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Hi, I am Beth Van Schaack, the Leah Kaplan Visiting Professor in Human Rights at the Stanford Law School. I am here to speak today about Article 67 of the ICC statute, which sets a long list of fair trial rights. These are drawn in many respects from Article 14 of the International Covenant on Civil and Political Rights, or ICCPR, and other human rights instruments. These rights apply to “any proceeding” before the Court, including trials involving substantive international crimes, as well as crimes against the administration of justice as set forth in Article 70 of the ICC statute. Although the over-arching right to a fair trial is oriented towards the accused person, the Court in the *Mathieu Ngudjolo Chui* case confirmed that other participants in the trial process are also entitled to fair process, including the Prosecution and victims.

There is a lot going on in this article, so this is just a short commentary on several of the particular rights enumerated.

First we have general articulation of the right to a fair and public hearing. This provision includes standard fair trial rights to a public trial, which exist to ensure transparency and oversight of the judicial process.

This principle finds further elaboration in Regulations 20 and 21 of the Court, which for example, allow for the public broadcasting of Court proceedings.

This right to a public trial finds expression in many human rights treaties, including the ICCPR. That treaty, however, contains several clawback clauses in its articulation of this right, allowing for the right to be infringed when there are overriding national security or privacy concerns. These exceptions are not included within the ICC Statute, although Article 64(7) does indicate that the trial chamber may go into closed session to protect confidential or sensitive information. This procedure is further elaborated upon in Article 72 of the ICC statute.

The right to a public trial is in direct tension with Article 68, which allows the Court to order protective measures against victims and witnesses, or an accused, including going into closed sessions. The Court will thus often go into closed session when identifying information about a protected witness is introduced in Court. Later, the Court may order a public reclassification of portions of the trial transcript that do not contain sensitive information.

Article 67(1) also contains the equality of arms principle, which requires that the defence be placed on the same footing as the Prosecution. This, in turn, has influenced the way in which defence counsel are reimbursed by the Court.

A second set of rights is the right to be informed promptly of the charges against an accused. This right is closely tied to defendants' right to prepare an effective defence to any criminal charges against him or her. This information as to the charges against the accused, as well as the underlying facts and their legal characterization, must be provided in a language that the defendant fully understands and speaks. In the confirmation of charges decision in the case against Callixte Mbarushimana, for example, a Pre-Trial Chamber determined that the Prosecution's formulation of the charges was too vague as to time and place to enable the defendant to properly prepare a defence. This provision is also related to the disclosure obligations placed on the Prosecution when it comes to exculpatory and inculpatory information. Also deserving of note in Article 67 is the right to have adequate time and facilities to prepare a defence, and to communicate freely with counsel in confidence. This provision is also directly implicated when the Court invokes Regulation 55, changing the legal characterization of the facts against an accused without amending the charges. It may also come up with respect to conditions of detention.

In the case involving Mathieu Ngudjolo Chui, for example, the Appeals Chamber concluded that the accused's detention in Schipol Airport did not run afoul of the right to have an access to his counsel because, for example, the defendant could be visited by members of his legal team during business hours, and outside those hours if necessary in the interest of justice. Moreover, meetings with counsel were subject only to indirect surveillance. In the case involving Laurent Gbagbo of Côte d'Ivoire, a Pre-Trial Chamber concluded that in the event that the Prosecution requests more time to conduct further investigation, the defendant in turn should be given additional time to respond to the new evidence produced by the Prosecution; and all accused must be accorded adequate time to prepare their defence, they are also allowed and entitled to a trial without "undue delay." Now, what constitutes "undue" remains unclear, particularly given that many proceedings before the ICC are quite complex and thus quite lengthy, being measured in years rather than months.

Article 67 also includes reference to the right of the defendant to be present at trial, which also finds expression in Article 63. In that latter Article, this right is articulated as more of a duty upon the Trial Chamber, rather than a right of the defendant. Nonetheless, it has been established to ICC jurisprudence that this right may be waived, and that there are exceptions, such as when witness safety or national security is at issue. And, according to new changes to the Rules of Procedure and Evidence, this obligation of the Court may be satisfied by the use of video technology.

Article 67 also articulates the right to counsel and to legal assistance, including legal aid in the event that the accused lacks sufficient means to hire a private counsel.

The right of defendants to choose their personal representation is not unlimited, of course. For example, defence counsel must be on the ICC's roster and have other necessary qualifications, such as those contained in Rule 22 of the Rules of Procedure and Evidence.

Pursuant to Regulation 73 of the Court, the Court will also arrange for duty counsel, until the accused has chosen counsel of his or her choice. If the defendant pleads indigence, defence counsel may be appointed without charge. The indigence test is based on a fair and objective assessment of the assets of the defendant. Express in this provision is also the right self-representation, which is elaborated upon in Rule 21 of the Rules of Procedure and Evidence. This

possibility has not yet been fully pursued before the ICC. As a result, it remains to be seen if the ICC will adopt some of the limitations on this right, as we have seen before the *ad hoc* tribunals, as for example, when the accused disrupts the proceeding. The right of defendants to confront witnesses against them is tempered in certain circumstances when witness protection measures are in place. Furthermore, the ability of the Court to compel witnesses to testify remains quite limited, and also very much dependant on state cooperation.

The right to raises defences is not unlimited either, given that the Statute itself precludes certain defences, such as immunity, and limits others, such as superior orders.

Article 67 articulates the right to have a competent interpreter and translation into the language that the accused “fully understands and speaks.” This standard is quite a bit higher than many human rights instruments and jurisprudence have recognized.

Not surprising, Article 67 also articulates the right to silence and a right against self-incrimination. The ICC Statute adds a requirement that the silence of an accused cannot be used against him or her. In this regard, the Treaty also goes farther than many human rights treaties where this notion is not expressly articulated. This same right to silence attaches at the investigative stage per Article 55 of the ICC Statute. In the case involving Mathieu Ngudjolo Chui, a Trial Chamber confirmed that the right to a Trial Chamber confirmed that the right to silence can be waived in which case the accused’s testimony or his refusal to answer an incriminating question, can in fact be used against him or her. Furthermore, while the accused are allowed to make unsworn statements, they are not necessarily subject to cross examination, and they do not need to be treated as full evidence.

As a corollary right, as is the case in most legal system the accused is presumed innocent until proven guilty. The statute confirms that there can be no reversal of the burden of proof.

Moreover, the Prosecution must disclose exculpatory evidence to the accused. In the case against Thomas Lubanga, when the Prosecution had failed to release certain exculpatory evidence, a Trial Chamber confirmed that exculpatory evidence includes: first, material that implies the innocence of the accused; second, material that mitigates guilt; and third, material that implicates the credibility of Prosecution evidence.

This prosecutorial duty of disclosure is a continuing one and a rigorous one. Indeed, in the *Kenya* cases, a Trial Chamber required the Prosecution to produce summaries of evidence for the defendant, to facilitate the defence interpretation of the material produced. The Prosecution may, pursuant to Rule 83, request an *ex parte* hearing before the Court to determine if there are questions, about whether certain evidence should be disclosed to the defence. Although all of these rights are articulated in Part 6 of the Statute, which is devoted to trials before the Court, many of these rights likely attach after the initial appearance of the accused, when proceedings against him or her have begun. Now, it’s not entirely clear from the Statute what remedy are defendant would be entitled to in the event that there is a breach of one or more these rights, either by the Court itself, or by national authorities that may have custody over the accused prior to the transferred to the Court. In a national system, the remedy could include anything from declaratory relief, to compensation, to a stay in the proceedings, to sanctions upon a responsible party, to the exclusion of evidence, and most far-reaching, even an order for a new trial with the dismissal of charges.

Now, given their origins and their formulation, this Article is likely to be interpreted in keeping with international human rights laws as pronounced by treaty bodies, such as the Human Rights Committee, which has monitors compliance with the ICCPR, and regional human rights courts such as the European Court of Human Rights, the Inter-American Court of Human Rights

or African Court of Human and Peoples Rights. This is all envisioned by Article 21(3) of the ICC Statute, which articulates sources of law for the Court.

These open-ended formulations of fair trial rights allow the Court to evolve its procedures in keeping with the progressive development of international human rights law as it concerns fair trial rights.