

PROCEDURAL ISSUES CONCERNING ICC TRIAL CHAMBER I'S NO CASE TO ANSWER DECISION IN THE GBAGBO AND BLÉ GOUDÉ CASE



AUTHORS*

Sofía Campos Sánchez
María Fernanda Jaramillo Gómez
Sofía Linares Botero
Sara Paula Mosquera López

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INTRODUCTION

This research paper is part of the research work by the International Law Clinic, organized by the Universidad del Rosario (Bogotá, Colombia) and the Ibero-American Institute of the Hague for Peace, Human Rights and International Justice (IIH, The Netherlands), in cooperation with the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC). It seeks to analyse the following three procedural issues relating to the ICC Trial Chamber I's No Case To Answer Decision in the Gbagbo and Blé Goudé case:

- Do ICC chambers have the power to define the applicable standard of proof or approach to evidence ex post facto – i.e. after issuing its decision?
- Are the principles of fairness and expeditiousness of the proceedings only in benefit of the accused?
- In which instances a declaration of mistrial is appropriate?

The second ground of appeal presented by the Prosecutor's Office of the International Criminal Court (“OTP”), states that the majority of Trial Chamber I made an error of law and/or procedure in acquitting Laurent Gbagbo and Charles Blé Goudé because of not having appropriately articulated a clearly defined standard of proof and approach towards assessing evidence.¹ In other words, the OTP argued that the Chamber erred by not establishing a clear standard of proof (not to be mistaken with applying the wrong standard of proof).² For the OTP, this led to several inconsistencies and errors that materially affected the decision, thus rendering it null (mistrial).³

It is important to clarify that Trial Chamber I issued its oral decision on January 15th, 2019, acquitting the Gbagbo and Blé Goudé. Subsequently, the Chamber provided its written decision six months later, on July 16th, 2019, clarifying that the standard of proof that was used was that of ‘No Case to Answers Motion’ (NCTA). Finally, the OTP filed the appeal on September 17th, 2019.

Giving due regard to Article 21 of the ICC Statute, the International Law Clinic conducted an analysis of the available jurisprudence on said procedural issues by different international courts and tribunals, including: (i) the International Criminal Court (ICC); (ii) the International Criminal Tribunal for the former Yugoslavia (ICTY); (iii) the International Criminal Tribunal for Rwanda (ICTR); (iv) the European Court of Human Rights (ECtHR); (v) the Inter-American Court of Human Rights (IACtHR); (vi) the Extraordinary Chambers in the Courts of Cambodia (ECCC); (vii) the Special Tribunal for Lebanon (STL); and (viii) the Special Court for Sierra Leone (SCSL).

¹ ICC, the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Appeals Chamber, *Public redacted version of “Prosecution Document in Support of Appeal”*, October 17, 2019, ICC Doc. No.: ICC-02/11-01/15, para 122.

² *Ibid.*, para 126.

³ *Ibid.*, para 153.



1. DOES A CHAMBER HAVE THE POWER TO DEFINE THE APPLICABLE STANDARD OF PROOF AFTER ISSUING ITS DECISION?

1.1. International Criminal Court

The ICC does not have a clear body of jurisprudence on the issue at hand, as it has only issued one ruling involving the content of the standard of proof: the 2018 judgment on appeal in the case against Jean-Pierre Bemba.⁴ Moreover, the ICC's appeal judgment in this case did not address the issue of the establishment of the standard of proof *ex post facto*, i.e. after a decision has been issued, but rather its improper application.

In its judgment, the ICC Appeals Chamber assessed and verified whether the content and application of the standard of proof was correct and expeditious. It also clarified that it had the power to independently review the reasoning behind the Trial Chamber's judgment on the content and application of the standard of proof, as long as the accused had raised possible flaws in this regard. In such cases, the Appeals Chamber must provide the reasons why in its view the decision of the Trial Chamber contains an error in the definition and/or application of the standard of proof.⁵ The Appeals Chamber must do so independently, without any type of bias regarding the decision taken by the Trial Chamber.

1.2. International Criminal Tribunal for the former Yugoslavia

The ICTY does not have a clear body of jurisprudence on the issue in question. Nevertheless, it has dealt with the improper application of the standard of proof in some of its decisions.

The ICTY Appeals Chamber has ruled in cases where an error of law arises from the incorrect application of the standard of proof. According to the Appeals Chamber, when this occurs, the Trial Chamber will have to articulate the correct legal standard and assess the evidence contained in the trial record to determine whether or not they are sufficient to establish the guilt of the accused beyond reasonable doubt.⁶

The ICTY Appeals Chamber has also ruled on the admission of evidence indicating that under Rule 89(C) of the Rules of Procedure and Evidence (RPE), the Trial Chamber can admit any evidence that is relevant and has probative value.⁷ Moreover, Rule 89(D) states that '[a]

⁴ ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"*, June 8, 2018, ICC Doc No.: ICC-01 / 05-01 / 08-3636.

⁵ *Ídem*.

⁶ ICTY, the Prosecutor v. Milan Lukic and Sredoje Lukic, Appeals Chamber, *Judgment*, December 4, 2012, Case No.:IT-98-32/1, para 12.

⁷ *Ibid.*, para. 566.



Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.’

The way a Chamber establishes the probative value of the evidence presented at trial depends on various factors that go hand in hand with the circumstances of each case. Regarding oral testimony, the ICTY has established that Trial Chambers have the power to decide whether a witness is credible or not. The same occurs with other types of evidence for which Trial Chambers decide whether they are credible. Therefore, the Appeals Chamber gives ample margin of appreciation to the Trial Chambers to assess the evidence presented at trial.⁸

In conclusion, no decision has been found that responds directly to the problem in question, since the ICTY has not addressed situations where the standard of proof was established after the issuance of a decision. The ICTY Appeals Chamber’s decisions only deal with how to correct the standard of proof when the Trial Chamber applied it incorrectly. In addition, the ICTY Appeals chamber has also established rules for determining the guilt of the accused, which must be established beyond reasonable doubt.

1.3. International Criminal Tribunal for Rwanda

The ICTR, much like the ICTY, does not have jurisprudence on the issue at hand. However, the ICTR Appeals Chamber has ruled in different opportunities about the improper application of the standard of proof. When this happens, the ICTR Appeals Chamber articulates the correct legal interpretation and reviews the relevant evidence in light of the beyond reasonable doubt standard of proof. In so doing, the Appeals Chamber not only corrects the legal error, but also applies the correct legal standard to the evidence contained in the trial record.⁹

Similarly, the ICTR Appeals Chamber has established how the Trial Chamber must act pursuant to Rule 87 (A) of the RPE,¹⁰ which provides that a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

In conclusion, the ICTR has not addressed the question at hand since it has not addressed situations where the standard of proof was established after the issuance of a decision. The ICTR Appeals Chamber’s decisions only deal with how to correct the standard of proof when the Trial Chamber applied it incorrectly. Moreover, the ICTR Appeals chamber has also established rules for determining the guilt of the accused, which must be established beyond all reasonable doubt.

⁸ICTY, the Prosecutor v. Zlatko Aleksovski, Appeals Chamber, *Judgment*, March 24, 2000, Case No.: IT-95-14/1, para. 62-63.

⁹ICTR, the Prosecutor v. Simon Bikindi, Appeals Chamber, *Judgment*, March 18, 2010, Case No.:ICTR-01-72, para. 11.

¹⁰ICTR, the Prosecutor v. Jean Paul Akayesu, Appeals Chamber, *Judgment*, June 1, 2001, Case No.:ICTR-96-4, para. 219.



1.4. European Court of Human Rights

The ECtHR has no jurisprudence on the matter in question as it has stated that procedural and evidentiary norms and the rules regarding the standard of proof are in principle within the purview of each State or member country. In other words, each State has the autonomy to determine its internal evidentiary and procedural rules and those concerning the standard of proof.¹¹ This autonomy is given in the context of the minimum requirements for a fair trial established in Article 6 of the European Convention on Human Rights (ECHR). Hence, States have autonomy to adopt their own rules, but they cannot go against the provisions of Article 6 of the ECHR.

This means that the ECtHR does not act as a court of appeal in respect of the decisions taken by domestic jurisdictions.¹² It can only hear matters related to the application of procedural and evidentiary regulations, including provisions on the standard of proof, insofar as States, in applying their own norms may have infringed the rights and freedoms protected by Article 6 of the ECHR.¹³ This happened in the *Nachova et al. v. Bulgaria* case (2005), where the ECtHR established that, in criminal cases, the applicable standard of proof must be that of beyond reasonable doubt.¹⁴ However, no ECtHR ruling has directly addressed the issue of establishing the standard proof after the issuance of a decision.

1.5. Inter-American Court of Human Rights

The IACtHR has not developed jurisprudence on the issue in question. Nevertheless, concerning the standard of proof, the IACtHR has indicated that it does not deal with States' internal issues, much like the ECtHR. Likewise, the IACtHR has established that it will only hear domestic cases insofar as States infringe human rights protected by the American Convention on Human Rights (ACHR).

A key example of the IACtHR' jurisprudence on the issue, is the *Noriega de Carvalho et al. v. Brazil* case (2006),¹⁵ where the Court stated that domestic courts are expected to examine the facts and evidence submitted in any given case, and that the IACtHR does not replace the national courts' functions.

¹¹ ECtHR, *Garcia Ruiz v. Spain*, Judgment, January 21st, 1999, no. 30544/96, para. 28; 'While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts.'

¹² ECtHR, *Melnychuk v. Ukraine*, no. 28743/03, July 5th, 2005.

¹³ ECtHR, *Garcia Ruiz v. Spain* no. 30544/96, January 21st, 1999. Para.28.

¹⁴ ECtHR, *Nachova and others v. Bulgaria* [GC], no. 43577/98, 6 July 2005. Para. 147.

¹⁵ IACtHR, *Nogueira de Carvalho et al. v. Brazil. Judgment of 28 November, 2006 (Preliminary Objections and Merits)*, November 28, 2006, para 80.



In this context, the IACtHR has clearly established that it is not a court of *fourth instance*. As a result, it does not work as an appellate court to decide on disagreements between the parties as to the assessment of evidence or the application of domestic law in areas that are not directly related to the fulfilment of the obligations established in the ACHR.¹⁶

In sum, the IACtHR has not decided yet any cases where an allegation is made that determining the standard of proof after the issuance of a decision has violated the ACHR.

1.6. Extraordinary Chambers in the Courts of Cambodia and Special Tribunal for Lebanon

The International Law Clinic found no case law in the ECCC or the STL relating to the definition of the applicable standard of proof after the issuance of a decision.

1.7. Special Court for Sierra Leone

The SCSL is the only international tribunal that has addressed the situation where a chamber defined the applicable standard of proof after the issuance of a decision. This occurred in the *Ayyash et al.* case. On June 1st, 2016, the Trial Chamber orally established that the defendant, *Mustafa Amine Badreddine*, had not died, and therefore the proceedings against him could not be terminated. Later, on June 7th of the same year, the Chamber issued the decision in writing, defining the standard of proof that was effectively applied.¹⁷

The *Badreddine* Defense argued that the Trial Chamber erred in failing to state what the requisite standard was in its Oral Decision and, only did so through the written decision, which was issued almost a week later. Consequently, the *Badreddine* Defense contended that it was not clear what standard the Trial Chamber applied when it delivered its Oral Decision, thus introducing a prejudicial lack of clarity in the decision-making process.¹⁸

The Appeals Chamber, after a careful review of the Trial Chamber's decision and the Defence's contention at the appeal, established that the standard of proof cannot be determined after the decision has been issued, since it constitutes an error of law. Hence, according to the Appeals Chamber, the Trial Chamber made an error of law, which invalidated the decision.¹⁹

¹⁶ IACtHR, *Mémoli v. Argentina. Judgment of 22 August, 2013 (Preliminary Objections, Merits, Reparations and Costs)*, August 22, 2013, para 140.

¹⁷ SCSL, *the Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra (The Prosecutor v. Ayyash and Others), Appeals Chamber, Decision on the Interlocutory Appeal of the Defense of Badreddine on the "Provisional Decision on the Death of Mr. Mustafa Amine Badreddine and the Possible Termination of Proceedings"*, July 11, 2016, Case No.: STL-11-01 / T / AC / AR126.11. Available at: <https://www.legal-tools.org/doc/312855/pdf/>.

¹⁸ *Ibid.*, para. 28.

¹⁹ *Ibid.*, para. 41.



As a result, for the SCSL Appeals Chamber, judges do not have the power to determine the applicable standard of proof *ex post facto*, that is, after issuing their decision. Thereupon, the standard of proof must be established before any decision is made at trial (e.g. before the issuance of a judicial order or a judgment). Otherwise, there would be no reliable standard on which to base the decision, and judges would be free to make decisions at their discretion and justify them afterwards.

2. ARE THE PRINCIPLES OF FAIRNESS AND EXPEDITIOUSNESS OF THE PROCEEDINGS ONLY IN BENEFIT OF THE ACCUSED?

2.1. International Criminal Court

The ICC Statute establishes in Article 64(2) that a fair trial entails the possibility for the parties involved to adequately present their case, with a view to influencing the court's decision.²⁰ In the *Lubanga* case, the Appeals Chamber considered that the principle of fairness constitutes a fundamental right that ought to be present during trial,²¹ and that can be fulfilled through the extensive interpretation of other rights (such as equality of arms²²) and the regulation of the ICC Chambers' actions.²³

ICC's Deputy Prosecutor James K. Stewart, argues that the principle of fairness does not only benefit the accused and that all parties involved in the proceedings play an essential role for its application. Stewart argues that the concept of fair trial rights transcends the scope of the rights of accused persons, comprising the interests of victims, witnesses, and the OTP.²⁴ In support of his claim, he addresses the definition of 'fairness' provided by Pre-Trial Chamber I, pointing out the fact that the term comes from two other concepts: (i) balance; and (ii) equity. Likewise, the author recalls that, according to Pre-Trial Chamber I, fairness of the proceedings includes respect for the procedural rights of the OTP, the Defence, and the Victims, thus

²⁰ICC, Situation in Uganda, Pre-Trial Chamber II, *Decision on Prosecutor's Application for Leave to Appeal in Part Pre-trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58*, August 19, 2005, ICC Doc. No.: ICC-02/04-01/05-20, para. 30.

²¹ ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *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*, June 13, 2008, ICC Doc. No.: ICC-01/04-01/06-1401, para. 77.

²² Ibid., para. 77-79.

²³ Ibid., para. 77.

²⁴ Stewart, James K. (2014) 'Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium - Arusha, Tanzania', Compendium on the Legacy of the ICTR and the Development of International Law.



acknowledging that the ICC guarantees this principle for all parties involved in the proceedings.²⁵

According to Stewart, this means that: (i) victims and witnesses²⁶ should have the possibility to testify freely, contributing to the Trial Chamber's process to reach a sound decision; (ii) the OTP²⁷ must be granted the opportunity to present its case free of external influences so that the Trial Chamber has all the necessary elements to make a decision, and; (iii) the Defense²⁸ must be able to respond to the charges against the accused and present evidence to support its arguments, thus ensuring a fair trial through which a precise and credible decision is made.²⁹

Regarding the principle of expeditiousness of the proceedings, ICC jurisprudence highlights that expeditiousness must be respected and ought to be present in all proceedings before the ICC Chambers.³⁰ The principle of expeditiousness of the proceedings transcends also the scope of the rights of the accused, encompassing the interests of victims, witnesses, and the OTP.³¹

Based on the above, it is reasonable to conclude that the principles of fairness and expeditiousness of the proceedings in the ICC are not only in benefit of the accused.

2.2. International Criminal Tribunal for the former Yugoslavia

The principles of fairness and expeditiousness of the proceedings are established in Article 20 of the ICTY Statute. According to this provision, Trial Chambers must, in accordance with the RPE, ensure that the trial is fair and expeditious, and that the proceedings are conducted with full respect for the rights of the accused, and due regard for the protection of victims and

²⁵ ICC, Situation in the Democratic Republic of the Congo, 'Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS6, ICC -01 / 04-135-Teng', March 31, 2006, para. 38.

²⁶ ICC, the Prosecutor vs. Katanga and Ngudjolo, Appeals Chamber, *on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"*, July 28 2010, ICC Doc. No.: ICC-01/04-01/07 OA 10, July 12, 2010, para. 45.

²⁷ ICTY, the Prosecutor vs. Aleksovski, Appeals Chamber, *Decision on the Prosecutor's Appeal on Admissibility of Evidence*, February 16, 1999, Case No.:IT-95-14/1, para. 25; ICTY, the Prosecutor vs. Jadranko Prlic *et al.*, Appeals Chamber, *Decision on the Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case*, February 6, 2007, Case No.: IT-04-74-AR73.4, para. 24; ICTY, the Prosecutor vs. Martić, Appeals Chamber, *Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić*, September 14, 2006, Case No.:IT-95-11-AR73.2, para 13; ICTY, the Prosecutor vs. Tadic, Appeals Chamber, *Judgment*, July 15th, 1999, Case No.: IT-94-1-A, para 48.

²⁸ ICC, Rome Statute. Article 67.

²⁹ Stewart, James K. (2014) 'Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium - Arusha, Tanzania', *Compendium on the Legacy of the ICTR and the Development of International Law*, p. 16 - 17.

³⁰ ICC, the Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, *Judgment on the appeal of Thomas Lubanga Dyilo against the Decision on the challenge of the defense before the jurisdiction of the Court*, December 13, 2006, ICC Doc. No.: ICC-01 / 04-01 / 06-772, para. 37.

³¹ ICC, Situation in Uganda, Pre-Trial Chamber II, *Decision on Prosecutor's Application for Leave to Appeal in Part Pre-trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58*, August 19, 2005, ICC Doc. No.: ICC-02/04-01/05-20, para. 31.



witnesses. Similarly, Article 21 of the ICTY Statute establishing the rights of the accused,³² states that observance of such rights is essential to guarantee a fair trial.

Likewise, ICTY's jurisprudence has determined that Article 23 is directly related to the principle of fairness,³³ since it establishes that all judgments must be justified. Moreover, it has addressed the key elements of this principle, namely the fundamental right to be tried by an independent and impartial tribunal established by law.³⁴

ICTY's jurisprudence has also pointed out that, in order to guarantee a fair trial, Trial Chambers must effectively protect witnesses, for this principle favours them as well. Hence, in the event of witness intimidation, it is incumbent upon Trial Chambers to take all reasonable measures to protect witnesses, either at the request of the parties or *proprio motu*.³⁵

Trial Chambers have ample powers to effectively protect witnesses, as established in Article 54 of the RPE, including the ability to issue orders, summonses, subpoenas, warrants and transfer orders, as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. Furthermore, Trial Chambers have the power to adopt any available measure for the protection of witnesses and to request that the presentation of evidence be made by videoconference. If these measures were to fail, Trial Chambers have also the power to postpone or suspend the trial at the request of the parties or *proprio motu*.³⁶

The principle of expeditiousness of the proceedings is meant to ensure that proceedings do not suffer undue delays and the trial is completed within a reasonable time. Nevertheless, ICTY's jurisprudence has explained that it is important to maintain a balance between expeditiousness and fair trial, particularly in cases of significant scope and complexity.³⁷ In this regard, the ICTY Appeals Chamber has held that logistical considerations should not take

³² For Article 21 of the Statute of the ICTY: '1. All persons will be equal before the International Tribunal. 2. The accused, in the substantiation of the charges against him, shall have the right to be heard publicly and with due guarantees, subject to the provisions of article 22 of the Statute. 3. The innocence of the accused shall be presumed until his guilt is proven in accordance with the provisions of this Statute. 4. The accused, in the substantiation of any charge that is imputed to him in accordance with this Statute, will have the right, in a condition of full equality, to the following minimum guarantees: a) To be informed without delay, in a language that he understands and in detailed form, of the nature and causes of the charges that are imputed to him; b) To have the time and adequate means to prepare their defense and to communicate with a defender of their choice; c) To be tried without undue delay; d) To be present in the process and to defend himself personally or to be assisted by a defender of his choice; to be informed, if he does not have a defender, of the right that assists him to have it, and whenever the interest of justice requires it, to be appointed a public defender, free of charge, if he lacks sufficient means to pay it; e) To interrogate or have the prosecution witnesses questioned and to obtain the appearance of the defense witnesses and that they be questioned under the same conditions as the prosecution witnesses; f) To be assisted free of charge by an interpreter, if they do not understand or speak the language in the International Tribunal; g) Not to be forced to testify against himself or to confess guilt.'

³³ ICTY, the Prosecutor v. Anto Furundzija, Appeals Chamber, *Judgment*, July 21, 2000, Case No.: IT-95-17/1-A, para. 69.

³⁴ *Ibid.*, para. 177.

³⁵ ICTY, the Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, Appeals Chamber, *Judgement*, July 19, 2010, Case No.: IT-04-84, para. 35.

³⁶ *Ibid.*, para.36.

³⁷ ICTY, the Prosecutor v. Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic, Sreten Lukic, Appeals Chamber, *Judgement*, January 23, 2014, Case No.:IT-05-87, para. 101.



priority over the Trial Chamber's duty to safeguard the fairness of the trial, thus implying the duty to comply with the established procedures and rules.³⁸

ICTY's jurisprudence suggests that the accused is the one who benefits most from the principles of fairness and expeditiousness. Nevertheless, Tochilovsky affirms that, although Trial Chambers are obliged to ensure that a trial is fair and expeditious, with full respect for the rights of the accused,³⁹ the accused is not the only one entitled to be treated fair and equitably.⁴⁰ Trial Chambers' obligation of protecting the integrity of the proceedings means ensuring fairness and expeditiousness in the conduct of the case as far as both parties are concerned.⁴¹ According to Tochilovsky, it is very difficult to think how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution (which acts on behalf of the interests of the international community and of the victims)⁴² beyond a strict compliance with statutory fundamental protections.⁴³ Likewise, the ICTY has established that the protection of witnesses is essential to ensure a fair trial in the development of the proceedings.⁴⁴

Based on the above, it is possible to conclude that although the principles of fairness and expeditiousness have been mostly developed in benefit of the accused persons, for it is more likely that their rights are transgressed, they also apply to victims, witnesses, and the Prosecution. Moreover, ICTY Trial Chambers have the obligation to protect victims and witnesses, in order to safeguard the integrity of the proceedings.

2.3. International Criminal Tribunal for Rwanda

At the ICTR, the principles of fairness and expeditiousness of the proceedings have been developed based on Article 19 of the ICTR Statute. This article establishes that Trial Chambers must ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the RPE, with full respect for the rights of the accused and due regard for the protection

³⁸ ICTY, the Prosecutor v. Zdravko Tolimir, Appeals Chamber, *Judgement*, April 8, 2015, Case No.:IT-05-88/2, para. 23.

³⁹ Tochilovsky, Vladimir. (2008) *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*. Leiden: Brill | Nijhoff, p.276.

⁴⁰ ICTY, the Prosecutor v. Milutinović, Trial Chamber III, *Decision on Prosecution's Request for Certification of Rule 73 bis Issue for Appeal*, August 30th, 2006, Case No.: IT – 05–87 – T, para. 10.

⁴¹ Tochilovsky, Vladimir. (2008) *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*. Leiden: Brill | Nijhoff, p. 276.

⁴² Ídem.

⁴³ ICTY, the Prosecutor vs. Aleksovski, Appeals Chamber, *Decision on the appeal of the Prosecutor on the admissibility of the evidence*, February 16, 1999, Case No.:IT-95-14/1, paras. 24-25.

⁴⁴ Mcdermott, Y. (2011). Rights in reverse: A critical analysis of fair trial rights under international criminal law. In Schabas, W, Mcdermott, Y & Hayes, N. (Ed.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*. Aldershot: Ashgate, p.4.



of victims and witnesses. This is consistent with Article 20 of the ICTR Statute, which sets out the rights of the accused.

According to the ICTR's jurisprudence, the principle of fairness is composed by the following guarantees: (i) the Prosecution's obligation to disclose any exculpatory material;⁴⁵ (ii) the right to free legal assistance (which does not confer the right to choose one's counsel);⁴⁶ (iii) the Trial Chamber's mandate to provide a reasoned opinion;⁴⁷ (iv) the right to cross-examine witnesses;⁴⁸ (v) the establishment of proceedings that ensure equality between the parties;⁴⁹ (vi) the independence and impartiality of the judges;⁵⁰ (vii) clear and precise information of the charges;⁵¹ and (viii) the application of the same standard of proof in the assessment of Prosecution and Defence's evidence,⁵² amongst others.

Similarly, the ICTR Appeals Chamber has underscored that the Trial Chamber's obligation to ensure the principles of fairness and expeditiousness of the proceedings, entails a delicate balancing of interests, particularly in cases where there are multiple accused.⁵³ Furthermore, according to the ICTR Appeals Chamber, the elements and complexity of the case are to be considered when ensuring that the proceedings do not suffer from an undue delay. For this reason, the Appeals Chamber has recognized that it is unreasonable to expect that ICTR proceedings will always be as expeditious as national proceedings, since the gravity and complexity of the cases do not permit it.⁵⁴ Likewise, the Appeals Chamber has highlighted that cases heard before the ICTR may be conducted differently, considering their characteristics and complexities.⁵⁵

Even though these principles have been mostly developed in benefit of the accused, Tochilovsky clarifies that the right to a fair trial applies both to the Defence and the

⁴⁵ ICTR, the Prosecutor v. Calixte Kalimanzira, Appeals Chamber, *Judgement*, October 20, 2010, Case No.: ICTR-05-88-A, para.18.

⁴⁶ ICTR, the Prosecutor v. Jean Kambanda, Appeals Chamber, *Judgement*, October 19, 2000, Case No.: ICTR-97-23-A, para. 33.

⁴⁷ ICTR, the Prosecutor v. Edouard Karemera, Mathieu Ndirumapatse, Appeals Chamber, *Judgement*, September 29, 2014, Case No.: ICTR-98-44, para. 26; ICTR, the Prosecutor v. Gregoire Ndhaimana, Appeals Chamber, *Judgement*, December 16, 2013, Case No.: ICTR-01-68, para.14.

⁴⁸ ICTR, the Prosecutor v. Calixte Kalimanzira, Appeals Chamber, *Judgement*, October 20, 2010, Case No.: ICTR-05-99-A, para. 40.

⁴⁹ *Ibid.*, para. 34.

⁵⁰ ICTR, the Prosecutor v. Clement Kayishema, Obed Ruzindana, Appeals Chamber, *Judgement*, June 1, 2001, Case No.: ICTR-95-1, para. 55.

⁵¹ Statute Of The International Tribunal For Rwanda: Article 20: Rights of the Accused.

⁵² ICTR, the Prosecutor v. Tharcisse Renzaho, Appeals Chamber, *Judgement* April 1, 2011, Case No.: ICTR-97-31-A, para.540.

⁵³ ICTR, the Prosecutor v. Aloys Ntabakuze, Appellation Chamber, *Judgement*, May 8, 2012, Case No.: 98-41A-A, para.21.

⁵⁴ ICTR, the Prosecutor v. Justin Mugenzi, Prosper Mugiranza, Appeals Chamber, *Judgement*, February 4, 2013, Case No.: ICTR-99-50-A, para.32.

⁵⁵ *Ídem.*



Prosecution⁵⁶, as evidenced in the *Prosecutor vs. Karemera* case⁵⁷. Although the use of the word ‘fairness’ in the context of a criminal trial might commonly refer to fairness for an accused, the Prosecution undoubtedly is entitled to a fair opportunity to present its case and evidence.

Regarding the principle of expeditiousness of the proceedings, McDermott establishes that several ICTR’s rulings are very illustrative as to the enormous barriers defendants face when attempting to assert their right to a trial without undue delay. This is because Trial Chambers may justify undue delays due to the complexity of the case, thus prioritizing a fair trial.⁵⁸

In conclusion, according to ICTR’s jurisprudence, the principles of fairness and expeditiousness of the proceedings are meant to ensure the respect for the accused’s rights. Moreover, fair trial guarantees must be favoured over the principle of expeditiousness. Nevertheless, this doesn’t exclude the fact that both fairness and expeditiousness also apply in favour of the Prosecution, the victims and witnesses.

2.4. European Court of Human Rights

The principles of fairness and expeditiousness of the proceedings are provided for in Article 6 of the ECHR, which indicates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The ECtHR has developed the principle of fairness, indicating that it is closely related to the following guarantees: (i) effective participation in the proceedings;⁵⁹ (ii) equality of arms and adversarial proceedings;⁶⁰ (iii) reasoning of judicial decisions;⁶¹ (iv) proper administration of evidence;⁶² and (v) the principle of immediacy,⁶³ amongst others. It is reasonable to affirm that these principles have been mostly developed in benefit of the accused.

Nevertheless, the ECtHR has also highlighted that the principles of equality of arms and adversarial proceedings (and all its implications) benefit all parties in the proceedings. This is exemplified in the *Dombo Beheer BV c. The Netherlands*⁶⁴ case, in which the ECtHR found that each party must be afforded a reasonable opportunity to present their case under equal

⁵⁶ Tochilovsky, V. (2008), *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*, Leiden, Brill | Nijhoff, p. 276.

⁵⁷ ICTR, the Prosecutor v. Karemera, Trial Chamber III, *decision on Severance of André Rwamakuba and Amendments of the Indictment*, December 7, 2003, Doc No.: ICTR-98-44-PT, para.26.

⁵⁸ McDermott, Y. (2011), “Rights in reverse: A critical analysis of fair trial rights under international criminal law”, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, p.12.

⁵⁹ ECtHR, Murtazaliyeva v. Russia, *Judgment*, December 18, 2018, Application no. 36658/05.

⁶⁰ ECtHR, Dombo Beeher BV v. The Netherlands, *Judgment*, December 27, 1993, Application 14448//88.

⁶¹ ECtHR, Hadjianastassiou v. Greece, *Judgment*, December 16, 1992, Application no. 12945/87.

⁶² ECtHR, Khan v. United Kingdom, *Judgment*, May 12, 2000, Application no. 35394/97.

⁶³ ECtHR, P.K. v. Finland. *Judgment*, July 9, 2002, Application no. 37442/97.

⁶⁴ ECtHR, Dombo Beheer BV v The Netherlands, *Judgment*, October 27, 1993, Application no. 14448/88.



conditions. The ECtHR stated also that national courts have the obligation to ensure that each individual case fulfils the requirements contained in the ECHR regarding the fair administration of justice, with full respect to the rights and guarantees of the parties to the proceedings.⁶⁵

Similarly, Rainey, Wicks and Ovey, illustrate when analysing this case that in order to provide equality of arms, it is required a fair balance between the parties both in civil and criminal cases. Furthermore, what essentially matters is that the parties are afforded a reasonable opportunity to present their case, including their evidence, under conditions that do not place them at substantial disadvantage *vis-a-vis* their opponent.⁶⁶ Tochilovsky adds that the right to an adversarial trial also means that both Prosecution and Defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party, with a view to influencing the Court's decision.⁶⁷

Regarding the principle of expeditiousness of the proceedings, it has been developed by the ECtHR in several cases within the framework of the proper administration of justice. Amongst these cases, the *Zimmermann and Steiner v Switzerland*⁶⁸ case stands out. In this case, the ECtHR found that the reasonableness of the length of the proceedings must be assessed in each case according to its specific circumstances. In other words, for the ECtHR there is not a specific length or time limit under which the principle of expeditiousness is fulfilled, for it is necessary to assess and evaluate each case in its integrity and in light of its specific circumstances (including the complexity of the case and the amount of evidence to be assessed, amongst others). Thus, the Convention's approach consists in examining the overall length of the proceedings, covering all their stages.⁶⁹

In conclusion, although the ECtHR's jurisprudence has been mostly focused on the interpretation of the applicants' guarantees (normally, the accused in domestic criminal proceedings), it is nonetheless true that the ECtHR has also provided clear guidelines establishing that the principles of fairness and expeditiousness of the proceedings favours all parties involved in them.

2.5. The Inter-American Court of Human Rights

⁶⁵ *Ibid.* para. 33.

⁶⁶ Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey (2017), *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. Oxford University Press, pp. 291-292.

⁶⁷ Tochilovsky, Vladimir (2008), *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*. Leiden: Brill | Nijhoff. pp. 275-276.

⁶⁸ ECtHR, *Zimmermann and Steiner v. Switzerland*. *Judgment*. July 13th, 1983, Application no. 8737/79, para. 24.

⁶⁹ Tochilovsky, Vladimir (2008), *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*. Leiden: Brill | Nijhoff. p. 296.



In the IACtHR, the principle of fairness has been adopted by an extensive interpretation of Articles 8 (judicial guarantees) and 25 (judicial protection) of the ACHR. As a result, the IACtHR's jurisprudence⁷⁰ considers that Article 8 includes, *inter alia*, the following rights, that emanate from the principle of fairness: (i) the right to a hearing;⁷¹ (ii) the right to an effective judicial investigation;⁷² (iii) the right of due diligence;⁷³ and (iv) the right to an independent, impartial and competent tribunal,⁷⁴ amongst others.

Moreover, the IACtHR also considers that Article 25 of the ACHR includes some rights (also contained in Article 8) related to the principle of fairness, such as: (i) the right to be heard;⁷⁵ (ii) the right to an effective judicial investigation;⁷⁶ and (iii) the right of due diligence.⁷⁷

These fair trial rights have been developed by the IACtHR, mostly in benefit of the applicants (normally, victims of severe violent acts). This can be shown in cases such as the *Barrios Altos v. Perú* case,⁷⁸ where the IACtHR found that the State breached the right of the victims and their relatives to be heard. The application of these principles in favour of the applicants can also be seen in the *Durand and Ugarte v. Perú*,⁷⁹ where the right to an effective judicial investigation was breached by the State since it didn't investigate the disappearance of the victims. One last example can be found in the *Favela Nova Brasília v. Brazil* case⁸⁰, where the IACtHR recalled that States Parties are obligated to provide effective judicial remedies, which are to be substantiated in accordance with the due process principle.

Regarding the principle of expeditiousness of the proceedings, the IACtHR has also found it included in Articles 8 and 25 of the ACHR. In respect of Article 8, this can be seen, for example, in the *Favela Nova Brasília v. Brazil*.⁸¹ In this case, the IACtHR stated that a judicial decision should be produced within a reasonable time, since a prolonged delay may constitute a violation of judicial guarantees.

⁷⁰ IACtHR, *Jurisprudence booklet of the Inter American Court of Human Rights N°12. Due Process*. Available at: <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo12.pdf>

⁷¹ IACtHR, *Apitz Barbera et al. ("First Court of the Contested Administratif") v. Venezuela, Judgment of 5 August, 2008. (Preliminary Exception, Case, Reparations and Costs)*, August 5, 2008, Series C No. 182, para. 75.

⁷² IACtHR, "Niños de la Calle" (*Villagrán Morales et al.*) v. Guatemala, *Judgment of 19 November, 1999*, November 19, 1999, Series C No. 63, paras. 230 - 233.

⁷³ IACtHR, *Anzualdo Castro v. Perú, Judgment of 22 September, 2009 (Preliminary Exceptions, Case, Reparations and Costs)*, September 22, 2009, Series C No. 202, paras.135, 154.

⁷⁴ IACtHR, *Las Palmeras v. Colombia, Judgment of 6 December, 2001*, December 6th, 2001, Series C No. 90, paras. 53 - 54.

⁷⁵ IACtHR, *Barrios Altos v. Perú, Judgment of 14 March, 2001*. March 14, 2001, Series C No. 75, para. 42.

⁷⁶ IACtHR, *Durand and Ugarte v. Perú, Judgment of 16 August, 2000*, August 16th, 2000, Series C No. 68, para.130.

⁷⁷ IACtHR, *Favela Nova Brasília v. Brasil, Judgment of 16 February, 2017 (Preliminary Exceptions, Case, Reparations y Costs)*, February 16, 2017. Series C No. 333, para.174.

⁷⁸ IACtHR, *Barrios Altos v. Perú, Judgment of 14 March, 2001*, March 14, 2001, Series C No. 75, para.42.

⁷⁹ IACtHR, *Durand and Ugarte v. Perú, Judgment of 16 August, 2000*, August 16th, 2000, Series C No. 68, para. 130.

⁸⁰ IACtHR, *Favela Nova Brasília v. Brasil, Judgment of 16 February, 2017 (Preliminary Exceptions, Case, Reparations y Costs)*, February 16, 2017, Series C No. 333, para.174.

⁸¹ *Ibid.*, para. 217.



Likewise, in the *Claude-Reyes et al. v. Chile* case,⁸² the IACtHR pointed out that States must provide a simple, prompt and effective remedy, so that they comply with the necessary expeditiousness in delivering indispensable information. If they fail to do so, the judicial protections enshrined in the ACHR would be breached.

Hence, it can be concluded that the IACtHR has developed the principle of expeditiousness only in favour of the applicants, highlighting their right to access an effective judicial remedy at the national level. The same thing happens with the principle of fairness.⁸³

2.6. Extraordinary Chambers in the Courts of Cambodia

In the ECCC, the principles of fairness and expeditiousness of the proceedings have been developed pursuant to Article 33 of the law that creates and regulates the ECCC.⁸⁴ According to this provision, Chambers must ensure that trials are fair and expeditious and are conducted in accordance with existing procedures. Likewise, this provision provides that trials must be conducted with full respect for the rights of the accused and for the protection of victims and witnesses. Article 33 establishes also that Trial Chambers must exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

The ECCC has focused on the Chambers' obligation to ensure a fair trial and the expeditiousness of the proceedings.⁸⁵ In the Appeal Judgment of *Khieu Samphân And Nuon Chea*, the Appeals Chamber has established that the aforementioned principles are part of the due process principle, which has two main elements: the right of the accused to be tried without undue delay, and the right to obtain the attendance and examination of witnesses on his behalf.⁸⁶

Based on the above, it can be stated that the principles of fairness and expeditiousness of the proceedings have been mostly developed in benefit of the accused, even though the law that creates and regulates the ECCC has established that victims and witnesses must also be protected during the proceedings.

2.7. Special Tribunal for Lebanon

⁸² IACtHR, *Claude Reyes et al. v. Chile*, *Judgment of 19 September, 2006 (Case, Reparations and Costs)*. September 19, 2006, para.137

⁸³ However, authors like Laurence Burgorgue-Larsen and Amaya Ubeda de Torres have stated that the applicants and State Member's procedural guarantees should always be interpreted in light of the principle of fair trial. Laurence Burgorgue-Larsen, Amaya Ubeda de Torres. *Inter American Court of Human Rights*. 2011. p.656.

⁸⁴ ECCC, *Law on the Establishment of Extraordinary Chambers in the Courts Of Cambodia for the Prosecution Of Crimes Committed During the Period of Democratic Kampuchea*. August 10, 2011, Modification of October 27, 2004.

⁸⁵ ECCC, the Prosecutor v. Khieu Samphân and Nuon Chea, Supreme Court Chamber, *Appeal Judgment*, November 23, 2016, Greffiers: Volker Nerlich, Sea Mao, Paolo Lobaa, Theoun Phan. Case No.: 002/19-09-2007-ECCC/SC, para.162.

⁸⁶ Ídem.



The principle of fairness is established in Article 16(2)⁸⁷ and 17⁸⁸ of the STL Statute, as an essential component of the rights of the accused and of the victims. It is also been embedded in the process to ensure a fair trial for all the parties involved.

Regarding the principle of expeditiousness of the proceedings, it is contained in Article 28 of the STL Statute,⁸⁹ which underscores that judges must be guided by the RPE during all procedural stages, in order to have an expeditious trial that respects and guarantees the principle of fairness for all parties involved.

2.8. Special Court for Sierra Leone

The SCSL Statute points out that the principles of fairness and expeditiousness of the proceedings are guarantees of the accused. Article 17 includes these principles as part of the following core rights of the accused: (i) equality before the Special Court; (ii) a fair and public hearing; (iii) presumption of innocence; and (iv) minimum judicial guarantees.

The principle of fairness essentially implies that the accused has the right to ‘a fair procedure.’ Moreover, amongst the minimum judicial guarantees of the accused, there are some aspects relevant to the principle of fairness of the proceedings, including: (a) the right to be informed of the charges promptly and in detail in a language that the accused understands; (b) the right to have adequate time and facilities for the preparation of the defence; and (c) the right to communicate with counsel of his or her own choosing. Nevertheless, McDermott indicates how it has been argued that the right to a fair trial does not favour the accused exclusively, but it protects also the other parties involved in the proceedings, based on the principle of equality.⁹⁰

Regarding the principle of expeditiousness of the proceedings, it is contained in Article 17 of the SCSL Statute, as part of the minimum judicial guarantees of the accused (the right to be

⁸⁷ Statute of the Special Tribunal for Lebanon. Resolution 1757 of the Security Council of the United Nations. May 30th, 2007: ‘*The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.*’.

⁸⁸ Statute of the Special Tribunal for Lebanon. Resolution 1757 of the Security Council of the United Nations. May 30th, 2007: ‘*Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.*’.

⁸⁹ Statute of the Special Tribunal for Lebanon. Resolution 1757 of the Security Council of the United Nations. May 30th, 2007: ‘*In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.*’.

⁹⁰ McDermott, Y. (2011). Rights in reverse: A critical analysis of fair trial rights under international criminal law. In Schabas, W, McDermott, Y & Hayes, N. (Ed.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*. Aldershot: Ashgate, p.4.



tried without undue delay). A strictly literal reading of the Statute seems to indicate that this right is intended to protect the accused only. Nevertheless, the Appeals Chamber has stated in the *Norman and others* case that the principle of expeditiousness favours the victims and their relatives as well, because they may not overcome the trauma or achieve personal closure until the proceedings conclude.⁹¹

3. IN WHICH INSTANCES A DECLARATION OF MISTRIAL IS APPROPRIATE?

3.1. International Criminal Court

Neither the ICC Statute, nor the ICC RPE, explicitly regulate the declaration of a ‘mistrial’, meaning the termination of the proceedings before the end of the trial because of an error that renders the trial null.

Nevertheless, this did not prevent the majority of Trial Chamber V in the *Ruto and Sang* case to terminate the proceedings of the case before the end of the trial, as a result of a ‘mistrial’.⁹² In this case, two out of three judges of the Chamber, agreed that (i) there had been inappropriate political meddling during the trial in an attempt to impact the trial’s results; (ii) there had been a lack of cooperation from the witnesses, caused by an environment of intimidation, interference, and generalized pressure, fuelled by hostility and rejection of the proceedings by the government, local communities and media in Kenya, amongst others; and, as a result (iii) the OTP had been unable to present sufficient evidence to continue with the trial.

As a consequence, Trial Chamber V decided to terminate the proceedings, vacate the charges and discharge the accused, without prejudice to re-prosecution in the future for the same charges,⁹³ based on Article 64(2) of the ICC Statute, which indicates that the Trial Chamber shall ensure a fair and expeditious trial. The argument underpinning this decision was that the actions against the witnesses (intimidation and pressure) casted major doubts as to their freedom and willingness to testify. Thus, the Chamber sought to ensure compliance with the principle of fair trial.

⁹¹ SCSL, the Prosecutor v. Norman et al., Appeals Chamber, *Decision on the applications for a stay of proceedings and denial of right to appeal*, November 4, 2003, Case No.: SCSL-2003-09-PT, para. 8.

⁹² ICC, Situation: Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang. *Press Release of April 5th, 2016*. ICC-01/09-01/11-2027-Red-Corr.

⁹³ ICC, the Prosecutor v. William Samoei Ruto and Joshua Arap Sang, *Scheduling Order for Oral Hearings on the Defence 'No Case to Answer' Motions*, October 26, 2015. ICC-01/09-01/11-1990-Corr-Red; Sang Defense, motion of November 6, 2015, ICC- 01/09-01/11-1991-Red.



3.2. International Criminal Tribunals for the former Yugoslavia and Rwanda

Neither the ICTY Statute and RPE nor the ICTR Statute and RPE contain any provision that explicitly regulates the declaration of a ‘mistrial’. Nevertheless, ICTY and ICTR trial and appeals chambers have the implicit power to declare it, according to Rule 54⁹⁴ and 107⁹⁵ of the ICTY and ICTR RPE.⁹⁶

According to the ICTY’s jurisprudence, a ‘mistrial’ is a remedy that must be declared during the trial stage given that it is an interlocutory decision that declares the early termination of the trial because of an error that renders it null.⁹⁷ As a result, it must be requested during the trial and not during the appeals proceedings.⁹⁸

Regarding the ICTR, the International Law Clinic has found no ICTR’ case law on the declaration of a mistrial.

3.3. European Court of Human Rights

Since the ECtHR is not an appeals court for decisions made by domestic jurisdictions,⁹⁹ it is not within its purview to deal with errors of fact or law allegedly committed by national courts, unless and only insofar as they may have infringed rights and freedoms protected by the ECHR (Article 6, in particular).¹⁰⁰ Hence, the ECtHR does not have the mandate to resolve domestic issues relating to procedural or evidential matters, such as the declaration of a ‘mistrial’. As a result, the ECtHR has not addressed the question of in what instances the declaration of a ‘mistrial’ is appropriate.

3.4. Inter-American Court of Human Rights

⁹⁴For Rule 54 of the Rules of Procedure and Evidence of the ICTY and the ICTR: ‘*At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.*’.

⁹⁵For Rule 107 of the Rules of Procedure and Evidence of the ICTY and the ICTR: ‘*The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.*’.

⁹⁶ICTY, the Prosecutor v. Anto Furundzija, Appeals Chamber, *Judgment*, July 21, 2000, Case No.: IT-95-17/1-A, para. 20.

⁹⁷ICTY, the Prosecutor v. Anto Furundzija, Appeals Chamber, *Judgment*, July 21, 2000, Case No.: IT-95-17/1-A, para.19; ICTY, the Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic And Esad Landžo, Appeals Chamber, *Judgment*, February 20, 2001, Case No.: IT-96-21-A, para. 645.

⁹⁸ICTY, the Prosecutor v. Anto Furundzija, Appeals Chamber, *Judgment*, July 21, 2000, Case No.: IT-95-17/1-A, para 33.

⁹⁹ECtHR (2020), *Rules of Court*, January 1, 2020, page 58. Available at: https://www.echr.coe.int/documents/rules_court_eng.pdf

¹⁰⁰ECtHR, García Ruiz v. Spain, *Judgment*, January 21, 1999, para 28: ‘*[...]the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.*’.



The preamble of the ACHR and the IACtHR's jurisprudence clarify that the IACtHR does not act as a court of *fourth instance*.¹⁰¹ This is explicitly set out in the *Palma Mendoza et al. v. Ecuador* case (2012).¹⁰² As a result, the IACtHR, much like the ECtHR, does not have the mandate to resolve domestic issues, including those relating to: (i) ordering specific ways for investigating and judging domestic cases;¹⁰³ and (ii) establishing specific rules to be applied in domestic proceedings, such the declaration of a 'mistrial'.¹⁰⁴ As a consequence, the ECtHR has not dealt with the question of in what instances the declaration of a 'mistrial' is appropriate.

3.5. Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon and Special Court for Sierra Leone

The International Law Clinic has found no case law on the declaration of a mistrial in the ECCC, the STL or the SCSL.

4. CONCLUSION

This research paper has analysed the following three procedural issues relating to the January 15th, 2019 ICC Trial Chamber I's No Case To Answer Decision in the Gbagbo and Blé Goudé case, that is currently under appeal: (i) whether ICC chambers have the power to define the applicable standard of proof or approach to evidence *ex post facto*; (ii) whether the principles of fairness and expeditiousness of the proceedings are only in benefit of the accused; and (iii) the instances in which a declaration of mistrial is appropriate.

The analysis has been conducted with due regard to Article 21 of the ICC Statute. As a result, it aims at providing a broad overview of the available jurisprudence on said procedural issues by different international courts and tribunals, including the ICC, the ICTY, the ICTR, ECtHR, the ICtHR, the ECCC, the STL and the SCSL.

¹⁰¹ Preamble of the American Convention on Human Rights adopted at the Inter-American Specialized Conference on Human Rights of November 22, 1969.

¹⁰² IACtHR, *Palma Mendoza et al. v. Ecuador*, *Judgment of 3 September, 2012, (Preliminary Objection and Merits)*, September 3, 2012, para.16.

¹⁰³ IACtHR, *Nogueira de Carvalho et al. v. Brazil*, *Judgment of 28 November, 2006 (Preliminary Objections and Merits)*, November 28, 2006, para. 80.

¹⁰⁴ IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, *Judgment of 22 June, 2015 (Preliminary Objections, (Merits, Reparations and Costs)*, June 22, 2015, para.174.



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