and unredacted recordings.¹¹⁶

The fact of this investigation and the complete set of recordings were first disclosed to the defence in November 2016.¹¹⁷ The defence then filed a request for a stay of proceedings, which the Trial Chamber 'considered was more appropriately characterized as a request for adjournment of the proceedings, in order to assess the disclosed Conversations and the prejudice resulting therefrom'.¹¹⁸ The Trial Chamber denied this request, as well as defence requests for suspensive effect of and leave to appeal that decision.¹¹⁹ Instead, in 2017, the Ntaganda defence team received temporary additional means to review this disclosure.

In March 2017, the defence for Mr Ntaganda filed a request for a stay of the proceedings with prejudice to the prosecution, arguing that, 'given the high relevance of those conversations to Defence strategy as well as to Mr Ntaganda's personal knowledge of the case', the prosecution's access to these materials 'amounts to an abuse of the Court's process, as a result of which Mr Ntaganda cannot receive a fair trial'.¹²⁰ In its decision on the March 2017 defence request, Trial Chamber VI recognised that the prosecution's access to certain information placed it in an 'unduly advantageous position vis-à-vis the Defence' and that was indeed prejudicial to the accused, but denied the defence's request for a permanent stay, finding that the prejudice incurred did not meet the high threshold required for that remedy.¹²¹ It stated that 'a permanent stay of proceedings is an exceptional remedy only granted as a last resort, when the essential pre-conditions of a fair trial are missing, and when there is no sufficient indication that the relevant issues will be resolved during the trial process, rendering it impossible to "piece together the constituent elements of a fair trial"'.¹²²

113 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1840-Red, Public Redacted Version of 'Prosecution's Response to the "Defence Request for Stay of Proceedings With Prejudice to the Prosecutor" (ICC-01/04-02/06-1830-Conf)', 30 March 2017, ICC-01/04-02/06-1840-Conf, 6 April 2017 ('OTP Response to Ntaganda Second Stay of Proceedings Request'), para 18.

114 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-638-Conf-Exp, Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70, 13 August 2015.

115 OTP Response to Ntaganda Second Stay of Proceedings Request, para 35.

116 *Ibid.*, paras 35–36.

117 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1616, Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70, 7 November 2016.

118 See ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1883, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017 ('Decision on Ntaganda Second Stay of Proceedings Request'), para 8.

119 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02-06-1629-Red, Public Redacted Version of 'Urgent Request for Stay of Proceedings' dated 14 November 2016, 14 November 2016; ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02-06-T-159-Conf-Eng, Transcript, 16 November 2016; ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02-06-1830-Red, Public Redacted Version of 'Defence Request for Stay of Proceedings With Prejudice to the Prosecutor', 20 March 2017, ICC-01/04-02/06-1830-Conf, 21 March 2017 ('Ntaganda Second Stay of Proceedings Request'); Decision on Ntaganda Second Stay of Proceedings Request.

120 Ntaganda Second Stay of Proceedings Request, para 2.

121 Decision on Ntaganda Second Stay of Proceedings Request, paras 42–43 and 60–62.

122 *Ibid.*, para 60.

However, the Trial Chamber took a number of other measures. It ruled that the prosecution would not be allowed to use material obtained in the Article 70 investigation during the Article 5 trial unless it specifically authorised the prosecution to do so ‘upon receipt of a substantiated request to be filed sufficiently in advance’.¹²³ The Chamber may also allow the defence to recall prosecution witnesses and/or disregard certain evidence.¹²⁴

II. The mandate to investigate and prosecute Article 70 violations at the ICC

Powers to initiate Article 70 investigations

The manner in which the *Bemba* and *Ntaganda* Article 70 investigations have unfolded has been shaped in part by the mandate accorded to the OTP with respect to Article 70 in the ICC legal framework. Rule 165 of the ICC RPE states that ‘[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source’. The first ruling interpreting the Article 70 framework came in the *Katanga and Ngudjolo* case, when Trial Chamber II ruled that Rule 165 of the ICC RPE ‘gives only the Prosecutor the authority to begin an investigation on the offences defined in Article 70 of the Statute, whether he acts *proprio motu* or on the basis of information communicated to him by the Chamber or any other reliable source’.¹²⁵ In that instance, addressing allegations brought by the Ngudjolo defence that a prosecution witness had lied, the Trial Chamber declined to communicate any information to the Prosecutor, as it was not convinced that the witness intentionally decided to mislead the Court. The sole power of the ICC Prosecutor to initiate Article 70 investigations and prosecutions was also confirmed by Trial Chamber I in the *Lubanga* case, in addressing allegations of threats to defence witnesses. In an oral decision, the Trial Chamber ruled that the Prosecutor alone had been given the statutory authority to investigate Article 70 allegations, and that the only alternative course of action would be the possibility of a state investigating and prosecuting the allegations.¹²⁶

The issue of whether a chamber could circumvent the discretionary power of the Prosecutor to initiate Article 70 proceedings was raised by the defence in the *Ruto and Sang* case. In that case, during trial proceedings, defence counsel informed the prosecution that it had information concerning possible Article 70 violations by prosecution witnesses and intermediaries.¹²⁷ The defence declined to provide this Article 70 information to the prosecution during the trial, in part because, according to the defence, the prosecution did not agree to the defence’s proposed conditions that the information would be restricted to the Prosecutor and Deputy Prosecutor, and would not be shared with the trial team on the *Ruto and Sang* case.¹²⁸ The prosecution emphasised that it would consider information carefully and ‘take the steps it considers appropriate to ensure that the decision

123 *Ibid*, para 61.

124 *Ibid*, para 62.

125 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-190-Red-ENG, Transcript, 22 September 2010, p 3, lines 14–22.

126 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-350-Red-ENG, Transcript, 14 April 2011, pp 16–17.

127 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2028-Red, Public Redacted Version of ‘Ruto defence request to appoint an *amicus* prosecutor’, 2 May 2016, paras 5–10.

128 *Ibid*, paras 8–9.

is taken objectively', which could include involving persons outside the trial team or an external party, but it would not accept the information subject to conditions as to which staff could have access.¹²⁹

Following the Trial Chamber's termination of the case based on 'no case to answer' proceedings,¹³⁰ the Ruto defence, joined by the Sang defence, again raised allegations of Article 70 violations by prosecution witnesses and sought intervention from the Trial Chamber.¹³¹ The *Ruto and Sang* defence teams requested that the Chamber use its 'inherent powers' and/or its residual powers under Article 64(6) (f) to order the appointment of an *amicus* prosecutor, separated from the OTP trial team by a 'Chinese wall' to investigate these allegations.¹³² The prosecution opposed this request, arguing for dismissal *in limine* based on lack of standing for Mr Ruto and Mr Sang and lack of jurisdiction and legal authority on the part of the Trial Chamber. It argued in the alternative that the request should be dismissed on the merits.¹³³ The Trial Chamber agreed that, following its decision vacating the charges against the accused, it lacked jurisdiction over the request, and also agreed with the prosecution that the proper forum for a request to initiate an investigation would be the Pre-Trial Chamber.¹³⁴ There was, therefore, no ruling on whether the Chamber's powers under Article 64(6) (f) of the Statute would allow it to appoint an *amicus curiae* to investigate Article 70 allegations.

While future jurisprudence may evolve to allow the appointment of an *amicus* prosecutor on the basis of the chambers' inherent powers, the legal framework and current jurisprudence do not envisage powers to initiate Article 70 investigations beyond the OTP. This Discussion Paper makes an analysis based on the current state of jurisprudence, with the aim of improving the fairness of current practices. Nonetheless, the IBA also highlights the overall role of chambers in safeguarding the integrity of proceedings and the Court, which could still be called upon. This, in particular, remains a possibility if the OTP's approach to Article 70 is neither standardised nor transparent, which may raise questions about how the OTP's Article 70 mandate is being implemented. While the practices of other tribunals, discussed in Chapter 1, raise the possibility of amending the Statute to bring initiating Article 70 proceedings within the chamber's discretion and in line with the frameworks of the other tribunals, the IBA notes that amending the Statute is a long-term process that will not address immediate concerns.¹³⁵

129 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2031-Red, Public Redacted Version of Prosecution's Response to the Defence's Requests to Appoint an *Amicus* Prosecutor, 24 May 2016, para 29.

130 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red-Corr, Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016. See also IBA, *Evidence Matters in ICC Trials*, August 2016, p 57.

131 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2028-Red, Public Redacted Version of 'Ruto defence request to appoint an *amicus* prosecutor', 2 May 2016, para 36; ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2030, Sang defence response to 'Ruto defence request to appoint an *amicus* prosecutor', 18 May 2016, para 10.

132 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2028-Red, Public Redacted Version of 'Ruto defence request to appoint an *amicus* prosecutor', 2 May 2016, para 44; ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2030, Sang defence response to 'Ruto defence request to appoint an *amicus* prosecutor', 18 May 2016, paras 11–27.

133 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2031-Red, Public Redacted Version of Prosecution's Response to the Defence's Requests to Appoint an *Amicus* Prosecutor, 24 May 2016.

134 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2034, Decision on the Ruto Counsel's Request to Appoint an *Amicus* Prosecutor, 2 June 2016, paras 7–11.

135 In this regard, the IBA notes its previous recommendation in the context of an earlier report addressing witness issues where 'in lieu of amending the Statute or Rules, the IBA recommends that the ICC judges consider appointing *amicus curiae* to make recommendations on whether investigations should be launched (and whether they should be conducted internally or externally) when there are strong allegations of false testimony or witness interference but no apparent investigations, regardless of who the alleged offender is.' IBA, *Witnesses before the International Criminal Court*, July 2013, p 49.

Potential conflicts of interest

The legal frameworks of the ICTY, ICTR, STL and SCSL, which place the discretion to investigate and prosecute contempt with the chambers, also contain explicit provisions allowing for the appointment of an *amicus curiae* prosecutor in the case of a conflict of interest with the institution's OTP, and if the chamber or presidency decides not to investigate the matter itself. For example, at the ICTY, the chamber will direct the Prosecutor to investigate and prosecute allegations of contempt 'unless the Prosecutor makes a showing of conflict of interest with respect to the relevant conduct of the alleged contempt' in the form of a statement supported by facts and submitted to the chamber. The chamber may also *proprio motu* determine that the Prosecutor has a conflict of interest. In both situations, the chamber may direct the Registrar to appoint an *amicus curiae* prosecutor to investigate and prosecute.¹³⁶ The appointment of *amicus curiae* to address such situations is discussed further below.

To date, the ICC legal framework and practice do not present clear guidelines to determine conflicts of interest relating to Article 70, or a means to address them. Conflicts of interest tend to be fact-specific and difficult to identify. When conflicts of interest are left unaddressed, damage may be done not only to the integrity of the proceedings and the rights of the accused, but also to perceptions of the legal system itself. A legal system that is seen as partial or containing unaddressed conflicts of interest fails the objective test in respect of justice being seen to be done. In this regard, while regretting the gap in the ICC's framework for guiding the practice in relation to potential conflicts of interest in the context of Article 70 investigations or proceedings, the IBA underscores the importance of tools defining and describing conflicts of interest, such as codes of ethics. These may provide guidance or even place obligations on judges, counsel and other staff to declare any conflicts and recuse themselves from any situation in which they have an actual or perceived conflict.¹³⁷

Questions dealing with the possibility of the OTP or members of the OTP having conflicts of interest with respect to its Article 70 mandate have been addressed by both the prosecution and judges, as discussed below. In the *Lubanga* case, Trial Chamber I suggested that '[c]learly, if a team prosecuting a case were to find itself placed in a position of conflict when investigating or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to members of the OTP who were uninvolved with the proceedings or, in an extreme situation, to an independent investigator'.¹³⁸ In its filing on this issue in *Lubanga*, the prosecution accepted the basic premise that conflicts could exist and described possible measures to work around them:

'The Prosecution accepts that a conflict of interest could influence some of its staff, involved in the same case, but this conflict does not affect the Office itself. The Prosecutor can decide (or the Chamber could request the Office) to appoint a staff member who was not involved in the case to conduct the investigation. Alternatively, the Office could contract with a totally independent counsel to conduct the investigations. The Prosecutor is bound by obligations of fairness and impartiality in the execution of his mandate, as prescribed in Article 54(1). These obligations extend to the Prosecutor in the context of the investigation and prosecution of offences under

136 ICTY, *Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal*, IT/227, 6 May 2004, paras 7–8.

137 See, eg, ICC, *Code of Conduct for the Office of the Prosecutor*, paras 42–44; ICC, *Code of Professional Conduct for Counsel*, Art 16; ICTY, *Code of Professional Conduct for Counsel Appearing Before the International Tribunal Rev.3*, 6 August 2009, Art 14.

138 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-350-Red-ENG, Transcript, p 17, lines 14–19.

Article 70, just as in the investigation and prosecution of any other crime within the jurisdiction of the Court.¹³⁹

However, the IBA notes that, in the *Bemba* and *Ntaganda* cases, the OTP argued that an investigation into potential witness interference involving the accused necessarily must involve the same staff who, by virtue of their knowledge of the trial, also have knowledge relevant to the Article 70 investigation, for example, familiarity with code terms that the accused allegedly used and the ability to decipher references made to the main case.¹⁴⁰

OTP-appointed independent counsel

Publicly available information shows that the OTP has appointed an ‘independent counsel’ in one case to date to address an Article 70 matter. There is, however, limited public information about this appointment and the work done by the independent counsel. In the *Lubanga* case, following the issuance of the Trial Judgment, the Prosecutor appointed an independent counsel to investigate possible violations of Article 70 by prosecution intermediaries, after Trial Chamber I concluded that ‘intermediaries’ (persons who assisted the OTP in contacting witnesses in the Democratic Republic of the Congo), may have persuaded, encouraged or assisted witnesses to give false evidence in the case. In the Trial Judgment, the Chamber acknowledged that, under the ICC’s legal framework, it could not itself order an investigation, and therefore communicated its finding to the OTP.¹⁴¹ The Prosecutor did not publicly indicate any further actions, and the Lubanga defence subsequently raised the issue in its appeal, making a separate filing requesting that the Appeals Chamber order the OTP to disclose what actions it had taken in relation to Article 70.¹⁴² In the context of this litigation, the prosecution responded that an independent counsel had been engaged to conduct an investigation and that, on the basis of the counsel’s report and conclusions, as well as its own assessment of the evidence, the prosecution had decided not to pursue further investigations or prosecutions against any of the intermediaries.¹⁴³

In the *Lubanga* proceedings, the prosecution declined to disclose the independent counsel’s report to the defence, noting that it had no obligation, nor order from the Trial Chamber, to report back to the Court or the defence on any Article 70 investigations. The prosecution argued that, even though the report was prepared by an independent consultant who was engaged to avoid any conflict of interest, his report should be considered a confidential and internal document of the OTP and that, as an internal work product of the office, it was not subject to disclosure.¹⁴⁴ However, the prosecution offered to provide the report to the Appeals Chamber on a confidential and *ex parte*

139 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2716, Prosecution’s Observations on Article 70 of the Rome Statute, 1 April 2011, para 11.

140 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-314-Red, Public Redacted Version of ‘Prosecution’s Consolidated Response to Defence Requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the Other Members of the Office of the Prosecutor from the case Against Kilolo, Mangenda and Babala’, ICC-01/05-01/13-314-Conf, 4 April 2014, para 31; ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1636-Red, Public Redacted Version of ‘Prosecution’s response to the Defence Urgent Request for Stay of Proceedings’ (ICC-01/04-01/02-1629-Conf), 15 November 2016, ICC-01/04-02/06-1636-Conf, para 8.

141 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para 483.

142 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3066, *Requête de la Défense de M Lubanga aux fins de communication d’éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduites en vertu de l’Article 70*, 28 February 2014, para 15.

143 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3069, Prosecution’s Response to ‘*Requête de la Défense de M. Lubanga aux fins de communication d’éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduites en vertu de l’Article 70*’, 25 March 2014, para 9.

144 *Ibid*, para 19.

basis. After requesting the report, the Appeals Chamber affirmed the Prosecutor's discretion on whether to initiate or conduct investigations on Article 70 offences and, noting that the defence was now informed about the actions taken by the prosecution, also noted that it was satisfied there was no additional evidence to be disclosed in response to the defence's request.¹⁴⁵

In addition to the independent counsel in the *Lubanga* case, the OTP has, on other occasions not in the public record, employed an external counsel experienced with international criminal tribunals to filter materials relevant to an investigation, in order to provide an additional safeguard for the protection from disclosure of information potentially relating to defence strategy in the main case.¹⁴⁶ The IBA encourages continued development and application of such practices in a consistent and transparent manner.

Towards transparent guidelines and policy on the investigation and prosecution of Article 70 offences

The IBA benefitted from a consultation with senior OTP officials for the purposes of this Discussion Paper, during which it was clear that Article 70 matters remain a serious concern for the OTP, as well as a significant area of work and use of resources. It was also clear that the approach of the OTP to Article 70 matters remains one of case-by-case assessment and action. The OTP outlined an approach to Article 70 matters based on three principles: (1) Article 70 investigations and prosecutions are not the core business of the OTP; (2) the OTP does not remain passive when Article 70 allegations are made; and (3) Article 70 cases must reach a certain magnitude, representing, for example, a present threat to the integrity of ongoing proceedings, in order to justify ICC investigation and prosecution.¹⁴⁷

In this regard, the IBA emphasises the importance of a clear and consistent policy for implementing the OTP's Article 70 mandate, addressing, *inter alia*, the decision to open an investigation, assessing and managing potential conflicts of interest, and procedures for investigations that include guidelines for appointing independent counsel or *amicus curiae*. Some criteria for considering when to open an Article 70 investigation are included in the 2016 'Policy Paper on Case Selection and Prioritisation'. However, the IBA notes that these guidelines seem to be specific to addressing allegations raised by the OTP and do not specify procedures for allegations raised by other parties or the chamber.

The Policy Paper states:

'Where witness interference or evidence tampering has caused the degradation of the collected evidence or has impacted on the conditions of evidence-gathering or further investigations or on the trial proceedings, the Office will consider whether to commence prosecutions pursuant to article 70 of the Statute for offences against the administration of justice. This will be particularly so when witness interference or evidence tampering has affected investigations which are advanced to such an extent that the Office considers to be trial ready. Mindful of its mandate and the need to focus its efforts on the prosecution of core crimes, the Office will resort to article 70

145 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3114, Decision on the Request of the Defence in Relation to Investigations Conducted Pursuant to Article 70 of the Statute, Appeals Chamber, 17 June 2014, paras 19–23.

146 IBA consultation with the ICC Deputy Prosecutor and Director of the Prosecution Division, 1 June 2017.

147 *Ibid.*

prosecutions bearing in mind the factors set out in rule 162(2) and it will in any event cooperate with national authorities, as appropriate.¹⁴⁸

A small amount of additional information about the OTP's approach to Article 70 investigations and prosecutions is also included in its Strategic Plans. In the 2015–2018 Strategic Plan, Article 70 is discussed as a component of security and witness protection. The Strategic Plan emphasises the role of states and prioritises seeking state cooperation to prosecute Article 70 offences. However, the OTP also states that it will 'directly undertake the investigation and prosecution of such offences where a State is unable or unwilling to do so and the obstruction or interference is of such gravity or scale that seriously affects the administration of justice at any stage of the proceedings. In any given case, the Office may also decide to conduct investigations and prosecutions itself when it concludes that the Court is better suited to exercise jurisdiction'.¹⁴⁹ However, working practices in relation to Article 70 are not addressed in detail, and again the availability of Article 70 procedures for allegations brought by other parties should be clarified to ensure transparency.

In addressing issues related to Article 70 allegations, judges have also remarked on the need for further objective criteria guiding Article 70 investigations and prosecutions, including for addressing potential conflicts of interest within the OTP and the Prosecutor's discretion of when to open an investigation. In the *Ruto and Sang* case, as discussed above, the Trial Chamber declined to appoint an *amicus curiae* prosecutor as requested by the defence. However, Judge Eboe-Osuji, in a Separate Opinion, noted that 'Article 70 aims to underscore the need for everyone to respect the judicial processes of this Court'.¹⁵⁰ Judge Eboe-Osuji highlighted a 'need for objective yardsticks that guide the decision to prosecute or not pursuant to article 70', citing the prosecution's own acknowledgement that it needed 'to develop a clearer conception of when recourse to Article 70 should be exercised'. Judge Eboe-Osuji stressed the need for transparency and speed in addressing these matters 'in order to minimise occasions in which observers are left wondering why it may be appropriate for the OTP to launch article 70 investigation and prosecution in one case, but not in another case in which questions of article 70 prosecution had also arisen'.¹⁵¹ Concerns about equal recourse to Article 70 for all parties were raised as early as the 2010 oral ruling in *Katanga and Ngudjolo*, where Trial Chamber II also cautioned that: 'any possible false testimony attributable to a prosecution witness is likely to create a situation of conflict of interests, which could influence the authority given to him to initiate such an investigation'.¹⁵²

In this regard, the IBA emphasises the need for Article 70-specific guidelines defining conflict of interest and setting out procedures for managing conflicts of interest. The current legal framework addresses impartiality and conflicts of interest more broadly. The Statute provides that neither the Prosecutor nor the Deputy Prosecutor shall participate in a matter in which their impartiality might reasonably be doubted on any ground.¹⁵³ Impartiality is included in the undertaking made by all staff of the OTP, and is emphasised throughout the OTP's Code of Conduct as 'one of the core principles

148 ICC OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para 54.

149 ICC OTP, *Strategic Plan 2016–2018*, 6 July 2015, para 79.

150 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2034-Anx, Decision on the Ruto Counsel's Request to Appoint an *Amicus* Prosecutor, Separate Further Opinion of Judge Eboe-Osiju, 2 June 2016, paras 2–3, footnotes omitted.

151 *Ibid.*

152 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-190-Red-ENG, Transcript, 22 September 2010, p 4, lines 1–5.

153 Rome Statute, Art 42(7).

governing the work of the office'.¹⁵⁴ The Code of Conduct further requires OTP staff to refrain from participating in and request to be excused from any matter 'in which their impartiality might reasonably be doubted on any ground', with emphasis on any matters they were involved in prior to taking office.¹⁵⁵ The ICC Prosecutor's mandate, set out in Article 54(1) (a) to 'establish the truth', requires that the Prosecutor cover 'all facts and evidence relevant to an assessment of whether there is criminal responsibility... and in doing so, investigate incriminating and exonerating circumstances equally'.¹⁵⁶ This is reinforced in the Code of Conduct, which stresses this obligation as a component of 'objective truth seeking', and calls for 'impartial judgments based on the evidence' as part of effective investigation and prosecution.¹⁵⁷

The impartiality of the prosecution in respect to Article 70 investigations was directly challenged by the defence in the *Bemba et al* case.¹⁵⁸ In that instance, the Appeals Chamber, pursuant to Article 42(8) of the Rome Statute, ruled on motions by Mr Kilolo and Mr Mangenda to disqualify the Prosecutor, Deputy Prosecutor and entire OTP staff from their prosecution on Article 70 charges.¹⁵⁹ The Appeals Chamber recalled the standard applicable: 'it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor. Rather, the question... is whether it reasonably appears that the Prosecutor lacks impartiality. In determining whether there is such an appearance of partiality, the Appeals Chamber considers that this determination should be based on the perspective of a reasonable observer, properly informed'.¹⁶⁰ It added that a presumption of impartiality is applicable to the Prosecutor.¹⁶¹

While the Appeals Chamber did not find that having the same staff working on linked Article 5 and Article 70 cases per se gave rise to reasonable doubts as to the Prosecutors' impartiality, the Chamber underlined that 'notwithstanding any potential advantages of familiarity, it considers that it is generally preferable that staff members involved in a case are not assigned to related article 70 proceedings of this kind'.¹⁶² Likewise, the Appeals Chamber urged the Prosecutor to 'take all necessary precautions in assigning staff members to avoid a situation where legitimate questions and concerns may be raised, even if these concerns do not meet the threshold required for a finding of disqualification'.¹⁶³ The Appeals Chamber's advice was referenced by Trial Chamber VI in the *Ntaganda* case, which stated that 'it would have been preferable for the Prosecution to have engaged a separate team to conduct the Article 70 investigations flowing from the Ntaganda case', in particular

154 See, eg, ICC, *Code of Conduct of the Office of the Prosecutor*, paras 8, 11, 20 and 29–31.

155 *Ibid*, para 31.

156 Rome Statute, Art 54(1)(a).

157 ICC, *Code of Conduct of the Office of the Prosecutor*, paras 49 and 51.

158 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-233-Red, Request for Disqualification of the Prosecution from the Investigation and Prosecution Against Mr Aimé Kilolo Musamba, 5 March 2014; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-250-Red, Response to 3 March 2014 'Request for Disqualification of the Prosecution from the Investigation and Prosecution of Aimé Kilolo Musamba and Jean-Jacques Kilenda', 12 March 2014; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-275, Corrigendum of the Defence Observations on the 'Request for Disqualification of the Prosecution from the Investigation and Prosecution Against Mr Aimé Kilolo Musamba' (ICC-01/05-01/13-233-Conf), 19 March 2014.

159 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-648-Red3, Public Redacted Version of Decision on the Requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the Entire OTP Staff, 21 October 2014.

160 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-648-Red3, Public Redacted Version of Decision on the Requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the Entire OTP Staff, 21 October 2014, para 24, citing ICC, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-175 (OA 3), Decision on the Request for Disqualification of the Prosecutor, 12 June 2012, para 20.

161 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-648-Red3, Public Redacted Version of Decision on the Requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the Entire OTP Staff, 21 October 2014, para 26.

162 *Ibid*, para 40.

163 *Ibid*, para 48.

as the Trial Chamber had already handed down decisions attempting to ensure that information solely pertaining to the defence case and investigations would not go to the prosecution.¹⁶⁴

The IBA also notes that dissenting and separate opinions to the Appeals Chamber's decision in the *Bemba et al* case suggested alternative courses of action, relying on different provisions in the legal framework. In a dissenting opinion, Judge Ušacka stated that, to preserve the fairness and integrity of the Court's proceedings, the correct course of action would be to grant the request to disqualify the Prosecutor, Deputy Prosecutor and entire OTP staff, and to refer the case to a State Party for prosecution. In support of this finding, Judge Ušacka stated:

'the specific circumstances of the case, the dual and simultaneous roles of the Prosecutor in the intertwined *Bemba* and *Bemba et al* cases, would lead any reasonable observer (i.e., someone objectively looking at the situation from the outside, being fully informed of the facts and proceedings at hand) to doubt the Prosecutor's impartiality'.¹⁶⁵

In a separate concurring opinion to the same decision, Judge Kourula made a distinction between the supervisory role of the Prosecutor herself, and the position of her staff. Judge Kourula wrote:

'The circumstances of the *Bemba* and *Bemba et al* cases and the specific way in which the Article 70 case is interrelated with the main case, as well as the timing of the commencement of the investigation at the end of the *Bemba* case, could indeed give rise to reasonable doubts as to the impartiality of the staff members who, I would note, have been intimately involved in the facts, evidence, and day to day legal strategies of the *Bemba* case'.¹⁶⁶

With reference to Article 31 of the OTP Code of Conduct, which states that '[m]embers of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground', Judge Kourula stated that the staff should have voluntarily excused themselves, and further notes that the Prosecutor should have avoided appointing them on overlapping proceedings. As noted, the IBA recommends the drafting of guidelines to define and provide procedures for addressing conflicts of interest in the Article 70 context, including, *inter alia*, determining which staff are assigned to Article 70 investigations and prosecutions, and when prosecution by States Parties would be preferable.

Amicus curiae prosecutors in ICL contempt cases

The rationale for bringing in an *amicus curiae* prosecutor in this context is to ensure that any allegations of contempt or offences against the administration of justice are investigated independently in the context of an ongoing adversarial trial process, without giving advantage or disadvantage to the position of either the prosecution or the accused in the proceedings that gave rise to the allegations of contempt. The ICTY, ICTR, SCSL and STL allow the chamber or contempt judge to order an *amicus curiae* or independent counsel to be appointed by the registry. The *amicus* is given a specific mandate to investigate and report back to the chamber, which may then request the

164 Decision on Ntaganda Second Stay of Proceedings Request, paras 31–32.

165 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-648-Anx2-Red, Decision on the Requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the Entire OTP Staff, Dissenting opinion of Judge Anita Ušacka, 21 October 2014, para 1.

166 ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-648-Anx1, Decision on the Requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the Entire OTP Staff, Separate concurring opinion of Judge Erkki Kourula, 21 October 2014, para 6.

amicus to prosecute the case.¹⁶⁷ In these situations, any prosecution undertaken by the *amicus curiae* is bound by the same statute, RPE and regulations that apply to other prosecutions before the court or tribunal, including protections for the rights of the accused.¹⁶⁸

THE ICTY

At the ICTY, the Practice Direction for prosecuting contempt provides templates for the undertaking of an *amicus curiae* investigator and prosecutor, which state, *inter alia*, that the *amicus* has no conflict or potential conflict with regard to the proceedings, and no other circumstances that will impact their impartiality and independence.¹⁶⁹ An *amicus curiae* prosecutor was appointed in two of the three contempt cases against Vojislav Šešelj,¹⁷⁰ in the case against Florence Hartmann as well as in the *Jojić et al* case arising from the Šešelj case. In the *Hartmann* case, a specially appointed Trial Chamber ordered the appointment of an *amicus curiae* prosecutor to investigate Ms Hartmann on two counts of contempt.¹⁷¹ Ms Hartmann, the former spokesperson of the ICTY OTP, was alleged to have knowingly disclosed, both in a published book and oral statements, information contained in confidential decisions of the Appeals Chamber in the *Slobodan Milošević* case. On receiving the report of the *amicus* prosecutor, the Trial Chamber ordered the *amicus* prosecutor to proceed with the prosecution.¹⁷²

Multiple allegations of contempt arising from the Šešelj case were also addressed through *amicus* prosecutors. This case was highly contentious and presented multiple procedural distinctions, including that Mr Šešelj was self-represented and maintained a particularly combative stance towards the Tribunal. In that context, the Trial Chamber cited ‘the interests of justice’ when requesting that the Registrar appoint an *amicus curiae* prosecutor to investigate and prosecute allegations of contempt by Vojislav Šešelj for the disclosure of confidential information in a published book.¹⁷³ While the notion of ‘interest of justice’ is not developed in this decision and is a very subjective term, it generally refers to the cause of fairness and equity used when a judge has the discretion to make a ruling in a particular situation.

ICTY Trial Chamber III also ordered the appointment of an *amicus curiae* prosecutor to investigate allegations made by Mr Šešelj that OTP investigators had intimidated and pressured witnesses. Faced with these wide-ranging and numerous allegations of contempt, the Trial Chamber emphasised that it took the information seriously, and that it refused ‘to allow any doubt to fester concerning a possible violation of the rights of the Accused and concerning the investigation techniques employed by certain members of the prosecution in this case’.¹⁷⁴ Subsequent to the report of the *amicus curiae*, the Trial Chamber found that there were insufficient grounds to bring charges. The Trial Chamber also

167 See ICTY RPE, Rule 77(C) (ii) and (D) (ii); ICTR RPE, Rule 77(C) (ii) and (D) (ii); SCSL RPE, Rule 77(C) (iii); STL RPE, Rule 60bis (E) (ii) and (F) (ii).

168 See ICTY RPE, Rule 77(E); ICTR RPE, 77(E); SCSL RPE, Rule 77(E); STL RPE, Rule 60bis (H).

169 ICTY, *Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal*, IT/227, 6 May 2004, Annexes I and II.

170 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.2, Decision on Allegations of Contempt, 21 January 2009; ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.3, Public Redacted Version of Second Decision on Prosecution’s Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books) Issued on 3 February 2010, 4 February 2010.

171 ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Order in Lieu of an Indictment on Contempt, 27 August 2008.

172 ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Judgment on Allegations of Contempt, 14 September 2009.

173 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.2, Decision on Allegations of Contempt, 21 January 2009, para 12.

174 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-T, Redacted Version of the ‘Decision in reconsideration of the decision of 15 May 2007 on Vojislav Šešelj’s Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon’, 29 June 2010, para 29.

indicated that it wished to make a redacted version of the *amicus curiae*'s report public 'for the sake of transparency'.¹⁷⁵

THE ICTR

The ICTR has also appointed an *amicus* investigator and/or prosecutor in certain contempt cases, as provided for in the ICTR RPE.¹⁷⁶ In the *Ngirabatware* case, the Chamber decided to appoint an *amicus curiae* to investigate contempt allegations concerning possible interference with OTP witnesses, in order to 'best protect the interests of justice'. Both the OTP and defence supported the appointment of the *amicus*, with the defence noting that otherwise, the OTP would have 'to play a dual role, preparing witnesses and simultaneously investigating allegations related to a witness' security'.¹⁷⁷ In the *Karemera et al* case, the Trial Chamber directed the registry to appoint an *amicus curiae* to investigate allegations of false testimony with regard to an OTP witness. Again, the OTP and the defence teams supported the appointment of an independent investigator.¹⁷⁸

The ICTR has also seen challenges to the prosecution's impartiality in contempt proceedings by the defence, for example, in the *Nshogoza* case. Mr Nshogoza was a defence investigator on the *Kamuhanda* case who was alleged to have corrupted a prosecution witness who had recanted his initial testimony. The Nshogoza defence alleged that the OTP had a conflict of interest in investigating this allegation in light of the fact that it concerned a prosecution witness.¹⁷⁹ In its decision, the Trial Chamber limited itself to noting that it was 'open to the Appeals Chamber to direct the Registrar to appoint *amicus curiae* to investigate the matter pursuant to Rule 77(C) (iii) if, in the view of the Appeals Chamber, the Prosecutor had a conflict of interest with respect to the relevant conduct'.¹⁸⁰ The Trial Chamber underlined that a chamber's decision to appoint the Prosecutor, rather than an *amicus curiae*, would have entailed an assessment of conflict of interest pursuant to the language of Rule 77.¹⁸¹ This ICTR jurisprudence is particularly worth noting as it highlights that, in the ICTR context, a case-by-case assessment was made by an independent actor, in this instance, the judge, as to the potential conflict of interest of the prosecuting authority.

THE STL

At the STL, contempt proceedings were initiated in relation to the publication of confidential information from the main case before the Tribunal: *Prosecutor v Salim Jamil Ayyash et al*. Prior to commencing what would be the first contempt proceedings before the STL, Judge Baragwanath,

175 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-T, Decision on Vojislav Šešelj's Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution, 22 December 2011, para 19.

176 ICTR RPE, Rule 77 (C) (ii) and (D) (ii).

177 ICTR, *Prosecutor v Augustin Ngirabatware*, ICTR-12-94, Decision on Prosecution Oral Motion for Rule 77 Investigation Related to Witness ANAF, 30 October 2009, paras 13–14.

178 ICTR, *Prosecutor v Édouard Karemera et al*, ICTR-98-44, Decision on Prosecutor's Confidential Motion to Investigate BTH for False Testimony, 14 May 2008, paras 4–6.

179 ICTR, *Prosecutor v Léonidas Nshogoza*, ICTR-2007-91-I, Preliminary Pro Forma Submissions in Support of Preliminary Motions Pursuant to Rule 72 of the ICTR Rules of Procedure and Evidence, 11 April 2008, para 5. Defence reiterated its challenge in two subsequent motions: ICTR, *Prosecutor v Léonidas Nshogoza*, ICTR-2007-91-I, Preliminary Motions Pursuant to Rule 72, and Alternative Motion Under Rule 73 to Dismiss the Indictment, 24 June 2008, para 3 and ICTR, *Prosecutor v Léonidas Nshogoza*, ICTR-2007-91-I, Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment (Rules 72 and 73 ICTR RPE), 13 November 2008, paras 12–16.

180 ICTR, *Prosecutor v Léonidas Nshogoza*, ICTR-2007-91-I, Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment, 17 December 2008, para 31.

181 ICTR, *Prosecutor v Léonidas Nshogoza*, ICTR-2007-91-I, Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges, 4 February 2009, para 14.

acting as Contempt Judge,¹⁸² took submissions on the conduct of the proceedings under STL Rule 60bis(E), including on the issue of whether to appoint an *amicus curiae*, from all parties and participants and from the Defence Office of the Tribunal. STL Rule 60bis(E) provides that the Contempt Judge may direct the Prosecutor or an *amicus curiae* to investigate and report back, or may initiate proceedings himself/herself. None of the submissions supported the Contempt Judge directly initiating proceedings, and the Prosecutor indicated that he preferred not to investigate the matter himself. While the Contempt Judge noted that one reason for the appointment of an *amicus* could be a conflict of interest on the part of the Prosecutor, he clarified that:

‘The Prosecutor did not accept or suggest actual conflict; appointment of *amicus* would be premised on the need for justice to be *seen* to be done, in a context where all organs of the Tribunal and other participants in its proceedings with access to any relevant documents are potentially under scrutiny. There is further the advantage of not requiring further to burden the Prosecutor with additional responsibilities.’¹⁸³

III. Lessons learnt and implications of the ICC’s structure for implementing Article 70

The comments of Judge Baragwanath and position of the STL Prosecutor highlight some advantages of appointing an *amicus curiae*, as a measure that supports the legitimacy of the institution, and a means of ensuring that any questions about the impartiality of the contempt proceedings are addressed. The decision to appoint external *amicus curiae* to investigate also conserves the resources of the prosecution for cases within its primary mandate. The ICC OTP has expressed concern regarding the utility of appointing *amicus curiae* prosecutors to deal with Article 70 matters, citing primarily the inefficiency of bringing in an external person without the relevant context and expertise. The OTP also expressed a view that the centralisation of the mandate with the OTP, rather than a system whereby different chambers are in charge of the matter, appointing an *amicus* to prosecute the case when they deem fit, allowed for a more active and comprehensive approach to possible Article 70 offences.¹⁸⁴

The goals of protecting the legitimacy of the proceedings and the institution are logical goals for managing the procedural aspects of contempt investigations and proceedings. In this regard, the IBA notes the practices of other international tribunals, in particular where chambers addressing allegations of contempt took into account considerations of conflict of interest, and the need to preserve the appearance of impartiality. These considerations, even if not directly applicable to the ICC context because of the difference in legal frameworks, are still useful, in that they highlight the potential pitfalls and challenges of managing a dual mandate. In this regard, the IBA also highlights the input of ICC judges and parties on Article 70 proceedings to date, for managing the dual mandate of the ICC OTP with respect to Article 70 and Article 5.

182 Upon notification of these events, the Pre-Trial Judge referred the matter to the President for referral to a contempt judge. At the time of the referral in April 2013, the President of the Tribunal, Judge David Baragwanath, was rostered to be the Contempt Judge for that month, and therefore designated himself to deal with the proceedings.

183 STL, *Prosecutor v Ayyash et al*, STL-11-01/PT-CJ/R60bis.1, Public Redacted Version of Decision on Allegations of Contempt, 29 April 2013, para 24.

184 IBA consultation with the ICC Deputy Prosecutor and Director of the Prosecution Division, 1 June 2017.

To the extent that the OTP is charged with investigating with the aim of objective truth-seeking, greater emphasis must be placed on ensuring that its investigations are seen to be conducted impartially and independent from any Article 5 matters. While the OTP has not been obliged to provide information about how it processes Article 70 allegations and how it manages the information arising from these investigations, the fact that it has shared little of this information to date may be raising unnecessary questions and concerns. The IBA strongly recommends that the OTP clarify the process and criteria for appointing staff and independent counsel to investigate Article 70 allegations, provide sufficient and timely responses to allegations from all parties, and ensure that any potential conflicts of interest are addressed in a transparent manner according to the legal framework. As further discussed in Chapter 4, such measures, in particular when set down in guidelines and practice directions, can contribute to the Article 70 mandate being adequately understood both within and without the OTP, and to preserving the fairness of proceedings overall.

Article 70 proceedings to date have also put a focus on the role of the respective chambers in managing proceedings. As discussed above, this role is different at the ICC. Unlike other institutions, where chambers have discretion to order investigation and prosecution of allegations of contempt, the ICC has not found that this discretion exists. It is crucial, however, not to overlook the high degree of control that ICC chambers and, in particular, the pre-trial chamber, have over the shape and fairness of the investigation and subsequent proceedings. As illustrated by the summaries of the *Bemba* and *Ntaganda* proceedings, the scope of the investigative measures allowed, and the timing and amount of information put before each chamber, potentially have enormous implications on the fairness of proceedings. Specific issues with the *ex parte* proceedings and access to communications are discussed further in Chapter 3.

The IBA urges particular attention to the implications of managing an Article 70 investigation into the alleged acts of a person accused of Article 5 crimes, as practice to date has shown that this situation raises additional challenges to ensuring the fairness of the trial. In both *Bemba* and *Ntaganda*, the prosecution was engaged in simultaneous proceedings before the pre-trial and trial chambers. When *ex parte* and confidential Article 70 investigations run parallel to Article 5 proceedings, it creates the potential for overlap in the authority and supervision of the pre-trial and trial chambers on a number of issues.

In this regard, it is helpful to note some of the practices of other tribunals. In managing the first two contempt cases at the STL, the Contempt Judge made a strict division between the ‘investigating’ and ‘prosecuting’ mandates by recusing himself after issuing the orders in lieu of an indictment. Citing the principle of *nemo iudex in causa sua*, the Judge found that he could not sit impartially as a judge over a matter in which he had acted to determine the charges and issue the order to indict the accused.¹⁸⁵ Judge Baragwanath emphasised that ‘a person against whom a contempt case is brought is entitled to an impartial judge, and the absence of the appearance of bias, as much as any other accused. In principle it is to be expected that recusal by the Contempt Judge will occur to ensure protection of these rights’.¹⁸⁶ While the mandate of the Prosecutor at the ICC makes the same issue unlikely to arise, ICC trial chambers have protected the same principle by directing the Prosecutor to

185 STL, *In the Case Against New TV SAL and Karma Mohamed Thasin Al Khayat*, STL-14-05_F0001, Redacted Version of Decision in Proceedings for Contempt With Orders in Lieu of an Indictment, 31 January 2014, para 69.

186 *Ibid.*

take Article 70 investigations to the pre-trial chamber, and also by strictly limiting the use of Article 70 investigatory material in the Article 5 trial.

Another important power of the chamber is that to put in place additional safeguards. At the ICTY and ICTR, simultaneous investigations into contempt matters have also been conducted alongside a trial in which evidence was being heard. In a number of these cases, various procedural safeguards were employed. For example, in the *Šešelj* case at the ICTY, the Trial Chamber took measures to preserve the integrity of the ongoing proceedings by ordering a temporary adjournment following allegations of witness interference.¹⁸⁷ The Chamber then directed the registry to appoint an *amicus curiae* to prosecute the multiple contempt cases.¹⁸⁸ In the case of *Lukić and Lukić*, the Trial Chamber requested submissions from both parties before initiating contempt proceedings, to protect the right of the accused to be heard.¹⁸⁹ Likewise, the ICTR Trial Chamber in the *Nyiramasuhuko* case ordered the prosecution to communicate to the defence allegations of contempt made in an *ex parte* submission, and allowed the defence to respond to the allegations. Procedural safeguards were also implemented in the *Turinabo and Sebureze* case, which arose from the *Ngirabatware* case. In that case, the Trial Chamber directed the registry to appoint an *amicus curiae* to investigate the contempt allegations,¹⁹⁰ and the contempt proceedings were initiated after the *Ngirabatware* trial judgment was issued, more than two years after the *amicus* investigator filed his report.¹⁹¹

To the extent that witness interference and allegations of witness interference have become long-term and consistent issues, the IBA underscores the important role of chambers in managing proceedings and upholding procedural fairness. While chambers do not have the discretionary mandate to initiate investigations into Article 70 matters, they are in a position to ensure consistency between chambers, manage the impact of an Article 70 investigation on ongoing Article 5 trial proceedings, and preserve the fundamental rights of the accused *vis-à-vis* ongoing and future trial proceedings. The IBA notes the importance of both separation of functions and levels of review within the judiciary, as well as safeguards to further that separation in cases of an investigation into the alleged acts of a person accused of other crimes before the Court.

187 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-T, Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti in Annex, 11 February 2009.

188 ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.2, Decision on Allegations of Contempt, 21 January 2009; ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.3, Public Redacted Version of Second Decision on Prosecution's Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books) Issued on 3 February 2010, 4 February 2010; ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R77.4, Public Redacted Version of 'Decision on Failure to Remove Confidential Information From Public Website and Order in Lieu of Indictment' Issued on 9 May 2011, 24 May 2011.

189 ICTY, *Prosecutor v Milan Lukić and Sredoje Lukić*, IT-98-32/1. Contempt charges were eventually brought against a case manager from Milan Lukić's defence team and a defence witness (see *Prosecutor v Jelena Rasić*, IT-98-32/1-R77.2 and *Prosecutor v Zuhdija Tabaković*, IT-98-32/1-R77.1).

190 ICTR, *Prosecutor v Augustin Ngirabatware*, ICTR-99-54, Decision on Prosecution Oral Motions for Amendment of the Chamber's Decision on Allegations of Contempt, 6 July 2010.

191 ICTR, *Prosecutor v Augustin Ngirabatware*, ICTR-99-54-T, Decision on Allegations of Contempt, 21 February 2013.

Chapter 3: Protecting the rights to an effective defence and of the accused in detention

The Article 70 investigations in the *Bemba* and *Ntaganda* cases have raised fundamental issues regarding core rights of an accused and, in particular, how those rights are affected when the accused is also a suspect in an Article 70 investigation. Of particular concern is the application of exceptional measures such as *ex parte* proceedings and disclosure to the prosecution of the accused's communications from the detention unit, as well as allowing the chamber and prosecution to access privileged communications of the accused and their counsel.

As discussed in this chapter, the legal framework permits exceptions to fundamental rights under limited circumstances. For example, as discussed below, the accused's right to be heard is a core component of due process, which can be suspended only in specific and limited circumstances. However, in the context of *ex parte* Article 70 investigations, this right to be heard has been suspended for significant periods of time, for reasons including the prosecution's allegation that the accused may take further actions to interfere with witnesses, frustrate the investigation or cover their own actions, should they be aware of the investigation. Another core right is that to privileged communication with counsel, which can only be waived or broken in very limited circumstances. The definition of privilege and the application of the 'crime-fraud exception' to privilege have been at issue in the *Bemba et al* Article 70 case.

While underscoring the importance of witnesses to ICC proceedings as well as witness protection, the IBA nonetheless emphasises that any weakening of due process guarantees for purposes of witness protection, even if the legal framework provides for an exception, is a balancing exercise that must be approached with extreme caution. Application of exceptions to and suspension of due process rights impact the fairness of proceedings and the ability of the Court to provide a fair trial.

In this regard, the IBA highlights that, in the *Bemba* and *Ntaganda* cases, the accused have sought stays of proceedings and challenged the proceedings as abuse of process, citing unfairness due to Article 70 proceedings.¹⁹² These legal challenges should be the last resort for a defendant to protect their due process rights, as the remedies they seek are considered exceptional remedies. Although the issues presented were found not to meet the high bars for a finding of abuse of process or stay of proceedings, the information in those filings, as well as some concerns expressed by chambers in the context of those decisions, are clear indications of issues that need further examination. In this chapter, the IBA focuses on two main areas that would benefit from discussion: the use of *ex parte* proceedings, and issues relating to privacy and privilege for an accused in detention.

192 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3217-Red2, Public Redacted Version of Defence Request for Relief for Abuse of Process, 30 January 2015 ('*Bemba* Abuse of Process Defence Request'); ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1629-Red, Public Redacted Version of 'Urgent Request for Stay of Proceedings', 14 November 2016; *Ntaganda* Second Stay of Proceedings Request.

I. *Ex parte* proceedings

The legal basis for ex parte proceedings

In the ICC's legal framework, the accused has the right to be present at trial,¹⁹³ as well as the right to be served with and respond to all requests.¹⁹⁴ *Ex parte* proceedings, which exclude one party and their legal representatives, are provided for as an exceptional measure in limited circumstances.¹⁹⁵ For example, where 'disclosure may prejudice further or ongoing investigations', the Prosecutor may apply *ex parte* to the chamber for a limited exception to disclosure.¹⁹⁶ *Ex parte* proceedings may also be permitted as a measure to maintain confidentiality of victim or witness information.¹⁹⁷ However, such applications have been subject to important restrictions.¹⁹⁸ Among others, if the information is later to be introduced into evidence, the accused must receive 'adequate prior disclosure'.¹⁹⁹

In principle, as articulated by Trial Chamber I in the *Lubanga* case, *ex parte* procedures are only to be used exceptionally when there are no other procedures available, and the Court must ensure that their use is proportionate given the potential prejudice to the accused. The other party should be notified of the procedure and its legal basis should be explained, unless to do so is inappropriate.²⁰⁰ In this regard, 'complete secrecy would, for instance, be justified if providing information about the procedure would risk revealing the very thing that requires protection'.²⁰¹ The chamber must always be provided with a full explanation of the legal basis and a factual justification for the *ex parte* procedure.²⁰² These principles were affirmed by Trial Chamber VI in the *Ntaganda* case, in the context of evaluating the *ex parte* Article 70 investigation in that case.²⁰³

As noted in Chapter 2, Article 70 investigations in the *Bemba* and *Ntaganda* cases have had *ex parte* proceedings both before the respective trial chambers, as well as before the pre-trial chamber. The questions that arise are not necessarily with regard to whether *ex parte* proceedings should take place at all, given that *ex parte* proceedings are recognised as an exception in the context of an investigation at the ICC. In this regard, it is worth noting that the ICC's approach is consistent with the ICTY's approach to *ex parte* investigations of contempt allegations. The Practice Direction adopted by the

193 Rome Statute, Arts 63(1) and 67(1)(d).

194 ICC RPE, Rule 134(1).

195 *Ex parte* proceedings are expressly provided for in five limited situations, according to Art 72 of the Statute and Rules 74, 81, 83 and 88. See also ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1058, Decision on the Procedures to be Adopted for *Ex Parte* Proceedings, 6 December 2007, para 4.

196 ICC RPE, Rule 81(2).

197 ICC RPE, Rule 81(4). See also ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-108-Corr, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, paras 10–11.

198 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-108-Corr, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, para 13.

199 ICC RPE, Rule 81(2).

200 However, the IBA notes that this places the burden on the defence to evaluate if such *ex parte* filings should have been notified and to request their disclosure (see, eg, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3023, *Requête de la Défense relative aux procédures ex parte*, 25 April 2013 and ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-3158, *Requête de la Défense relative aux procédures ex parte*, 11 August 2015).

201 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1058, Decision on the Procedures to be Adopted for *Ex Parte* Proceedings, 6 December 2007, para 12. See also, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-568, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I, entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, paras 65–67.

202 ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1058, Decision on the Procedures to be Adopted for *Ex Parte* Proceedings, 6 December 2007, para 12.

203 Decision on Ntaganda Second Stay of Proceedings Request, para 49.

ICTY President indicates that a request to investigate potential contempt shall be made prior to the commencement of the investigation and on a confidential and *ex parte* basis.²⁰⁴ If the chamber finds it appropriate that the allegations be investigated by an *amicus curiae* investigator, it shall direct the Registrar to appoint an *amicus curiae* and that order shall also be confidential and *ex parte*, along with the appointment of the *amicus curiae* investigator.²⁰⁵ Only when the chamber decides to issue an order in lieu of indictment is the defence to be informed.²⁰⁶ The question instead is whether appropriate safeguards are being used to protect the rights of the accused and the integrity of the main case in ICC proceedings.

Ex parte proceedings in Article 70 investigations

The impact of *ex parte* proceedings has been raised as a significant issue in Article 70 investigations and the related Article 5 cases. In the *Bemba* Article 5 case, *ex parte* proceedings were carried out before the Trial and Pre-Trial Chambers for a period of approximately five²⁰⁷ and six²⁰⁸ months respectively, for a total period of 11 months. The defendant and his counsel were notified of the *ex parte* Article 70 investigation when the arrest warrants were executed for Article 70 allegations.²⁰⁹ In the *Ntaganda* trial, *ex parte* proceedings were carried out before the Pre-Trial Chamber for a period of approximately 15 months,²¹⁰ after which period the prosecution gave notice of the Article 70 investigation along with disclosure of more than 20,000 recording files of the accused's communications from the detention unit.²¹¹ At the time of writing, no Article 70 charges have been brought against Mr Ntaganda.

In both the *Bemba* main case and the *Ntaganda* case, the defendants have argued that their case was materially affected by the length of the *ex parte* processes, as well as by the material obtained by the prosecution and exposed to the Trial Chambers during these processes. The defendants have argued that the prosecution gained an undue advantage through access to crucial information, including about defence strategy and defence witnesses, which would otherwise not have been available to it. According to the defendants in those cases, the information obtained in the Article 70 investigation

204 ICTY, *Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal*, IT/227, 6 May 2004, para 5.

205 *Ibid*, paras 8–9.

206 *Ibid*, para 15.

207 This calculation is based on the information available in the public record. The first confidential *ex parte* filing related to the subsequent Article 70 investigation between the OTP and Trial Chamber III is ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2412, Prosecution's Request for Record of Payments made by the Registry to Witnesses Called by the Defence of Jean-Pierre Bemba Gombo, 15 November 2012. The Trial Chamber indicated that it was not competent to hear requests related to an Article 70 investigation in ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2606-Red, Public Redacted Version of 'Decision on the Prosecution's Request Relating to Art 70 Investigation' of 26 April 2013, 2 May 2014.

208 This calculation is based on the information available in the public record. The first confidential *ex parte* filing is ICC, *Situation in the Central African Republic*, ICC-01/05-44-Red, Public Redacted Version of 'Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, 3 May 2013, ICC-01/05-44-Conf-Exp', 12 February 2014. The defence was made aware of the investigation following the issuance of a warrant of arrest against the five individuals (ICC, *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-1-ENG, Warrant of Arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 20 November 2013).

209 See *Bemba* Art 5 Appellant's Document, paras 16–41; IBA consultation with Counsel (spring 2017).

210 This calculation is based on the information available in the public record. The first filing is a confidential *ex parte* request from the OTP before Pre-Trial Chamber II for judicial assistance to access Ntaganda's and Thomas Lubanga's non-privileged call and visitors logs and recordings of the non-privileged conversations from 22 March 2013 (ICC, *Prosecutor v Bosco Ntaganda*, ICC-01-04-638-Conf-Red, Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70, 28 November 2016). The defence became aware of the investigation when the OTP filed a notice of the disclosure of evidence obtained under Article 70 (ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1616, Prosecution's Communication of the Disclosure of Evidence Obtained Pursuant to Article 70, 7 November 2016).

211 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1629-Red, Public Redacted Version of 'Urgent Request for Stay of Proceedings' dated 14 November 2016, para 12.

enabled the prosecution to adapt its presentation of evidence in the Article 5 case, while at the same time preventing the defence from properly cross-examining witnesses or adjusting its own defence strategy in light of the information obtained by the prosecution.²¹² In both *Bemba* and *Ntaganda*, the defendants argue that a reasonable observer properly informed would apprehend bias on the part of the trial chambers, as a result of the chambers' knowledge of the Article 70 investigations and exposure to the unrebutted representations made by the prosecution.²¹³

At the time of writing this Discussion Paper, chambers have, for the most part, rejected arguments that defendants suffered prejudice as a result of the *ex parte* proceedings and, in particular, prejudice sufficient to justify a stay of proceedings or a finding of abuse of process.²¹⁴ Trial Chamber III found that the Bemba defence failed to demonstrate any prejudice resulting from the *ex parte* proceedings, both in the context of the *Bemba* main case Trial Judgment and in an earlier ruling on abuse of process allegations.²¹⁵ Trial Chamber III also denied the defence's request for a stay of proceedings based on arguments that the Trial Chamber had been contaminated by material it was exposed to during the *ex parte* proceedings, stating that it would base its judgment 'solely on evidence submitted and discussed before it at the trial'.²¹⁶ While Trial Chamber VI also found no apprehension of bias on the part of the Chamber in the *Ntaganda* case, it did find that, through the Article 70 investigation, the prosecution gained access to information that was prejudicial to the accused, as it gave the prosecution an undue advantage. The Chamber took measures to limit the usage of Article 70 investigation material in the Article 5 case, including requiring the prosecution to get specific authorisation from the Chamber to use such information in the trial.²¹⁷

However, while the trial chamber may take steps to limit the impact of an Article 70 investigation in the trial, the IBA also notes that the separation of functions between chambers, as discussed in Chapter 2, places the primary oversight of the investigation with the pre-trial chamber. In this regard, the pre-trial chamber must also ensure the rights of the accused in both the Article 5 and any eventual Article 70 proceedings are not prejudiced by the investigation phase before the pre-trial chamber. If *ex parte* proceedings are necessary, safeguards may include, *inter alia*, implementing a review process with independent counsel prior to disclosing information to the prosecution, or providing for representation for the rights of the defence through an *ad hoc* counsel or bar association, as discussed below.

The right to be heard and to representation

Ex parte proceedings limit the accused's right to be heard and right to representation, and may also have an impact on the efficiency of proceedings. Within an *ex parte* process, the accused does not

212 *Ibid*, para 2; *Ntaganda* Second Stay of Proceedings Request, paras 56, 65 and 75. See also *Bemba* Abuse of Process Defence Request, paras 5, 104–105 and 109; *Bemba* Art 5 Appellant's Document, para 71.

213 *Ntaganda* Second Stay of Proceedings Request, para 84; *Bemba* Abuse of Process Defence Request, paras 98–99 and 108–112; *Bemba* Art 5 Appellant's Document, para 109.

214 See, for example, ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3059, Decision on the Defence Request for Interim Relief, 2 May 2014; Decision on *Ntaganda* Second Stay of Proceedings Request.

215 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, 21 March 2016, para 258, citing ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3255, Decision on 'Defence Request for Relief for Abuse of Process', 17 June 2015, paras 88–89 and 105.

216 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3255, Decision on 'Defence Request for Relief for Abuse of Process', 17 June 2015, paras 88–89.

217 Decision on *Ntaganda* Second Stay of Proceedings Request, paras 43 and 61–62.

have the ability to respond to factual allegations or legal arguments. In particular, when information is being sought about the activities of the accused, such as whether they were making permissible or impermissible payments to witnesses, the prosecution makes a strategic decision about whether to investigate *ex parte* or seek a direct explanation. In the *Bemba* case, upon receiving an anonymous tip that witnesses had received bribes, the prosecution launched an investigation into the financial activity of the accused and others, which included seeking information from Western Union and other sources. Following on the *ex parte* investigation into financial payments, the Bemba defence has invoked the violation of its right to be heard and its impact on the fairness of the proceedings in its appeals brief for the Article 5 case.²¹⁸ The defence team in *Ntaganda*, subsequent to being notified of the *ex parte* Article 70 investigation, has also submitted that it should be allowed to make submissions on the allegations of contempt made against the accused.²¹⁹

In the *Ongwen* case, when suspicions of potential witness interference arose from the registry's monitoring of Mr Ongwen's communications, the OTP took another approach. The OTP raised its concerns to the Chamber and requested the Chamber to order the defence to cease payments to potential OTP and defence witnesses, and to explain any payments or promises of payment. The OTP also requested the Chamber to order the registry to review Mr Ongwen's communications and to share certain specific communications with the OTP in order to evaluate possible Article 70 offences.²²⁰ By involving the defence before initiating any investigation into potential Article 70 offences, the OTP provided an opportunity for the defence to give information and context for any payments that had been made. The Single Judge partly granted the OTP's request, ordering the defence to cease and disclose the payments or promises of payment made to potential witnesses.²²¹ However, the Chamber declined to order the registry to review Mr Ongwen's communications because requests for investigative measures should be brought before a pre-trial chamber.²²² Although the defence submitted that the OTP should have raised these issues in *inter partes* communications before bringing the matter before the Chamber, the defence was offered an opportunity to make submissions with regard to the OTP's allegations.²²³

Practice from the *ad hoc* tribunals provides additional precedent for allowing the defence to respond at earlier stages of proceedings. For example, in the *Nyiramasuhuko* case, the ICTR Trial Chamber ordered the prosecution to communicate to the defence the allegations made in its motion originally submitted *ex parte* to the Chamber, and the defence was given the right to be heard on the prosecution's allegations.²²⁴ In the *Simić* case before the ICTY, parties were allowed to make

218 *Bemba* Art 5 Appellant's Document, paras 51–84.

219 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1629-Red, Public Redacted Version of 'Urgent Request for Stay of Proceedings' dated 14 November 2016, 14 November 2016, paras 4, 23 and 28.

220 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-482-Red, Public Redacted Version of 'Request for an Order that Mr Ongwen Cease and Disclose Payments to Witnesses and that the Registry Disclose Certain Calls Made by Mr Ongwen', 24 June 2016, ICC-02/04-01/15-482-Conf, 12 July 2016.

221 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-521, Decision on Prosecution 'Request for an Order that Mr Ongwen Cease and Disclose Payments to Witnesses and that the Registry Disclose Certain Calls Made by Mr Ongwen', 10 August 2016, para 16.

222 *Ibid*, para 20.

223 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-590-Red, Public Redacted Version of 'Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf', filed on 4 July 2016, 7 July 2016, para 34.

224 ICTR, *Prosecutor v Pauline Nyiramasuhuko et al*, ICTR-98-42, Order in the Matter of the Prosecutor's *Ex Parte* Further Allegations of Contempt, 19 July 2001, pp 2–3; ICTR, *Prosecutor v Pauline Nyiramasuhuko et al*, ICTR-98-42, Decision on the Prosecutor's Further Allegations of Contempt, 30 November 2001, para 1.

submissions on the allegations of contempt before any contempt proceedings were initiated.²²⁵ When allegations of contempt arose in the *Lukić and Lukić* case, the ICTY Trial Chamber, following the receipt of investigation reports from the prosecution, and with a view to assessing whether the alleged witness interference had had an impact on the reliability of the evidence in these proceedings, permitted the parties to make applications to introduce evidence or call witnesses relevant to the allegations.²²⁶ Contrary to the procedure followed in the *Bemba* case, the fact that defence team members may have been involved did not appear to rule out a more open procedure.

If it is not appropriate for the defendant and their counsel to be involved in the early stages of an Article 70 investigation, the IBA strongly encourages chambers to ensure there is representation for the rights of the defence in such proceedings. In this regard, ad hoc counsel should be appointed to represent the interests of the defence or, failing this, the ICC Office of Public Counsel for the Defence (OPCD) should be included in the proceedings. Another possible means for ensuring some representation for the general interests of the defence is the presence of a representative of a bar association or the ICC Bar Association (ICCBA) in such proceedings. In fact, the need for representation for the rights of the defence was raised in the early stages of the *Bemba et al* investigation. At the outset of the *ex parte* proceedings, the registry noted a number of times in both status conferences and filings that there was no representation of the defence.

Strict limitations on ex parte proceedings

The IBA underscores that, in accordance with the ICC's legal framework and jurisprudence, and in accordance with upholding the rights of the accused, *ex parte* proceedings are an exceptional measure that should be as limited in duration as possible. Managing this process falls to the chambers presiding over an investigation or trial, which have the obligation to keep the proceedings under review and, in this context, can limit the duration and impact of the *ex parte* proceedings. In this regard, to ensure that *ex parte* proceedings do not undermine the fairness of proceedings, the prosecution must also exercise restraint in seeking these measures. This is particularly true in an Article 70 investigation, which is directed by the prosecution under the supervision of a pre-trial chamber, and where the rights of the accused in relation to the trial are at stake.

In the *Ntaganda* case, the Trial Chamber, on at least three separate occasions, advised the prosecution that Article 70 investigations should be concluded as expeditiously as possible, and disclosure should be made as soon as possible.²²⁷ However, the Trial Chamber presiding over the main case was not itself in a position to order disclosure. When evaluating the defence's arguments that prejudice had resulted from the lengthy *ex parte* proceedings, the Trial Chamber found that it was not in a position to question the *ex parte* Article 70 investigation.²²⁸ The trial chamber is, however, in a position where it must seek to mitigate the impacts of *ex parte* proceedings to ensure that the trial itself remains

225 ICTY, *Prosecutor v Milan Simić et al*, IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000, paras 3–5.

226 ICTY, *Prosecutor v Milan Lukić & Sredoje Lukić*, IT-98-32/1, Judgment, 20 July 2009, para 21.

227 ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1364-Red2, Decision on Defence Request Seeking Certain Material Relating to Review of Restrictions Placed on Mr Ntaganda's Contacts, 3 June 2016, ICC-01/04-02/06-1364-Conf-Exp, 21 November 2016, para 22; ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1494-Red4, Decision Reviewing the Restrictions Placed on Mr Ntaganda's Contacts, 7 September 2016, ICC-01/04-02/06-1494-Conf-Exp, 21 November 2016, para 24; Decision on Ntaganda Second Stay of Proceedings Request, para 50.

228 Decision on Ntaganda Second Stay of Proceedings Request, para 51.

fair. Trial chambers, therefore, may need to take actions such as imposing restrictions on the use of material gained during the investigation, and granting additional time or resources to allow the defence to address the *ex parte* portion of proceedings once disclosure takes place. The IBA also notes the importance of public proceedings and creating a public record of the case, including through filing public redacted versions of decisions in a timely manner.

II. Privilege, privacy and the rights of the accused in detention

As part of the Article 70 investigations in both the *Bemba* and *Ntaganda* cases, the prosecution received materials from the detention unit, including logs of visitors and telephone calls, as well as access to recordings of conversations. In the *Bemba* case, the prosecution also gained access to selected privileged communications between Mr Bemba and his legal team. Access to communications was provided with permission of the Pre-Trial or Trial Chambers, as permitted by the legal framework outlined below. In light of the fundamental rights implicated by communication rights and detention issues, the IBA urges further examination of the issues raised by these procedures.

Communication rights and privileges

According to Regulation 173 of the Regulations of the Registry, detainees in the ICC detention unit have restricted access to a landline telephone on which they can make and receive calls. A list of contacts approved by the Registrar is held by the Chief Custody Officer of the detention unit, and restrictions may be placed on communications by limiting the amount of time available, as well as by restricting numbers that may be called. Aside from these general telephone rights, a detainee also has access to a privileged line for the purpose of having privileged communications with their legal counsel and team.²²⁹ With the exception of the privileged line, all telephone conversations are recorded through ‘passive monitoring’, meaning that the recordings are made and archived without being listened to at the time.²³⁰ The Chief Custody Officer may also implement random ‘active monitoring’ in which conversations are listened to simultaneously, and may be terminated in case the detainee is attempting to engage in a set list of prohibited behaviours, including interfering with witnesses.²³¹ Active monitoring for a set period of time may also be ordered by the Registrar, with notification to the detained person and their counsel.²³² Judges have also ordered restrictions on the languages that a detainee speaks on their phone calls, to ensure that the calls take place in a language that can be understood.²³³

The prosecution may also request the chamber to prohibit, regulate or set conditions for contact between a detainee and other persons under Regulation 101(2) of the Regulations of the Court, which sets out a list of reasons including possible prejudice to the proceedings or any other investigation. In this instance, as with active monitoring, the detainee must be informed of the request, and Regulation 101(3) of the Regulations of the Court also stipulates that they must have the

229 ICC, Regulations of the Registry, Regulation 174(1).

230 *Ibid*, Regulation 174; see also *Bemba* Transcript of 9 April 2013, p 18, lines 24–25.

231 *Ibid*, Regulation 175(1).

232 *Ibid*, Regulations 175(2) and (3).

233 See, eg, ICC, *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-785-Red, Public Redacted Version of Decision on Prosecution Requests to Impose Restrictions on Mr Ntaganda’s Contacts, 18 August 2015, para 69.

opportunity to be heard. In ‘exceptional circumstances such as in an emergency’, Regulation 101(3) provides that the detainee may be informed and given the opportunity to be heard after the fact ‘as soon as practicable’.

Restrictions on communications from the detention unit

The prosecution has made extensive use of provisions that allow it to request restrictions on and access to the non-privileged communications of the accused. For example, in the *Katanga and Ngudjolo* case, the prosecution initially sought restrictions between contacts of the co-accused while in the ICC detention centre, citing possible prejudice to investigations and witness interference. While the restrictions were not initially allowed based on a lack of concrete evidence, the registry subsequently imposed limited restrictions and monitoring based on reasonable grounds to believe that Mr Katanga and Mr Ngudjolo may have tried to interfere or intimidate persons through their communications.²³⁴ After the Trial Chamber ordered the registry’s report on the monitoring to be disclosed to the prosecution, the OTP sought prohibition on all contacts, as well as access to the recorded conversations, arguing that the information would help the OTP assess protective measures as well as investigate possible Article 70 offences.²³⁵

The level of access granted to the prosecution, as well as the rationale for that access, was litigated in the *Katanga and Ngudjolo* case and eventually ruled on by the Appeals Chamber. Beyond seeking to address witness protection and Article 70 issues, the OTP also argued that some conversations constituted incriminating evidence that could contribute to the determination of the truth in the Article 5 trial.²³⁶ However, the Trial Chamber did not agree. While the Trial Chamber found that the restrictive measures had a legitimate aim, were proportionate and were necessary under the circumstances, the Chamber only permitted the prosecution to have access to excerpts of conversations where strictly necessary.²³⁷ The Trial Chamber found that the recorded conversations could not be used by the OTP to make a determination of the truth, finding that the monitoring measures had been put in place for a different reason, and that use for determination of the truth could open the OTP to an abuse of process challenge on the ground that the information had not been equitably obtained.²³⁸ This decision was partially overturned by the Appeals Chamber,

234 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-322, Decision Revoking the Prohibition of Contact and Communication Between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, pp 9–10 and 14; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-894, Registrar’s Decision on the Monitoring of Non-Privileged Telephone Communications and Visits of Mr Germain Katanga and Mr Mathieu Ngudjolo Chui, 12 February 2009.

235 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1243-tENG-Red, Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, para 39, citing ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1200-Conf-Exp, Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the Regulations of the Court to Prohibit Mathieu Ngudjolo’s Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees, 12 June 2009, paras 29–35.

236 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1195-tENG-Corr-Red, Registrar’s initial report on the monitoring of Mathieu Ngudjolo Chui’s non-privileged communications further to the Registrar’s decision of 12 February 2009, 8 June 2009. See, eg, ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1243-tENG-Red, Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, para 39, citing ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1200-Conf-Exp, Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the Regulations of the Court to Prohibit Mathieu Ngudjolo’s Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees, 12 June 2009, para 33.

237 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1243-tENG-Red, Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, paras 30–31 and 35.

238 *Ibid*, para 40.

as discussed below.²³⁹ It is worth noting that, while the Trial Chamber continued to review the restrictive measures and over time relaxed and then ceased the measures, overall, Mr Ngudjolo's communications and visits were monitored and restricted at different levels for a period of two years.²⁴⁰

In the *Ntaganda* case, the prosecution first requested restrictions on his communications in August 2014, pursuant to Regulation 101(2) of the Regulations of the Court, based on concerns that he was 'passing confidential information about prosecution witnesses to his relatives and associates in order to intimidate and threaten prosecution witnesses and their families'.²⁴¹ This request was notified to the defence. The restrictions – namely limiting Mr Ntaganda's visitors to counsel and diplomatic representatives, and allowing the registry to listen to his non-privileged conversations and review past conversations – were granted by Trial Chamber VI in December 2014. On the basis of the registry's first report, in March 2015, the Chamber ordered additional restrictions including, *inter alia*, active monitoring of Mr Ntaganda's non-privileged conversations, restricting the times for his communications and limiting the languages of his conversations.²⁴²

The restrictions on Mr Ntaganda's communications, as well as the active monitoring, remained in place until at least September 2016, a period of over two years. During this time period, the Trial Chamber reviewed the restrictions a number of times, receiving reports from the registry as well as submissions from the defence. At the same time, in August 2015, the prosecution had filed the *ex parte* request to the Pre-Trial Chamber for additional access to Mr Ntaganda's conversations and, as of 30 September 2015, had been granted access to Mr Ntaganda's non-privileged contacts and visitor logs, as well as the full recordings of non-privileged conversations for both Mr Ntaganda and Mr Lubanga from 22 March 2013 onwards. The *ex parte* portion of the proceedings was disclosed to Mr Ntaganda on 7 November 2016.²⁴³

Purpose and scope of prosecution access to communications

In the *Katanga and Ngudjolo* case, the Appeals Chamber clarified that the Trial Chamber had the discretion to order disclosure of parts of an accused's confidential detention record, including recordings, under the exception contained in Regulation 92(3) of the Court.²⁴⁴ In coming to this decision, the Appeals Chamber noted that the Trial Chamber's original rejection of the Prosecutor's

239 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1718, Judgment on the Appeal of the Prosecutor Against the 'Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre', 9 December 2009.

240 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1334-tENG-Red, Second Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in Respect of Mathieu Ngudjolo, 24 July 2009; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1498-tENG-Red, Third Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in Respect of Mathieu Ngudjolo, 25 September 2009; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1709-tENG-Red, Fourth Decision on Measures of Prohibition and Restriction of Contacts Outside and Inside the Detention Centre in Respect of Mathieu Ngudjolo, 9 December 2009; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1785-tENG, Registrar's Decision Ordering the Monitoring of Mathieu Ngudjolo's Non-Privileged Communications Between 25 September 2009 and 28 January 2010, 22 January 2010; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1966-tENG-Red, Decision on the Registrar's Report on the Monitoring of Some of Mathieu Ngudjolo's Conversations Following the Registrar's Decision on Monitoring dated 22 January 2010, 16 March 2010.

241 OTP Response to Ntaganda Second Stay of Proceedings Request, para 14.

242 *Ibid*, paras 15–19.

243 *Ibid*, paras 30–41.

244 ICC, Regulations of the Court, Regulation 92. See also *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1718, Judgment on the Appeal of the Prosecutor Against the 'Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre', 9 December 2009, paras 40–41.

request for access ‘hinders him from fulfilling his duty under article 54(1) of the Statute “to establish the truth”’, and that the Trial Chamber must strike a balance between the Prosecutor’s Article 54(1) responsibilities and the rights of the accused, including the rights to privacy and the right to conduct his defence.²⁴⁵

Following the guidance from the Appeals Chamber, the Trial Chamber issued a decision that nonetheless denied the prosecution’s request for full access, finding that the prosecution had failed to make the case that ‘a lack of access to such information would, in this instance, deprive him of any possibility of achieving the objective prescribed by article 54(1) of the Statute’.²⁴⁶ The Chamber found that ‘the mere fact that one or more transcripts could potentially provide information of interest or, as the case may be, evidence necessary to the determination of the truth does not, *per se*, render their disclosure indispensable or, in any event, necessitate an interference with the rights of the Accused’.²⁴⁷

In its decision, Trial Chamber II emphasised both the discretion of the Chamber, as well as the role of the registry in reporting on communications in such a way that prevents irrelevant or sensitive information from passing to the prosecution. Such information includes:

‘Conversations of a private and/or an affective nature with his wife, family members or relatives; conversations of a spiritual or religious nature; general discussions of family, domestic or financial matters; considerations pertaining to the Accused’s health; financial considerations linked to the conduct of his investigations and his defence in general; and the Defence strategy, as previously decided with his Counsel, insofar as it concerns the conduct of investigations, the organisation of meetings in the Democratic Republic of the Congo and the determination of those matters founding his defence.’²⁴⁸

The Trial Chamber emphasised that it was ‘essential to inquire as to the necessity and proportionality of the proposed prosecutorial interference’ in imposing any measures that interfered with the right to respect for private and family life or the right to mount a defence.²⁴⁹

However, the prosecution has been granted greater access to non-privileged communications in the *Bemba* and *Ntaganda* cases in relation to suspected offences against the administration of justice. The prosecution also received access to privileged communications in the *Bemba* case, as discussed further below. In this regard, the IBA notes the difference in the approach from Trial Chamber II, and the much less restrictive approach of the Single Judge, where an Article 70 investigation is concerned.

In the *ex parte* proceedings in the *Bemba* case, the Single Judge ordered that the prosecution be given direct access (rather than through an independent counsel, as the prosecution had requested) to the non-privileged recordings. The Single Judge also granted the prosecution’s request for suspending the accused’s right to be heard, as provided in the Regulations of the Court and the registry. In this decision, the Single Judge distinguished the ‘specific purpose’ served by recordings made in the

245 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1718, Judgment on the Appeal of the Prosecutor Against the ‘Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre’, 9 December 2009, paras 50 and 52.

246 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2187-tENG-Red, Decision Further to the Appeals Chamber Judgment of 9 December 2009 and Responding to Request 1959-Conf-Exp of the Office of the Prosecutor, 10 June 2010, para 61.

247 *Ibid.*

248 *Ibid.*, para 58.

249 *Ibid.*, para 59.

detention unit from that served by the detention record and determined that they should be treated differently with respect to confidentiality and disclosure. According to the Single Judge, the detention record, which contains personal information of a confidential nature, is intended to preserve all information pertaining to the period of the accused's time in the Court's custody. On the other hand, the Single Judge found that telephone conversations are recorded and saved in case they are needed for an eventual investigation, stating that recordings 'can be of the essence in allowing the relevant authorities to properly investigate' any 'suspicion as to the behaviour of an accused'.²⁵⁰ For this reason, the Single Judge found that all unprivileged calls 'can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an "independent counsel" to be appointed'.²⁵¹

The IBA is concerned that such a finding contains insufficient safeguards for the rights and privacy of the accused, especially in a situation where, in reality, the communications may be provided to the same prosecutors who are trying the Article 5 case. While it is difficult to assess the scope of how such information might benefit the prosecution, the application of safeguards, such as review by an independent counsel or further involvement of the chamber or registry, would prevent non-relevant information from being unnecessarily exposed, protect the privacy of the accused, and ensure that defence strategy was not made available to the prosecution. In addition, the IBA emphasises the role of the chamber in finding a balance between any investigations into the communications of the accused and their right to privacy, family life or the right to mount a defence. As articulated by Trial Chamber II in the *Ngudjolo* case, any measures that interfere with the accused's fundamental rights must be carefully assessed and found to be both necessary and proportional.

Lawyer-client privilege

The IBA has emphasised the importance of privileged communication between lawyers and clients as an integral component of a fair trial, and as a 'necessary corollary of a suspect's right to communicate freely with his or her chosen counsel in confidence'.²⁵²

The principle of lawyer-client privilege has been defined as:

'A rule of evidence, which provides that confidential communications between legal practitioner and client made for the sole purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation, cannot be given in evidence nor disclosed by the client or by the legal practitioner without the consent of the client.'²⁵³

Lawyer-client privilege, 'accepted in customary law as one of the fundamental human rights relating to due process',²⁵⁴ aims at protecting the integrity of the relationship between an accused and their

250 ICC, *Situation in the Central African Republic*, ICC-01/05-46, Decision on the Prosecutor's 'Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70', 8 May 2013, para 9.

251 ICC, *Situation in the Central African Republic*, ICC-01/05-50, Decision on the 'Registry's Observations Pursuant to Regulation 24bis of the Regulations of the Court on the Implementation of the "Decision on the Prosecutor's 'Request for Judicial Assistance to Obtain Evidence for Investigation Under Article 70'"', 27 May 2013, para 10.

252 IBA, *Fairness at the International Criminal Court*, August 2011, p 25.

253 ICTY, *Prosecutor v Radoslav Brđanin and Momir Talić*, IT-99-36, Decision on 'Motion for Production of Documents-Dzonlić Testimony' of 11 March 2002, 9 April 2002, para 6.

254 STL, *Before the President*, CH/PRES/2009/01/rev, Order on Conditions of Detention, 21 April 2009, para 16.

counsel²⁵⁵ and has been widely recognised before international courts, including the ICC.²⁵⁶ Within the ICC's legal framework, privilege is recognised as a fundamental right of the accused,²⁵⁷ and as a more general principle covering all communications made in the context of the professional relationship between a person and their counsel, with two explicit exceptions: the person either consents in writing or voluntarily discloses the information to a third party who then gives evidence of that disclosure.²⁵⁸

While the Rome Statute is clear that the accused has the right to 'communicate freely with counsel of the accused's choosing in confidence',²⁵⁹ the interpretation of this framework has been challenged in a number of cases. In the *Mbarushimana* case, issues were raised about how such communications would be identified.²⁶⁰ In that case, when evidence seized from the suspect included potentially privileged communications, the Pre-Trial Chamber proposed to review the materials to ensure that privileged communications would not be passed to the prosecution. However, this regime would still potentially expose the Pre-Trial Chamber, which had yet to confirm charges against Mr Mbarushimana, to material that could be prejudicial to the defence. At that time, the IBA had expressed concern about the apparent flaws in the procedure for identifying privileged material, and urged the Court, in consultation with defence counsel and the OPCD, to devise a policy and protocol for the inspection of potentially privileged information. At the time of writing, no policy and protocol has been made public.²⁶¹

In the *Bemba* main case, there were discussions about the scope of privilege, particularly with regard to the personal scope. The defence in the *Bemba* case argued that all members of the defence team should enjoy privileged communications with the accused.²⁶² The Chamber favoured a stricter approach and found that, in accordance with the legal framework, only 'lead counsel or co-counsel and assistants to counsel as referred to in Regulation 68 of the Regulations [of the Court] who satisfy the requirements of Regulations 124-127 of the Regulations of the Registry' enjoy privileged communications.²⁶³ The material scope of privilege had been previously discussed in the *Mbarushimana* case, where the Chamber adopted a broader approach, finding that communications 'made in the context of the professional relationship' between the accused and their counsel were to be privileged, but also that communications that might not appear to be made in such context 'may attract privilege depending on their content and the circumstances, context or purpose of their creation or communication'.²⁶⁴

255 Karim AA Khan and Gissou Azarnia 'Evidentiary privileges', in Karim AA Khan, Caroline Buisman and Christopher Gosnell, *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) p 585.

256 See, eg, ICTY/ICTR RPE, Rule 97; Rome Statute, Art 67(1)(b); ICC RPE, Rule 73; ICC Regulations of the Registry, Regulations 169(1)(a), 174(1) and 175(2); ICC, *Code of Professional Conduct for Counsel*, Arts 8(1) and 15(3).

257 Rome Statute, Art 67(1)(b).

258 Rome Statute, Art 69(5); ICC RPE, Rule 73(1).

259 Rome Statute, Art 67(1)(b).

260 IBA, *Fairness at the International Criminal Court*, August 2011, p 25. See also ICC, *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-67, Decision on the 'Prosecution's Request for a Review of Potentially Privileged Material', 4 March 2011; ICC, *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-105, Second Decision on Matters Regarding the Review of Potentially Privileged Material, 15 April 2011.

261 IBA, *Fairness at the International Criminal Court*, August 2011, p 10.

262 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2963, Defence Motion on Privileged Communications, 6 February 2014, para 12; ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3004, Defence Reply to the 'Prosecution's Response to the "Defence Motion on Privileged Communications"', 3 March 2014, paras 6(b), 8 and 24.

263 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3080, Decision on 'Defence Motion on Privileged Communications', 3 June 2014, para 19.

264 ICC, *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-237, Decision on the Review of Potentially Privileged Material, 16 June 2011, p 7.

The crime-fraud exception to privilege

In addition to the exceptions for explicit waiver or third party disclosure included in the ICC framework, the ‘crime-fraud exception’ is an additional exception to privilege that is widely recognised.²⁶⁵ In international tribunals, the crime-fraud exception is explicitly included in the STL RPE, and is also recognised within the legal frameworks of the ICTY and ICTR.²⁶⁶ Under the crime-fraud exception, privilege is waived when the communications are used in furtherance of a crime or fraud.

The ICC legal framework does not include an explicit crime-fraud exception allowing access to privileged communications. However, in the *Bemba et al* case, the Single Judge of Pre-Trial Chamber II found that the crime-fraud exception allowed the OTP access to privileged communications between Mr Bemba and his counsel.²⁶⁷ The Single Judge reasoned that the crime-fraud exception was well recognised at both a national and international level, and made reference to the relevant STL RPE provisions as well as the jurisprudence of the SCSL.²⁶⁸ In the ICC context, the Single Judge stated:

‘The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(l) (b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when – as in the present case – the counsel seems to be an accomplice in the scheme. This behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer–client communications as a matter of course.’²⁶⁹

The Single Judge’s finding that the crime-fraud exception was applicable to the ICC’s framework was later accepted by Trial Chamber VII, in the context of the *Bemba et al* proceedings.²⁷⁰ Requests for leave to appeal the decision confirming the crime-fraud exception were denied.²⁷¹ In light of the fundamental importance of privilege to the accused’s ability to present his defence and realise the rights guaranteed under the statute, two *amicus curiae* requests were submitted to the Chamber,

265 SCSL, *Prosecutor v Bangura et al*, SCSL-11-02, Decision on the Prosecutor’s Request for Subpoenas, 28 June 2012, paras 13–14, citing David Ormerod QC, ed, *Blackstone’s Criminal Practice* (Oxford University Press 2006) para 9.19.

266 STL RPE, Rule 163(iii); ICTY, Registry, *Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal*, IT/38 Rev.10, 15 November 2016, Rule 65(B); ICTY, Registry, *Code of Conduct for Counsel Appearing before the ICTY*, IT/125 Rev.3, 6 August 2009, Art 13(C) (i); ICTR, Registry, *Code of Professional Conduct for Defence Counsel before the ICTR*, 14 March 2008, Art 8(2) (d) (i).

267 ICC, *Situation in the Central African Republic*, ICC-01/05-52-Red2, Decision on the Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70’, 29 July 2013.

268 *Ibid*, para 4.

269 *Ibid*, para 3.

270 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-947, Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 9 April 2015, para 14; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1257, Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, para 13.

271 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-962, Defence Leave to Appeal Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947, 25 May 2015; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1096, Decision on Defence Request for Leave to Appeal the ‘Decision Providing Materials in Two Independent Counsel Reports and Related Matters’, 21 July 2015; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1140, Motion on the Inadmissibility of Material Obtained in Violation of Statutory Guarantee that Accused and Counsel be Able to Communicate Freely and in Confidence, 10 August 2015; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1257, Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015.

seeking to provide additional assistance in interpreting privilege and the crime-fraud exception.²⁷² Both *amicus curiae* requests were denied, with the Trial Chamber stating that it was in a position to resolve any questions raised by the parties without assistance.²⁷³ However, the IBA notes that the Trial Chamber does not appear to have conducted any review of the legal basis presented by the Pre-Trial Chamber, nor did it further articulate a definition or principles for applying the crime-fraud exception in the ICC context, beyond stating that ‘whether a given communication satisfies the crime/fraud privilege exception must be evaluated in the context of the charges as a whole’, and that communications should be evaluated in their broader context.²⁷⁴

Independent review of privileged communications

Following the determination that the crime-fraud exception applied to some of the privileged communications in the *Bemba et al* investigation, the Single Judge appointed an independent counsel to review information prior to providing it to the prosecution. At the investigation stage of the proceedings, the independent counsel reported to the Single Judge of the Pre-Trial Chamber, who then reviewed material prior to providing it to the prosecution.²⁷⁵ Trial Chamber VII, when presiding over the *Bemba et al* trial, maintained the procedures established by the Pre-Trial Chamber, and emphasised that ‘the Independent Counsel fulfils his role autonomously and not as an agent or a delegate of the Chamber for purposes of the exercise of its own functions’. In this regard, Trial Chamber VII stated that it did not rely exclusively on the independent counsel’s analysis and conducted its own independent analysis of the relevance and potentially privileged character of the documents in question.²⁷⁶

The Single Judge initially requested the independent counsel to identify calls in the log made to parties connected to the investigation and to review the recordings of any such calls.²⁷⁷ The same independent counsel was later appointed to assist with other portions of the investigation, including reviewing new material such as DVDs containing email communications,²⁷⁸ being present at the unsealing of seized material, reviewing it and reporting to the Chamber on which materials were

272 ICC, *Prosecutor v Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-1205, Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence [filed by Michael G Karnavas], 31 August 2015; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1256, Application of The Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia To File an *Amicus Curiae* Brief on The Motion on the Inadmissibility of Material Obtained in Violation of the Statutory Guarantee that the Accused and Counsel be Able to Communicate Freely and in Confidence, 16 September 2015. Some of the observations of Karnavas on privilege and the crime-fraud exception were later published by Karnavas: ‘Attorney-Client Privilege and the Crime-Fraud Exception — Part I’ at <http://michaelgkarnavas.net/blog/2015/09/16/privilege-part-i> accessed 30 May 2017.

273 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1212, Decision on Request of Mr Michael Karnavas for Leave to Submit *Amicus Curiae* Observations, 3 September 2015; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1257, Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, para 6.

274 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-947, Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 9 April 2015, para 18.

275 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3101, Decision on ‘Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications’ and Addendum, 3 July 2014, para 27.

276 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-947, Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 9 April 2015, paras 15–16.

277 ICC, *Situation in the Central African Republic*, ICC-01/05-52-Red2, Decision on the Prosecutor’s ‘Request for Judicial Order to Obtain Evidence for Investigation Under Article 70’, 29 July 2013, para 7.

278 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01-05/01-13-41, Decision Appointing an Independent Counsel and Taking Additional Measures for the Purposes of the Forensic Acquisition of Material Seized in the Proceedings, 13 December 2013; ICC, *Prosecutor v Bemba et al*, ICC-01/05-01/13-366-Red, Decision on the ‘Prosecution’s Request to Refer Potentially Privileged Materials to Independent Counsel’, 25 April 2015.

relevant and not privileged.²⁷⁹ At a later stage, after the execution of the arrest warrants, the reports of the independent counsel were also notified to the defence teams in the *Bemba et al* case.²⁸⁰

The regime put in place for review of privileged material has been challenged on a number of grounds. Arguments included, *inter alia*, that the appointment of an independent counsel constituted an abuse of judicial discretion, not supported by the ICC's legal framework or its jurisprudence, and that the judges were not permitted to 'divest their judicial powers to an independent entity, particularly one who is not subject to any obligations or professional controls'.²⁸¹ It was also argued that the independent counsel was not properly instructed to take measures to safeguard the rights of the defence.²⁸² The judicial supervision of the independent counsel was also challenged.²⁸³ In particular, questions were raised about the ability of the Single Judge to adequately review the reports of the independent counsel prior to transmission to the prosecution, as the communications were mostly in Lingala, a language not spoken by the Single Judge.²⁸⁴

Additionally, concerns were raised about the independence and impartiality of the independent counsel, alleging that he acted as a second Prosecutor. His independence was also challenged on the basis that 'he sought and received directions from the prosecution in relation to the execution of his tasks'.²⁸⁵ Finally, some questions were raised as to the standard used by the independent counsel as to consider the privileged conversations relevant to the prosecution's investigations. The Bemba defence claimed the independent counsel was applying a 'might be of relevance' standard, which would be inconsistent with the direction from the Single Judge, and a broad approach that is insufficiently protective of the rights of the accused, in that it allows the prosecution to have access to information that did not constitute evidence of any offence.²⁸⁶ At the time of writing, many of these issues are currently being litigated before the Appeals Chamber.

Strengthening protections for privileged communications

The IBA strongly urges further articulation of the legal regime for protecting privileged communications. To ensure a fair trial, an accused person must be able to communicate with their counsel in confidence, as well as with relevant members of the legal team. It is additionally clear that further consideration is needed on practices for managing privileged information in the context of investigations and trials, and defining and applying exceptions including the crime-fraud exception. Lack of clarity about these issues can have a chilling effect on the ability of the accused to communicate with their counsel, as guaranteed by the Statute, and may create a barrier to presenting an effective defence.

Likewise, an independent counsel has the potential to provide a valuable service to the chamber and prevent privileged information from being shared with the prosecution. However, the IBA

279 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-893, Decision on 'Request Concerning the Review of Seized Material' and Related Matters, Trial Chamber VII, 9 April 2015, paras 19–23.

280 *Ibid*, para 23.

281 *Bemba* Abuse of Process Defence Request, para 69.

282 *Ibid*, para 75.

283 *Bemba* Art 5 Appellant's Document, para 98.

284 *Bemba* Abuse of Process Defence Request, para 70.

285 *Ibid*, paras 75 and 77.

286 *Bemba* Art 5 Appellant's Document, para 98.

recommends the adoption of guidelines and a clear legal framework for this role, including guidelines for selecting counsel, ensuring their impartiality and that they are able to operate independently of the prosecution. The issues raised by the use of an independent counsel in the *Bemba et al* case highlight a lack of clarity on the mandate and the rules governing his work.

In light of the importance of these issues to a fair trial and the rights of the accused, the IBA reiterates its call for a policy and protocol that clarifies and provides certainty on issues relating to privileged communications. The IBA recommends that the policy and protocol be made in coordination with, and reflect the input of, relevant stakeholders such as defence counsel, the OPCD and the ICCBA.

Chapter 4: Taking Article 70 forward

As noted in Chapter 1, Article 70 is designed to address a range of activities that may fall within the broad category of contempt or offences against the administration of justice, including allegations of witness interference. Within the legal framework, Article 70 is supported by provisions to address misconduct and other offences, which provide for lesser sanctions and disciplinary measures. Article 70, with the possibility of imprisonment and significant fines, is at the top of the pyramid of measures available to the Court to protect the integrity of its proceedings. As such, it is an important provision, and one that should be used with care and precision, to support the integrity and fairness of the ICC's proceedings.

In the context of international criminal courts and tribunals, the approach to dealing with these crimes is guided both by the type of behaviour alleged or suspected, as well as the legal framework. An investigation into an activity such as a single instance of disclosure of confidential information will differ in nature from an investigation into an alleged long-term scheme to corrupt the testimony of trial witnesses. As outlined in this Discussion Paper, the ICC's Article 70 procedures and jurisprudence are shaped by the Court's distinct legal framework. It is also clear, however, that the development of the procedures has been influenced by the type of behaviours alleged to date. In particular, this is reflected in the development of procedures that use some of the stronger investigatory measures available to the prosecution to ensure the protection and testimony of witnesses in high-stakes trials.

The Article 70 procedures have also been shaped by the first such case to proceed to trial. The ICC prosecution has characterised the *Bemba et al* Article 70 case as 'unlike the vast majority of contempt cases adjudicated before the *ad hoc* and hybrid tribunals', in that 'it does not simply concern an individual incident, where, for instance, confidential information was disclosed, or a witness refused to testify or answer questions'.²⁸⁷ Rather, it describes the activities as 'multiple offences' involving 'a dedicated, disciplined, and concerted effort to undermine the entirety of the [*Prosecutor v Bemba* Article 5 case] by illicitly coaching numerous witnesses and/or bribing them, and the consistent and the deliberate violation of Court orders and regulations'.²⁸⁸ Indeed, following conviction of the accused in *Bemba et al*, the prosecution has described their crimes as part of 'an epidemic of witness interference that continues to profoundly affect the ICC'.²⁸⁹ Such statements underscore the urgency and seriousness with which the prosecution has implemented its Article 70 mandate to date.

It is not the aim of this Discussion Paper to assess the factual allegations made by the Prosecutor with respect to the Article 70 allegations and charges to date. Indeed, many of the facts underlying these allegations, as well as the steps taken to address them, remain out of the public record. In addition, at the time of writing this Discussion Paper, many of the procedural steps taken remain under review as part of the appeal in the *Bemba* and *Bemba et al* cases, while proceedings in other cases are ongoing. However, with this Discussion Paper, the IBA is seeking to encourage reflection on some of the important issues relating to procedures, practices and legal interpretations. The IBA's approach

287 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-2085-Red, Public Redacted Version of 'Prosecution's Submission on Sentencing', 12 December 2016, para 11.

288 *Ibid.*

289 *Ibid.*, para 2.

recognises the challenges to changing the ICC's legal framework, as well as the jurisprudence confirming the sole power of the OTP to investigate and prosecute Article 70 offences, and offers analysis to improve the current practices within this legal framework. It is hoped that, over time, any allegations brought under Article 70 will follow a consistent and transparent set of procedures, with additional necessary safeguards for the rights of the accused.

Impartiality and Article 70 proceedings

Among the components of fairness relevant to Article 70 proceedings, the IBA highlights the importance of upholding the principle of impartiality. Courts have been clear that one reason to prosecute acts of contempt as crimes is to ensure the public has confidence in the courts' ability to administer justice and, as part of that, to protect confidential information, particularly witness information.²⁹⁰ The public's confidence in the impartiality of courts and tribunals is a no less important facet of how these institutions function. Indeed, the legal framework and jurisprudence of international criminal courts and tribunals have established that justice must both be done and be seen to be done.²⁹¹ As Rohan has written: 'the system of international law must be seen as a system which is consistent, transparent, and not unfairly weighted against the interests of any party'.²⁹²

Together with independence, the requirement of impartiality is embedded in international instruments and domestic legal systems as a means of reinforcing the separation of powers and the rule of law, which depends on judicial institutions exercising jurisdiction free from interference or improper influence.²⁹³ Impartiality is required of judges, who must make decisions 'on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.²⁹⁴ In a fair trial, judges 'must not harbor preconceptions about the matter put before them... and must not act in ways that promote the interests of one of the parties'.²⁹⁵ Prosecutors are likewise called upon to 'protect the public interest' and 'act with objectivity', including taking heed of 'all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect'.²⁹⁶ In this regard, international standards recommend the adoption of guidelines to ensure the fair and consistent exercise of discretionary functions by prosecutors.²⁹⁷

290 See, eg, ICTY, *Prosecutor v Vojislav Šešelj*, IT-03-67-R.77.4, Public Redacted Version of Judgment Issued on 28 June 2012, para 53; ICTY, *Prosecutor v Florence Hartmann*, IT-02-54-R77.5, Judgment, 14 September 2009, paras 26, 74 and 80; ICTY, *Prosecutor v Marijačić and Rebić*, IT-95-14-R77.2, Judgment, 10 March 2006, paras 49–50; STL, *In the Case Against New TV SAL and Karma Mohamed Thasin Al Khayat*, STL-14-05_F0001, Redacted Version of Decision in Proceedings for Contempt With Orders in Lieu of an Indictment, 31 January 2014, paras 37–38.

291 ICTY, *Prosecutor v Anto Furundžija*, IT-95-17/1, Judgment, 21 July 2000, para 182; ICTR, *Prosecutor v Georges Rutaganda*, ICTR-96-3, Judgment, 26 May 2003, para 39; SCSL, *Prosecutor v Issa Hassan Sesay et al*, SCSL-04-15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para 15; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-572, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 Against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para 10.

292 Colleen Rohan, 'Ethical Standards in the Practice of International Criminal Law', in Colleen Rohan and Gentian Zyberi, ed, *Defence Perspectives on International Criminal Justice* (Cambridge University Press 2017) pp 43–44.

293 OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), pp 115–117 and 135–138 (and references therein) www.ohchr.org/Documents/Publications/training9chapter4en.pdf accessed 26 May 2017.

294 UN, Congress on the Prevention of Crime and Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, as endorsed by the UN General Assembly, A/RES/40/146, 13 December 1985, Principle 2.

295 OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), p 135, citing *Arvo O Karttunen v Finland*, CCPR/C/46/D/387/1989, Communication No 387/1989, para 7.2.

296 UN, Congress on the Prevention of Crime and Treatment of Offenders, *Guidelines on the Role of Prosecutors*, 7 September 1990, Principles 13(a) and (b).

297 *Ibid*, Principle 17.

It is equally important to have clear procedures allowing challenges on the basis of impartiality and conflict of interest. To evaluate impartiality or the appearance of bias – for example, in the challenge to the impartiality of a court official – involves the consideration of ‘whether a fair-minded and informed member of the public would reasonably apprehend bias in all the circumstances of the case’.²⁹⁸ However, attention should be given to ensure that the presumption of impartiality is not set unduly high, and that the burden to challenge it does not fall solely to the defence. The European Court of Human Rights has held that there is both a subjective and objective element to impartiality: not only must members of a tribunal be free of bias and be objectively seen to be so, a court must ‘offer guarantees to exclude any legitimate doubt in this respect’.²⁹⁹ The IBA notes the value of codes of conduct and other legal policies and instruments in this regard. However, in order to be meaningful, codes and policies must be enforced and transparent.

Within the ICC’s legal framework, impartiality is emphasised in multiple provisions³⁰⁰ and, importantly, is an explicit right of the accused, who is entitled to ‘a fair hearing conducted impartially’.³⁰¹ Indeed, the Statute makes clear that, when considering witness protection, victim participation and exceptions to disclosure, any measures taken must not be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.³⁰² Keeping in mind that the ICC prosecution combines its Article 70 mandate in ongoing investigations with its role as a party in adversarial proceedings before the Court, the OTP must maintain public confidence while executing both of these mandates. Among other things, this entails ensuring that the prosecution’s trial strategy does not appear to unduly benefit from the access granted by Article 70 investigations, and that the OTP follows a clear and transparent policy that applies equally to all Article 70 allegations brought by any party. In respect of chambers, maintaining public confidence requires upholding their obligation to ensure the integrity and fairness of Article 5 and Article 70 proceedings through, *inter alia*, full realisation of Articles 66 and 67 and related provisions, and applying additional safeguards if necessary. Chambers are also called to enforce strict supervision and limitation of exceptional measures such as *ex parte* proceedings and monitoring and restrictions on communications.

Clarifying and improving the OTP’s Article 70 procedures

The ICC’s framework and jurisprudence have confirmed that the OTP has the discretionary mandate to investigate and prosecute offences against the administration of justice. This places the primary obligation on the prosecution to ensure that Article 70 allegations are addressed and investigations and prosecutions take place in keeping with the Prosecutor’s obligations to impartiality and objectivity. It is also clear that the Article 70 mandate, while it will remain secondary to the Article 5 mandate, will continue to occupy significant time and resources for the OTP, in particular as issues with witness interference remain a concern.

298 ICTY, *Prosecutor v Anto Furundžija*, IT-95-17/1, Judgment, 21 July 2000, para 268.

299 OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), p 120, citing *Case of Daktaras v Lithuania*, Application No 42095/98, Judgment, 10 October 2000, para 30.

300 See, eg, Rome Statute, Arts 36(3) (a) and 41(2) (a); ICC, *Code of Judicial Ethics*, ICC-BD/02-01-05, 9 March 2005, Art 11. *The Code of Judicial Ethics* is an advisory document that serves as ‘guidelines on the essential ethical standards required of judges in the performance of their duties’. See also, ICC, *Code of Conduct of the Office of the Prosecutor*, paras 8, 11, 20, 29–31, 49 and 51.

301 Rome Statute, Art 67(1).

302 See, eg, Rome Statute, Arts 68(1), 68(3) and 68(5).

It is, therefore, essential that the Article 70 mandate be adequately understood both within and without the OTP, and that the OTP works towards consistency in executing the mandate while still maintaining the ability to make case-by-case evaluations and decisions based on the facts of the situation. The IBA encourages the OTP to increase transparency regarding the procedures and actions taken under the Article 70 mandate, and to build on its experience to date to articulate policies that clarify guidelines and procedures for key issues, including: appointing staff and independent counsel to investigate allegations; providing sufficient and timely responses to allegations from all parties; and ensuring that any potential conflicts of interest within the OTP are addressed in a transparent manner according to the legal framework. Guidelines and policies are important tools to ensure the transparent, fair and consistent exercise of the Prosecutor's discretion.

The legal framework is clear that Article 70 should be equally available to all parties. This means that the OTP should be able promptly and transparently to respond to allegations brought by not only the prosecution, but also by the defence, the chamber, another participant or by an external source. Current practice does not publicly address how the OTP responds to allegations in a consistent and fair manner, and in such a way that upholds its obligation to investigate objectively. In this regard, a public summary or accounting of measures taken in respect of the OTP's Article 70 mandate would support the transparency and objectivity of the Court.³⁰³ It would also more clearly account for the resources that are required to address Article 70 allegations, informing States Parties and other stakeholders about the resources needed for the Article 70 mandate.

Strengthening States Parties' ability to respond in Article 70 matters

Article 70(4) of the Statute also makes clear that States Parties have an active role to play in addressing Article 70 allegations. To the extent that a state would have jurisdiction over an Article 70 matter or can otherwise assist the OTP with Article 70 investigations and prosecutions, states should provide this support, including, where appropriate, prosecuting crimes domestically. Prosecution by states may not be feasible in all circumstances. Some of the possible challenges include crimes committed across multiple jurisdictions, issues with witness protection *vis-à-vis* local authorities, as well as the reluctance of witnesses to trust and cooperate with local authorities, and absence of appropriate domestic legislation.³⁰⁴

In this regard, the IBA recommends that States Parties review domestic legislation with a view towards ensuring the inclusion of Article 70 offences if such crimes are not included. This urgent need was stressed by the President of the ICC, who called attention to the fact that as many as half of States Parties do not have adequate laws criminalising Rome Statute crimes.³⁰⁵ The President highlighted the relationship between effective prosecution of Article 70 offences for the effective prosecution of core crimes, and emphasised the 'specific obligation under article 70.4 of the Statute on States Parties to extend their criminal laws to encompass offences against the administration of justice before the

303 See also, IBA, *Witnesses before the International Criminal Court*, July 2013, p 49.

304 IBA consultation with the ICC Deputy Prosecutor and Director of the Prosecution Division, 1 June 2017.

305 Judge Silvia Fernández de Gurmendi, President of the International Criminal Court, Keynote speech at Seminar 'From Ratification to Action: The Importance of Full Implementation of the Rome Statute', The Hague, 16 September 2015, p 2.

ICC'.³⁰⁶ The IBA underscores that States Parties investigating and prosecuting Article 70 matters should do so consistent with the fair trial requirements of the ICC framework.

Protecting the integrity of trial proceedings and the rights of the accused during trial

While the ICC places investigation and prosecution of Article 70 allegations within the discretion of the Prosecutor, chambers maintain their own statutory obligations in ensuring that Article 70 proceedings are fair. The IBA notes the importance of both separation of functions and levels of review within the judiciary, as well as safeguards to further that separation should there be an active investigation into the alleged acts of a person accused of other crimes before the Court. In this regard, the IBA highlights the importance of the trial chamber directing matters relating to Article 70 investigations at the earliest possible moment to the pre-trial chamber when an Article 70 allegation is raised. The IBA also reiterates that Article 70 investigations involving an accused charged with other crimes bring additional considerations for protecting their rights with respect to the ongoing legal proceedings.

In keeping with their exceptional nature, *ex parte* proceedings should take place only when strictly necessary, and disclosure should take place as soon as possible, along with providing the suspect or accused with the opportunity to be heard. In particular, in cases where the accused may be in a position to provide information that would shorten proceedings or assist an investigation, ordering disclosure and allowing a response as soon as possible will increase efficiency and clarity of proceedings. Prolonged periods of *ex parte* investigations, in particular when followed by significant amounts of disclosure, create resource challenges for the defence and have an impact on the equality of arms. This is particularly true during an active trial. In this regard, adjournments or additional resources should be allowed as needed to ensure that trial proceedings remain fair and to protect the statutory right to adequate time and facilities to prepare a defence. Likewise, the IBA strongly recommends representation of the rights or interest of the defence in *ex parte* proceedings that address issues with an impact on the rights or interests of the defence through ad hoc counsel or, in the alternative, the OPCD.

Strengthening witness-related practices and investigations

The IBA continues to support the work of the Court to address the serious issue of witness interference and to mitigate its potential impact on ICC cases. Chambers and the OTP, as well as the IBA, have emphasised the need to address the root causes underlying witness vulnerability and unreliability, including, *inter alia*, by strengthening practices for investigations, limiting and more carefully managing the use of intermediaries, and reinforcing witness support.³⁰⁷ Noting also that the bulk of the Court's evidence in its first cases has been provided by witness testimony, the IBA has emphasised the importance of developing other sources of evidence in support of a goal already identified by the OTP.³⁰⁸

³⁰⁶ *Ibid*, p 3.

³⁰⁷ ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras 151–168 and 183–197; ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2434-Red, Redacted Decision on Intermediaries, 31 May 2010, para 138; ICC OTP, *Strategic Plan 2016-2018*, 6 July 2015, para 78; IBA, *Witnesses Before the International Criminal Court*, July 2013, pp 43–47.

³⁰⁸ ICC OTP, *Strategic Plan 2016-2018*, 6 July 2015, para 78; IBA, *Evidence Matters in ICC Trials*, August 2016, p 17.

The facts outlined in Article 70 proceedings to date have underscored the importance of continuing to strengthen practices to work with witnesses by all parties. In particular, the *Bemba et al* investigation and case put a focus on the need to clarify the range of permissible financial transactions by both parties but, in particular, by the defence. The evidence that provided the basis for initial judicial orders in the *Bemba et al* case consisted of records of money transfers, relied on by the prosecution to argue that Mr Bemba (or his proxies) was making improper payments to witnesses in exchange for their testifying a certain way.³⁰⁹

In fact, as highlighted by the evidence presented in the case,³¹⁰ there is a range of permissible payments to witnesses from both parties. While this is generally acknowledged, the types and amounts of payments are not widely known. This may, in part, be necessary to ensure that there is not a financial incentive to testify or engage with the Court on behalf of either party. However, it is important to note that financial incentive to engage with the Court, in particular to testify or not testify in a certain manner, is a thread running through Article 70 investigations and proceedings.³¹¹ In this regard, the IBA encourages the Court to continue efforts to apply best financial practices in witness management, and to ensure that defence teams in particular receive sufficient support and training on issues including payments and reimbursements to witnesses.

A related issue is that of intermediaries and resource persons, who are contractors used by both parties to contact and interact with witnesses in the field. Intermediaries and resource persons are used for a number of reasons, including their language skills and familiarity with local and cultural contexts, which allows them to have access to and interact with witnesses with greater ease than court staff or officials. However, intermediaries and resource persons may also be used, in part, because there are not sufficient resources to employ professional investigators and, in this regard, resource persons may not receive sufficient training in both ethics and the legal requirements for witness testimony compared to a professional investigator. In particular, the IBA notes with concern that the legal aid budget provides a limited budget for defence investigations, and that this leads to the practice of defence teams relying on a locally based resource person instead of a more expensive international investigator with training and experience in international criminal investigations. In the current revision of the legal aid policy, the IBA urges increasing resources for defence investigations, with a clear objective of supporting defence teams in hiring professional and well-trained investigators.

Reinforcing the rights of the accused in detention and lawyer-client privilege

Finally, the *Bemba et al* case and *Ntaganda* Article 70 investigation have brought to the fore issues with communications and privileged communications. As discussed at length in Chapter 3, Article 70 investigations to date have permitted widespread access to the communications of the accused from the detention unit in order to screen the communications for possible attempts to contact

309 *Bemba* Transcript of 9 April 2013, p 8, lines 21–22.

310 ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-T-42-Red2-Eng, Transcript, 9 March 2016, p 83, lines 2–8.

311 See, eg, ICC, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras 364, 365, 388, 449, 483 and 1361; ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1989, Judgment Pursuant to Article 74 of the Statute, 19 October 2016, paras 702–703; ICC, *Prosecutor v Walter Osapiri Barasa*, ICC-01/09-01/13-1-Red2, Warrant of Arrest for Walter Osapiri Barasa, 2 August 2013; ICC, *Prosecutor v Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15-1-Red, Decision on the ‘Prosecution Application under Article 58(1) of the Rome Statute’, 10 March 2015.

witnesses, share confidential witness information, or give orders to influence or tamper with witnesses.

The IBA emphasises the importance of strict guidelines in respect of the communications of an accused that may be disclosed in the case of an investigation. Any measures that interfere with the right to respect for private and family life or the right to mount a defence should be adopted only after evaluating the necessity and proportionality of the proposed prosecutorial actions, notably taking into account the specific limits of the allegations and crime-fraud exception. Any disclosure to the prosecution should be examined on a case-by-case basis – for conversations of a private and/or an affective nature with family; conversations of a spiritual or religious nature; general discussions of family, domestic or financial matters; considerations pertaining to the accused's health; financial considerations linked to the conduct of defence investigations and the defence in general; and the defence strategy, as previously decided with counsel, insofar as it concerns the conduct of investigations, the organisation of meetings and the determination of those matters founding the defence.³¹²

If an independent counsel is appointed to screen material from an Article 70 investigation, the IBA also underlines the need for guidelines and a clear legal framework for this role, including guidelines for selecting counsel and ensuring their impartiality. In instances of chamber-appointed counsel, material should be reviewed according to a 'strict relevance' standard rather than a 'might be of relevance' standard to ensure that only directly relevant material is shared with the prosecution so as to protect both the privacy of the accused and information that may be relevant for defence strategy.

Finally, the IBA underscores that privileged communication between lawyers and clients is a fundamental component of a fair trial and must be preserved to protect the integrity of the relationship between an accused and their counsel. While jurisprudence has addressed the personal and material scope of privilege, the procedure for identifying privileged material remains insufficiently articulated, raising concerns about protecting the rights of the accused. In this regard, it is essential that the Court clarifies and provides certainty on issues relating to privileged communications by devising a policy and protocol addressing these issues. In doing so, the Court should coordinate with relevant stakeholders such as defence counsel, the OPCD and the ICCBA.

As the Court has now applied a version of the crime-fraud exception to privilege and allowed the use of privileged communications in evidence, the Court should also ensure that adequate and updated training on privilege, the scope of privilege and the crime-fraud exception to privilege are available to counsel and legal teams who are representing accused persons before the ICC. While, as noted, defence counsel misconduct is a rare occurrence, the IBA particularly emphasises the importance of training in a context where counsel from diverse backgrounds and legal systems are practising before an international court or tribunal. Training is key to address any lack of clarity about the applicable codes of conduct, as well as procedural rules and regulations.³¹³

312 See, ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2187-tENG-Red, Decision Further to the Appeals Chamber Judgment of 9 December 2009 and Responding to Request 1959-Conf-Exp of the Office of the Prosecutor, 10 June 2010, para 58.

313 See Gentian Zyberi, 'Dealing with professional misconduct by counsel', in Colleen Rohan and Gentian Zyberi, ed, *Defence Perspectives on International Criminal Justice* (Cambridge University Press 2017) pp 131–133.



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