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General approach on legal and factual reasons for accessing classified or confidential evidence during litigation – a perspective of the International Criminal Court

- **Introduction**

The refugee and asylum seeking crisis is a worldwide phenomenon and it affects both developed and developing countries alike. It has become a human rights issue that both countries of origin and receiving States of asylum seekers and refugees should take seriously. Needless to say, this phenomenon also raises issues of security for states which is exacerbated by among others, terrorism. In response, countries need strong rights compliant laws, rights compliant law enforcement officers and of course progressive judicial and administrative officers like yourselves. And of course as already observed, the asylum seekers and refugees are people not statistics.

I have been asked to talk about the general approach on legal and factual reasons for accessing classified or confidential evidence, during litigation from the perspective of the International Criminal Court or the ICC for our purposes. Needless to say, the ICC does not deal with migration or asylum cases; but with war crimes, genocide and crimes against humanity cases, nevertheless, some lessons can be shared in ensuring procedural fairness when it comes to accessing classified or confidential evidence. The balance of rights between the prosecution, defendants, victims or witnesses, and the guarantees of confidentiality, which must be struck in the context of international criminal proceedings, are comparable to those of migration and asylum seekers in national proceedings. Thus, I hope our discussion will be useful when we view these similarities.

The Rome Statute that establishes the ICC, requires the ICC, pursuant to article 21(3), among other things, to interpret the Statute in a manner consistent with internationally recognized human rights and of course the right to a fair trial is an underlying right in any judicial proceedings whether nationally or internationally.

With this in mind, my presentation will address two distinct aspects of the Rome Statute. First, I will briefly outline the necessary considerations when dealing with the concerns of victims and witnesses, when weighed against the rights of the defendant. I will also discuss Article 72 of the Rome Statute that deals with the "Protection of national security information", and which also safeguards the national security interests of States Parties. Of course, at this level, I should also

underline the fact that the procedure aims to ensure a balance where States Parties can protect their national security interests, and also continue cooperating with the ICC in all other respects. And finally, I will outline potential means which can be employed by national authorities when dealing with migration and asylum cases.

- **How does Confidentiality at the ICC work**

While the general rule is that information must be disclosed,[1] international courts and tribunals, including the ICC, usually have provisions for the restriction on disclosure of information in order to protect witnesses, victims and their relatives, and the Prosecution's informants. Notably, it is necessary to ensure the continuity and integrity of the investigation and prosecution, and to protect confidential information.

The quandary, however, is that, whereas the assurance of confidentiality guarantees the protection of prosecution informants, victims, witnesses and their relatives, at times limited access can hinder the application of fair trial principles and therefore prejudice the accused. Balancing these interests requires the ICC to take into account procedural fairness, equality of arms, transparency of proceedings and respect for the rights of the accused to be informed fully of the charges and evidence against him, to enable him to prepare effectively for his defence.

Having said this, however, it is pertinent to note that the European Court of Human Rights, in the **Rowe and Davis v. U.K.** case has ruled that "the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security and the need to protect witnesses at risk of reprisals […] which must be weighed against the rights of the accused" and that "only such measures restricting the rights of the defence which are strictly necessary are permissible".[2]

[1] See Rules 66 to 68 of the ICTY RPE; Rules 76, 77 and 121 of the ICC RPE; Article 61(3) and 67(2) of the ICC Statute; Art. 6(3) of the ECHR; ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Sale Mohammed Jerbo Jamus*, ICC-02/05-03/09, AC, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Posses- sion of the Office of the Prosecutor", 28 August 2013, para. 34; and ECtHR, *Užukauskas v. Lithuania*, no. 16965/04, 6 July 2010, para. 51.

[2] ECtHR, *Rowe and Davis v. United Kingdom*, n. 28901/95, Judgement, 16 February 2000, para. 61 ("the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security and the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of a crime, which must be weighed against the rights of the accused […] However, only such measures restricting the rights of the defence which are strictly necessary are permissible […] Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.")

The legal framework of the ICC tries to capture a balanced and proportional approach by providing restrictions on disclosure of certain information, but it also offers safeguards to ensure fair and impartial trials.[3] For example Article 68 of the Rome Statute and Rule 81 of the Rules of Procedure and Evidence require the ICC to protect the safety of witnesses and victims, by taking appropriate measures, such as non-disclosure of their identity. In the *Katanga case*, the Pre-Trial Chamber extended this protection to family members of the victims.[4] In the *Abu Garda case*, the Chamber also extended the protection to staff members and informants of the Office of the Prosecutor.[5] On the other hand, the same Rule 81 also provides for safeguards, among them, the rule that the confidential material at issue cannot be used as evidence, without prior disclosure to the defence.

This shows that a nuanced and balanced approach is needed when dealing with the disclosure or non-disclosure of confidential information and competing legal interests of the parties.

This brings me to the second point of the presentation. The ICC must engage in a balancing exercise when it comes to national security interests of States. The very nature of the crimes upon which the ICC has jurisdiction, sometimes intertwines with national security concerns. Therefore, statutory provisions that ensure that all necessary steps are taken, not to prejudice national security interests of a State, enable essential cooperation of States and consequently the proper functioning of the ICC.

The protection of the State's national security interests is outlined in Article 72 of the Rome Statute which I referred to above. This Article was a serious concern for States when they were drafting the Rome Statute. The article is considered "one of the most difficult provisions to draft, interpret and apply".[6] And it is not surprising, given national interests on the one hand, such as the protection of the State's national security, and the interests of the international community on the other, such as ending impunity for the most serious international crimes that shock the conscience of humanity i.e. war crimes, crimes against humanity and genocide.[7]

What are "national security interests"?

[3] Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", ICC-01/05-01/08-323, 16 December 2008, para. 29-32

[4] *Prosecutor v. Germain Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 7 December 2007, ICC-01/04-01/07-90, para. 4

[5] *Prosecutor v. Bahar Idriss Abu Garda*, Public Redacted Version of the 'First Decision on the Prosecution's Requests for Redactions" issued on 14 August 2009, 20 August 2009, ICC-02/05-02/09-58-RSC, para. 10

[6] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck et al., 3rd ed., 2016), p. 1777

[7] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck et al., 3rd ed., 2016), p. 1777

Information which can be considered as "prejudicial to national security interests" under Article 72, is arguably wide and varied. This concept can encompass a wide range of interests, such as territorial integrity, sovereignty, independence, national defence, military operations, external affairs, and internal affairs, such as the State's structure and internal security.[8] However, the International Criminal Tribunal of the former Yugoslavia Appeals Chamber in the *Blaškić case* stated that, allowing national security considerations to prevent the international tribunal from obtaining documents that might be crucial to the conduct of the trial, would undermine the very essence of the international tribunals' functions.[9] Principle 2(b) of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information also states that "a restriction sought to be justified on the ground of national security is not legitimate, unless its *genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity*".

Article 72 of the Rome Statute also provides a State with the right to lodge a claim to the Judges on the ground that disclosure would prejudice its national security interests and this is based on the "*opinion of that State*". This can complicate the issue. It has been argued that subjective determination can be disadvantageous to the functioning of the ICC, since a broad interpretation can hinder the proper administration of justice, by granting States discretion to withhold information from the Courts.[10] However, it is worthwhile to note that this right is not absolute and that "if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused", it may, in certain instances, order disclosure.[11]

Thus, I would like to point out that the Rome Statute provides safeguards to prevent States from abusing their right to claim non-disclosure of certain information as being prejudicial to their national security interests. The ICC has the power to permit only genuine claims. It is my view that particular safeguards, by analogy, can be used to find innovative solutions in migration and asylum cases at national level.

- **Other safeguards against abuse of article 72 of the Statute**

As articulated above, article 72 protects the security interests of States. However, article 72 is, without prejudice to the Prosecutor's right under article 54(3)(e), to non-disclosure of information she obtained confidentially, if the information shall be used solely for the purpose of generating new

[8] S. Swoboda*, Confidentiality for the protection of national security interests*, Revue internationale de droit pénal 2010/1 (Vol. 81), p. 215
[9] ICTY, *Prosecutor v. Tihomir Blaškić*, 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, paras 64, 65
[10] S. Swoboda*, Confidentiality for the protection of national security interests*, Revue internationale de droit pénal 2010/1 (Vol. 81), p. 215
[11] Article 72(b) of the Rome Statute

evidence.[12] The Trial Chamber in the *Lubanga* case concluded that the Prosecutor must exercise this right with caution, since it can infringe on the rights of the accused, and pose significant harm to the principle of equality of arms and fairness of the proceedings. The Chamber held that "entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence, which would otherwise have been disclosed to the accused, is withheld from him, because of the confidentiality agreement would improperly inhibit the opportunities for the accused to prepare his defence."[13] The Appeals Chamber of the ICC has also ruled that non-disclosure agreements entered into between the Prosecutor and a State or other entities like the united Nations under article 54(3)(e) are inviolable, thus "the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which *counter-balancing measures can be taken to ensure that the rights of the accused are protected, and that the trial is fair, in spite of the non-disclosure of the information*."[14]

In addition to that, while under article 72, it is for the State to bring the claim of national security, it is the ICC that rules on the proportionality of the measures sought by the State, and decides whether the State is in breach of its statutory obligations. The ICC makes an inference on the existence or non-existence of a fact, or orders disclosure, depending on who holds the information. If the ICC decides that the State is in breach of its obligations under the Statute, it can report the State to the Assembly of States Parties of the Rome Statute or to the United Nations Security Council, pursuant to article 87(7) of the Rome Statute. The ICC, however, cannot compel the State to comply with its request for disclosure.

This particular example can be of relevance in migration and asylum litigation. Disclosure of evidence is necessary in order to guarantee respect for the principle of equality of arms, which guarantees to both parties be they civil or criminal proceedings equal treatment and equal opportunity to prepare

[12] Article 54(3)(e) of the Rome Statute

[13] In addition, the Trial Chamber further observed that: "the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial" and therefore, a stay on the proceeding was required.

[14] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "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", ICC-01/04-01/06-1486, 21 October 2008, para. 48 ("instead, the Chamber will have to determine, in ex parte proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54 (3) (e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.").

and present their case. Even if disclosure is not absolute, it is a rule made to ensure a fair trial, and non-disclosure must only be used in extraordinary circumstances, and the ICC it is statutory.[15] I must state that this is a matter of State Cooperation for the ICC, which even after 15 years of the existence of the ICC is still an issue.

- **Alternative solutions in case information cannot be disclosed**

When claims of national security are raised, those affected by the claim should find alternative ways to solve the issue of disclosure, before the ICC Judges take any ultimate measures. Again by way of sharing, Article 72(5) provides for several steps in order to resolve the matter amicably and this list is non-exhaustive:

- First, it provides for modification or clarification of the request to avoid or minimise the impact on the national security interests of the State, by, for instance, limiting the scope of the request.
- Secondly, it provides for a determination by the ICC regarding the relevance of the information or evidence sought, and whether it can be obtained through another source or in a different form.
- Thirdly, it provides for making an agreement on conditions under which the assistance could be provided, for instance, through the provision of summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the ICC's legal framework.

It is my view that these three options could be of particular interest and relevance to the national systems in migration, refugee and asylum cases. This of course would require national courts to be innovative while engaging with State organs. It is, however important to understand that a State has an obligation to protect its national security, yet at the same time it has an obligation to guarantee the right to a fair trial or administrative proceedings for the migrant or asylum seeker in question. As such Courts play a pivotal role in facilitating this.

[15] In ZZ v. Secretary of State for the Home Department, the Court of Justice of European Union ("CJEU") dealt with the meaning of Article 30 (2) of the Free Movement Directive which requires the authorities to inform the persons concerned of the grounds on which a decision to refuse the right of residence is based, unless this is contrary to the interests of state security. In determining whether the authorities can refrain from disclosing certain information on grounds of state security, the CJEU noted that there is a need to balance state security with the requirements of the right to effective judicial protection stemming from Article 47 of the Charter of Fundamental Rights [Right to an effective remedy and to a fair trial]. It concluded that the national court reviewing the authorities' choice not to disclose, precisely and in full, the grounds on which a refusal is based, must have jurisdiction to ensure that the lack of disclosure is limited to what is strictly necessary. In any event, the person concerned must be informed of the essence of the grounds on which the decision was based in a manner which takes due account of the necessary confidentially of the evidence. CJEU, ZZ v. Secretary of State for the Home Department, Case C-300/11, 4 June 2013.

Conclusion

As much as national security claims can be legitimate, the Courts have a duty to guarantee that the rights of the accused will not be violated by this claim. It is for the Courts to strike a balance on considering national security on the one hand, and the rights of the accused and the rights of society in general, on the other. When a Court believes that confidentiality will lead to an imbalance in the trial, and therefore, undermine the minimum requirements of fairness, the Rome Statute demands that the Court should not carry on with the proceeding, until a solution has been be found to safeguard the accused's rights. This cautious approach could also be employed in migration and asylum cases. I also understand that given migration flows, this solution might appear a difficult one, yet one should not undermine the importance of procedural rights.

The hope is that, similarly, in the context of national migration, refugee and asylum cases, States will ensure that the highest human rights standards are applied.

I thank you for your attention.
