

**The Prosecution's Duty of Disclosure before  
International Criminal Tribunals**

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Philosophy

by  
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## ABSTRACT

The prosecution's duty of disclosure is at the heart of an accused's right to a fair trial. Information and knowledge is power. Owing to the nature of criminal investigation, the prosecution almost always has more time and resources at its disposal in order to prepare its case than the defence. More importantly, the prosecution has access to certain information that the defence would not have and it has the means to access them. As a consequence, in order to ensure the fundamental rights of the accused are respected, it is crucial for the prosecution to disclose any relevant material to the defence in a timely manner so that the latter has a chance to prepare its case adequately.

Despite the undeniable importance of this duty, prosecutors routinely violate their obligations of disclosing material to the defence that is of vital importance for case preparations. This thesis, accordingly, asks the question: why are disclosure problems so hard to resolve? Is the disclosure framework really workable in the international criminal tribunals?

Public institutions, like the International Criminal Court, are supposed to be the epitome of justice; however, because of its unique characteristics, and perhaps ironically, international criminal law proved to be an ever harsher environment for the defendant when it comes to disclosure of evidence: the accused faces more obstacles when preparing its case and the Courts' motivation to sanction prosecutors who fail to honour disclosure duties seems to be significantly lower when compared with national jurisdictions.

In particular, due to certain difficulties and challenges faced by the international criminal tribunals and international prosecution, it is often argued that the standard of fairness can be different from the ones guaranteed to the accused in domestic courts. This thesis argues that these departures are not justified. Three main areas will be examined and analysed: the context in which the international criminal tribunals operate in, the nature of the prosecutor's role, and the attitudes of the judges.

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This thesis is dedicated to my parents, who have been nothing but loving and amazing.

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# CHAPTER I

## INTRODUCTION

‘For in criminal cases the State has in the police, an agency for the discovery of evidence, superior to anything which even the wealthiest defendant could employ.’

– Lord Delvin, *Report to the Secretary of State for the Home Department Commenting on Evidence of Identification in Criminal Cases*, 1976.<sup>1</sup>

Information is Power.

### I. Introduction

The prosecution’s duty of disclosure is at the heart of an accused’s right to a fair trial.

Information and knowledge is power. This is particularly true in litigations, as the party that holds more information is likely to win, and the other party would not be able to prepare its case due to a lack of information. Owing to the nature of criminal investigation, prior to trial, it is the prosecution that has more time and resources at its disposal in order to prepare its case than the defence. More importantly, the prosecution has access to certain information that the defence would not have and it has the means to access them. As a consequence, in order to ensure a fair trial, it is crucial for the prosecution to disclose any relevant material to the defence so that the latter has a chance to prepare its case.

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<sup>1</sup> Honourable Lord Patrick Devlin, ‘Report to the Secretary of State for the Home Department Commenting on Evidence of Identification in Criminal Cases’ [1976] London: Her Majesty’s Stationary Office, para.1.17.

Despite the undeniable importance of this duty, prosecutors routinely violate their obligation of disclosing material to the defence that is of vital importance for case preparation. This thesis, accordingly, asks the question: why is this disclosure problem so hard to resolve? Public institutions, like the International Criminal Court, are supposed to be the epitome of justice; however, due to its unique characteristics, ironically, international criminal law proved to be an ever harsher environment for the defendant when it comes to disclosure of evidence: the accused faces more obstacles when preparing the defence and the Courts' motivation to sanction prosecutors who fail to honour disclosure duties seems to be significantly lower when compared with national jurisdictions.

Although the contextual difficulties and challenges faced by international criminal tribunals and international prosecutions are well documented,<sup>2</sup> the impact of this context on the rights of the accused is much less acknowledged.<sup>3</sup> More problematically,

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<sup>2</sup> See e.g. Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers Ardsley 2002) Chapter III. They focused on the hardship of evidence collection in the international context. They stated that 'it is different from national trials, because the prosecution does not have at hand a state machinery to assist in and investigations and evidence collection. It must rely on the cooperation of states. Thus complications arise from the fact that States act according to their own interests.' Similar views are echoed by others, for example M Cherif Bassiouni, in line with May and Wierda's position in his various publications, e.g. M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff Publishers 2012). He stated that these 'peculiarities of [international criminal proceedings] have a direct impact on evidence. Accordingly, he argued 'as a consequence the rules of evidence at these proceedings before International Criminal Tribunals tend to be flexible and leave much discretion to the judges.

See also Antonio Cassese, *International Criminal Law* (Oxford University Press 2003); Hiroto Fujiwara and Stephan Parmentier, 'Investigations' in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) 573–5; Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10 *Journal of International Criminal Justice* 611.

<sup>3</sup> Recent years, Defence counsels have provided more defence perspective: see, e.g. Wayne Jordash and Matthew R Crowe, 'Evidentiary Challenges for the Defence' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014); Alexander Zahar, 'Pluralism

arguments presented by the Courts and the scholarship usually side with the prosecution in order to cope with the special circumstances of international prosecution arising from the international context. This thesis will examine and analyse those common claims for the departure of the traditional standards of fairness.<sup>4</sup> First and foremost, as will be examined in Chapter II, the *ad hoc* Tribunals restrict the application of the equality of arms principle without giving satisfying explanations. The designs of the international criminal tribunals reveal further hardship for the internationally accused, and a lower standard of fairness is even advocated so that the international criminal tribunals can fulfil additional objectives of mainly a political nature, which will be discussed further in Chapter III and IV. The next two Chapters (V and VI) provide a comparative view by addressing the disclosure issues in two common law jurisdictions (England and United States), before dealing with the specific disclosure problems of international criminal tribunals in Chapter VII and VIII.

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and the Rights of the Accused in International Criminal Proceedings' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014); Karim AA Khan and Anand A Shah, 'Defensive Practices: Representing Clients before the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 191; Karim AA Khan and Caroline Buisman, 'Sitting on Evidence: Systematic Failings in the ICC Disclosure Regime - Time for Reform' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP Oxford 2015).

<sup>4</sup> In particular, Damaška argues that there should be a different assessment. See Damaška, 'Reflections on Fairness in International Criminal Justice' (n 2); Mirjan Damaška, 'Should National and International Justice Be Subjected to the Same Evaluative Framework?' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (OUP Oxford 2013) 1419. He argues that 'given their innate weakness, the complexity of crimes they process, and the multiplicity of their goals, some departures from domestic conception of fairness should be expected and accepted.'

## **II. The Purpose of this Research**

### **A. The Research Question**

**Is the current Disclosure Regime in the International Criminal Tribunals unworkable? If yes, how so?**

The issues related to disclosure can be discussed in many aspects, this thesis, however, focuses on the duty of the prosecutor. Despite the well-established importance of this duty to the rights of the defence, prosecutors often fail to meet their disclosure obligations and are rarely sanctioned by the judges. It seems that a gap exists between the law of disclosure and its actual application in practice. Accordingly, the thesis endeavours to answer the question: Is the current disclosure framework in the international criminal tribunals unworkable? If the answer is in the affirmative, how so? Why are the disclosure problems so hard to resolve?

This thesis notes that international criminal procedure is commonly viewed as a *sui generis* system. While the *sui generis* claim as such is not wrong, without proper analysis, its application could lead to a departure from the traditional standard of fairness or a contextualised assessment of fairness. However, it would be argued that such departure of fairness is not justified, notwithstanding the special context of international criminal proceedings. Although the unique circumstances and peculiar difficulties faced by the international criminal tribunals and international prosecutions do bring certain difficulties and challenges in their operations, it should be highlighted

that the so-called 'special context' of international criminal law makes the international defendants suffer no less, if not more, than the prosecution, and puts the defence in a more onerous situation than in its domestic counterparts. This is particularly so regarding the collection of evidence, since the prosecution enjoy significantly more resources and sometimes exclusive access to documents and witnesses. The prosecution's duty of disclosure, accordingly, is extremely crucial for the defence to prepare its case and, perhaps, the only possibility to rebalance the inequality of arms in international criminal trials.

### **Why this Research matters**

Is it better to allow ten guilty persons to escape conviction, than to risk one innocent to suffer? Indeed, it is almost impossible to guarantee that all guilty persons would be convicted and all innocents would walk free. What most criminal justice systems can guarantee is the criminal process to be just and fair. However, if prosecutors do not hand over important, relevant material to the defence, it is very likely that innocents will suffer and the person who is really responsible will escape.

Nonetheless, this well-founded perception of criminal law seems to be abandoned when international crimes are involved. Here, it should be noted that international criminal law is a pluralist body of law. It is, in essence, a mixture of public international law and



domestic criminal law<sup>5</sup> and its development has been influenced by other branches of law, in particular, international human rights law and international humanitarian law.<sup>6</sup> These different types of law often cause tensions,<sup>7</sup> as their interests and approaches are in a competing state: public international law generally concerns the harmonisation between States, and adopts a horizontal approach; by contrast, criminal law employs a vertical approach, as it addresses the individuals' wrongs and punishment by a State.<sup>8</sup> Their assumptions and methods of reasoning can also be contradictory: criminal law focuses on a particular individual's guilt and responsibility, so it follows principles such as legality, its application is more restrictive and has a clear boundary; human rights law and humanitarian law pay more attention to the broader system; hence, they seek to apply to as many people as possible.<sup>9</sup>

Disclosure issues highlight such contradictions and tensions inherent in international criminal law. For instances, the problems of the disclosure of confidential documents shows the conflicting interests between States' national security and the accused's right

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<sup>5</sup> Antonio Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford University Press, 2013) 4,5; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2014) 3; Ilias Bantekas, *International Criminal Law* (4th edn, Hart Publishing 2010) 3.

<sup>6</sup> E.g. *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-T, *Judgement* (22 February 2001) at para. 470. The Trial Chamber illustrated the different legal context between international humanitarian law and international human rights law.

<sup>7</sup> Cryer and others (n 5) 3.

<sup>8</sup> *ibid*, citing Glanville Williams, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107. See also Fujiwara and Parmentier (n 2) 584. Noting that Public International Law is more often consensual and non-coercive, c.f. domestic criminal law: mandatory and coercive.

<sup>9</sup> Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925; Gabrielle McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY' in Gideon Boas (ed), *International Criminal Law: Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers 2003); Patricia Pinto Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism' (2012) 23 *Criminal Law Forum* 161.

to access vital information. Also, the exercise of the victims' rights and the concerns of safety of witnesses reveal the tension between the rights of victims and witnesses and the fair trial rights of the defence. In addition, political and policy concerns, especially in the form of the wider goals of international criminal justice – e.g. establishing a historical record and restoring peace and security – can severely affect the accused's rights.

Moreover, from a comparative criminal procedure viewpoint, the approach of disclosure is inseparably linked to philosophical values of procedural models. Disclosure reflects the core difference between the adversarial and the inquisitorial system in their approach of seeking out the truth. Common law countries adopt a complex set of disclosure rules, whilst civil law jurisdictions generally use a dossier. How to reconcile the different approaches in the international context has become a long debated issue in international criminal tribunals and the scholarship.

Since disclosure duty bears particular importance to the fairness for the accused, non-disclosure should only be granted in exceptional circumstances, with authorisation from the courts. However, as the practice of the international criminal tribunals has shown, prosecutors routinely violate their duty to disclose and, unfortunately, are rarely sanctioned for it.

There are various reasons why the disclosure regime raised many disputes in the international criminal courts. Partly because the need to ‘secure convictions’ is stronger in the context of international crimes given the often-disturbing nature, and the presumption of guilt is greater when the crime is more severe, as studies have exhibited.<sup>10</sup> As illustrated in the *Lubanga*<sup>11</sup> and *Kenyatta*<sup>12</sup> cases, the duty of disclosure is at the very heart of fundamental clashes between competing interests and, without the guarantee of due process to the accused, the Courts could potentially gamble away legitimacy to the point of the complete collapse of the prosecution, e.g. *Kenyatta*.<sup>13</sup> Hence, the prosecutor’s disclosure duty not only has a considerable effect on the accused, but also has a large impact on the legitimacy of the Tribunals themselves. In other words, while disclosure plays a pivotal role in any fair trial, are the courts, watched by the world public, under such immense pressure to re-establish justice and other police-based objectives (e.g. establishing historic precedent, restoring peace)?

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<sup>10</sup> Jennifer K Robbennolt, ‘Outcome Severity and Judgments of “Responsibility”: A Meta-Analytic Review1’ (2000) 30 *Journal of applied social psychology* 2575; Jeffrey W Lucas, Corina Graif and Michael J Lovaglia, ‘Misconduct in the Prosecution of Severe Crimes: Theory and Experimental Test’ (2006) 69 *Social psychology quarterly* 97. Studies have pointed out ‘the more severe the crime, the greater the perceived pressure to convict and the greater the likelihood of perceiving an accused person as responsible for the crime.’

<sup>11</sup> First stay of proceedings: *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 (*‘Lubanga’ case*), Trial Chamber: *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); Second stay of proceedings: *Lubanga case*, Trial Chamber: *Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (8 July 2010); the Appeals Chamber lifted the stay later: *Lubanga case*, Appeals Chamber: *Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 Entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”* (8 October 2010).

<sup>12</sup> *Prosecutor v Uhuru Muigai Kenyatta*, No. ICC-01/09-02/11, (*‘Kenyatta’ case*), Trial Chamber: *Decision on the withdrawal of charges against Mr Kenyatta* (13 March 2015).

<sup>13</sup> *ibid.*

Does this pressure lead them to sacrifice the rule of law, which is *conditio sine qua non* in order to dispense justice? Are the Courts so focused on making it right again that they tend to accept standards which they know would be insufficient according to fundamental principles of law?

## **B. Principal Findings**

The particular contexts in which the international criminal tribunals operate in have made the prosecution's duty of disclosure harder to fulfil. This is due to various reasons, notably the nature and complexity of international crimes, the pressure from the international community to 'end impunity' and to achieve other political motivated objectives, and the need of state cooperation and assistance. These factors of the international context have led to the possible application of a contextualised approach of fairness – a departure from the traditional standard of fairness.

This thesis argues that while a fair disclosure regime is still possible to be achieved in international criminal tribunals, the special context of international criminal proceedings tends to create certain difficulties, which need to be addressed more directly than at present. This thesis finds that the reason behind the unworkability of the disclosure regime is more of the result of political reality: the international criminal courts and prosecutors are under a tremendous political pressure to deal with related issues.

However, it is submitted that the contextual arguments are hardly justifiable after close scrutiny, and not warranted from a legal standpoint.

### **III. Structure of the Thesis**

#### **A. Scope and Limitation**

At the outset, this research focuses on the disclosure duties of the prosecution. It is acknowledged that the defence also has disclosure obligations before international criminal tribunals and national jurisdictions. But the issues related to defence disclosure are separate matters. For one, unlike prosecution disclosure, the issue of defence disclosure is highly contentious in principle, as it might violate the right against self-incrimination,<sup>14</sup> although it might have the positive effect of assisting the prosecution in understanding the defence case at an early stage and aiding the prosecution to perform its duty more effectively. Both the U.S. and England have rules regulating defence disclosure, and the problems of expanding the side of the defence has recently become the centre of debate.<sup>15</sup>

However, in the international criminal tribunals there are relatively less requirements regarding defence disclosure. The *ad hoc* Tribunals initially did not provide any general obligations for the defence to disclose,<sup>16</sup> the ICTY and ICTR RPEs now require the

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<sup>14</sup> Article 67(1) (g) ICC Statute.

<sup>15</sup> Criminal Justice Act 2003.

<sup>16</sup> Rule 67 ICTY/ICTR RPEs.

defence to disclose certain information.<sup>17</sup> But in the International Criminal Court, defence disclosure requirements are still at a minimum, unless the accused raises a defence of alibi<sup>18</sup> or insanity.<sup>19</sup> The concern is that although defence disclosure might facilitate the effectiveness and expeditiousness of the trial, it would be done possibly at the expense of the rights of the accused.<sup>20</sup> Accordingly, since the nature and purpose of defence disclosure is very different from prosecution disclosure, to include it in this study would have raised more than one central research question. Therefore, this thesis will only discuss the disclosure duties of the prosecutors. References to defence disclosure will still be made when required.

Also, it does not seek to exhaust all relevant rules of the exceptions of disclosure. This thesis recognises the exceptions of disclosure provided in the Statutes, e.g. work product, internal documents of the prosecution,<sup>21</sup> however, it will not go into detail to examine them, as they are not problematic as such. The reason for this is that the purpose of this thesis is to examine the gap between the law and practice of prosecution disclosure and to answer the question: why could the prosecution not perform its duty properly? Therefore, if there were a legitimate reason for the prosecution not to disclose, which could only be assessed on a case-by-case basis, it would not be a problem as far

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<sup>17</sup> E.g. list of witnesses: Rule 65ter (G) ICTY RPE, Rule 73ter (B)ICTR RPEs; copies of defence witness statements: Rule 67(A) ICTY RPEs.

<sup>18</sup> Rule 79(1) (a) ICC RPEs.

<sup>19</sup> Rule 79(1) (b) ICC RPEs.

<sup>20</sup> Kate Gibson and Caille Lussiaá-Berdou, 'Disclosure of Evidence' in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in international criminal justice* (Oxford University Press 2010) 342, 344.

<sup>21</sup> Rule 81(1) ICC RPEs.

as this research is concerned. In other words, the focus of this thesis is to determine when the prosecutors *should* disclose relevant information to the defence but fail to do so. The concerns related to the safety and protection of victims and witnesses are also acknowledged, but it would be a separate research question to explore the issues of the conflict between victims and defence rights. Hence, victims' rights will be mentioned but not in depth.

One limitation of this thesis is that it only includes common law jurisdictions as a comparative basis. This is due to practical reasons: civil law countries have no comparable disclosure rules. Therefore, it would not be able to serve the point of comparing the duty of the prosecution to disclose relevant evidence to the defence. Nonetheless, the chapter of international criminal procedure has provided a critical analysis regarding the differences between the common law and civil law approach, and discussed the use of dossier as generally employed in civil law countries comprehensively.

## **B. Methodology**

### **Doctrinal Legal Research**

This research is largely based on primary resources, including the Statutes, Rules of Procedure and Evidence and jurisprudence, of the modern international criminal courts: the ICTY, ICTR and ICC. It reviews and analyses a large amount of decisions regarding

prosecution disclosure. In addition, library based theoretical work has been conducted.

It further examines the gaps between the law and practice of the disclosure regime in international criminal tribunals. This thesis focuses on why the prosecution fails to perform its duty properly. By examining how this disclosure duty has been interpreted and applied by the legal actors in practice, it provides an analysis as to why it is often unworkable. Recent cases in both U.S. Courts and the ICC have indicated that the disclosure regimes are not operating as intended.

### **Comparative Analysis Approach**

The two chapters of common law jurisdictions provide a comparative view of the duty of disclosure. The reason for a closer examination of the U.S. Federal and the English system is their detailed disclosure system. Academic debate in these countries has already lasted for decades, thereby establishing a profound and detailed study of disclosure rules and implementation. Accordingly, this approach has the potential to closely identify, compare and discuss the inherent problems concerning the law and practice of disclosure.

In addition, the ICTY Rules of Procedure and Evidence is largely based on the U.S. model, particularly its disclosure provisions.<sup>22</sup> The ICTR bears similar rules with the ICTY. It should be reminded that, with regard to the ICC, the drafters of the Rome

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<sup>22</sup> For the reasons of adopting a U.S. model, see Chapter IV.



Statute considered to adopt a dossier model, yet eventually decided against it.<sup>23</sup> At the Preparatory Commission for the International Criminal Court, lengthy and detailed discussions took place regarding disclosure.<sup>24</sup> In the end, the Australian proposal was largely adopted. The Australian draft was based on the ICTY's rules of procedure and various decisions by the judges. Therefore, it can be concluded that the ICTY had an important impact on this part of the ICC rules. Consequently, the jurisprudence at the *ad hoc* Tribunals will be addressed in detailed in this thesis.

It is observed that the *dossier* approach might contradict to the existing adversarial setting before the ICC. In particular, the Trial Chamber is not allowed to have any knowledge of the materials prior to the introduction into evidence at trial. Otherwise the Trial Chamber could be prejudiced by this prior knowledge and lose its function as an impartial arbiter of the proceedings. This position of the (Pre)Trial Chamber clearly reflects adversarial influences. By contrast, civil law systems' common practice is that the judges have full knowledge of the whole dossier prior to the commencement of the trial. As a consequence, this thesis will not address any particular civil law countries, as they have no comparable rules concerning disclosure. However, the possibility and (dis)advantages of using a dossier before the ICC will be discussed in Chapter IV.

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<sup>23</sup> Gibson and Lussiaá-Berdou (n 20) 311–2.

<sup>24</sup> Proceedings of the Preparatory Commission at its second session (26 July–13 August 1999) PCNICC/1999/L.4/Rev.1, New York, 18 August 1999.

The comparative approach in this thesis is crucial, as it highlights certain differences – not only in the technical sense, but also the wider context: the impact, the nature of the crimes and the international context can have on the accused’s rights to a fair trial.

In the domestic criminal law context, as pointed out by Robinson, the general focus is on ‘the restraining the use of the state’s coercive power against individuals’, however, in the context of international criminal justice, ‘prosecution and conviction are often conceptualized as the fulfilment of the victims’ human right to a remedy.’<sup>25</sup>

Accordingly, there is a great disparity in the scholarship concerning due process and the rights of the defendants. While ‘wrongful convictions’ and ‘miscarriages of justice’ are a common assessment in the national courts,<sup>26</sup> the international jurisdictions seem to be more concerned with how to put ‘war criminals’ (note that it should be ‘alleged’ war criminals!) to justice and how to ‘end impunity’. This shows that the nature of international crimes, especially due to its exceptional magnitude and gravity, can lead to a presumption of guilt and therefore make the work of the defence counsels much more difficult.

This potential presumption of guilt, then, could induce a strikingly extravagant departure of traditional standard of fairness. This is not to conclude that international

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<sup>25</sup> Robinson, ‘The Identity Crisis of International Criminal Law’ (n 9). See also Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 of 16 December 2005; Jon M Van Dyke, ‘The Fundamental Human Rights to Prosecution and Compensation’ (2000) 29 *Denver Journal of International Law and Policy* 77.

<sup>26</sup> See Chapters V and VI.

criminal tribunals should adopt the same standard as domestic criminal courts. However, departures would warrant proper justifications. The arguments, so far, as examined in this thesis, are not convincing. Others, for example Fry, have examined whether the nature of international crime itself justifies a departure.<sup>27</sup>

The need to secure convictions is greater in the international context. This is evidently shown by the international criminal courts themselves. For example, the expansion of certain rights, which were originally designed solely for the accused, to be applicable to the prosecution and, at times, applying a lower evidentiary standard. Remarkably, this phenomenon also occurs in the scholarship, when scholars often focus on the importance of other competing interests and wider objectives of the Courts.<sup>28</sup> These arguments are much less common in the domestic context, although there is a trend to advocate an expansion of victims' rights. The reasons for this difference is that, in part, the early development of international criminal law was dominated by public international law and international human rights lawyers, but in the recent years more criminal lawyers have attributed to the field.<sup>29</sup>

The comparative studies conducted in this thesis are crucial. It clearly illustrates and distinguishes the types of problems which are intrinsic in criminal justice and which are

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<sup>27</sup> Elinor Fry, 'The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity' in Sergey Vasiliev and Elies van Sliedregt (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014).

<sup>28</sup> See e.g. Bassiouni, *Introduction to International Criminal Law* (n 2) (noting the importance of historical record); Mark Klamberg, 'What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentation of a Legal Regime' (2010) 79 *Nordic Journal of International Law* 279.

<sup>29</sup> Bantekas (n 5) Preface.

inherent in the international context. The identification of separate sets of issues is, therefore, vital for this research and is designed to provide a much clearer overview of the different problems of disclosure. Unfortunately, as far as disclosure in the international context is concerned, the scholarship has a tendency to mix non-related issues for a 'balancing test'. Although similar claims have been made in the domestic context, for example, to balance public interests and the rights of the accused, commentators<sup>30</sup> generally criticise such an approach and uphold the importance to avoid wrongful convictions.

It should be noted that some competing interests, for example, the victims and witnesses' *safety* and the defence's right to confront witnesses could be subjected to a balance test.

However, even this should only be done in exceptional circumstances when the

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<sup>30</sup> E.g. Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002); Mike Redmayne, 'Criminal Justice Act 2003:(1) Disclosure and Its Discontents' (2004) 2004 Criminal Law Review 441 ('alongside bureaucratic managerialism and efficiency is the rhetoric of "balance": we are constantly told that the criminal justice system needs rebalancing in favour of victims or the law abiding majority'); Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010) (arguing that if a balancing test is to be used, then it is important to take a wide view of the issues – could the situation have been avoided? Why not abandon the prosecution? – rather than one which simply weighs the importance of sensitivity against the Defences rights); Andrew Choo, *Evidence* (Oxford University Press 2015) 147 (regarding the privilege against self-incrimination, a more principled objection to the approach: the very essence of a right would seem to be 'balanced away' on an apparently ad hoc basis). See also Denise Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31 Melb. UL Rev. 873; Ashworth 58.

Ashworth (2002) also noted that in the ECHR context, 'although the balancing test is often employed, it should be noted that the concern of 'public interest' should not be weighed against the right to a fair trial. Such arguments have a place in relation to the qualified rights, but not where Art. 6, the right is a strong and unqualified one.' At 115.

With regard to disclosure, he also remarked that 'it is not simply that the right to disclosure can be 'balanced away' whenever there is a countervailing public interest. The right must be maintained so far as possible; exceptions can only be permitted in limited circumstances; and when an exception is recognized, its scope must be kept to the minimum and the Defence must be compensated for it in some way.'

witnesses' safety is genuinely at stake and the accused's rights must be respected.<sup>31</sup> By contrast, it is more dubious to suggest a balancing approach between the accused's fair trial rights with other goals of international criminal justice. For example, Turner has advocated for such a balancing approach.<sup>32</sup> She considers the Trial Chamber's balancing approach in *Kenyatta* to be better than the 'legal absolutist' approach adopted by the *Lubanga* Trial Chamber.<sup>33</sup> She stated that '[F]ollowing this approach...while important for indicating fair trial rights, can impair the Court's ability to achieve other goals, such as punishing international crimes and compiling an accurate historical record.'<sup>34</sup> As it will be established in Chapter III, the expectation of establishing a historical record is a highly defective one in the context of international criminal justice. It might be acceptable to recognise this historical record goal as a by-product,<sup>35</sup> but an accused's fundamental right should not be balanced away by it, as the historical record goal is only secondary to the primary objective of adjudicating a person's guilt.

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<sup>31</sup> See e.g. Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137; Monroe Leigh, 'Witness Anonymity Is Inconsistent with Due Process' [1997] *American Journal of International Law* 80 (argued the Chamber's decision of withholding identities of victims and witnesses from the Defence will deny the accused's of a fair trial and lead to the conviction on the basis of tainted evidence).

Cf. Christine M Chinkin, 'Due Process and Witness Anonymity' [1997] *American Journal of International Law* 75 (argued that Leigh failed to take into account the full judgement, the right of accused is not absolute and have to be balanced against other important interest, considering the context of the ICTY).

<sup>32</sup> Jenia Iontcheva Turner, 'Accountability of International Prosecutors' in Carsten Stahn (ed), *Law and Practice of the International Criminal Court* (Oxford University Press 2014).

<sup>33</sup> See *Lubanga* case, Trial Chamber, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (8 July 2010). The Trial Chamber held that fair trial of the accused was no longer possible, if Prosecution refused to disclose the identities of his intermediaries.

<sup>34</sup> Turner (n 31) 393.

<sup>35</sup> Fry (n 26) 260.

Although prosecutorial misconduct is a serious problem, the international context and the so-called wider goals of international criminal tribunals have made this issue a blind spot. It should be highlighted that some rights are not meant to be *balanced*, in particular the defence's rights to access inculpatory and exculpatory material. As demonstrated by the collapse of *Kenyatta* trial, allowing the prosecution to hide such crucial information, eventually would lead to the integrity of the proceedings being challenged.

### **C. Structure of the Chapters**

This thesis will mainly assess the prosecution's disclosure duty from a defence perspective. Admittedly, by framing the question with a focus on the defence would seem to imply that Packer's due process model is favoured in this thesis.<sup>36</sup> It will not be asking *status quo* questions, that is, instead of simply providing a detailed description of the law of disclosure and the courts jurisprudence, it will critically examine the claims made by the courts and in the scholarship.

This thesis has three main parts: 1) the challenges of the international context; 2) disclosure regime in domestic jurisdictions; 3) the law and practice of prosecution's duty of disclosure in the international criminal tribunals. The first part approaches the research question by critically analysing the international context, whilst the second part

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<sup>36</sup> Herbert L Packer, 'Two Models of the Criminal Process' [1964] University of Pennsylvania Law Review 1.

reviews the problem from the context of criminal law. By dividing the question into different contexts, it becomes clear where the problems lie and provides a comprehensible view of the disclosure regime in the international criminal tribunals.

**1. The Context which the International Criminal Tribunals Operates in is challenging for the Defence:**

- a) Lack of resources;
- b) Tension between the goals;
- c) Hybrid nature of international criminal procedures.

This thesis starts from addressing how the duty of disclosure is developed and applied in the context of international criminal tribunals (Chapter II). Because this disclosure duty is not explicitly stated in the Statutes of, except for the ICC, its statutory status was developed within the concept of the equality of arms principle under the right of the accused. However, the principle of equality of arms itself is not well-defined and has many deficiencies both in principle and in practice.<sup>37</sup> The result is that the application of this principle is highly limited in international criminal tribunals, which still places the defence in a severe disadvantage vis-à-vis the prosecution, in particular the significant disparity of resources.

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<sup>37</sup> See e.g. Charles Chernor Jalloh and Amy Elizabeth DiBella, 'Equality of Arms in International Criminal Law: Continuing Challenges' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Aldershot: Ashgate 2013); Jordash and Crowe (n 3); Maria Igorevna Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012).

It proceeds to examine the designs of the international criminal tribunals in Chapter III. It will be argued that there is an inherent defect exists in the international settings, which places the defence in a further unfavourable position. First and foremost this Chapter underscores the primary aim of international criminal proceedings – the adjudication of a person’s guilt. It then analyses the so-called wider goals, which, as it will be argued, should only have secondary status. They should not interfere with the primary goal, for both principle and practical reasons.<sup>38</sup> Furthermore, the tensions among these wider goals<sup>39</sup> will be analysed. To ask the criminal court to kill several birds with one stone, will ultimately lead to confusion and failure. In the later section, other factors, including structural, financial and political factors, will be explored. It will be shown that the international environment is harsh for the accused.

Chapter IV deals with international criminal procedure. The dispute concerning the proper procedural model between civil and common law jurists has been ongoing for many years.<sup>40</sup> This thesis will underline the inherent problems of the hybrid nature of international criminal procedure, and will examine the *sui generis* claim: do the difficulties deriving from the international context justify a departure from the

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<sup>38</sup> Caroline Buisman, ‘Ascertainment of the Truth in International Criminal Justice’ (Brunel University 2012).

<sup>39</sup> For a detailed assessment, see Mirjan Damaška, ‘What Is the Point of International Criminal Justice’ (2008) 83 Chicago-Kent Law Review 329.

<sup>40</sup> See discussions in e.g. Gideon Boas, ‘A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY’ in William Schabas and Gideon Boas (eds), *International Criminal Law: Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers 2003); Cryer and others (n 5) 424–5; Mark Klamberg, *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Brill 2013) 501–6; Frédéric Mégret, ‘Beyond Fairness: Understanding the Determinants of International Criminal Procedure’ (2009) 14 UCLA Journal of International Law and Foreign Affairs 37, 46–8.



traditional standard of fairness? Furthermore, it will analyse the fundamental differences between the two legal systems dominant in the international criminal courts and the consequences of blending them. Also, it will be discussed whether the dossier approach is a suitable alternative in the international context.

## **2. The Law and Practice in Domestic Jurisdictions**

As mentioned, a comparative approach is vital for this research. The purpose is to examine disclosure regimes in common law jurisdictions, since the Tribunals disclosure rules are similar to the U.S. and England. Accordingly, these two jurisdictions will be explored in detail with regard to disclosure rules and procedures. It will be shown that similar problems exist in national jurisdictions. For instances, the dual role of the prosecutors, and the reliance on the prosecution's good faith to carry out its disclosure duty. However, as it will be shown, their approach regarding the treatment of the rights of the defence is much more cautious. In fact, a defence in both systems would not face the kind of hardship their counterparts in international criminal courts have to deal with.

## **3. The Law and Practice in Modern International Criminal Tribunals**

Chapter VII examines the disclosure regime and how it is applied in modern international criminal courts: ICTY, ICTR and the ICC. The Statute and RPEs at the hybrid tribunals e.g. SCSL, STL, ECCC are not particularly discussed because, apart from the ECCC, they are essentially similar to the *ad hoc* Tribunals, references are

made when necessary. It will explore the issues of prosecution disclosure in these tribunals, in particular the problems caused for the defence.

Chapter VIII further addresses and examines particular disclosure issues at the ICC resulting from the structural differences and the international context, particularly the ongoing conflicts. In addition, the duty of prosecution disclosure could be potentially conflicting with its other duty under the Rome Statute, such as the need to protect witnesses and duties under confidentially agreement. Although these matters might also exist in the ICTY and ICTR, it is intensified in the ICC due to the special context, and has caused the two stays of the proceedings in the *Lubanga* trial.

It would seem that the unworkability of the duty of disclosure, in part, arises from the difficulty of seeking evidence in the international context, which implies that the defence rights can be somewhat compromised. It will be shown that many issues of disclosure could be avoided if the prosecutors did not fail to uphold their disclosure duties. However, the circumstances of the international context seem to passively encourage the prosecution's misconduct with regard to disclosure, since sanctions are extremely rare, and if applied, they lack sufficient severity.

#### **IV. Concluding Remarks**

This thesis will argue that it is exactly because the internationally accused is charged with serious crimes, there is much more at stake not only for the defendant but also for

the international criminal courts and the international community. The internationally accused deserves no less protection from wrongful conviction and fair treatment.

Traditional standards of fairness should be maintained and, only by doing so, justice could be achieved. It should be emphasised that neither the interests of victims, nor the international community as a whole, are served by reducing the rights of defendants in the hope of making it easier to convict them.

## CHAPTER II

# THE PROSECUTION'S DUTY OF DISCLOSURE AND THE PRINCIPLE OF EQUALITY OF ARMS

### I. Introduction: the Development

The prosecution's duty of disclosure in the context of international criminal law is developed through the concern of protecting basic human rights of the accused. In the literature and jurisprudence of international criminal law, the accepted legal basis for disclosure obligations is the right to a fair trial, in particular, the principle of equality of arms and the minimum guarantees which should be afforded to the accused, such as the right to adequate time and facilities.<sup>1</sup>

By contrast, disclosure is developed mostly through common law in national jurisdictions.<sup>2</sup> In England and Wales, and the United States, the importance of proper disclosure was only recognized after several occasions of prosecution malpractice. In fact, until recently, in the domestic context, disclosure was merely viewed as professional ethics, rather than recognized as a 'duty' or even a right of the defendant.<sup>3</sup>

Nevertheless, in both national and international criminal law, the concept of the

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<sup>1</sup> See Klamberg, *Evidence in International Criminal Procedure* (n 39) 274; Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff Publishers 2008) 274–84. See also Article 6 ECHR and relevant jurisprudence.

<sup>2</sup> See Chapters V and VI 'Common Law Jurisdictions'.

<sup>3</sup> For a more development, see Chapters V and VI 'Common Law Jurisdictions'.

prosecution having a duty to disclose evidence to the accused so that the defence can prepare his defence properly is widely recognised as an essential requirement to guarantee a fair trial.

In the context of the historical tribunals i.e. the International Military Tribunal and the *International Military Tribunal for the Far East*, disclosure rules did not appear in the Charter of the International Military Tribunal,<sup>4</sup> although Article 9 of the Charter of the *International Military Tribunal for the Far East* and Rule 4 of the Rules of Procedure for the International Military Tribunal permitted the accused to request documents or witness testimony.<sup>5</sup> Also, the historical tribunals did not provide adequate resources for the preparation of the defence case, which the defence counsels of both Nuremberg and Tokyo Tribunals made mention of more than once.<sup>6</sup> The defence investigators were

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<sup>4</sup> Charter of the International Military Tribunal at Nuremberg, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279, 8 August 1945 ('IMT Charter').

<sup>5</sup> Charter of the International Military Tribunal for the Far East, TIAS No. 1589 at 3, 4 Bevens 20, 19 January 1946, amended 26 April 1946 ('IMTFE Charter').

IMTFE Charter Article 9 (e) – 'Production of Evidence for the Defense'

(e) An accused may apply in writing to the Tribunal for the production of witnesses or of documents [...].

IMT RPE Rule 4 'Production of Evidence for the Defense'

(a) The Defense may apply to the Tribunal for the production of witnesses or of documents by written application to the General Secretary of the Tribunal. The application shall state where the witness or document is thought to be located, together with a statement of their last known location. It shall also state the facts proposed to be proved by the witness or the document and the reasons why such facts are relevant to the Defense.

<sup>6</sup> Yvonne McDermott, 'General Duty to Ensure the Right to a Fair and Expeditious Trial' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 776; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal* (Oxford University Press 2007) 89–90. McDermott noted that, in particular, a lack of adequate of time for the preparation of the defence case was at issue in the Tokyo tribunal.

even denied access to the archives of Nazi Germany.<sup>7</sup> As the defence was at a significant disadvantage, the principle of equality of arms was not upheld at the historical tribunals, and can be seen as one of the fundamental deficiencies in both the Nuremberg and Tokyo trials.<sup>8</sup>

As for modern international criminal trials, disclosure rules are still not mentioned in the Statute of the *ad hoc* Tribunals, but regulated by their Rules of Procedure and Evidence ('RPEs'). Accordingly, concerning the statutory basis of the disclosure duty, the international criminal law jurisprudence has derived the disclosure duty from Article 21 of ICTY and Article 20 of the ICTR, entitled 'Rights of the Accused'. The International Criminal Court, arguably, is more advanced in this matter: Article 67 (1) has similar wording regarding the rights of the accused, and paragraph (2) has expressed the prosecution's duty to disclose favourable evidence to the Accused.<sup>9</sup> Also, Article

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<sup>7</sup> Otto Kranzbuhler, 'Nuremberg Eighteen Years Afterwards' in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 436.

<sup>8</sup> McDermott, 'General Duty to Ensure the Right to a Fair and Expeditious Trial' (n 45) 777.

<sup>9</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9 of 17 July 1998, entered into force 1 July 2002. ('ICC Statute')

Article 67— 'Rights of the accused'

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;
- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and

54(1) (a) imposes a further duty on the ICC prosecutors – the duty to proactively *search* for both incriminating and exonerating evidence.<sup>10</sup> In this Chapter, the principle of equality of arms and the courts’ approach will be examined.

## II. Equality of Arms and Right to a Fair Trial

The principle of equality of arms is developed within the concept of the right to a fair trial in the international context,<sup>11</sup> in both international human rights law and

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examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

See also Rule 83 ICC RPEs ‘Ruling on exculpatory evidence under article 67, paragraph 2’

<sup>10</sup> Article 54 ICC Statute— ‘Duties and powers of the Prosecutor with respect to investigations’

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

But see:

Article 54 (3) (e) ICC Statute—

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.

See also Rule 82— ‘Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)’

<sup>11</sup> William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011) 221.

international criminal law.<sup>12</sup> It is recognised that the principle of equality of arms between the prosecution and the defence in a criminal trial goes to the heart of the fair trial guarantee.<sup>13</sup> Originating from European human rights law,<sup>14</sup> the ICTY has adopted the position that the notion of fair trial under European Convention on Human Rights ('ECHR') is equivalent to Article 20(1) of the ICTY Statute,<sup>15</sup> and has been referring to the European jurisprudence extensively when interpretation of the principle is needed.

According to the jurisprudence of European Court of Human Rights, the principle of equality of arms means that each party must be afforded a reasonable opportunity of presenting its case to the court under conditions which do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent.<sup>16</sup> Although this principle itself does not explicitly appear in the Statute or RPEs of the ICTY and ICTR and of the ICC,

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<sup>12</sup> For international human rights law, see e.g. *Neumeister v Austria* [1968] ECHR 1, 27 Jun 1968; *Morael v France*, Merits, Communication No. 207/1986, UN Doc CCPR/C/36/D/207/1986, IHRL 2458 (UNHRC 1989), 28th July 1989, p/416. For International Criminal Court cases, see e.g. *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08 ('Bemba' case), Appeals Chamber, *Judgment on the Appeal of Jean-Pierre Bemba Gombo Against the Decision of Pre-Trial Chamber III entitled Decision on Application for Interim Release* (16 December 2008) at paras. 32; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07 ('Katanga' case) *Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case*, *Prosecutor v. Katanga and Ngudjolo Chui* (13 May 2008) at para. 63; *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 ('Lubanga' case), Trial Chamber: *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) at para. 79.

<sup>13</sup> *Prosecutor v Milomir Stakić*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149; *Prosecutor v Orić*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para.7; *Prosecutor v Duško Tadić*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 44 (hereinafter *Tadić Appeal Judgement*).

<sup>14</sup> *Ekbatani v Sweden* (1988) A 134, 13 EHRR 504, at para. 30; *Barbera v Spain* (1988) 11 EHRR 360 at para.18; *Brandsetter v Austria* (1991) 15 EHRR 213 at para.67, citing in *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, *Decision on Prosecutor's Appeal on Admission of Evidence* (16 February 1999) at para.24.

<sup>15</sup> *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) (hereinafter *Kordić and Čerkez Appeal Judgement*) at para. 175; *Tadić Appeal Judgement* (n 52) at para.44.

<sup>16</sup> *Dombo Beheer BV v NL* (1994) 18 EHRR 213, at para. 33; *Ruiz-Mateos v Spain* [1993] 16 EHRR 505, at para.63 (noting equality of arms require a real opportunity for the parties to comment on the evidence against it).



it is implicit to the wording of Article 21(4) ICTY and Article 20(4) ICTR Statute, which ensures certain minimum guarantees ‘in full equality’. The Rome Statute also included this right in Article 67. The doctrine has been increasingly favoured in the international criminal law jurisprudence, and has been addressed as elementary to the fairness of international criminal proceedings.<sup>17</sup> As explained by one ICC Pre-Trial Chamber, ‘fairness is closely linked to the concept of equality of arms, or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.’<sup>18</sup>

Nevertheless, how the principle is and ought to be applied before an international criminal trial, and the exact scope of this principle is not without confusion. The *ad hoc* Tribunals’ approach towards the principle will be critically assessed in the next section.

### **III. The Scope of Equality of Arms**

#### **A. Procedural Equality**

The *ad hoc* Tribunals have limited the scope of the principle of equality of arms to

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<sup>17</sup> Christoph Safferling, ‘Equality of Arms’ in Antonio Cassese (ed), *The Oxford companion to international criminal justice* (Oxford University Press 2009) 311 (described it as a general principle of law). See also, *Prosecutor v Radoslav Brđanin & Momir Talić*, No. IT-99-36-T, *Public version of the confidential decision on the alleged illegality of rule 70 of 6 May 2002* (23 May 2002) at para. 22 (describing the overall fairness test); *Prosecutor v Krajišnik and Plavšić*, No. IT-00-39-T, *Decision on Prosecution Motion for Clarification in respect of Application of Rules 65 ter, 66 (B) and 67 (C)* (1 August 2001).

<sup>18</sup> Situation in Uganda, ICC-02/04-01/05-20-US-Exp, PTC 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 Unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005* (19 August 2005) at para. 30. PTC II relies on *Tadić Appeal Judgement* (n 52) at para. 48.

procedural equality. In *Tadić*, the Appeals Chamber considered the proper scope of this principle. There are three main points that should be discussed here. Firstly, the prosecution maintained that this principle is restricted to procedural equality, whereas the defence argued that the principle also extends to substantive equality.<sup>19</sup> By referring to the jurisprudence of the European authorities, the Appeals Chamber accepted the prosecution's submission that the principle meant procedural equality only.<sup>20</sup> Secondly, the Chamber held that 'there is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court...'<sup>21</sup> Thirdly, due to the particular circumstances of the international tribunals, e.g. the need of state cooperation, lacking enforcement power, etc., 'the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts.' Although the conclusion reached by the Appeals Chamber is understandable as a matter of practical consideration, it is, however, not entirely convincing from a principle viewpoint.

Concerning the first point, the problem is that the Appeals Chamber cited several ECHR and HRC authorities to support its reasoning.<sup>22</sup> The Courts and some commentators hold the view that the principle of equality of arms can be interpreted as identical as its ECHR equivalent.<sup>23</sup> However, it is doubtful that the Tribunals could and should apply

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<sup>19</sup> *ibid* at para. 45.

<sup>20</sup> *ibid* at para. 50.

<sup>21</sup> *ibid* at para. 49.

<sup>22</sup> *ibid* at para. 48-50.

<sup>23</sup> *Kordić and Čerkez Appeal Judgement* (n 54) at para. 175; *Tadić Appeal Judgement* (n 52) at para. 44.

the ECHR jurisprudence without careful analysis first. Admittedly, it is natural to interpret the purview of a principle as its origins, nevertheless, the different context between the ECHR and the ICTY, ICTR should have been taken into account when applying it.<sup>24</sup> As Jones and Powles critically pointed out, in the Appeals Chamber's Judgement, the Chamber has relied on inappropriate ECHR cases, as many of them are in fact concerned about civil matters, rather than criminal ones.<sup>25</sup> The distinctiveness between civil and criminal cases should be observed, in that none of the parties in civil cases will suffer the institutional and other inherent disadvantages as the accused does in criminal cases. Also, the purpose of civil litigation and criminal proceedings differs, as the former deals with dispute and compensation, whereas the latter decides over one's guilt and punishment. Therefore, in civil law cases, it can be accepted that guaranteeing procedural equality is enough for the Court while the same does not hold true for criminal cases. Furthermore, the emphasis on civil cases can too easily lead to the conclusion that the prosecution and defence are equal parties in the proceedings, both the intended beneficiaries of the equality of arms principle.<sup>26</sup>

As to the second point, the Tribunal held that if the matter is outside the control of the Tribunals, equality of arms does not apply. Again, the Appeals Chamber relied on the

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<sup>24</sup> Robinson, 'The Identity Crisis of International Criminal Law' (n 9) 943, 946–949 (noting the different contexts between international criminal law and human rights law).

<sup>25</sup> John RWD Jones and Steven Powles, *International Criminal Practice: The International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Court for Sierra Leone, the East Timor Special Panel for Serious Crimes, War Crimes Prosecutions in Kosovo* (Oxford University Press 2003) 592.

<sup>26</sup> *ibid.*

European human rights cases to support its position. However, the situation between the two institutions can be very different, since the European Court of Human Rights mainly deals with cases from relatively stable, western democracies where police forces are able to provide law and order and, thus, are able to ensure the appearance of witnesses before domestic courts. This was evidently not the situation in *Prijedor*, where the police chief, Simo Drljaca, was himself indicted for genocide by the ICTY (and shot by SFOR troops trying to arrest him on 10 July 1997, 2 months after the *Tadić* Trial judgment was rendered), and where the attendance of witnesses could not and would not be secured by the local police.<sup>27</sup> The distinct context is even more so when comparing the European situation to that of the ICTR and the ICC, although both Courts have followed the approach of the ICTY.

Turning to the third point, the Tribunal calls this approach ‘more liberal’ is in fact confusing. It has been believed to imply a more lenient approach favouring the defence,<sup>28</sup> but this was not the case in *Tadić*. In this case, the defence contended that the lack of cooperation and obstruction by certain external entities<sup>29</sup> prevented the proper presentation of its case at trial. However, what the Chamber meant in that context was that the Tribunal would assist the defence to obtain access to evidence only when it would be *within its control*. The defence was not in protest of the Trial Chamber’s

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<sup>27</sup> *ibid* 591–2.

<sup>28</sup> Cf. Geert-Jan GJ Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (Kluwer Law International 2005) 39–40; Stefania Negri, ‘The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure’ (2005) 5 *International Criminal Law Review* 513, 545.

<sup>29</sup> Referring to the Government of *Republika Srpska* and the civic authorities in *Prijedor*.

failure in responding to a request for assistance, but the result of the relevant authorities' non-cooperation. The Chamber held that the defence is given a reasonable opportunity to present its case and, accordingly, no breach of the equality of arms principle can be observed.<sup>30</sup>

Commentators are of divided opinion if this liberal approach is warranted. Buisman, for example, has cautioned that this approach could be precarious, as it may justify undesirable restrictions on the principle.<sup>31</sup> However, others seem to view this approach 'realistic', as the Chamber acknowledges that 'there are no mechanistic solutions to the "inequality" problem'.<sup>32</sup>

### **B. The Applicability of the Principle of Equality of Arms**

It is submitted that the only 'right' holder of the principle of equality of arms is the accused. Other parties, e.g. the prosecution, victims, international community, at most could only be addressed as 'interest holders' of the right to a fair trial, they do not hold such enforceable rights as deriving from their status at trial.<sup>33</sup>

Concerning the applicability of the principle of equality of arms, the Tribunal's current

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<sup>30</sup> *Tadić Appeal Judgement* (n 52) at para.53.

<sup>31</sup> Caroline Buisman, 'Defence and Fair Trial' in Roelof Haveman, Olga Kavran and Julian Nicholls (eds), *Supranational Criminal Law: A System of Sui Generis* (2003) 221.

<sup>32</sup> Sergey Vasiliev, 'Trial' in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (OUP Oxford 2012) 735.

<sup>33</sup> Yvonne McDermott, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights Under International Criminal Law' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing 2012) 166.

position is that it applies to both the defence and the prosecution.<sup>34</sup> Despite the principle was traditionally understood as a remedy of disadvantages suffered by the weaker party, i.e. the accused,<sup>35</sup> the Chambers did not dismiss the possibility of applying equality of arms on the prosecution.<sup>36</sup> Tracing back to the early era of the ICTY, both positions existed. In *Tadić*, Judge Vohrah stated in his Separate Opinion that ‘the principle is intended in an ordinary trial to ensure that the defence has means to prepare and present its case equal to those available to the prosecution which has all the advantages of the State on its side ... the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the defence acquiring parity with the prosecution in the presentation of the defence case before the Court to preclude any injustice against the accused.’<sup>37</sup>

This position, however, was rejected by a later case, where the Trial Chamber expressed the view that to interpret the principle as guaranteeing equality for one side of proceedings would itself be ‘tantamount to a procedural inequality in favour of the

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<sup>34</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Severance of Andre Rwamakuba and Amendments of the Indictment* (7 December 2004) at para.26; *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, *Decision on Prosecutor’s Appeal on Admission of Evidence* (16 February 1999) at para. 25; *Prosecutor v Prlić et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case* (6 February 2007) at para. 14.

<sup>35</sup> Stefania Negri, ‘Equality of Arms-Guiding Light or Empty Shell?’ in Michael Bohlander (ed), *International Criminal Justice: A critical Analysis of Institutions and Procedures* (Cameron May 2007) 13.

<sup>36</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Decision on Application by Mario Cerkez for Extension of Time to File his Respondent’s Brief* (11 September 2001) at para. 7.

<sup>37</sup> *Prosecutor v Tadić, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements*, No. IT-94-1-A (27 Nov 1996) p.7. In this case, the Chamber interpreted Article 21(4) (e) to mean that there must be procedural equality between the accused and the prosecutor and, since the Prosecutor must provide a witness list pre-trial, the Defence must provide a witness list prior to the commencement of its case, so that the Defence Witnesses can be examined ‘under the same conditions’ as the Defence examined Prosecution witnesses. See, para.22.

defence and against the prosecution, and will result in inequality of arms.’<sup>38</sup> It should be noted that the Trial Chamber seemingly misinterpreted the statement of Judge Vohrah. He stated that the principle should be interpreted to favour the defence and the prosecution being equal before the Trial Chamber, not that the principle favours the defence.<sup>39</sup> Nevertheless, the issue was then settled by the Appeals Chamber in *Tadić*, held that:

‘[U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the prosecution and the defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.’<sup>40</sup>

The Appeals Chamber provided the justification for this approach in *Aleksovski*, and explaining that ‘this application of the concept of a fair trial in favour of both parties is understandable because the prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged.’<sup>41</sup> It even

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<sup>38</sup> *Prosecutor v Zejnil Delalić et al.*, No. IT-96-21-T, Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence”, (4 February 1998) at para. 48-9.

<sup>39</sup> John E Ackermann and Eugène O’Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia: With Selected Materials from the International Criminal Tribunal for Rwanda* (Martinus Nijhoff Publishers 2000) 135.

<sup>40</sup> *Tadić Appeal Judgement* (n 52) at para. 52. This position has been consistently applied by the Chambers in the later *Kordić, Prlić, Aleksovski* cases.

<sup>41</sup> *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, *Decision on Prosecutor’s Appeal on Admissibility of Evidence* (16 February 1999) at para.24.

went on to suggest that ‘it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the prosecution beyond...’<sup>42</sup>

However, this explanation apparently is not convincing after scrutiny and is hardly consistent with the Statute. Although many authorities have endorsed the Tribunal’s rationale for the prosecution’s entitlement to equality of arms,<sup>43</sup> they failed to provide proper explanation as well.

Firstly, it is curious that the ICTY has used Article 21 paragraph (1) instead of paragraph (4) as the statutory basis for equality of arms.<sup>44</sup> Article 21(1) ICTY Statute provides that ‘All persons shall be equal before the Tribunal’. The fact that this was routinely interpreted as a legal basis for equality of arms in the proceedings of the *ad hoc* Tribunals is confusing.<sup>45</sup> The problem is that the provision speaks of the equality of

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<sup>42</sup> *ibid* at para. 25; See also Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (n 40) 276.

<sup>43</sup> See May and Wierda (n 2) 262 (citing the above Aleksovski Decision); Bassiouni, *Introduction to International Criminal Law* (n 2) 839; Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (n 40) 276. These authorities did not closely examine the rationale, but simply stated that because the prosecution ‘represents international community, including the victims’; however, why would the fact of being a representative justify the prosecution to be entitled to such right? Tochilovsky further note that ‘although 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.’ But why ‘undoubtedly? He did not provide further explanation.

<sup>44</sup> E.g. *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, *Decision on Prosecutor's Appeal on Admissibility of Evidence* (16 February 1999) at para. 23.

Article 21(4) ICTY RPEs provides that ‘In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality’.

<sup>45</sup> E.g. *Prosecutor v Slobodan Milošević*, No. IT-02-54-AR73, *Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit* (16 May 2002) at para. 313; *Prosecutor v Stakić*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149; *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, *Decision on Prosecutor's Appeal on Admissibility of Evidence* (16 February 1999), at para. 23; *Prosecutor v Duško Tadić*, No. IT-94-1-A, *Judgement*, IT-94-1-A (15 July 1999), at para. 47; *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-A, *Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief* (11 September 2001), at para.5.



‘all persons’, and not ‘all *parties*’. The principle of equality before the court is a different issue than the principle of ‘equality of arms’; it is a principle of non-discrimination, meaning that the accused should not be discriminated due to grounds such as gender, ethnic race, nationality, or religion, etc.<sup>46</sup> Although it is possible to evoke a parallel with the principle of equality of persons before the court, merging them in this manner is hardly justifiable.<sup>47</sup> Some scholars seem to follow this strange logic of the Tribunals without questioning it further.<sup>48</sup>

Moreover, Article 21 of the ICTY Statute and Article 20 ICTR) is titled ‘Rights of the Accused’, hence, it could be reasonably inferred that Article 21 (1) was intended to grant equality between accused persons, and does not call for an equal status of the prosecution and the defence at trial.<sup>49</sup> That is, the prosecution should be excluded from the application of this Article.

Nevertheless, the *ad hoc* Tribunals have interpreted this provision differently. The ICTR held that the Statute obliges a Trial Chamber to ensure that a trial is fair and expeditious with full respect for the rights of the accused, and does not provide that *only* the accused is entitled to be treated equitably. It was noted that ‘protecting the integrity

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<sup>46</sup> Vasiliev (n 71) 729.

<sup>47</sup> Stefan Trechsel and Sarah J Summers, *Human Rights in Criminal Proceedings* (Oxford University Press Oxford 2005) 95.

<sup>48</sup> E.g. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (n 40) 277. Curtis FJ Doebbler, *Introduction to International Criminal Law* (Lulu.com 2007) 118. Both referred to Article 21(1) ICTY RPE and 20(1) ICTR RPE.

<sup>49</sup> McDermott, ‘General Duty to Ensure the Right to a Fair and Expeditious Trial’ (n 45) 780. See also, Sergey Vasiliev, ‘The Role and Legal Status of the Prosecutor in International Criminal Trials’ [2010] Available at SSRN 1715465 40–9 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1715465](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1715465)> accessed 2 October 2015.

of the proceedings means ensuring fairness in the conduct of the case as far as *both* parties are concerned.’ While a Chamber must be diligent in ensuring that the accused is not deprived of its rights, the prosecution must also not be unduly hampered in the presentation of its case.<sup>50</sup>

Secondly, the discourse of the prosecution’s entitlement to a fair trial, because the prosecution ‘acts on behalf the interests of the international community’, including the victims, is also dubious. Is not the accused himself also part of the ‘international community’?<sup>51</sup> Having said that, it is still questionable to what extent the prosecution can be properly regarded as representing victims in the procedural sense, as the interests of the prosecution might not always be identical to the victims’. The ICC innovation structure of the Victims Representation is an example of this point. The role of the prosecution, in addition to being an advocate, can also be defined as ‘minister of justice’, which entails that the prosecution has no identifiable clients. Since the prosecution is the servant of justice, accordingly, it is perhaps more proper to define its procedural status as powers and discretion rather than ‘rights’.<sup>52</sup> Consequently, the right to a fair trial does not apply to the prosecutor as a matter of legal entitlement, as the situation of

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<sup>50</sup> *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Prosecution Joint Motion for Reopening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza by Video-Link* (16 November 2006) at para. 18. [emphasis added]; *Prosecutor v Aleksovski*, No. IT-95-14/1-AR73, *Decision on Prosecutor's Appeal on Admissibility of Evidence* (16 February 1999) at para. 25.

<sup>51</sup> Cf. Vasiliev (n 49) 737 (noting the mainstream view thus acknowledges that the Prosecution does not hold the relevant ‘rights’ for the sake of it, but only as a corollary of representing one side in an adversarial debate between the accused, on the one hand, and the victims and/or the community, on the other hand).

<sup>52</sup> Vasiliev (n 71) 738.

the accused.

Without a doubt, the original formulation of fair trial rights was designed for the defendant.<sup>53</sup> Presumably, the prosecution, as an organ of the state, was seen to have the backing of the state in the pursuit of its prosecutorial prerogatives; thus it is possibly more likely that granting the prosecution explicit due process rights was seen as unnecessary, rather than being undesirable.<sup>54</sup> However, practice has shown that in international criminal proceedings, there are occasions where the prosecution has alleged that its fair trial rights have been violated.<sup>55</sup>

However, despite the dictates of logic, the international criminal tribunals have continued to recognise prosecutorial rights emulating various rights of the accused, and this practice looks unlikely to change in the near future. Other actors, such as victims and the international community, continue to have their fundamental interests recognised in this manner, albeit less frequently.<sup>56</sup>

### **C. Burden of proof**

Another argument for justifying the approach of the ‘proportionality’ test, instead of

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<sup>53</sup> McDermott, ‘General Duty to Ensure the Right to a Fair and Expeditious Trial’ (n 45) 780.

<sup>54</sup> *ibid.* Cf. Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003) 324–5.

<sup>55</sup> See e.g. *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) and *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Corrigendum to Judgement of 19 July 2010* (23 July 2010). For an analysis, see Yvonne McDermott, ‘Double Speak and Double Standards: Does the Jurisprudence on Retrial Following Acquittal under International Criminal Law Spell the End of the Double Jeopardy Rule?’ in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing 2012).

<sup>56</sup> McDermott, ‘General Duty to Ensure the Right to a Fair and Expeditious Trial’ (n 45).

substantive equality, is that the prosecution has the burden of proof. In *Orić*, the Appeals Chamber noted that, in light of the burden of proof, a prosecution's task is more onerous than that of the defence.<sup>57</sup> Analysing the different treatment concerning the restrictions on witnesses and time between the prosecution and defence, the ICTY concluded that proportionality, and not mathematical equality, was, therefore the required approach.<sup>58</sup> The Appeals Chamber held that:

'This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the prosecution. The prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defen[s]e strategy, by contrast, often focuses on poking specifically targeted holes in the prosecution's case, an endeavour which may require less time and fewer witnesses.'<sup>59</sup>

This logic is endorsed by the SCSL in *Sesay*<sup>60</sup> and *Norman*.<sup>61</sup> In response to the defence's request for better resources, the Court hold that the prosecution 'bears the

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<sup>57</sup> *Prosecutor v Orić*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 7.

<sup>58</sup> *Jordash and Crowe* (n 3) 179–80; *Vasiliev* (n 71) 734.

<sup>59</sup> *Prosecutor v Orić*, IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para.7.

<sup>60</sup> *Prosecutor v Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, *Decision on the Sesay Defence Team's Application for Judicial Review of the Registrar's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 16th April 2007* (12 February 2008) at para.39.

<sup>61</sup> *Prosecutor v Norman, Fofana, and Kondewa*, Case No.SCSL-04-14-T, *Order to the First Accused to re-file summaries of witness testimonies* (2 March 2006) at p.3.

burden of proof beyond a reasonable doubt, every count and essential element of those counts, while the defence only needs to raise a reasonable doubt in order to secure the acquittal of the Accused. This reality, we consider, might justify the attribution of more resources and more time to enable the prosecution to accomplish this very heavy and delicate task.’<sup>62</sup>

The contention that because the prosecution has a heavy burden of proof, a substantive inequality is justified between the parties is slightly flawed. Admittedly, in reality there can be no true equality of arms, the link between burden of proof and equality of arms is, however, oversimplified by the Tribunals, especially in the context of international criminal proceedings. It is submitted the fact that the prosecution has the burden of proof, as such, does not justify the different treatment between the prosecution and defence.

The burden of proof, *onus probandi*, means that the burden is on the party who asserts it. As a general principle of law, it is a fundamental requirement that the party who alleges must prove it, not the party who denies it.<sup>63</sup> This principle applies in both civil

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<sup>62</sup> *Prosecutor v Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, *Decision on the Sesay Defence Team’s Application for Judicial Review of the Registrar’s Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 16th April 2007* (12 February 2008) at para.39.

See also Jalloh and DiBella (n 36) 275 (noting the use of qualified instead of definitive language, ‘it seems apparent that the Court recognised that it was treading on dangerous territory’ and ‘the logic here oversimplifies the reality of International criminal charges’).

<sup>63</sup> *Prosecutor v Delalić et al*, No. IT-96-21-T, *Judgement* (16 November 1998) at para. 599; Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Martinus Nijhoff Publishers 1998) 149–150 (citing cases of other international courts).

and criminal cases. Because criminal cases are always initiated by the prosecution, it is the prosecution who will bear the burden of proving the defendant's guilt. Here, it should be reminded that burden of proof is closely linked to the principle of presumption of innocence.<sup>64</sup> In respect of the imposition of the burden of proof, there is no fundamental difference between adversarial and inquisitorial systems.<sup>65</sup> Let us assume a situation where the defendant is extraordinary wealthy and has all sorts of resources,<sup>66</sup> will this fact switch the burden of proof onto the defence? Or, in other words, will the defendant lose its right to be presumed innocent? The answer is that it is still the prosecution who will bear the burden of proof, because he is the party that alleges it.

The different standard of burden of proof, that is, to prove 'beyond a reasonable doubt' in criminal cases, however, suggests that criminal law recognises the institutional advantage enjoyed by the prosecution. In addition, the stake, e.g. liberty or life, in criminal cases is normally higher than civil matters. Logically, as mentioned, because of the prosecutor's role and the nature of criminal proceedings, he enjoys several advantages during criminal investigation which justifies the heavy burden of proof.

However, as applied by the Tribunals, the argument goes the other way round: because

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<sup>64</sup> The principle of presumption of innocence: Article 21(3) ICTY Statute; Article 20 (3) ICTR Statute; Article 66 (1) ICC Statute.

<sup>65</sup> Zappalà, *Human Rights in International Criminal Proceedings* (n 93) 91.

<sup>66</sup> Although this question is moot. As noted at the outset of this thesis, even the wealthiest defence is hardly able to outrank the prosecution. See Honourable Lord Patrick Devlin, 'Report to the Secretary of State for the Home Department Commenting on Evidence of Identification in Criminal Cases' [1976] London: Her Majesty's Stationary Office para. 1.17.

the prosecution has a high burden of proof, he is entitled to enjoy much more resources and, thus, the principle of equality of arms will not be violated. More inherently, if the prosecution receives support proportionate to his burden, then the claims of equivalence between the parties become meaningless.<sup>67</sup>

In practical terms, because of the complex nature of international crimes, the international defence has to do a lot more than ‘poking holes’ in the prosecution’s case in international criminal proceedings. But even if poking holes would be the focus of a defence case, the size of the prosecution case may require the defence to tailor its case to it, as a matter of strategy.<sup>68</sup> The more evidence the prosecution presents, the more there is for the defence to rebut.<sup>69</sup> The reasoning provided in *Orić* suggests that the defendant might only undertake to investigate one element of the defence, is overlooking the reality of international criminal charges.

This argument in fact shows the pro-prosecution atmosphere among the judges, which is similarly illustrated in the U.S. policy arguments.<sup>70</sup> The presumption of innocence is difficult to be upheld, as many judges themselves view the defence as enjoying too many advantages, and feel the necessity to argue for the prosecution. Therefore, it does

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<sup>67</sup> Jalloh and DiBella (n 36) 266.

<sup>68</sup> Jordash and Crowe (n 3) 279.

<sup>69</sup> JPW Temminck Tuinstra, *Defence Counsel in International Criminal Law* (TMC Asser Press 2009) 164.

<sup>70</sup> See Chapter V.

not come as a surprise that the only retrial in the ICTY – based on the violation of the right to a fair trial – is not ordered in favour of the defence, but the prosecution!<sup>71</sup>

## **IV. Equality of Arms and Resources**

### **A. Resources – Key to Prepare One’s Defence**

In order for a criminal justice system to work fairly, the defence must be able to present its case properly. This is particularly true for the adversarial settings adopted by the international criminal tribunals. The defence’s ability to prepare an effective defence is indispensable for the right to a fair trial and the principle of equality of arms. The Statutes of the modern criminal Tribunals has recognised the importance of this right, and explicitly guarantee the accused’s right ‘to have adequate time and facilities for the preparation of his or her defence’.<sup>72</sup>

However, at least from the viewpoint of the defence, this right is far from being realised.

At the *ad hoc* Tribunals, the defence counsels have frequently complained about the lack of sufficient resources which impaired their ability to conduct proper investigations.

In contrast, the prosecution has enjoyed wide-ranging resources, including time, personnel and other investigative powers. The international context, in particular at the investigation phase, has imposed further evidentiary challenges for the defence.<sup>73</sup> As

pointed out by Jordash and Crowe, the allocation of resources ‘is often the key to

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<sup>71</sup> *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010).

<sup>72</sup> Article 21 ICTY Statute and Article 20 ICTR Statute.

<sup>73</sup> Jordash and Crowe (n 3) 263.



unlocking a good defence'.<sup>74</sup>

Inequality of resources has further widened the existing imbalance between the two parties, where the defence has already suffered numerous institutional disadvantages. Instead of addressing this issue, however, the Tribunals have avoided providing any meaningful explanation of what this right means in the context of international trials.<sup>75</sup>

### **B. Not Equality of Resources**

The Chambers have constantly stated that an accused is entitled to 'a reasonable and adequate opportunity to present his case'.<sup>76</sup> One ICC Chamber elaborated that this means the right of a 'party to proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour'.<sup>77</sup> Nonetheless, practice has shown that the Courts have promise much, but delivered little that is enforceable in practice.<sup>78</sup>

In light of the jurisprudence of the *ad hoc* Tribunals, it seems that the Courts are more concerned about the difficulties and obstacles encountered by the Tribunals and the prosecution than the rights of the defence. Instead of attempting to improve the

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<sup>74</sup> *ibid* 276.

<sup>75</sup> *ibid* 278.

<sup>76</sup> *Prosecutor v Milošević*, No. IT-02-54-T, *Decision in relation to Severance, Extension of Time and Rest* (12 December 2005) at para. 25; *Prosecutor v Stakić*, No. IT-97-24-A, *Judgement* (22 March 2006) at para.149. *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 181. *Katanga case*, Trial Chamber, *Judgment* (7 March 2014) at para. 1572.

<sup>77</sup> *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp, PTC II, *Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on Prosecutor's Applications for Warrants of Arrest under Article 58* (19 August 2005) para. 30.

<sup>78</sup> Jordash and Crowe (n 3) 278.

disequilibrium between the two parties, the Courts appear to prepare a full set of arguments which can combat nearly any defence claim of reconstructed the concept of equality of arms inequality.<sup>79</sup> Being unable to meet the demand of the defence, the Chambers seek to be creative with its response, rather than solving the underlying problem itself.

Firstly, the Tribunals considered that equality of arms does not mean equality of 'resources'. According to the ICTY, the principle of equality of arms means that a judicial body is obligated to ensure that neither party is put at a disadvantage *when presenting its case*.<sup>80</sup> It is interesting to note that the Chambers have always defined this right as a negative one,<sup>81</sup> rather than positive, which seem to imply that there is a minimal guarantee of adequate and sufficient time and resources to present one's defence. In line with the ECHR jurisprudence, it is interpreted as merely requiring 'procedural' equality, not substantive equality.<sup>82</sup> As the jurisprudence continuously reiterates, this is not to be confused with 'equality of means and resources',<sup>83</sup> or with mathematical equality.<sup>84</sup> So, in *Milutinović*, the defence cannot rely on a lack of

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<sup>79</sup> Jalloh and DiBella (n 36) 272.

<sup>80</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras 175-76; *Prosecutor v Milutinović et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 23; *Tadić Appeal Judgement* (n 52) at paras 48 and 50 (discussing human rights principles from the jurisprudence of the ECtHR and by the Human Rights Committee).

<sup>81</sup> Jordash and Crowe (n 3) 278.

<sup>82</sup> See e.g. *Tadić Appeal Judgement* (n 52) at paras. 51-2.

<sup>83</sup> *Prosecutor v Perišić*, No. IT-04-81-PT, *Decision on Motion to Appoint Amicus Curiae to Investigate Equality of Arms* (18 June 2007) at para. 9

<sup>84</sup> *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-T, *Judgement* (21 May 1999) at para. 60; *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-T, *Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute of the International Criminal Tribunal for Rwanda* (5

resources during the pre-trial stage to establish that he is disadvantaged in presenting his case at trial.<sup>85</sup> In *Orić*, it is considered unnecessary to give the accused the same amount of time as the prosecution to present his case. A principle of basic proportionality, rather than strict mathematical equality, generally governs the relationship between the time allotted to both sides.<sup>86</sup> Similarly, the proportionality test applies to the numbers of documents and translation services.<sup>87</sup> For example, in *Prlić*, the Appeals Chamber held that it was not relevant to compare the number of documents translated for the prosecution to determine if the number of documents to be translated for the defence was reasonable.<sup>88</sup>

By employing this approach, any differences between the defence and the prosecution regarding personnel, financial and other resources will not necessarily affect the principle of equality of arms.<sup>89</sup> The Appeal Chambers reviews the sufficiency of defence recourses without regard to parity or equality with the prosecution. In doing so, the apparent secrecy of the prosecutorial practice is protected and, for the Tribunals it is

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May 1997) at para. 3. See also *Prosecutor v Orić*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005).

<sup>85</sup> *Prosecutor v Milutinović et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 24.

<sup>86</sup> *Prosecutor v Orić*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 9.

<sup>87</sup> Although these are problems more related with the Registrar as opposed to the judges. See *Prosecutor v Zejnil Delalić*, No. IT-96-21-T, *Order on Defence Applications for Amendment of the Directive on Assignment of Defence Counsel, Forwarding the Documents in the Language of the Accused and Confirmation of the Status of the Witnesses for the Defence* (31 May 1996); *Prosecutor v Boškoski and Tarčulovski*, No. IT-04-82, *Decision on the motions on fair trial and extensions of time* (19 May 2006) at para. 13.

<sup>88</sup> *Prosecutor v Prlić et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Prajlak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008) at para. 29.

<sup>89</sup> *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at paras. 63-71.

better to move away from the arguments that are bound to lead to the conclusion that there is in fact actual disparity.<sup>90</sup>

As pointed out by Safferling, this approach has been rightly criticized as ‘being premature and damaging the visibility of procedural fairness’<sup>91</sup> due to the huge disparity between the parties in their respective ability to prepare their case.

Furthermore, some have spoken out in favour of a more normative approach and a renunciation of the formal interpretation of this principle for the ICTY.<sup>92</sup> This would result in an allocation of responsibility to the judges with regard to the abilities of the defence. This would also shift the role of the judges from an observant to a more active state.

### **C. Different Roles of the Parties**

Under the international criminal law jurisprudence, equality of arms does not mean that the prosecution and defence should be treated in an absolute equal fashion. Indeed, pursuing ‘full’ equality of arms in criminal proceedings will not be possible in reality and perhaps not necessary.<sup>93</sup> In criminal proceedings, both the prosecution and defence

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<sup>90</sup> Jalloh and DiBella (n 36) 273.

<sup>91</sup> Christoph Safferling, *International Criminal Procedure* (Oxford University Press 2012) 414.

<sup>92</sup> Gabrielle McIntyre, ‘Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ (2003) 16 *Leiden Journal of International Law* 269, 272.

<sup>93</sup> Wąsek-Wiaderek, *The Principle of ‘Equality of Arms’ in Criminal Procedure Under Article 6 of the European Convention on Human Rights and Its Functions in Criminal Justice of Selected European Countries: A Comparative View* (Leuven University Press 2000) 50; Pieter Van Dijk, Godefridus JH Hoof and Godefridus JH Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers 1998) 430.

have different roles and, accordingly, have different rights and obligations.<sup>94</sup> The very nature of the criminal process, regardless the model employed, is not equal between the prosecution and defence; at least during the investigation stage, equality is not the aim. In order to conduct a criminal investigation, the prosecution is equipped with all kinds of resources, e.g. support of police and other authorities, privileges and immunities,<sup>95</sup> and has more time to prepare its case. In contrast, the defence is more of a responsive role. It is clear that the prosecution is in a stronger position than the defence even before the trial has started.

At the trial stage, for the civil law systems, the imbalance between the parties is not problematic as such, as there is a lesser need to compensate this inequality – it is believed that the judges will find out the truth and protect the accused's basic rights, at least in theory. In the common law jurisdictions, however, because the underlying premise of the adversarial settings is two parties are equal, the defence are given certain rights and privileges, such as the right to be presumed innocent and right to remain silence, in order to compensate the greater powers which the prosecution enjoys.<sup>96</sup>

However, the question that should be asked here is, whether the fact that the two parties have different roles to play can justify the substantial imbalance between them. The

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<sup>94</sup> See Trechsel and Summers (n 86) 96. Noting that 'From the very beginning of the criminal process, the prosecution and the defence are in very different positions... Equality can only be conceived of, in this context, as a certain equivalence.'

<sup>95</sup> Klamberg, *Evidence in International Criminal Procedure* (n 39) 264–5 (noting the prosecution 'has special powers to collect evidence, the support of States, larger resources, privileges and immunities which create an imbalance to the detriment of the defence').

<sup>96</sup> Buisman (n 70) 218.

underlying presumption is that the prosecution is entitled to enjoyed significant advantages, as a natural consequence of their different functions.<sup>97</sup> Following this premise and logic, the defence will hardly be ever able to successfully argue equality of arms. In other words, due to the ‘inherent different roles’, even huge disparity in resources between the parties would not render the trial unfair.

In addition, the analysis of the Chamber did not go as far as clarifying how this proportionality test can be applied in practice, especially with regard to actual resources. In order to deal with the evidentiary challenges, the defence team must have resources that are proportionate to the size and complexity of the case.<sup>98</sup> This involves the amount of evidence against the accused, the layout of a defence strategy and the question of how to react to the prosecution’s theory of events, and evidence to be investigated. Every defence team has to deal with these issues, since they are necessary to develop a sound defence strategy and assess its potential.<sup>99</sup>

## **V. Concluding Remarks**

As critically pointed out by Jordash and Crowe, after two decades ‘the meaning of equality of arms remains poorly defined.’<sup>100</sup> It is submitted that the principle of equality

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<sup>97</sup> Jordash and Crowe (n 3) 278.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid* 274.

of arms as applied by the *ad hoc* Tribunals, is far too restricted. This principle, which is designed to guarantee the defendant's right to a fair trial, has become almost impotent in the *ad hoc* Tribunals. By adopting a formal interpretation approach, the Tribunals generally reject the defence's claims based on this principle, in particular when more resources are requested by the defence. Ironically, at the same time, the Tribunals are concerned about the prosecution being disadvantaged when a similar claim is advanced by the prosecution, as illustrated in the *Haradinaj* case. In this regard, it is not a surprise when some commentators doubt if the principle of 'equality of arms is or even could be a key element of trial fairness.'<sup>101</sup>

After examining the arguments used by the courts to limit the scope of the principle of equality of arms, it can be submitted that only the accused should be the right-holder of this principle and, even if accepting the argument that equality of arms is applicable to the prosecution, it should not be as a matter of right, but only as an 'indirect consequence.' The Court's approach of procedural equality is not clear enough; instead, this Chapter argues that the courts should make an effort to ensure substantive equality, which should be the proper approach in the context of international criminal law.<sup>102</sup>

Notwithstanding the Tribunals' own difficulties and hurdles, the fact remains that the defence is at a significant disadvantage position vis-à-vis the prosecution. Accordingly, in order to truly reach the equality of arms principle and the right to a fair trial, the

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<sup>101</sup> Safferling, *International Criminal Procedure* (n 130) 416 (suggesting quite the contrary is true).

<sup>102</sup> For similar arguments, see Buisman (n 70).

Courts should do more than only guaranteeing the minimum requirements to the accused, but assist the defence to deal with evidentiary problems commonly faced in international crimes cases.



## CHAPTER III

# THE DESIGNS OF INTERNATIONAL CRIMINAL TRIBUNALS — A HARSH DEAL FOR THE DEFENCE

### I. Introduction

The purpose of this Chapter is to show the disadvantaged position of the defence under the current design of the international criminal tribunals. Notwithstanding the peculiar circumstances faced by the tribunals, it is without a doubt that, in most cases, the prosecution holds a much stronger position than the defence before trial.<sup>1</sup> While the international environment is indeed hard for an international prosecutor to conduct an investigation,<sup>2</sup> it should be highlighted that the situation is even more difficult for the defence to prepare its case. In other words, the defence is suffering no less from those ‘unique challenges’ arising from the international characters of an international criminal trial than the prosecution, and is more likely to be affected due to its institutional, financial and political disadvantages. Accordingly, the task of preparing an adequate defence in international criminal tribunals is far more strenuous than in the domestic ones. However, jurisprudence and scholarship generally focus on the difficulties and challenges faced by the Tribunals or the prosecution. As for a defence perspective, it

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<sup>1</sup> Although see Alex Whiting, ‘Disclosure Challenges at the ICC’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, USA 2014) (arguing that in certain Croatian leadership cases, the Defence has more access than the Prosecution). Cf. Khan and Buisman (n 3).

<sup>2</sup> See e.g. Damaška, ‘Reflections on Fairness in International Criminal Justice’ (n 2) 614 (‘given their innate weakness’); Bassiouni, *Introduction to International Criminal Law* (n 2) 868; Whiting (n 142) 1008.

was rarely mentioned until recently.<sup>3</sup>

This Chapter is divided into two parts. The first part will address the issues of the goals of international criminal justice while the second part would explore other difficulties and challenges arising from the international context for the defence. By examining the wider goals of international criminal justice, it will be shown that the discourse of international criminal justice reflects a certain degree of presumption of guilt towards the accused. This is problematic for the defence, because these goals affect the design of a court. If a criminal court seeks to achieve objectives such as ‘ending impunity’ and ‘justice for victims’, inevitably, certain rights of the defence would be sacrificed and, we risk to come dangerously close to the goal of ‘securing convictions’. Even the term ‘fairness’ is having a different meaning in international criminal justice,<sup>4</sup> as described in the previous Chapter. In light of the discrepancies between domestic and international criminal courts, some have suggested that fairness of the defendants should be balanced with fairness of the victims and even prosecutors.<sup>5</sup> The aim of establishing historical record and truth seeking is also troublesome, as it is doubtful if this should be the function of a criminal court.<sup>6</sup> The conflicting nature and ‘overabundance’<sup>7</sup> of these

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<sup>3</sup> See e.g. Zahar (n 3); Jordash and Crowe (n 3); Jalloh and DiBella (n 36); Khan and Buisman (n 3); Khan and Shah (n 3).

<sup>4</sup> *Prosecutor v Tadić*, No. IT-94-1-T, *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses* (10 August 1995) at paras. 27 and 55.

<sup>5</sup> Damaška, ‘Reflections on Fairness in International Criminal Justice’ (n 2) 615.

<sup>6</sup> For a thorough examination and analysis regarding the function of seek-seeking, see Buisman (n 37) 51–3.

<sup>7</sup> Damaška, ‘What Is the Point of International Criminal Justice’ (n 38) 331.

goals would also be observed.<sup>8</sup>

Despite of the special circumstances of international criminal justice, it will be argued, the adjudication of guilt should be the main aim of an international criminal trial, and other objectives could only be regarded as secondary. This is also out of realistic and practical concerns of what a criminal court could do. As Buisman puts it, it is hard to ‘determine in any situation whether the secondary objectives, e.g. reconciliation, peace and security, and contribution to a historical record have been achieved.’<sup>9</sup>

The second part of this Chapter will then address other challenges in the international context for the defence. Three particular aspects would be examined: structural, financial and political. These conditions place the international defence in less favourable circumstances than its national counterparts.

## **II. Goals of International Criminal Law**

### **A. Introduction**

It is often contended that by virtue of the grave, shocking nature of international crimes,

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I. <sup>8</sup> See also Mirjan Damaška, ‘Problematic Features of International Criminal Procedure’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 177; Buisman (n 37) 24–31; Fry (n 26) 256.

<sup>9</sup> Buisman (n 37) 366.

international criminal tribunals should not only pursue the ordinary goals as of domestic criminal courts, but also endeavour to achieve a set of wider goals.<sup>10</sup> However, in particular from the defence point of view, the so-called wider goals run the risk of accounting for a bias against the internationally accused before the trial has even started. It is submitted that while the international courts are attempting to pursue these wider goals, they should not lose sight of the principal objective of the criminal trial, that is, to determine the guilt of the accused, based on the evidence properly presented before the court.

One should not neglect that the political agendas have been an attendant phenomenon of the *ad hoc* Tribunals since their first formation.<sup>11</sup> As illustrated by the mandate of the ICTY, it is ‘established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.’<sup>12</sup> A similar concept was expressed in the Preamble of the Rome Statute, which states that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’.<sup>13</sup> As for their main goals the trials are ‘to put an end to impunity for the perpetrators of

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<sup>10</sup> For discussions of goals, see e.g. Cryer and others (n 5) 29–42; Jens David Ohlin, ‘Goals of International Criminal Justice and International Criminal Procedure’ in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013); Damaška, ‘What Is the Point of International Criminal Justice’ (n 38); Klamberg, ‘What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentation of a Legal Regime’ (n 27).

<sup>11</sup> For a comment, see Howard Morrison, *International Criminal Tribunals*, Counsel, June 2001, at 14 (expressing concerns about these objectives and not mentioning due process rights of the accused).

<sup>12</sup> Preamble, *ICTY Statute*; Preamble, *ICTR Statute*. See also, Colloquium, ‘Developments in the Law, International Criminal Law: The Promises of International Prosecution’ (2001) 114 *Harvard Law Review* 1957.

<sup>13</sup> 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3.

these crimes and thus to contribute to the prevention of such crimes.’<sup>14</sup> It is, accordingly, not surprising that the rights and interests of the defence are not mentioned, letting alone regarded as a priority by the international community. On the contrary, the protection of defence rights is often seen as an obstacle to achieving justice,<sup>15</sup> and a misconception held by many is that ‘a strong defence will weaken a court ... by winning cases and gaining acquittals.’<sup>16</sup> However, it should be borne in mind that justice can only be achieved when a trial is fair, and a proper defence team, accordingly, will only strengthen the legitimacy of a trial and of the Court itself.

## **B. The Primary Goal of Criminal Trials: Determination of Guilt or Innocence**

There is little objection that the principal objective in international criminal proceedings is to determine whether the defendant is guilty or innocent.<sup>17</sup> In addition, conventional goals of domestic criminal law usually include retribution for wrongdoing, general and individual deterrence, incapacitation, and rehabilitation.<sup>18</sup> In this regard, the objectives of national and international criminal law are indeed similar. For example, the ICTY has

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<sup>14</sup> Preamble, Rome Statute.

<sup>15</sup> *Prosecutor v Issa Hassan Sesay*, No. SCSL-2003-05-PT, Defence Reply to Prosecution Response to: Application for Reconsideration of and/or Leave to Appeal Regarding the Order of Judge Bankole Thompson (Protective Measures for Witnesses and Victims) Rendered on the 23<sup>rd</sup> May 2003 (June 13 2003) p. 26.

<sup>16</sup> *ibid*, p. 27.

<sup>17</sup> Damaška, ‘What Is the Point of International Criminal Justice’ (n 38) 331; Bert Swart, ‘Damaška and the Faces of International Criminal Justice’ (2008) 6 *Journal of International Criminal Justice* 87, 100; Stephan Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* (University of Pennsylvania Press 2013); May and Wierda (n 2) para.1.30.

<sup>18</sup> *Cryer and others* (n 5) 29.

stated that its two main objectives are retribution and deterrence.<sup>19</sup> Certain procedural objectives, such as the protection of fundamental rights of the accused are also observed in order to serve the above mentioned goals.<sup>20</sup> As stated by May and Wierda, ‘a trial falling short of international standards of fairness can be said to the contrary to the very purpose of holding international trials.’<sup>21</sup> Nevertheless, some have asserted that punishment may differ, or at least be differently interpreted, between international and domestic criminal law.<sup>22</sup>

### C. Wider Goals

In the context of international criminal justice, it is often suggested that these international criminal tribunals should have additional purposes, which surpass the traditional confines of normal domestic criminal trials.<sup>23</sup> As international criminal trials

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<sup>19</sup> See e.g. *Prosecutor v Zlatko Aleksovski*, No. IT-95-14/1-A, *Judgement* (24 March 2000) at para. 185. See also U.N. SCOR 48th Sess., 3217th mtg, U.N. Doc. S/Res 827 (1993); ICTY Statute.

<sup>20</sup> Jens David Ohlin, ‘A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law’ (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 77, 84–100 (noting that the goals for international criminal procedure and international criminal justice in general might be different albeit related); Damaška, ‘What Is the Point of International Criminal Justice’ (n 38).

<sup>21</sup> May and Wierda (n 2) 260. Although they also noted that ‘the object and purpose of the modern tribunals is to contribute to the restoration and maintenance of peace and security in the former Yugoslavia and Rwanda.’ See also John Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy’ (2009) 7 *Journal of International Criminal Justice* 17. With regard to the goal of ‘restoration and maintenance of peace and security’, Fry noted that this goal is only applicable for the ad hoc Tribunals, ‘in the sense of the UN Charter is a goal of international criminal justice at the macro (institutional) level, because the UNSC as the guardian of international peace and security is also the sponsor of the tribunals’ mandates and the trigger of their jurisdiction. However, whether restoring peace and security in general is typical for international crimes to the extent that it can be viewed as a differentiating factor at the micro level (of individual trials and related evidentiary issues) is far from obvious.’ Fry (n 26) 256–7.

<sup>22</sup> See Mark A Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ [2005] 99 *Northwestern University Law Review* 539; Frederik Harhoff, ‘Sense and Sensibility in Sentencing: Taking Stock of International Criminal Punishment’ in Ola Engdahl and Wrangle, Pal (eds), *Law at war: The Law as it Was and the Law as it Should Be* (Martinus Nijhoff Publishers 2008) 121.

<sup>23</sup> May and Wierda (n 2) 12; Cryer and others (n 5) 30; Damaška, ‘What Is the Point of International

deal with gruesome, heinous crimes such as war crimes, crimes against humanity, and genocide, they should serve greater purposes.<sup>24</sup> Accordingly, wider goals, including ending impunity, creating a historical record, and provide justice for victims, have been imposed on international criminal tribunals.<sup>25</sup> The main contention for the pursuit of these wider goals is that given the special context of international crimes, and the specific mandates of international criminal tribunals, the objectives of international criminal proceedings can be different from the ones of domestic criminal law.<sup>26</sup>

However, it is submitted that although these goals are admirable, they should only be considered as secondary, as they can obscure the primary objective of criminal trials and encroach the defendant's basic rights. As observed by Damaška, there is an 'overabundance' of aims, not all of which stand in perfect harmony with each other.<sup>27</sup> These goals can be competing and even conflicting and, therefore, cannot be resolved easily.<sup>28</sup> Also, potentially, they contradict fundamental principles of criminal law, such as the principle of legality<sup>29</sup> and the presumption of innocence.<sup>30</sup> This negatively

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Criminal Justice' (n 38) 331.

<sup>24</sup> Cryer and others (n 5) 30.

<sup>25</sup> *ibid* 30–5; John Jackson, 'Faces of Transitional Justice: Two Attempts to Build Common Standards beyond National Boundaries' in John Jackson, Maximo Langer and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Oxford: Hart Publishing 2008) 226. See also Report of the UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Postconflict Societies', UN Doc S/2004/616, 23 August 2004, para. 38.

<sup>26</sup> See Ohlin (n 151).

<sup>27</sup> Damaška, 'What Is the Point of International Criminal Justice' (n 38) 331.

<sup>28</sup> *ibid*.

<sup>29</sup> A lower standard of proof is often advocated and employed in international criminal tribunals. For instances, the concept of Joint Criminal Enterprise and Command Responsibility are created to deal with the hardship in charging international defendants. See e.g. Robinson, 'The Identity Crisis of International Criminal Law' (n 9) 938–43 (joint criminal enterprise), 649–955 (command responsibility); Carsten Stahn and Larissa Van den Herik, "Fragmentation", Diversification and "3D" Legal Pluralism: International

affects the rights of the accused. Practically, it is also debatable whether the international criminal tribunals are the best forums to accomplish these wider goals.<sup>31</sup>

As a consequence of pursuing a variety of goals, cases before international criminal courts could be unnecessary lengthy and costly.<sup>32</sup>

Therefore, perhaps it would be more realistic and helpful to accept the limits of criminal law. These wider objectives could and should be better pursued by other means.<sup>33</sup>

Having unrealistic hopes or expectations of what criminal law is capable of could be potentially dangerous.<sup>34</sup> As pointed out by other commentators, ‘by setting impossible tasks to international criminal law ‘disenchantment and depression will set in when these goals are not being met.’<sup>35</sup> Some consider that this is already the case.<sup>36</sup>

The following broader goals will be examined: ending impunity, establishment of a historical record, and justice for victims.

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Criminal Law as the Jack-in-The-Box?’ in Larissa Van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 57.

<sup>30</sup> Damaška, ‘What Is the Point of International Criminal Justice’ (n 38) 355–6.

<sup>31</sup> For further detail discussion, see e.g. Buisman (n 37).

<sup>32</sup> M Cherif Bassiouni, ‘Reflections on Contemporary Developments in International Criminal Justice’ in Bartram S Brown (ed), *Research handbook on international criminal law* (Edward Elgar Publishing 2011) 410.

<sup>33</sup> Buisman (n 37).

<sup>34</sup> Cryer and others (n 10) 29.

<sup>35</sup> Iain Cameron, ‘Individual Responsibility under National and International Law for the Conduct of Armed Conflict’ in Ola Engdahl and Pal Wrangé (eds), *Law at War: The Law as it Was and the Law as it Should Be* (2008) 58; Damaška, ‘What Is the Point of International Criminal Justice’ (n 38) 331.

<sup>36</sup> Florian Jessberger and Julia Geneuss, ‘Down the Drain or Down to Earth? International Criminal Justice under Pressure’ (2013) 11 *Journal of International Criminal Justice* 501; Payam Akhavan, ‘The Rise, and Fall, and Rise, of International Criminal Justice’ (2013) 11 *Journal of international criminal justice* 527.



## 1. 'Ending Impunity'

The United Nations *ad hoc* tribunals and the International Criminal Court were established with the public policy aim of 'ending impunity' for the leaders allegedly responsible for genocide and war crimes.<sup>37</sup> It should be noted that, however, the discourses – 'impunity' and 'war criminals' – to a certain extent, demonstrate a definite prosecutorial bias in the very objectives and designs of these tribunals.<sup>38</sup> It seems to imply that because of the serious, immoral nature of the crimes, certain safeguards created by traditional criminal law can be suspended. In addition, due to the previous hardship of prosecuting these defendants, *inter alia*, immunity, the development of public international law and human rights law has been focusing on removing these prosecutorial barriers.<sup>39</sup>

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<sup>37</sup> See The Preamble of the Rome Statute: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crime'. ICTY as the first international criminal tribunal since Nuremberg and Tokyo, and the first one established by the UN, the ICTY reversed the tradition of impunity for war crimes and sent a message that international criminal justice could be delivered. This justice has touched countless individuals in the former Yugoslavia and helped them to restore both their dignity and the rule of law in the region as a whole," said ICTY Registrar John Hocking, in Press Release, The Hague, 24 October 2011. Preamble, ICTR Statute: 'the prosecution of persons responsible for serious violations of international humanitarian law would enable (the aim of ending impunity) to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace' Brian H Bornstein and Richard L Wiener (eds), *Justice, Conflict and Wellbeing: Multidisciplinary Perspectives* (Springer 2014) 198; Mark Klamburg, *Power and Law in International Society: International Relations as the Sociology of International Law* (Routledge 2015) 107 (claiming the purpose is to end impunity).

<sup>38</sup> See the later section of this Chapter.

<sup>39</sup> E.g. Bassiouni, 'Reflections on Contemporary Developments in International Criminal Justice' (n 173) 409 (stating that impunity is no longer the norm); Amrita Mukherjee, 'Rethinking Justice: Individual Criminal Responsibility, Immunity and Torture' in Charles Sampford, Spencer Zifcak and Derya Aydin Okur (eds), *Rethinking International Law and Justice* (Ashgate Publishing, Ltd 2015) 102; Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Bloomsbury Publishing 2012) 326.

However, it is submitted that, applying such a policy-oriented approach to criminal law could be precarious, in particular for the rights of the accused. The context of international criminal justice creates a temptation, in the name of ‘fighting impunity’, to provide a lower standard of fairness in international criminal proceedings. As pointed out by Aranburu, the ‘investigation of international crimes is often affected by a certain tendency to downgrade the presumption of innocence of the accused due to the extreme of the crime and the high expectations created by the proceedings’.<sup>40</sup> Fry also noted that the goal of fighting impunity could harbour the possibilities of influencing certain evidentiary issues, such as employing a lower standard of proof.<sup>41</sup> Nevertheless, from a normative viewpoint, to apply lower evidentiary standards for such objective is clearly unacceptable, as such standards are paramount to achieving an accurate and reliable fact-finding and the basic protection of the defence’s rights.<sup>42</sup>

In addition, this approach has the potential of destroying the foundation of the international criminal tribunals. Luban, for instance, has rightfully observed that the legitimacy of these tribunals does not come ‘from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments. Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver;

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<sup>40</sup> Xabier Agirre Aranburu, ‘Methodology for the Criminal Investigation of International Crimes’ in Alette Smeulers (ed), *Collective violence and international criminal justice: An Interdisciplinary Approach* (Antwerpen: Intersentia 2010) 358.

<sup>41</sup> Fry (n 26) 255.

<sup>42</sup> *ibid* 256.

their rightness depends on their fairness.’<sup>43</sup> It is precisely because the international accused are charged with genocide and other serious crimes, the Tribunals should adhere to the fundamental principles of criminal law and bearing the accused’s rights in mind. What is the point of having international trials at all if the outcome is without being fair and just?

## 2. Establishing a Historical Record

Another ambitious aim set by the United Nations is the attempt to use the Tribunals as history recording devices.<sup>44</sup> Recognising such aim has the didactic purpose of learning from the past,<sup>45</sup> or ‘educating people of “historical truth” through law.’<sup>46</sup> Note that, the aim of establishing a historical record is sometimes being equalised with the goal of truth finding.<sup>47</sup> However, it should be highlighted that there is a subtle difference between ‘truth’ and ‘history’. History is, in fact, a subjective matter, as there can exist various versions of history. By contrast, the ‘truth’, is an objective one. As it would be

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<sup>43</sup> David J Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’ [2008] Georgetown Public Law Research Paper.

<sup>44</sup> Cryer and others (n 5) 30–5; Jackson, ‘Faces of Transitional Justice’ (n 166) 226. See also Report of the UN Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Postconflict Societies’, UN Doc S/2004/616 (23 August 2004) at para. 38.

<sup>45</sup> Fry (n 26) 257; Damaška, ‘What Is the Point of International Criminal Justice’ (n 38).

<sup>46</sup> Martti Koskeniemi, ‘Between Impunity and Show Trials’ (2002) 6 Max Planck Yearbook of United Nations Law Online 1, 34.

<sup>47</sup> See e.g. Klamberg, ‘What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentation of a Legal Regime’ (n 27); Bassiouni, ‘Reflections on Contemporary Developments in International Criminal Justice’ (n 173) 410 (giving the example of Eichmann Trial as an example of setting a historical record of the Holocaust; and stating that in Al-Dujail trial of Saddam Hussein such purpose is absent). But, see also In his opening statement at the beginning of the *Eichmann* trial in Jerusalem in 1961, Attorney-General Gideon Hausner seemed less confident about the trial’s role in this larger scheme: ‘I doubt whether in this trial we...will succeed in laying bare the roots of the evil. This task must remain the concern of historians, sociologists, authors and psychologists, who will try to explain to the world what happened to it.’

examined in the next Chapter,<sup>48</sup> the extent of truth that could be achieved, at best, in a criminal trial is limited to the ‘trial truth’, which is determined based on the evidence presented to the fact-finders. In other words, since history will be depending on *who* is telling it, to ask an international criminal tribunal to achieve this goal could be problematic, as the fact-finders could be easily influenced by the narrative created by the prosecution or the victims.

However, the ICTY in its early days appeared to be committed to this truth-seeking mission. For instance, trial *in absentia* is permitted by the Rule 61 proceedings, which supposedly has the purpose of giving victims a forum for their voice, and pursuing the truth.<sup>49</sup> In *Karadžić and Mladić*, the Trial Chamber stated that:

‘Rule 61 proceedings... International criminal justice, which cannot accommodate the failures of individual or states, must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility.’<sup>50</sup>

This decision shows that the ICTY equates the importance of seeking historical truth with adjudicating a person’s criminal responsibility. However, such an assessment perhaps is overstated, since the history presented in international criminal proceedings

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<sup>48</sup> See Chapter IV.

<sup>49</sup> Rule 61 ICTY RPEs.

<sup>50</sup> *Prosecutor v Karadžić and Mladić*, No. IT-95-5-R61, IT-95-18-R61, *Review of the Indictments pursuant to Rule 61* (11 July 1996).

is usually one-sided.<sup>51</sup> Later, as the Tribunals have grown relatively mature, the Chamber appeared to be re-thinking their own role and limitations. For example, in *Stakić*, they have recognised that although they have ‘endeavoured to come as close as possible to the truth . . . the Chamber is aware that no absolute truth exists.’<sup>52</sup>

The history telling function is generally regarded as the most peculiar goal of prosecuting international crimes.<sup>53</sup> While it is harmless to have such an objective as merely a by-product of the criminal proceedings,<sup>54</sup> as it would not necessarily undermine the rights of the accused or affect the purview of the trial,<sup>55</sup> it might have a differentiating effect if it is set as a primary objective at the trial level.<sup>56</sup> This is because, when the judges decide to put the task of ‘recording historical events’ in front of adjudicating a person’s guilt, they would have to admit plenty of evidence, and a huge amount of it would be inadmissible otherwise. The current practice of the *ad hoc* tribunals seem to be admitting as much as they can, and reviewing it at a later date to decide the probative value. The Rules *92ter*, *92bis*, *92quater* have these effects, as they would not have been admitted in most common law jurisdictions.<sup>57</sup> It is submitted that

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<sup>51</sup> Vladimir Tochilovsky, ‘Defence Access to the Prosecution Material’ in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013).

<sup>52</sup> *Prosecutor v Stakić*, No. IT-97-24-T, *Judgement* (31 July 2003) at para. 21.

<sup>53</sup> Swart (n 158) 107.

<sup>54</sup> Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge University Press 2011) 16.

His research shows practitioners often insist that the goal of history telling is not a burden that should be placed on the shoulders of judicial institutions; providing historical truth, or historical narratives, is merely a by-product of international crime proceedings. See also William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP Oxford 2012) 161.

<sup>55</sup> Mirjan Damaška, ‘Truth in Adjudication’ (1997) 49 *Hastings Law Journal* 289, 293.

<sup>56</sup> Fry (n 26) 260.

<sup>57</sup> E.g. *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-AR73.5, *Decision on Appeal Regarding Statements*

this type of approach is dubious and the judges are at the risk of being tainted by unreliable evidence. This could put the accused in a severely disadvantageous position, as more evidence are being admitted without providing a proper chance to challenge them, and many are admitted without careful scrutiny. It also might make the trial proceedings unnecessary lengthy. Accordingly, it should be emphasised that there is an inherent limitation of criminal proceedings: truth-finding should be based on the evidence presented and not go beyond than that.<sup>58</sup> The criminal trial itself should focus on the adjudication of the guilt of the accused.<sup>59</sup> The better forum for the goal of ‘historical truth’ perhaps would be the Truth and Reconciliation commission,<sup>60</sup> and the task of recording history should be left to the historians alone.

### **3. Justice for Victims**

#### **Victims’ versus Defence Rights**

The issues related to victims perhaps are the most difficult ones in any criminal justice systems.<sup>61</sup> Traditionally, in criminal trials, the focus of ‘rights’ is on the defendants only and victims do not have the right to intervene during a criminal trial. In most

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*of a Deceased Witness* (21 July 2000) at para. 18. The Appeals Chamber observed that it was faced with the question of whether the ‘unsworn, uncross-examined, out-of-court statement of a deceased witness should have been admitted into evidence as the only proof of the accused’s presence in a particular place at a particular time.’ See further, Megan A Fairlie, ‘Due Process Erosion: The Diminution of Love Testimony at the ICTY’ (2003) 34 Cal. W. Int’l LJ 47.

<sup>58</sup> Ohlin (n 151).

<sup>59</sup> E.g. Landsman (n 158).

<sup>60</sup> E.g. The South African Truth and Reconciliation Commission

<sup>61</sup> The issue of protection of victims is a separate matter, which will be addressed at Chapter VII regarding redactions and delays.

common law jurisdictions, victims have no particular status, other than being heard as witnesses when they are called to the stand. But the recent movement seems to be advocating a shift from defendants to victims' rights and participation.<sup>62</sup> However, it should be noted that, this issue is not for international criminal courts alone, as the calls for a more 'victim-centred' or 'victim-oriented' approach are also trendy in the domestic context, in particular in common law countries.<sup>63</sup> The rationale is to 'rebalance justice'; at least it is so argued.<sup>64</sup> Interestingly, in the domestic context, many have expressed concerns about the potential threat to the defendants' rights,<sup>65</sup> whilst the scholarship in the field of international criminal law seems to be much less alarmed.

The international criminal tribunals have placed significant focus on victims, notably

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<sup>62</sup> For detailed analysis regarding victims' participation, see e.g. Tochilovsky, 'Defence Access to the Prosecution Material' (n 192) 1300; Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 *Leiden Journal of International Law* 485. Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395.

Mariana Pena and Gaele Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *International Journal of Transitional Justice* 518.

Cf. Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2013) 76 *Law and Contemporary Problems* 235. (noting that victim participation can contribute to truth-finding in trials and give examples in which victims' representatives added facts and legal arguments that had been left out by the prosecution and defense, either due to error or their focus on the guilt or innocence of the accused. But the authors see obstacles to meaningful participation, including the application process and the fact that victims have little input into OTP's selection of crimes to be prosecuted. They are particularly concerned that common legal representatives do not have sufficient opportunity to consult with victims and make arguments on their behalf.) Cf. *ibid.* (contrasting participation and representation, they see representation *as* participation provided it is done well).

<sup>63</sup> E.g. England.

<sup>64</sup> See e.g. Government White Paper 2002 for the Criminal Justice Act (England).

<sup>65</sup> For England, see e.g. Ashworth and Redmayne (n 29); Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (Sweet & Maxwell 2012).

the ICC.<sup>66</sup> Due to the nature of international crimes in many cases there will be high numbers of victims and this, among other things, draws great attention from the international community. However, this substantial focus on victims could have a negative impact on the accused's right to a fair trial.<sup>67</sup> In particular, this 'victim-oriented' approach can lead to the erosion of the presumption of innocence. Branding it as victims' justice against the accused, as if the defendant is deemed to be found guilty. Therefore, it is no wonder why the Courts tolerate the prosecution's overused of redactions and delays in disclosing material to the accused.<sup>68</sup> To a certain extent, putting more attention on the victims means that the rights of the defence would be compromised in order to accompany the need of victims.<sup>69</sup>

The scholarship has mixed views regarding victims. Many have hailed the victims-related provisions as a substantial advance when compared with the law and practice of the ICC's predecessors.<sup>70</sup> But the regime of victim participation also has its critics and some warn that it is a potentially harmful experiment to what is still a highly fragile system.<sup>71</sup> Others, without being so critical, identify problems such as the unclear

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<sup>66</sup> E.g. Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victims' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1389.

<sup>67</sup> Zappalà, 'The Rights of Victims v. the Rights of the Accused' (n 30) (expressing concerns that a significant focus on victims would detract from the attention traditionally bestowed on the accused, and perhaps on the right to the accused's fair trial).

<sup>68</sup> See Chapter VII.

<sup>69</sup> See e.g. Packer's crime control and due process models. Packer (n 35).

<sup>70</sup> E.g. Theo Van Boven, 'The Position of the Victim in the Statute of the International Criminal Court' in Herman Von Hebel, Johan G Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, vol 77 (1999) 87.

<sup>71</sup> Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 75–6.



purposes behind the right of participation, and tensions with respect to the rights of the accused, the role of the prosecution, and the victim's potential parallel role as a witness.<sup>72</sup>

The expansion of victims' rights is also related to the ever-greater influence of NGOs in the international context. The NGOs, mostly, have been paying particular attention to the protection of victims, giving victims voices, and how to achieve justice for them. While these NGOs advocate human rights and justice, they are less concerned when it comes to the rights of the defence. Some commentators have expressed their concerns regarding the NGOs, pointing out that some of the most vocal 'NGOs have been unusually silent with regard to the rights of the defendants before international courts'.<sup>73</sup> When mentioning 'human rights', they often mix the human right of defendants and victims, which could have a misleading effect on analysing particular rights. Moreover, their approach is to expand the power of the prosecution; often, 'securing convictions' is more important than due process.<sup>74</sup> Jalloh and DiBell remarked that 'they are on the ground liaising with the victims and witnesses, in the media calling for an end to impunity, and often prematurely pronouncing the guilt of the accused'.<sup>75</sup> In addition,

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<sup>72</sup> See e.g. Jorda and de Hemptinne (n 207) 1338–9; Emily Haslam, 'Victim Participation in the International Criminal Court: A Triumph of Hope over Experience?' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Bloomsbury Publishing 2004) 334; Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Turku : Institute for Human Rights, Åbo Akademi University 2004) 152–4.

<sup>73</sup> Jacob Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 111, 112.

<sup>74</sup> Jordash and Crowe (n 3) 274.

<sup>75</sup> Jalloh and DiBella (n 36) 251–2.

NGOs often act as an additional investigative field resource for the prosecution.<sup>76</sup> This is particularly true in the context of the ICC. The problem is that this type of source – NGOs are interest groups – is hardly objective and often choose to overlook the defence’s rights. Jordash and Crowe observed that ‘convinced of the fundamental need, yet fragility, of the international criminal justice project, human rights activist groups have rarely advanced justified criticism of the international tribunals.’<sup>77</sup>

### **III. Challenges in the International Context**

#### **A. Inherent difficulties – Defence greater than Prosecution**

As Richard J. Wilson correctly observes, ‘[i]f the general problems with war crimes tribunals are great, the specific problems for defence counsel are especially difficult.’<sup>78</sup> The defence have ‘precious few resources and little or no institutional support’, while at the same time the law is a ‘rapidly developing blend of international and domestic concepts and procedures, requiring unique skills, experience, knowledge, strategic sense and training on the part of defen[s]e counsel.’<sup>79</sup> The ICTY has considered these difficulties since the early case of *Tadić*, in which the Trial Chamber has stated that ‘the Trial Chambers are mindful of the difficulties encountered by the parties in tracing and

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<sup>76</sup> *ibid* 252.

<sup>77</sup> Jordash and Crowe (n 3) 274.

<sup>78</sup> Richard J Wilson, ‘Special Issues Pertaining to International and War Crimes Tribunals’, *International Legal Aid & Defender System Development Manual* (National Legal Aid & Defender Association 2010) 184–5, available at <[http://www.nlada.org/Defender/Defender\\_Publications/International\\_Manual\\_2010](http://www.nlada.org/Defender/Defender_Publications/International_Manual_2010)>.

<sup>79</sup> *ibid* 185.

gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal.’<sup>80</sup> However, the Chamber considered that these difficulties are beyond the control of the Tribunals and, therefore, refused to assist the defence any further.

Although the position of the Chamber is understandable, it is submitted that this approach is not desirable and can lead to detrimental consequences for the defence, which, in turn, could weaken the legitimacy of the Tribunal. Furthermore, if the Court wishes to give the right to a fair trial a true meaning and to comply with the principle of equality of arms, the Chambers must engage beyond this passive approach. As suggested by Jalloh and DiBella, ‘the Courts should at least make an effort to assure that the defence was not placed on unequal footing during investigations and the procedures leading up to those decisions and judgements.’<sup>81</sup> This section would examine the three main disadvantage aspects of the defence in the international settings.

## **B. The Designs of International Criminal Courts**

### **1. Institutional Factor**

#### **Structure – an Imbalance Tripartite**

An inherent structural imbalance exists in the institutional designs of the international

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<sup>80</sup> *Prosecutor v Duško Tadić*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 52. (hereinafter *Tadić Appeal Judgement*).

<sup>81</sup> Jalloh and DiBella (n 36) 273.

criminal tribunals.<sup>82</sup> Ideally, a healthy and effective adversarial criminal justice system requires three main pillars: ‘an independent judiciary, a prosecuting authority which guards public interests, and independent and effective defence counsel.’<sup>83</sup> However, the current international criminal justice system is far from this wholesome tripartite. As Groulx pointed out, the reality is that the international criminal tribunals are mainly built around ‘two pillars’, the judges and prosecutors.<sup>84</sup> More problematically, the two *ad hoc* tribunals and the ICC are all built with the same ‘architectural defect’: while the judicial and prosecutorial pillars are well defined and independent, the defence has no independent organisation.<sup>85</sup>

To a certain extent, the international criminal tribunals also operate as a tripartite, the difference between domestic criminal courts is that the third pillar is not the defence; it is the Registrar. This is an additional obstacle the international defence counsels have to deal with. Structurally, the Defence is subordinated to the Registry, and its function is depending on the Registry’s budget.<sup>86</sup> In other words, unlike in the national system, the structural position of the defence is not on the same level as the prosecution, and many aspects of preparing a case is made subject to approval of the Registry.

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<sup>82</sup> Elise Groulx, ‘Equality of Arms: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System’ [2010] *Revue québécoise de droit international* 21.

<sup>83</sup> *ibid.* See also Stephen Thaman, ‘General Report. The Planning of the Conference’, (1992) 63 *Revue Internationale de Droit Penal*, 505 and 516.

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> The Special Tribunal for Lebanon is the only exception, which has an independent Defence Office. However, their budget is still subordinated to the Registry.

It is clear that placing so much power on the Registry can potentially be unfair to the defence.<sup>87</sup> Firstly, the main responsibility of the Registry are non-judicial matters, e.g. witness protection, detention facilities and routine court administration.<sup>88</sup> In other words, the function of the Registrar is not to assist the defence; it is to provide support to the judges and the prosecution in performing their duties. This in effect means that the defence would only receive limited resources and support from the Registry, as the issues related to the defence are not their priority. Secondly, such an institutional designs can easily foster a sympathetic relationship between the Registry and the prosecution since the two organs work closely together.<sup>89</sup>

Accordingly, it is not a surprise that many defence counsels consider the concentration of power in the hands of the Registrar to be excessive.<sup>90</sup> As highlighted by the defence counsels *Sesay*, ‘access to an office, the right to send a fax, the payment of a bill, permission to hire an investigator or to conduct legal research, approval of travel plans, the drafting of the code of professional conduct and the conduct of a professional disciplinary actions ... all these decisions are in the hands of the Registrar.’<sup>91</sup> The fact

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<sup>87</sup> Groulx (n 223).

<sup>88</sup> Article 43 ICC Statute.

<sup>89</sup> Toma Fila, ‘The ICTY from the Perspective of Defence Counsel from the Former Yugoslavia: My Point of View’ in Richard May, David Tolbert and John Hocking (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald: In Honour of Gabrielle Kirk McDonald* (Martinus Nijhoff Publishers 2001) 187 (noting that ‘the Prosecution office and Trial Chambers function in conjunction with a common administration, and that they are even in spatial proximity since they are located in the same building could be indicative in certain respects of the privilege position of the Prosecution’s office in relation to the Defence).

<sup>90</sup> E.g. *Prosecutor v Issa Hassan Sesay*, No. SCSL-2003-05-PT, Defence Reply to Prosecution Response (n 15).

<sup>91</sup> *Prosecutor v Issa Hassan Sesay*, No. SCSL-2003-05-PT, Defence Reply to Prosecution Response (n 15), p. 23.

that the Registry controls the work and budget of the defence, in combination with the potential possibility of a prosecutorial bias, can have a tremendously negative impact on the work of the defence.

## **2. Financial Factor**

Money plays an indispensable role in the international criminal justice system. Cryer has critically named money as the ‘dirty little secret’ of international criminal law.<sup>92</sup>

Indeed, money is often associated with power, as it can have an impact on the decisions to initiate prosecutions, and even who to prosecute.<sup>93</sup> Money is also essential for determining the time and resources needed to pursue these prosecutions, and to the very establishment of the Tribunals themselves.<sup>94</sup> It should be highlighted that, for the defence, to have adequate funding is equally pivotal for preparing an effective defence. Nevertheless, the international community and the scholarship tend to neglect such importance to it.

It is noted that immensely disparate budgets is a norm at the international courts.<sup>95</sup> The establishment of the International Criminal Court did not change the financial structure

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<sup>92</sup> Robert Cryer, ‘International Criminal Justice in Historical Context: The Post-Second World War Trials and Modern International Criminal Justice’, in Michael P Scharf, William Schabas and Gideon Boas (eds), *International criminal justice: Legitimacy and coherence* (2012) 170.

<sup>93</sup> *ibid.* Cryer pointed out that money ‘can influence the decisions to initiate prosecutions, the time taken to continue such prosecutions, and, perhaps more cynically, who to prosecute.’

<sup>94</sup> *ibid.*

<sup>95</sup> Simon De Smet, ‘A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Process of the ICC’, in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 425.

as of the *ad hoc* Tribunals. That is to say, the Registrar has the discretion to decide the defence's budget. Similarly, a huge imbalance between the prosecution and the defence can be observed. As noted by Higgins, 'in the present system, the efficacy of defence investigations cannot be guaranteed as they are commonly and consistently hampered by inadequate funding, a lack of cooperation from state institutions and logistical difficulties in accessing crime sites, potential witnesses and known sources of information'.<sup>96</sup> Other defence counsels also have collaborated that, during their practice at the ICTY, 'little had changed in the intervening years with regard to funding.'<sup>97</sup>

Although the problem of financing is more of a practical matter, it is also linked to politics and diplomacy.<sup>98</sup> The funding of the *ad hoc* Tribunals, although formally a matter of UN budget, depends on certain powerful State's inclination to finance it, in particular the United States of America.<sup>99</sup> Some pointed out the fact that the NATO States were not thoroughly investigated over their military actions with respect to the Kosovo may be linked to the support given to the Tribunal by some of those Countries.<sup>100</sup> The issue of funding was also evident for the establishment of the IMTs, as they were largely counting on the willingness of the United States.<sup>101</sup> The funding of

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<sup>96</sup> Gillian Higgins, 'Fair and Expeditious Pre-Trial Proceedings: The Future of International Criminal Trials' (2007) 5 *Journal of International Criminal Justice* 394, 395.

<sup>97</sup> Jordash and Crowe (n 3) 281.

<sup>98</sup> Cryer (n 233) 170.

<sup>99</sup> David Scheffer, 'A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence' (2008) 21 *Leiden Journal of International Law* 151.

<sup>100</sup> Danilo Zolo, *Invoking Humanity: War, Law and Global Order* (Bloomsbury Publishing 2002) 149.

<sup>101</sup> Cryer (n 233) 172.

the ICC is contributed by its member States.<sup>102</sup>

The question here is: why would the States fund the operation of these international criminal courts? As the States are the ultimate sponsors or ‘donors’<sup>103</sup> of these international courts, their motivations are predominately based on self-interests. Accordingly, it is not a surprise that they are rarely concerned with the financial resources of the defence. The financial structure of the international courts proves this point. As mentioned, in the context of the *ad hoc* Tribunals, the Registry controls the budget of the defence, and the Tribunals’ budget is decided by the United Nations.<sup>104</sup> As to the ICC, the structural situation is similar to the *ad hoc* Tribunals and the budget is contributed by the State Parties.<sup>105</sup> When it comes to resources and funding, it is often argued that resources are too limited to support the defence.<sup>106</sup> As a consequence, in terms of funding, it is foreseeable that the defence will not be in a favourable situation.

### 3. Political Factor

Another challenge for both the prosecution and the defence in the context of

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<sup>102</sup> Japan, Germany, France and the UK are the largest contributors. This also reflects why civil law has a more powerful influence in the ICC.

<sup>103</sup> See Cryer (n 233) 172. See generally, Sara Kendall, ‘Donors’ Justice: Recasting International Criminal Accountability’ (2011) 24 *Leiden Journal of International Law* 585.

<sup>104</sup> Benjamin F Nelson, *United Nations: Financial Issues and U.S. Arrears* (DIANE Publishing 1998) 2.

<sup>105</sup> For a comparison of budgets between the ICC and ICTY, see Stuart K Ford, ‘How Much Money Does the ICC Need?’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, USA 2014) 84.

<sup>106</sup> Groulx (n 223).



international criminal law is that they need the cooperation and supports of states for their investigation. For example, without the consent of the territorial State, the parties would not be able to enter the State to collect material or interview witnesses. This political factor creates evidentiary difficulties that domestic prosecution or defence normally would not have to deal with.<sup>107</sup> However, it should be noted that this factor has a harsher impact on the accused, compared with the prosecutor, as it might restrict the ability of the defence to prepare an adequate and effect defence.<sup>108</sup> The States are generally more cooperative with the prosecution. For instance, in *Tadić*, while the prosecutor encountered little problems in interviewing witnesses,<sup>109</sup> the defence team was met with obstruction by the certain external entities, as most defence witnesses still live in Republic Srpska in Bosnia.<sup>110</sup> The Bosnian authorities did not cooperate with the defence and accordingly, the defence counsels, contended that ‘there was no “equality of arms” between the prosecution and the defence at trial, and that the effect of this lack of cooperation was serious enough to frustrate the Appellant’s right to a fair trial’.<sup>111</sup>

However, in practical terms, there was little the Tribunals can actually assist in these matters, as the operation of international criminal tribunals are also depending on States

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<sup>107</sup> See Jordash and Crowe (n 3) 280–1.

<sup>108</sup> Stuart Beresford, ‘Redressings the Wrongs of The International Criminal Justice System’ in Ustinia Dolgopol and Judith Gail Gardam (eds), *The challenge of conflict: international law responds* (Martinus Nijhoff Publishers 2006) 378.

<sup>109</sup> *Tadić Appeal Judgement* (n 80), the prosecution witnesses are mostly Muslim, lives in Western Europe and North America, where governments are cooperating fully with the ICTY.

<sup>110</sup> *Tadić Appeal Judgement* (n 80).

<sup>111</sup> *Tadić Appeal Judgement* (n 52) at para. 29.

cooperation. As noted by Cassese, without such cooperation, the *ad hoc* Tribunals would ‘turn out to be utterly impotent’.<sup>112</sup> They are often criticised for this heavy reliance, which also leads to its ineffectiveness and political decisions, including selectivity.<sup>113</sup> The ICC, for instance, is accused of being biased against Africans.<sup>114</sup> Admittedly, these criticisms have its merits; nevertheless, it is important to note that, as a branch of Public international law, state consent plays an indispensable role in international criminal law and, accordingly, the effectiveness could not be assessed in the same way as domestic criminal law. In addition, the nature of public international law implies that the decision-making process is horizontal, rather than vertical as in the domestic context. The States’ willingness determines if an international court can run smoothly. As a consequence, the Tribunals’ hands are tied even if they wish to assist the defence. The issue of disclosure further touches the core of state interests and the sensitive question of national security. For example, in *Blaškić*,<sup>115</sup> the Appeals Chamber had to reverse the Trial Chamber’s decision<sup>116</sup> regarding the Subpoena issued against

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<sup>112</sup> Antonio Cassese, ‘Reflections on International Criminal Justice’ (1998) 61 *The Modern Law Review* 1, 10.

<sup>113</sup> For a detailed discussion on the issue of selectivity, see Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005).

<sup>114</sup> Cryer (n 233) 168–9.

<sup>115</sup> *Prosecutor v Blaškić*, No. IT-95-14-AR108bis, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 Oct. 1997) at para. 25. The Appeals Chamber held that only binding ‘orders’ or ‘requests’ can be addressed to States. The Appeals Chamber also dismissed the possibility of addressing subpoenas to state officials, at para. 38.

<sup>116</sup> *Prosecutor v Blaškić*, No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena duces Tecum* (18 July 1997). Note, this subpoena was requested by the Prosecution. The Trial Chamber emphasized on its primary obligation, which is ‘to provide a fair and expeditious trial and to guarantee the rights of the accused’, at para. 154. The Trial Chamber ordered Croatia and the Croatian Defence Minister Mr. Gojko Susak to comply with the *Subpoena Duces Tecum* within thirty days of the date of this Decision.

States and state officials.<sup>117</sup> As observed by Cogan, ‘evidence necessary to prove innocent or assert a legal defence may be beyond the reach of the court, either because of the court’s inability to successfully coerce the evidence-holder or because the evidence holder deliberately seeks to influence the outcome of the trial by manipulating the release of probative information.’<sup>118</sup> The fact is that the operation of international criminal tribunals is and will continue to be depending on the States’ cooperation, which creates a certain inferiority of the defence, as they are more likely to be denied state assistance.

#### **IV. Concluding Remarks**

This Chapter demonstrated that the international accused have to handle challenges that are unknown in the domestic context. If the international context is hard for the prosecutors, it is certainly harsher for the defence. As shown from the wider objectives of the international criminal tribunals, it is evident that the defence faces more pressure than their domestic counterparts. Many have advocated that in order to fulfil politically motivated goals, lower evidentiary requirements are sufficient. Also, the nature and

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<sup>117</sup> For discussions about this case, see e.g. Mieke Dixon and Grant Dawson, ‘The Protection of States’ National Security Interests in Cases before the ICTY: A Descriptive and Perspective Analysis of Rule 54 Bis of the Rules of Procedure and Evidence’ in Hiram Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May* (Martinus Nijhoff 2006) 112–8; Ruth Wedgwood, ‘Case Analysis: International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić’ (1998) 11 *Leiden Journal of International Law* 635, 635 et seq; Roland Bank, ‘Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence’ (2000) 4 *Max Planck Yearbook of United Nations Law* 233. See also Klamberg, *Evidence in International Criminal Procedure* (n 39) 240–1 (noting the inherent constraint for the accused, and the prosecution, to present his case, including evidence).

<sup>118</sup> Cogan (n 214) 124.

gravity of the crimes make the principle of presumption of innocence harder to be upheld in the international courts, as some argued that contextual assessment could be made. However, this approach might have detrimental effects on the rights of the accused and result in undesirable consequences as it might cause doubt to the legitimacy of the Tribunals themselves. In addition, expecting the Tribunals to work as a history recording device can make the trials unnecessary lengthy and, more importantly, untested and unreliable 'evidentiary debris' might be admitted into evidence and, possibly, taint the judges' minds. Although the goal 'justice for victims' is of great importance, the expansion of the victims' rights and their participation in the proceedings warrants a more cautious approach.

The institutional designs of the international criminal tribunals further illustrated certain factors that normally would not exist in their domestic counterparts. What could not be ignored is that political factors more or less would have an influence on the Courts' decisions, which could partially explain why the Chambers are reluctant to sanction the prosecution when they violate their disclosure obligations.

## CHAPTER IV

# INTERNATIONAL CRIMINAL PROCEDURE – THE BATTLE BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS

### I. Introduction

The disclosure regime adopted in the international criminal tribunals is one of the most controversial aspects of international criminal procedure. One main reason for this controversy is that the disclosure system is at the crux of the fundamental difference between the common law and civil law traditions. Civil lawyers would probably find the complex disclosure rules ‘foreign’ and ‘alien’,<sup>1</sup> since in civil law legal systems it is the ‘*dossier* which fulfil[l]s the function of the common law disclosure rules.’<sup>2</sup> The principle rationale of the different approaches of disclosure is similar though; it is believed that disclosure will result in the ‘just and efficient disposal of litigation.’<sup>3</sup>

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<sup>1</sup> Vladimir Tochilovsky, ‘International Criminal Justice: “Strangers in the Foreign System”’ (2004) 15 Criminal Law Forum 319, 342 (noting disclosure is ‘another unknown phenomenon to a civil law attorney’. See also Lars Büngeger, ‘Disclosure of Evidence’ in Christoph Safferling (ed), *International Criminal Procedure* (Oxford University Press 2012) 344 (noting ‘in Roman-Germanic criminal procedure the term is unknown’).

<sup>2</sup> Robert Heinsch, ‘How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is It Time for a More Judge-Dominated Approach’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 488; Kai Ambos, ‘International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?’ (2003) 3 International Criminal Law Review 1, 15. With reference to Alphons Orie, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford University Press Oxford 2002) 1484.

<sup>3</sup> Kate Gibson and Cainnech Lussiaá-Berdou, ‘Disclosure of Evidence’ in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in international criminal justice* (Oxford

Some commentators believe that switching to the *dossier* approach would have solved the problems of the current disclosure system in international criminal tribunals,<sup>4</sup> in that the dossier is more complete with regard to available evidence, and provides a ‘broader’ disclosure framework than the one employed in the current adversarial setting.<sup>5</sup>

However, it is submitted this is not necessarily the case, as the rooted problem of disclosure is the same, regardless of approach, the system is relying on the prosecutor’s good faith and competence to collect evidence and disclose it to the defence.

In addition, the *dossier* approach could have created a more prejudicial situation for the Accused, since in civil law jurisdictions the *dossier* is prepared for the judges,<sup>6</sup> whereas the defence is only entitled to a copy after the prosecution’s investigation is completed.<sup>7</sup>

By adopting this approach in the present adversarial settings, it could risk the judges being biased by seeing the evidence in advance. Accordingly, in order to fully

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University Press 2010) 306. Citing Paul Matthews and Hodge M Malek, *Disclosure* (Sweet & Maxwell 2012) 4.

<sup>4</sup> E.g. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (n 40) 95.

<sup>5</sup> Nancy A Combs, ‘Evidence’ in William A Schabas and Nadia Bernaz (eds), *Routledge handbook of international criminal law* (Routledge 2010) 324.

<sup>6</sup> Mirjan Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ [1973] *University of Pennsylvania Law Review* 506, 533–4; Richard S Frase, ‘Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?’ [1990] *California law review* 539, 672.

<sup>7</sup> Mary C Daly, ‘Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems’ (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 65, 67–8; Nico Jörg, ‘Are Inquisitorial and Adversarial Systems Converging?’ in Phil Fennell (ed), *Criminal justice in Europe: a comparative study* (Oxford University Press 1995) 47; Christine Van den Wyngaert, ‘Belgium’ in Christine Van den Wyngaert and others (eds), *Criminal procedure systems in the European Community* (Butterworths 1999) 30.

understand the problems of disclosure, an analysis and examination of international criminal procedure is requisite.

This section starts by arguing that the nature of international criminal procedure, which is a hybrid of different procedural models, creates a harsh environment for the international accused. One might assume that the blend would provide the defence extra layers of procedural guarantees, however, the opposite are usually true. This Chapter will seek to establish that the result of the mixture is the diminishing of the original procedural guarantees, which would have been afforded to the defendants in national legal systems. However, instead of addressing these issues, scholars have been attempting to justify such departures from domestic jurisdictions by claiming the system as '*sui generis*'. They argue, in order to deal with the 'unique challenges' arising from the international context, judges and prosecutors are entitled to have more freedom when exercising their power. This claim will be examined and, it is submitted that this approach could risk the judicial and prosecutorial position being unchecked and the rights of the defence being sacrificed. Then, this Chapter will examine the two main procedural models that dominate the modern criminal tribunals, and whether the call for a more inquisitorial style of proceeding is warranted.<sup>8</sup>

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<sup>8</sup> For discussions of the influence of the accusatorial and inquisitorial systems on the Tribunals, see May and Wierda (n 2) 2.01-2.12; George P Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law' in Antonio Cassese and others (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 104.

## II. The Nature of International Criminal Procedure

### A. 'Hybrid' or 'Compromised'

The general understanding of the procedure applied in international criminal tribunals is that it is a 'blend,' 'mixture,' or 'hybrid' of the common law and civil law systems. The dichotomy between the so-called 'common and civil law,' 'adversarial (accusatorial) and inquisitorial,' or 'Anglo-American and Romano-Germanic (Continental Europe)' systems has been a monotonous and almost tiresome debate. Note that, whatever terms are chosen, they are only considered to be the ideal-types,<sup>9</sup> because no 'pure' criminal procedure model exists in any current jurisdictions, and even within the same legal system there are substantial differences.<sup>10</sup> For example, although *juge d'instruction* has been commonly referred to as the typical feature of an inquisitorial system during the investigation phase, this is only true for a few civil law countries, e.g. Belgium and

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<sup>9</sup> These terms are not entirely precise and can be misleading. However, for illustration purposes, these terms will be used throughout. For a discussion of the two systems, see Mirjan Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' [1997] *The American Journal of Comparative Law* 839; Mirjan Damaška, 'Atomistic and Holistic Evaluation of Evidence: A Comparative View' in David Scott Clark (ed), *Comparative and private international law: essays in honor of John Henry Merryman on his seventieth birthday* (Duncker & Humblot 1990); William T Pizzi, 'The American Adversary System' (1997) 100 *West Virginia Law Review* 847; Françoise Tulkens, 'Main Comparable Features of the Different European Criminal Justice Systems' in Mireille Delmas-Marty (ed), *The criminal process and human rights: toward a European consciousness* (Martinus Nijhoff Publishers 1995).

<sup>10</sup> See Choo (n 29) 57. See also Gordon Van Kessel, 'European Perspectives on the Accused as a Source of Testimonial Evidence' (1997) 100 *West Virginia Law Review* 799, 800 (commenting on American distrust of 'anything inquisitory'); Renee Lettow Lerner, 'Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises, The' [2001] *University of Illinois Law Review* 791, 819 (observing that it was difficult for a French judge and prosecutor to appreciate the degree to which American prosecutions are adversarial).



France.<sup>11</sup> In contrast, in other countries such as Italy and Germany, it is the prosecutor who is responsible for the pre-trial investigation.<sup>12</sup>

It is indeed becoming increasingly difficult to put the present legal traditions into the corner of the common law or civil law. In the domestic context, commentators generally agree that the current trend is a convergence of the adversarial and inquisitorial models.<sup>13</sup> As Damaška rightly noted, ‘the venerable frontier between Anglo-American and Continental Europe has become increasingly ill-marked, open and transgressed.’<sup>14</sup> Generally, it is accepted that the Anglo-American and Continental Europe systems are the dominant ones in the international criminal tribunals.<sup>15</sup> Although, some commentators have considered that the rules cannot be truly international if other ‘legal families’ (e.g. Islamic, Chinese) are ignored. For example, Delmas–Marty and Ambos both argued that the Islamic system could or should have been included.<sup>16</sup> However, whether a system is truly ‘international’ should not depend on how many legal

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<sup>11</sup> Lerner (n 10) 801 (describing the role of the *juge d’instruction* in serious cases in France).

<sup>12</sup> In Germany, there is no longer an investigating judge; the prosecutor directs the pre-trial investigation. See Francis Pakes, *Comparative Criminal Justice* (Routledge 2014) 100.

<sup>13</sup> Mark J Findlay, *International and Comparative Criminal Justice: A Critical Introduction* (Routledge 2013) 48; Craig M Bradley, *Criminal Procedure: A Worldwide Study* (Carolina Academic Press 1999) xxi; G Van Kessel, ‘European Trends towards Adversary Styles in Procedure and Evidence’ in Malcolm Feeley and Setsuo Miyazawa (eds), *The Japanese Adversary System in Context: Controversies and Comparisons* (MacMillan, Basingstoke 2002); Basil S Markesinis, *The Gradual Convergence* (Clarendon Press, Oxford 1994) 30.

<sup>14</sup> Mirjan Damaška, ‘Negotiated Justice in International Criminal Courts’ (2004) 2 *Journal of International Criminal Justice* 1018, 1019.

<sup>15</sup> Cryer and others (n 5) 424–5; Göran Sluiter and others, *International Criminal Procedure: Principles and Rules* (OUP Oxford 2013) 28 (noting international criminal justice traditionally serves as an arena for a clash between these two visions); Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) 5.

<sup>16</sup> Kai Ambos, ‘International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?’ (2003) 3 *International Criminal Law Review* 1, 37 (suggesting should add Islamic Law or Chinese Law); Mireille Delmas-Marty, ‘The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law’ (2003) 1 *Journal of International Criminal Justice* 13, 19.

traditions have been added to the mixture. Even if elements of the other legal systems were added, the system would only create a more perplexing ‘mix and match’ and the not-so international arguments would still stand.<sup>17</sup> In other words, this type of ‘internationalism’ would not necessarily contribute to a better international criminal justice.

Accordingly, the analysis of these differences is not purely one of historical or superficial values.<sup>18</sup> Not only are the convergence and conflicts resulting from the blend of the adversarial and inquisitorial systems necessary and relevant for the application of the rules of international criminal procedure, but also affects the fairness of international criminal trials. The differences matter, and are not for academic exercise only.<sup>19</sup>

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<sup>17</sup> Richard Vogler, ‘Making International Criminal Procedure Work: From Theory to Practice’ in Mark Findlay and Ralph J Henham (eds), *Exploring the Boundaries of International Criminal Justice* (2011) 115.

<sup>18</sup> See also George C Christie, ‘Some Key Jurisprudential Issues of the Twenty-First Century’ (2000) 8 *Tulane Journal of International and Comparative Law* 217, 222 (‘[T]here are more than historical explanations for these differences in approach [between the two legal systems].’)

<sup>19</sup> See Colin B Picker, ‘International Law’s Mixed Heritage: A Common/civil Law Jurisdiction’ (2008) 41 *Vanderbilt Journal of Transnational Law*; Robert Christensen, ‘Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court’ (2001) 6 *Journal of International Law and Foreign Affairs* 391.

Christensen examines whether such amalgamation in the context of the International Criminal Court matters, and suggested that ‘the gap between the two models suggests that in a criminal court setting, legal tradition does matter’ at 403.

Cf. Safferling, *International Criminal Procedure* (n 130) 126 (noting the comparative approach is important but not decisive); Gideon Boas, James L Bischoff and Natalie L Reid, *International Criminal Law Practitioner Library: International Criminal Procedure* (Cambridge University Press 2011) 15–16 (arguing that international criminal procedure is a legitimate body of public international law, then it seems clear that international criminal law should embrace its status as a jurisdiction in its own right. Only then will those who draft and interpret the law be free from pre-occupation with the common and civil approaches to problem-solving in international criminal procedure). But they also note that the procedure rules are based on the rules of major domestic jurisdictions, Gideon Boas, James L Bischoff and Natalie L Reid, *Elements of Crimes under International Law: International Criminal Law Practitioner Library Series*, vol II (Cambridge University Press 2009) 8.

## B. *Sui generis*?

Scholarship has started to view international criminal procedure as a *sui generis* system.<sup>20</sup> While this thesis does not seek to challenge this view in depth,<sup>21</sup> it is noted that the fundamental differences and inherent conflicts, which exist between the different legal traditions, should not be ignored when applying such an approach. In essence, the international criminal justice system represents a procedural hybrid, which contains elements from different legal systems.<sup>22</sup> Accordingly, this procedural mixture means that the international criminal tribunals will face numerous challenges and endure tensions caused by a mixture of these conflicting common law and civil law characteristics.

As mentioned, the problem of this hybrid system is that many procedural safeguards, which exist in either common law or civil law systems to prevent prosecutorial abuse,

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<sup>20</sup> E.g. Ohlin (n 161) 81 ('moving beyond the common and civil law dichotomy and searching for its *sui generis* theory'); Cryer and others (n 5) 427; Ambos (n 261) 34–35; Patrick L Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *European Journal of International Law* 569, 574; Boas, Bischoff and Reid, *International Criminal Law Practitioner Library* (n 278) 1–17. See also John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 133 (noting the debate is less important than 'the question as to how well the system conforms to each of these participatory standards'); Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy' (n 162).

<sup>21</sup> See Maximo Langer, 'The Rise of Managerial Judging in International Criminal Law' 53 *American Journal of Comparative Law* 835 (claiming that the ICTY's procedure are neither unique nor represent an undefined hybrid system); Tochilovsky, 'International Criminal Justice: "Strangers in the Foreign System"' (n 260) (feeling uneasy about the hybrid system as it departs from the mature and carefully structured balance of domestic system).

<sup>22</sup> See Mark Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' (2001) 50 *International and Comparative Law Quarterly* 26, 29; K Ambos, 'The Structure of International Procedure: "Adversarial", "Inquisitorial" or Mixed?' in Michael Bohlander (ed), *International criminal justice: a critical analysis of institutions and procedures* (2007) 431. For an account of the adversarial and inquisitorial systems in a domestic setting, see Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure' (n 265) 506.

disappeared during the mixture.<sup>23</sup> Arguing the international criminal system as *sui generis*, or accepting the unique circumstances argument, seems to provide a justification for the diminishing restrictions that usually would be offered in domestic jurisdictions. However, it is submitted that this approach can lead to potentially perilous effects on evidentiary matters and procedural fairness and, accordingly, the Court's ability to reach a fair and just decision.

The common contention for justifying the *sui generis* approach are the distinctive circumstances of the international context which gives rise to a set of evidentiary challenges.<sup>24</sup> The assertion goes: the investigation of international crimes for the international prosecutors is far more complicated than in domestic crimes,<sup>25</sup> due to the

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<sup>23</sup> Scott T Johnson, 'On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia' (1998) 10 *International Legal Perspectives* 111, 176; Christensen (n 19) 407–8.

In domestic systems, prosecutors are held accountable through a variety of external mechanisms, including the democratic process, professional discipline boards, civil service disciplinary frameworks, and judicial supervision. For a debate of the different approaches in common and civil law with regard to prosecutors accountability, see e.g. Michael Tonry, *Punishment and Politics* (Routledge 2012); Ronald F Wright and Marc L Miller, 'The Worldwide Accountability Deficit for Prosecutor' (2010) 67 *Washington and Lee Law Review* 1587, 1600–9. Several of these mechanisms are either unavailable or only minimally available at the international level. As a result, international courts have to rely more on judicial supervision, but this then gave rise to the question of the independence of the Prosecutors. See Turner (n 31) 385–6.

<sup>24</sup> See e.g. Nancy A Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010) Chapter 9; May and Wierda (n 8) 1.03.

See also John D Jackson and Yassin M Brunger, 'Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014).

<sup>25</sup> See Fujiwara and Parmentier (n 2) 573–4 (noting the distinctiveness of international investigations); Morten Bergsmo and William H Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes', *Manual on human rights monitoring: An introduction for human rights field officers* (Norwegian Centre for Human Rights, University of Oslo 2008); Fry (n 26) 253–4. Fry noted that the distinction between ordinary and international crimes is not a black-and-white division.

nature of the crime, in that involves massive numbers of victims and perpetrators,<sup>26</sup> and the high threshold of the contextual requirement of the crime, e.g. ‘wide and systematic attack’ for the establishment of crime against humanity, ‘armed conflict’ for war crimes.<sup>27</sup> Furthermore, the complexity with regard to gathering evidence is in excess of domestic cases.<sup>28</sup> For example, the prosecution has to travel to the crime scene, which usually is remote from the Tribunals, and often requires assistance of the territorial states. In the context of the ICC, the collection of evidence is even more difficult, as it might have to take place in war zones where the conflict is still ongoing.<sup>29</sup> Unlike the domestic prosecutors, which are supported by a police force, the international prosecutors often have to rely on the cooperation of States, and sometimes have to ask national authorities to obtain information for them.<sup>30</sup> The assistance of international organisations and NGOs is often needed. For example, in order to get materials from the

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<sup>26</sup> May and Wierda (n 2) 1.26; M Cherif Bassiouni, *International Criminal Law: International Enforcement* (3rd edn, Martinus Nijhoff 2008) 581; Fujiwara and Parmentier (n 2) 574; Bergsmo and Wiley (n 284); Samuel Totten and Eric Markusen (eds), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge 2006).

<sup>27</sup> Aranburu (n 181) 367 (International crimes are crimes of context because their definitions contain ‘elements that operate as qualifiers of gravity and restrictors of international jurisdiction to extraordinarily offensive crimes’).

<sup>28</sup> See Amal Alamuddin, ‘Collection of Evidence’ in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in international criminal justice* (Oxford University Press 2010) 242.

<sup>29</sup> William Schabas, *The International Criminal Court : A Commentary on the Rome Statute* (Oxford University Press 2010) 677. See e.g. Situation in Uganda, ICC-02/04, PTC II, *Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53* (2 December 2005) at para.3-4; Darfur, OTP ‘Report on the activities performed during the first 3 years (June 2003 - June 2006) at para.14. The Prosecution stated that ‘on-going conflict has prevented the Office from investigating on the ground in Darfur, as the necessary security conditions are not present for victims, witnesses and staff members.’

<sup>30</sup> Fujiwara and Parmentier (n 2) 575–6; Schabas, *The International Criminal Court : A Commentary on the Rome Statute* (n 288) 676. In the context of the ICC, in principle, the State authorities should conduct the investigations first; see Article 54(2) ICC Statute. In exceptional situations, the Statute allows the Prosecutor to conduct investigations. Although on a practical level, the Prosecutors do so regularly.

United Nations, the ICC prosecutor must sign confidentiality agreements that the information would not be disclosed to the accused. This, as claimed by Mégret, is a hard reality the accused must accept, because ‘the stakes of international criminal justice justify minimal concessions’.<sup>31</sup>

The Tribunals themselves also suffer from all kinds of ‘institutional handicaps’,<sup>32</sup> as an organ established under public international law, state consents and sovereignty issues often come into play.<sup>33</sup> This creates further obstacles in obtaining evidence. For example, in the *Blaškić* case,<sup>34</sup> the ICTY basically failed to subpoena certain evidence from Croatia because Croatia failed to cooperate due to national security concerns.<sup>35</sup>

Although the case was solved, it is apparent that the function of an international criminal court is restricted by comparison with domestic courts. Other practical complications are also observed, such as cultural differences between witnesses and practitioners, and between criminal law professionals themselves, in addition to

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<sup>31</sup> F. Mégret, ‘Beyond “Fairness”’: Understanding the Determinants of International Criminal Procedure’ (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 37, 67.

<sup>32</sup> Fry (n 26) 251.

<sup>33</sup> Bassiouni, *International Criminal Law* (n 285) 584.

<sup>34</sup> *Prosecutor v Blaškić*, No. IT-95-14-AR108bis, *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).

<sup>35</sup> Thomas Henquet, ‘Accountability for Arrests: The Relationship between the ICTY and NATO’s NAC and SFOR’ in Gideon Boas and William Schabas (eds), *Boas, & Schabas, International Criminal Law Developments in the Case Law of the ICTY* (2003) 136. See generally Ruth Wedgwood, ‘Case Analysis: International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić’ (1998) 11 *Leiden Journal of International Law* 635.

languages and translations problems,<sup>36</sup> which normally would not be an issue in domestic courts.

The question, accordingly, arises: does this ‘unique circumstances’ and ‘institutional handicaps’ in combination with the attempt to fulfil the broader goals of international criminal justice,<sup>37</sup> justify a *sui generis* approach of international criminal procedure, which could lead to a lower standard of fairness to be applied to the accused?

One substantial issue is that massive amounts of poor quality prosecutorial material, which Murphy has described as ‘evidential debris’, might be admitted to evidence.<sup>38</sup>

Due to the hardship in the collection of evidence, certain innovative procedures were adopted to cope with the special context. For example, the *ad hoc* Tribunals now adopt written statements in lieu of oral testimony.<sup>39</sup> Rule 92bis of the ICTY and ICTR RPEs allows such statements if they constitute ‘proof of a matter other than the acts and conduct of the accused as charged in the indictment’.<sup>40</sup> Similarly, ICC may also permit

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<sup>36</sup> Combs (n 264) 74.

<sup>37</sup> As described in Chapter III.

<sup>38</sup> Peter Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials’ (2010) 8 *Journal of International Criminal Justice* 539, 543; HH Judge Peter Murphy and Lina Baddour, ‘Evidence and Selection of Judges in International Criminal Tribunals’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 369; Peter Murphy, ‘Excluding Justice or Facilitating Justice-International Criminal Law Would Benefit from Rules of Evidence’ (2008) 12 *International Journal of Evidence & Proof* 1, 2,3. Murphy, ‘Excluding Justice or Facilitating Justice-International Criminal Law Would Benefit from Rules of Evidence’. Murphy argues that what he calls ‘evidential debris’ will, rather than assist the fact-finders in establishing the truth, frustrate the trial.

<sup>39</sup> Cryer and others (n 15) 469. Originally, oral and live testimony is the principle, so the Defence would be given a chance to cross-examine. Now ICTY switched to favouring documentary evidence, though this is not the case in the ICTR.

<sup>40</sup> Rule 92bis ICTY/R RPEs – ‘Admission of Written Statements’

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence,

video-recorded or audio-recorded testimony, documents, and written transcripts.<sup>41</sup>

However, this approach risks the possibility of admitting unreliable evidence, because this in effect denies the opportunity for the defence to cross-examine the truthfulness of the witness statements.<sup>42</sup> This is one of the consequences of adopting an adversarial procedure model with a mixture of inquisitorial style of evidentiary rules, which is in favour of the so-called free proof, or flexible approach of evidence.<sup>43</sup> Note that, although civil law jurisdictions also contained exclusionary rules, it is not as extensive and complex as in common law system.<sup>44</sup> The result is that a substantial part of the material admitted in international criminal trials would never have been considered in

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which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:

(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

(b) relates to relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

<sup>41</sup> Article 69(2) ICC Statute; Rules 47, 67, 68 ICC RPEs. See e.g. *Lubanga* case, Trial Chamber, *Decision on the Consequences of Non-Disclosure of Exculpatory Materials...* (13 June 2008) at para. 1399 (written evidence); *Lubanga* case, Trial Chamber, *Decision on the Prosecutions Application for the Admission of the Prior Recorded Statements of Two Witnesses* (15 January 2009) (prior recorded statements); *Prosecutor v Katanga and Ngudjolo Chui*, ICC-01/04-01/07 ('*Katanga and Chui*' case), Trial Chamber, *Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219* (3 September 2010) (prior recorded testimony).

<sup>42</sup> Paul De Hert, 'Legal Procedures at the International Criminal Court', in Roelof Haveman, Olga Kavran and Julian Nicholls (eds), *Supranational Criminal Law: A System Sui Generis* (Intersentia 2003) 107.

<sup>43</sup> See e.g. Murphy, 'No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials' (n 297).

<sup>44</sup> Caroline Buisman, Myriam Bouazdi and Matteo Costi, 'Principles of Civil Law' in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) 30.



domestic criminal cases.<sup>45</sup> This gives the prosecution an enormous advantage in establishing its case. As described by Zahar, an excess amount of poor quality of evidence has become ‘a feature of leadership trials at the international tribunals’.<sup>46</sup>

Because of the contextual nature of the crime, a sheer quantity of material is needed to establish international crimes.<sup>47</sup> The tendency in the international criminal tribunals, therefore, is to admit as much evidence as possible. However, this practice is problematic and could be detrimental to the accused. Since the defence is given little chance to challenge the prosecution’s evidence in cross-examination, much prosecution evidence is admitted without appropriate scrutiny. It would be very difficult for the accused to rebut the evidence after it has been admitted.<sup>48</sup> In addition, as noted by Fry, although quantity might lead to quality, quantity could also ‘clog up the system and creates unmanageable trials, the quality of the proceedings as a whole may be affected negatively.’<sup>49</sup> The practice of the international criminal tribunals to admit as much as

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<sup>45</sup> In civil law jurisdictions exclusionary rules are often viewed as unnecessary, because professional judges will be handling them, unlike jury in common law trials. See *ibid* 29. However, it is doubtful if it is that different, notwithstanding their professional training. For example, in Germany, see Richard S Frase and Thomas Weigand, *How the Germans Do It, Comparisons with American Criminal Justice* (University of Minnesota, Law School 1992) 344; George P Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics* (Oxford University Press 2005) 547; Mirjan Damaška, ‘Free Proof and Its Detractors’ [1995] *The American Journal of Comparative Law* 343, 351.

<sup>46</sup> Alexander Zahar, ‘Pluralism and the Rights of the Accused in International Criminal Proceedings’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 232.

<sup>47</sup> Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials’ (n 297) 552.

<sup>48</sup> Zahar (n 46) 232.

<sup>49</sup> Fry (n 26) 267.

they can ‘ultimately makes it more difficult for judges to assess the weight of the evidence and arrive at the truth.’<sup>50</sup>

Another innovation of the international criminal tribunals, in light of the special context of international criminal trials, is the use of judicial notice<sup>51</sup> and adjudicated facts,<sup>52</sup> which is unknown in national jurisdictions.<sup>53</sup> These rules are adopted in order to shorten the trials, the reason of judicial economy, and to uniform decisions.<sup>54</sup> Many scholars have cautioned that the rights of the accused are likely to be infringed by the taking of judicial notice,<sup>55</sup> including the right to raise defences and to present evidence,<sup>56</sup> and possibly the right not to have a reversal burden of proof on the accused.<sup>57</sup> Although the defence may rebut judicially noted facts, this is considered a violation of the principle of the presumption of innocence, as it should be the prosecution’s job to prove the guilt of the accused and not the accused to prove his innocence by rebutting judicial notice and adjudicated facts.<sup>58</sup> However, the Trial Chambers of both the *ad hoc* Tribunals have

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<sup>50</sup> Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials’ (n 297) 552.

<sup>51</sup> Rule 93 ICTY/R RPEs.

<sup>52</sup> Rule 94 ICTY/R RPEs

<sup>53</sup> O Gon Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’ (2007) 5 *Journal of International Criminal Justice* 360, 369.

<sup>54</sup> Fergal Gaynor, ‘Judicial Notice and Agreed Facts’ in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 1109–1124; Klamberg, *Evidence in International Criminal Procedure* (n 39) 471; Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (Brill 2005) 264–5.

<sup>55</sup> James G Stewart, ‘Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent’ (2003) 3 *International Criminal Law Review* 245, 269.

<sup>56</sup> Article 67(1) (e) ICC Statute.

<sup>57</sup> Article 67(1) (i) ICC Statute.

<sup>58</sup> Göran Sluiter and Koen Vriend, ‘Defending the “Undefendable”? Taking Judicial Notice of Genocide’ in Harmen Wilt and others (eds), *The Genocide Convention: The Legacy of 60 Years* (Brill 2012) 84.

used this provision extensively.<sup>59</sup> With regard to the ICC this issue is still not clear,<sup>60</sup> although some have argued the ICC would be able to establish a proper balance between the rights of the accused and judicial notice.<sup>61</sup>

These rules and practices arising from special impediments of the international context clearly have some troublesome impact on the fairness towards the accused. Some commentators, however, have argued that to apply such contextualised fairness in international criminal proceedings is acceptable. Damaška, for example, contends that in light of the distinctive circumstances of the international criminal tribunals and the impediments they suffer, ‘some departures from domestic conceptions of fairness should be expected and accepted’.<sup>62</sup> In the application of the aforementioned exclusionary rules, he considers that it ‘must be weighed against the complexity of cases and the difficulties of obtaining evidence.’<sup>63</sup> Similarly, Mégret has claimed that, ‘to understand the arbitrages that international criminal procedure requires, one must be able to contextualize them in an understanding of the broader goals of international

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<sup>59</sup> See cases cited in Gaynor (n 313) 1109–1121.

<sup>60</sup> *ibid* 1121; Klamberg, *Evidence in International Criminal Procedure* (n 39) 476; Donald Piragoff, ‘Article 69 - Evidence’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes* (2nd edn, CH Beck 2008) 1317–8, 1331.

<sup>61</sup> Calvo-Goller (n 313) 266.

<sup>62</sup> Mirjan Damaška, ‘Reflections on Fairness in International Criminal Justice’ (2012) 10 *Journal of International Criminal Justice* 611, 614. He argued that ‘while international criminal procedure should be governed by standards of fairness, this does not necessarily imply that fairness demands are to be identical to the ones applicable in domestic proceedings. The context within which international criminal courts and tribunals operate should be taken into account.’

<sup>63</sup> *ibid* 619.

criminal justice.’ He argued that due to ‘daunting difficulties’ faced by the international tribunals, it is justifiable to impose heavy burden on the international accused.<sup>64</sup>

It is submitted that these arguments put forward by both Damaška and Mégret are questionable. Allowing context to determine rights of the defence certainly is a dangerous assertion. As assessed by Zahar, ‘if context is a determining factor, is it not a recipe for relativism? What is to prevent the lower limit from being context-dependent, too? Where does context-dependency stop? If we allow the tribunals the benefit of context, why not also allow it to the accused?’<sup>65</sup>

### **C. Mixed Model: Adversarial as Main with Inquisitorial Features**

International criminal procedures are arising as a new branch of law<sup>66</sup> as they are being maturely discussed and widely contested in the recent years.<sup>67</sup> Still, it has been often described as ‘fragmented’ and there are numerous calls for the harmonization of the rules.<sup>68</sup> The purpose of this Chapter, therefore, is not to debate which procedure model is more suitable for international criminal proceedings, or which is better for achieving

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<sup>64</sup> Mégret (n 39) 65.

<sup>65</sup> Zahar (n 46) 229 (describing Damaška’s argument is ‘on thin ice’).

<sup>66</sup> See e.g. Alex Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The legacy of the International Criminal Tribunal for the former Yugoslavia* (Oxford University Press 2011); Bartram S Brown, ‘International Criminal Law: Nature, Origins and a Few Key Issues’ in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar Publishing 2011) 13.

<sup>67</sup> Cryer and others (n 15) 423.

<sup>68</sup> See e.g. Jackson and Brunger (n 283). They argue that the process of harmonization has developed in a pragmatic manner on the basis of those procedures that seemed most accessible to hand and has resulted in a procedural convergence of largely ‘adversarial’ structures. Yet such a convergence, it will be argued secondly, was achieved without a shared consensus as to how these structures were to be utilized for the purposes of doing international justice. See Stahn and Van den Herik (n 170).

the goals of international criminal trials.<sup>69</sup> Rather, it is to discuss how the hybrid system affects the rights of the accused.

The general view is that the Rules of Procedure and Evidence of the ICTY and the ICTR essentially adopt the adversarial system with some features of the inquisitorial one.<sup>70</sup> With regard to evidence collection and presentation, the party-driven structure of a trial is obvious in the *ad hoc* Tribunals.<sup>71</sup> However, unlike in the adversarial system, the evidentiary rules implemented by the Tribunal are ‘immensely minimal’.<sup>72</sup>

According to Judge McDonald, ‘we merged elements of common and civil law into 129 rules,’<sup>73</sup> whilst the U.S. model proved to be ‘particularly influential’.<sup>74</sup> Civil law

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<sup>69</sup> For discussions, see Linda Carter and Fausto Pocar (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishing 2013) 19–23; Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge University Press 2007) (discussing how to manage complex international criminal cases).

<sup>70</sup> Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) 223 (noting that the structure of the Tribunal’s procedure is along the lines of the Anglo-American System); Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 384 (remarking that the Tribunal adopted a system close to a U.S. prepared memorandum and that, accordingly, ‘the court was conceived of as a sort of referee’. But civil law elements have influenced the conduct of the proceedings, see, in general, e.g. Robinson, ‘Ensuring Fair and Expedient Trials at the International Criminal Tribunal for the Former Yugoslavia’ (n 279); Daryl A Mundis, ‘From “common Law” towards “civil Law”: The Evolution of the ICTY Rules of Procedure and Evidence’ (2001) 14 *Leiden Journal of International Law* 367; Damaška, ‘The Uncertain Fate of Evidentiary Transplants’ (n 268); Boas, ‘A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY’ (n 39).

<sup>71</sup> Richard May and Marieke Wierda, ‘Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha’ (1998) 37 *Colum.J.Transnat’l L.* 725, 737; Langer (n 280) 857–8; Megan Fairlie, ‘The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit’ (2004) 4 *International Criminal Law Review* 243.

<sup>72</sup> Dirk Ryneveld, Q.C. and Daryl A Mundis, ‘The Contribution of the ICTY to the ICC: Procedural And. Evidentiary Aspects from a Practitioner’s Perspective’, *The Changing Face of International Criminal Law: Selected Papers* (International Centre for Criminal Law Reform and Criminal Justice Policy 2002) 54 (noting that of the 125 rules initially adopted, only ten were rules of evidence).

<sup>73</sup> Gabrielle Kirk McDonald, ‘Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia’ (2001) 24 *Hastings International and Comparative Law Review* 155, 158.

<sup>74</sup> Virginia Morris and Michael P Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Transnational Publishers Irvington-on-Hudson, New York 1995) 177.

influence is apparent in two particular aspects: the active role of professional judges and flexible approach regarding the admissibility of evidence.<sup>75</sup> The International Criminal Court, similar to the *ad hoc* tribunals, follows such a model but has added more elements of the civil law traditions, such as the establishment of a Pre-Trial Chamber.<sup>76</sup> The primary rationale for this gradual shift to civil law was the need to speed up proceedings.<sup>77</sup> Although, it should be noted that the intents for such shift are not pure,<sup>78</sup> as some are driven by political considerations<sup>79</sup> and the desire to better represent the procedures of civil law countries.<sup>80</sup>

The approach taken for the adoption of the rules of procedure and evidence, however, is different between the *ad hoc* tribunals and the permanent International Criminal Court.<sup>81</sup>

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<sup>75</sup> Ilias Bantekas, *International Criminal Law* (4th edn, Hart Publishing 2010) 475; Donald Piragoff, 'Evidence' in Roy S Lee (ed), *The International Criminal Court: elements of crimes and rules of procedure and evidence* (Transnational Publishers 2001) 351, 354 (describing the ICC framework as a compromised one). Piragoff stated that 'Common law systems tend to exclude or weed out irrelevant evidence, and inherently unreliable types of evidence, as a question of admissibility, while in civil law countries all evidence is generally admitted and its relevancy and probative value are considered freely together with the weight of the evidence. The compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has discretion to "rule on the relevance or admissibility of any evidence."'

<sup>76</sup> Boas, Bischoff and Reid, *International Criminal Law Practitioner Library* (n 278) 15 ('in the context of the ICC, a larger number of civil law-oriented procedures are taking root than have been seen in the *ad hoc* tribunals'). For a discussion, see Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (n 328) 39–41.

<sup>77</sup> Klamberg, *Evidence in International Criminal Procedure* (n 39) 371; Mundis, 'From "common Law" towards "civil Law"' (n 329) 368.

<sup>78</sup> Combs (n 264) 294; Gilbert Bitti, 'Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a *Concursus Delictorum*' in Dr Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Arno Spitz 2001) 276.

<sup>79</sup> Ambos (n 261) 7–9 (noting the Pre-Trial Chamber derives more from a political compromise).

<sup>80</sup> Silvia A Fernández Gurmendi, 'The Process of Negotiations' in Roy SK Lee (ed), *The International Criminal Court: the making of the Rome Statute : issues, negotiations and results* (Martinus Nijhoff Publishers 1999) 220.

<sup>81</sup> Fausto Pocar and Linda Carter, 'The Challenge of Shaping Procedures in International Criminal Courts' in Linda Carter and Fausto Pocar (eds), *International Criminal Procedure* (Edward Elgar Publishing 2013)

The ICTY and ICTR judges are entrusted to amend and interpret the Rules as ‘quasi-legislative’.<sup>82</sup> They possess the power to choose the rules freely as they deem appropriate. In contrast, the judges of the ICC do not have such power; it is the Assembly of State Parties, a political body, which has the authority to adopt the rules.<sup>83</sup> As a consequence, the ICC is less flexible regarding this matter.

Commentators have made arguments for favouring one tradition over another in the context of international criminal justice,<sup>84</sup> despite the fact that there is no real consensus on this question. As observed by Cassese, the choice for an adversarial structure for the Nuremberg Trials was more of pragmatic concerns.<sup>85</sup> Looking back to the establishment of the International Military Tribunal, it was more efficient and applicable to have each of the four allied powers contributing their own prosecutors than to appoint an investigating judge, which might create more difficulty than it could have solved.<sup>86</sup>

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<sup>82</sup> Daryl A Mundis, ‘The Legal Character and Status of the Rules of Procedure and Evidence of the Ad Hoc International Criminal Tribunals’ (2001) 1 *International Criminal Law Review* 191 (noting that judges go beyond simply interpreting the statute. Judges fill lacunae with respect to substantive crimes and evidentiary rules). Mundis is of the opinion that this quasi-legislative function resembles the quasi-legislative function exercised by the judges when making the rules.

<sup>83</sup> Pocar and Carter (n 340) 13 (noting that the ICC rules are negotiated within a political body instead of a restricted group of judges, they tend to be more elaborated and articulated, but lack flexibility). See also Daryl A Mundis, ‘The Assembly of States Parties and the Institutional Framework of the International Criminal Court’ [2003] *American journal of international law* 132, 132–47.

<sup>84</sup> See e.g. William Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals’ (2007) 4 *International Commentary on Evidence*.

<sup>85</sup> Cassese, *International Criminal Law* (n 70) 377–8. See also The President of the International Tribunal, First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 15, UN Doc S/1994/1007, A/49/342 (Aug 29, 1994) at para. 71.

<sup>86</sup> Jackson and Brunger (n 283) 163.

The ICTY was created under a different environment than Nuremberg. The United Nations Security Council had to take actions in relation to the Balkan conflicts, however, the challenges were of another nature compared with the International Military Tribunal — the conflict was still on going, there were no police force at its disposal, and local authorities were reluctant to cooperate.<sup>87</sup> Once more, the situation called for a powerful and independent prosecutor with the strong flexibility, in order to adapt to extraordinary circumstances unfettered by any judicial supervision.<sup>88</sup>

Unsurprisingly, when it came to drafting the Rules of Procedure and Evidence, the judges, under pressure of time, were drawn to the models of procedure that were the most readily available.<sup>89</sup> The precedent of Nuremberg created a starting point, but by far the best crafted and most complete draft at the disposal of the judges was that provided by the Americans. That draft drew upon the procedure of the US military commissions.<sup>90</sup> The ICTR basically followed the ICTY model, the Security Council aimed to establish an international tribunal to punish those responsible for international crimes in Rwanda. The Statute of the ICTR explicitly stated that its judges ‘shall adopt... the Rules of Procedure and Evidence ... of the ICTY with such changes as they deem necessary.’<sup>91</sup> The only significant concession to civil law practice was the

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<sup>87</sup> *ibid.*

<sup>88</sup> Christopher Gosnell, ‘The Changing Context of Evidential Rules’ in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) 215–6.

<sup>89</sup> Jackson and Brunger (n 283) 162.

<sup>90</sup> Morris and Scharf (n 333) 177; Antonio Cassese, ‘The ICTY: A Living and Vital Reality’ (2004) 2 *Journal of International Criminal Justice* 585, 594.

<sup>91</sup> Article 14 ICTR Statute.



principle of ‘flexibility’,<sup>92</sup> which permitted the court under Rule 89 to ‘admit any relevant evidence which it deems to have probative value’.<sup>93</sup> Such rules have allowed the Tribunals to make any type of evidence admissible.<sup>94</sup>

As to the establishment of the ICC, however, is different. Unlike the Historical Tribunals and the *ad hoc* Tribunals, as a permanent international criminal court, there have been extensive and lengthy debates on the procedural rules for the ICC. As observed by some, ‘for the first time in history there was an opportunity for the international community to meet and construct a system of international criminal justice.’<sup>95</sup> Admittedly, civil law influences came to play a more dominant role, but here too the preference for a powerful prosecutor won out; that is, ‘the adversary-accusatorial process prevailed in substance’.<sup>96</sup> This is probably because States themselves feel easier to control a powerful prosecutor in secrecy than over a judge who must account for decisions in a more public manner.<sup>97</sup>

Applying such a mixed model means that complications will inevitably present themselves. Regardless of the criticism about the hybrid approach, it is often argued that

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<sup>92</sup> Gideon Boas, ‘Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility’, *Criminal Law Forum* (Springer 2001); Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials’ (n 297).

<sup>93</sup> Rule 89 (C) ICTY/R PREs. For a commentary, see Christopher Gosnell, ‘Admissibility of Evidence’ in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010).

<sup>94</sup> Vogler (n 276) 106.

<sup>95</sup> Jackson and Brunger (n 283) 163.

<sup>96</sup> M Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (1999) 32 *Cornell International Law Journal* 443, 464.

<sup>97</sup> Jackson and Brunger (n 283) 163.

in the context of international criminal law, certain compromises are bound to happen.<sup>98</sup> Other than political reasons, from a legal point of view, it was hoped that in combining the advantages of both systems, the international trials would be able to guarantee the rights of the accused whilst at the same time ensuring the guilty would not escape punishment.<sup>99</sup> The common belief is that the common law principles are better at achieving the fair trial rights of the defendants,<sup>100</sup> and the civil law's feature of pre-trial management would be able to improve the trials' effectiveness and efficiency.<sup>101</sup>

However, it is submitted that the above belief is not necessarily true. In the domestic context, each system has its strength and weakness.<sup>102</sup> For example, it is not entirely accurate to suggest that the common law system affords more protection to the rights of the accused,<sup>103</sup> although it is true that there are more rights exercisable for the defence during trial.<sup>104</sup> Such as, with regard to the presumption of innocence, while being regarded as the 'golden thread' principle of criminal law,<sup>105</sup> common law countries often allow statutory exceptions to reverse the burden of proof, imposing a heavy

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<sup>98</sup> May and Wierda (n 2) 1.28; Bassiouni, *International Criminal Law* (n 285) 581; Damaška, 'Reflections on Fairness in International Criminal Justice' (n 2).

<sup>99</sup> May and Wierda (n 8) 4.03 (UNWCC LAW REPORTS, 'The Procedure of the Courts', Vol. XV, 190, 197).

<sup>100</sup> Fletcher and Sheppard (n 304) 547; Cryer and others (n 5) 425.

<sup>101</sup> See e.g. Heinsch (n 261) 488–92. But see e.g. Patrick L Robinson, 'Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY' (2005) 3 *Journal of International Criminal Justice* 1037, 1040 (noting that 'if not properly resolved, tension between the legal systems may lead to unfairness').

<sup>102</sup> Both systems have strengths and weaknesses in the protection afforded the rights of accused persons as well as in the process by which the truth is sought. See e.g. Cryer and others (n 15) 425 (noting that the inquisitorial system might be better in achieving the aim of creating an 'accurate historical record').

<sup>103</sup> *ibid.*

<sup>104</sup> Fletcher and Sheppard (n 304) 531–47.

<sup>105</sup> *Woolmington v DPP* [1935] UKHL 1.

burden on the defence.<sup>106</sup> This type of exceptions is unlikely to happen in most civil law countries. Another example is the status of victims. Although many have observed that victims have a theoretically stronger position in some civil law-based systems, as they enjoy the status of *partie civile*, it is doubtful if the victims are really treated better in those jurisdictions.<sup>107</sup> With regard to the length of trial, empirical evidence shows that England is in fact faster than many Continental European countries.<sup>108</sup>

Accordingly, the adoption of a mixed model is only partially the result of the desire to create a better system, as the reasons are probably more of political arrangements and to achieve broad acceptance among States.<sup>109</sup> Safferling pointed out that ‘chauvinism’ also plays a considerable part.<sup>110</sup> Continental European lawyers have expressed their dismay

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<sup>106</sup> For example, in England:

Section 28 Misuse of Drugs Act 1971 - Burden on the accused to prove that he neither believed nor suspected nor had reason to suspect that the item in his possession was a controlled drug. See *R v Lambert* [2002] 2 AC 545; Section 139(4) Criminal Justice Act 1988 - Burden on the defendant to prove that he had good reason or lawful authority for having a bladed article in a public place. See *L v DPP* [2003] QB 137 (Divisional Court). The Court held that the legal burden imposed was compatible with Article 6 ECHR because of strong public interest in bladed articles not being carried without good reason).

<sup>107</sup> See John R Spencer, ‘Introduction’ in Mireille Delmas-Marty and John R Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002) 36 (‘Although the position of the victim is theoretically stronger on the Continent than in England, it is a debatable question how much [if at all] the victim is really better off’).

Another example is the compensation orders. Spencer noted that ‘in England the victim has no right to ask the court for one, and - unlike in continental Europe - the sums so awarded are usually small because they are always geared to the defendant’s ability to pay. On the other hand, where a French or Belgian court awards a *partie civile* damages against the defendant, it is the *partie civile* who then has the thankless task of trying to make the convicted defendant pay; whereas in England, compensation orders are enforced automatically by the same court machinery as is used to make the defendant pay his fines.’ At 36.

For discussions regarding Victims’ rights in the ICC, see, e.g. T Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010); Juan Carlos Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Martinus Nijhoff Publishers 2013) 137–141.

<sup>108</sup> See Spencer (n 366) 33 (noting, particularly, the serious and complicated cases are notably faster in England).

<sup>109</sup> Cryer and others (n 15) 425.

<sup>110</sup> Safferling, *International Criminal Procedure* (n 130) 57 (‘Chauvinism’ is certainly the wrong approach

regarding the domination of common law rules in the *ad hoc* tribunals, pointing out that the adversarial rules may not be the best for international criminal trials.<sup>111</sup> Since the characters of different legal systems are not always compatible with one another, these compromises can lead to adverse effects, affecting the accused's fair trial rights and causing inefficiency of the proceedings.<sup>112</sup> The impact of political compromises over the Rules is even stronger in the ICC than the *ad hoc* Tribunals,<sup>113</sup> which might explain the dominance of inquisitorial elements in the ICC RPEs.

### III. The Roles of Judges and Parties

The fundamental difference between the adversarial and inquisitorial legal systems is the role of the parties and judges. There are various discussions regarding the roles of the actors in the scholarship.<sup>114</sup> This section would briefly examine the relevant part of the roles of the actors in criminal trials.

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in this regard and mistrust, which is still to be observed'). See also Gregory S Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2006) 45 *Columbia Journal of Transnational Law* 635.

<sup>111</sup> See e.g. Albin Eser, 'Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press 2011) 123–6 (the relationship between the role of actors and the search for truth); Cryer and others (n 5) 429–34; Karel de Meester and others, 'Investigation, Coercive Measures, Arrest, and Surrender' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 205–10 (with regard to the pre-trial phase).

<sup>112</sup> Cryer and others (n 15) 425.

<sup>113</sup> *ibid* 424–5 (noting that the ICC with a broad geographical jurisdiction may have a greater need for mixed influences).

<sup>114</sup> See e.g. Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991); Roelof Haveman, Olga Kavran and Julian Nicholls, *Supranational Criminal Law: A System Sui Generis* (Intersentia Uitgevers NV 2003); Cassese, *Cassese's International Criminal Law* (n 5) 335–6; Langer (n 280). For detailed discussions regarding the roles of the actors in the European context, see Mario Chiavario, 'Private Parties: The Rights of the

In general, criminal proceedings in the adversarial system are often described as a contest between two active parties before a passive fact-finder, either professional judges or a jury. Therefore, the role of defence counsels is expected to be more vigorous. As noted by Gallant, '[d]efense investigation plays a more important role in criminal justice in the common law world [than in the civil law world].'<sup>115</sup> By contrast, in the inquisitorial system, criminal procedure is seen as an official investigation, conducted by officials of the state. Note that, some civil law lawyers dislike the term 'inquisitorial' as it seems to refer to the inquisitions held by the Catholic Church in the European Late Middle Ages.<sup>116</sup> It is the judge, or sometimes a panel of judges, who is the main actor of criminal trials. This type of criminal procedure sometimes is also referred as 'judge-led' or 'judge-centric'.<sup>117</sup>

As noted by Boas, the greatest disparity between the two models is illustrated during the pre-trial phase.<sup>118</sup> In civil law jurisdictions, the pre-trial investigation will be conducted by

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Defendant and the Victim' in Mireille Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002); Antoinette Perrodet, 'The Public Prosecutor' in Mireille Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002); Denis Salas, 'The Role of the Judge' in Mireille Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002).

<sup>115</sup> Kenneth S Gallant, 'The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court' [2000] *The International Lawyer* 21, 37.

<sup>116</sup> See, Michael Bohlander, 'Basic Concepts of German Criminal Procedure: An Introduction' (2011) 1 *Durham Law Review* 1, 1. Note that the term 'inquisitorial' is perhaps historically compromised. It refers to a historic proceeding by the church that is known to be unlawful in itself and had only political ideological aims. See e.g. GEP Brouwer, 'Inquisitorial and Adversary Procedures - A Comparative Analysis' (1981) 55 *Australian Law Journal*, 207, 208 referring to the Spanish inquisition); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press 1988) 93–94 (remarking that 'the label "inquisitorial" evokes images of the auto-da-fe and the Iron Maiden, the Pit and the Pendulum').

<sup>117</sup> Craig R Callen and others, 'Cognitive Strategies and Models of Fact-Finding' [2008] *Crime, Procedure and Evidence in a Comparative and International Context* 165, 165; Damaška, *The Faces of Justice and State Authority* (n 373) 109, 154.

<sup>118</sup> Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY' (n 39)

an ‘impartial’ official, either an investigation judge, or a prosecutor. Unlike the prosecution which represents the executive branch in the common law countries, the prosecutors in civil law jurisdictions usually enjoy ‘quasi-judiciary’ status. In addition, even the educational training is very different between the two systems.<sup>119</sup> The roles of the judicial are considered to be neutral, and their missions are to find out the truth. The presumption is that the investigating judge or prosecutor will collect both inculpatory and exculpatory materials,<sup>120</sup> although empirical studies suggest that this perhaps only exists at the normative level.<sup>121</sup> The idea behind the inquisitorial system is ‘continuity’, as ‘policy-implementing’. After the investigating judge or prosecutor finished the investigation, all the information collected will be placed in a written case file, the ‘dossier’.<sup>122</sup> This dossier will then be passed on to the presiding judge. At trial, the roles for the trial prosecutor and defence counsel are limited, as they are only secondary to the judges. There is only ‘one-case’ and the judge will conduct the proceedings by asking the court witnesses questions and looking into the evidence. The prosecutor and

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<sup>119</sup> Fletcher, ‘The Influence of the Common Law and Civil Law Traditions on International Criminal Law’ (n 267) 104.

<sup>120</sup> Keith A Findley, ‘Adversarial Inquisitions: Rethinking the Search for the Truth’ (2011) 56 *New York Law School Law Review* 12 (describing a German prosecutor as a ‘second judge’ who functions in a ‘neutral, detached, and objective’ role). Cf. In France, the Prosecutor (Procurer), is considered to be part of the judiciary (magistrat). See e.g. Jacqueline S Hodgson, ‘The French Prosecutor in Question’ (2010) 67 *Washington and Lee Law Review* 1361; Lerner (n 269) 802; Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Bloomsbury Publishing 2005).

<sup>121</sup> E.g. German Criminal Procedure Code (*Strafprozessordnung*): Section 160 (2): The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that such evidence is taken the loss of which is to be feared. See further Christine Van den Wyngaert, *Criminal Procedures in the European System* (Butterworths 1993) 141; de Meester and others (n 370) 208–10 (role of the prosecutor at the pre-trial stage).

<sup>122</sup> Pakes (n 271) 88, 94–5; Lerner (n 269) 805.

defence counsel can suggest additional witnesses or lines of questioning to the judges,<sup>123</sup> but active performances are discouraged.

By contrast, the adversarial model is considered as ‘party-driven’ or ‘party-centric’ because the main actors in criminal proceedings are the parties—the prosecutor and defence. It is also referred as the ‘two-case’ approach. The stark contrast is evident during the investigation phase, the police or prosecutor (executive branch) are responsible for conducting the investigation.<sup>124</sup> The roles of the judiciary are limited, unless involving matters which require judicial approval such as warrant or detention. The parties will decide how to proceed the case, for example, plea bargains are a typical feature of common law systems. During the trial phase, the parties also have the liberty to present the evidence and to call witnesses.<sup>125</sup> Both the prosecutor and the defence counsel are ‘zealous advocates’, representing the State and the accused respectively. Meanwhile the judges usually take the approach of a ‘referee’ or ‘passive umpire’, whose roles are to control the proceedings such as regulating the time and ruling on the

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<sup>123</sup> Valérie Dervieux, ‘The French System’ in Mireille Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002) 253,258; Leonardo J Raznovich, ‘A Comparative Review of the Socio-Legal Implication of Burden of Proof and Presumptions to Deal with Factual Uncertainty’ (2008) 32 *American Journal of Trial Advocacy* 57, 58.

<sup>124</sup> In England, it is the police who are responsible for the investigation, then pass to the Crown Prosecution Service decide whether to prosecute or not. In the US, it is the executive branch—police, prosecutors, investigating agents— there is no concept of an investigating judge, as is found in a civil system.

<sup>125</sup> John R Spencer, ‘Evidence’ in Mireille Delmas-Marty and John R Spencer, John R. (eds), *European Criminal Procedures* (Cambridge University Press 2002) 627.

admissibility of the evidence. If the case is tried by lay judges, or a jury, there will be a professional judge or legal clerk to give the jury instructions.<sup>126</sup>

Although the prosecutor in the adversarial system is also seen as an administrator of justice and an officer of the court, his or her role is not expected to be neutral. Unlike in the civil law system, the prosecution case should only consist of evidence that will be used against the accused, notwithstanding its duty to disclose exculpatory material to the accused.<sup>127</sup> The theory is that, two parties present their view of the events in question by substantiating their claims with evidence and, subsequently, the fact finder is enabled to make a determination on the basis of the presented evidence.<sup>128</sup>

In the context of the international Tribunals, as observed by Christensen, the role of the prosecutor in the *ad hoc* Tribunals is a deviation from the original adversarial tradition.<sup>129</sup> The international prosecutor is far more powerful than the domestic one and possibly ‘not only has the authority, but he or she has the responsibility to decapitate an army, a negotiating team, or a civil authority even before the offense is proved.’<sup>130</sup> Johnson noted that the experience of the ICTY shows that ‘the prosecutor’s work goes largely unchecked by the judges.’<sup>131</sup> ICC sceptics are often concerned about

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<sup>126</sup> Salas (n 373) 500 (describing England).

<sup>127</sup> See Chapters V and VI.

<sup>128</sup> David A Harris, ‘The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants’ [1992] *Journal of Criminal Law and Criminology* 469, 499–500.

<sup>129</sup> Christensen (n 278) 407.

<sup>130</sup> Alfred P Rubin, ‘An International Criminal Tribunal For Former Yugoslavia’ (1994) 6 *Pace International Law Review* 7, 9.

<sup>131</sup> Johnson (n 282) 176.



this fact, and pointed out that lessons are not always learned from the past experiences.<sup>132</sup>

Common law lawyers are more concerned about the role of the prosecutor in the ICC.

The imbalance between the prosecutor and defence in the ICC perhaps is even more remarkable, and some see this as ‘an injustice carried over from the ICTY.’<sup>133</sup>

Disfavouring the defence, Gallant remarked that ‘the ICC Statute omits provisions guaranteeing sufficient funding for fair defence investigation of the facts of a case.

Additionally, the ICC Statute omits a clear determination of privileges and immunities of defence counsel and staff to investigate the facts of cases in the states in which evidence is or may be located or in which the alleged crimes occurred.’<sup>134</sup>

As to the role of the defence, its perilous position is a direct product of the clash between civil and common law. ‘Investigative funding is tied to the continuing discussion regarding the relationship between civil and common-law criminal procedure in the ICC.’<sup>135</sup> Because the ‘relationship’ has not been defined, the defence’s role in assuring justice is left in jeopardy.<sup>136</sup>

#### **IV. The Search for Truth?**

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<sup>132</sup> E.g. Rubin (n 389) 9 (‘The only effect that this arrangement seems likely to have would involve captives or the leaders of a defeated enemy. This should not be surprising, given that the Nuremberg model was in fact a victors’ tribunal’).

<sup>133</sup> E.g. Christensen (n 278) 417.

<sup>134</sup> Gallant (n 374) 21.

<sup>135</sup> *ibid* 37.

<sup>136</sup> Groulx (n 223).

Both common and civil law system seek for the truth, albeit different ways.

Commentators have observed that both systems aim at finding the truth, the only variation is the method chosen.<sup>137</sup> However, the weight and extent of this truth-seeking task can have a stark contrast between these two systems, especially when it might be conflicting with fairness. For common law lawyers, ‘fair play’ is equally, or perhaps even more, important than seeking the so-called truth, while for civil lawyers searching for the truth is the absolute priority.<sup>138</sup> It is also noted that the truth they seek in each system sometimes is not necessarily the same thing.<sup>139</sup> This is reflected, for example, in the two system’s approach with regard to the admission of evidence, where criminal procedure rules in civil law jurisdictions usually contain very little technical rules of evidence.<sup>140</sup>

Damaška, for example, has suggested that the common law system focuses more on the need for dispute resolution than truth seeking.<sup>141</sup> According to Damaška, there are two models: conflict solving and policy implementing. The common law system represents the former, which is also often referred to as the ‘contest’ model, while the civil law

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<sup>137</sup> E.g. Cryer and others (n 5) 424; Ohlin (n 151) 61, fn 86 (‘However, this does not entail the conclusion that a wholly party-driven evidentiary system is not designed with truth-seeking as its procedural goal; rather, the operative distinction is the chosen procedural method for achieving the truth’). See also Thomas Weigend, ‘Should We Search for the Truth, and Who Should Do It’ (2010) 36 *North Carolina Journal of International Law and Commercial Regulation* 389, 389 (criminal procedure systems all have the same goal of truth finding).

<sup>138</sup> See e.g. Weigend (n 396).

<sup>139</sup> Zappalà, *Human Rights in International Criminal Proceedings* (n 93) 16; Pocar and Carter (n 340) 20. They noted the difference between the ‘objective truth’ and ‘procedural truth’, the latter emphasises on the just settlement of disputes.

<sup>140</sup> Buisman, Bouazdi and Costi (n 303) 28–34.

<sup>141</sup> Damaška, *The Faces of Justice and State Authority* (n 373) 3.

system is equivalent to the latter.<sup>142</sup> He has observed that the two systems are not even-handedly committed to the pursuit of truth.<sup>143</sup> Although the description of a truth focus in civil law systems compared with a dispute resolution focus in common law systems do not do justice to the complexity of the systems today, the two themes are descriptive and explanatory of some underlying principles of the procedures.

Regarding the extent of truth-seeking, while it is generally accepted by both sides that procedural truth is the best that we could achieve, the common observation is that the adversarial model puts more emphasis on ensuring fairness for the accused in contrast with the non-adversarial attitude of ‘be as close as possible to the absolute truth’.<sup>144</sup> For example, common law systems have more complicated rules for admission of evidence, illegally obtained evidence will be excluded, even if it would assist the truth-determining process.<sup>145</sup> In the civil law system, despite recognising the fact that it is hardly possible to reach the absolute truth, they must aim at ‘striving for the best possible truth’.<sup>146</sup> Civil law lawyers would argue that truth is intertwined with justice;

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<sup>142</sup> Damaška, *The Faces of Justice and State Authority* (n 373); Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure’ (n 265) 581.

<sup>143</sup> Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure’ (n 265) 513.

<sup>144</sup> Eser (n 370) 122. See also Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure’ (n 265) (describing civil law system as ‘more committed to the search for truth’ than an adversary system); Mirjan Damaška, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’ (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 365, 379–80 (noting a more recent decrease in emphasis on truth with an increase in procedural fairness); Thomas Weigend, ‘Is the Criminal Process About Truth? A German Perspective’ (2003) 26 *Harvard Journal of Law & Public Policy* 157, 161–2 (describing the tradition emphasis on truth and noting changes due to procedural rights of the accused).

<sup>145</sup> Richard E Myers, ‘Adversarial Counsel in an Inquisitorial System’ (2011) 37 *NCJ Int’l L. & Com. Reg.* 411, 413–6 (truth-deflecting’ practices in adv proceedings); Jacqueline S Hodgson, ‘Safeguarding Suspects’ Rights in Europe: A Comparative Perspective’ (2011) 14 *New Criminal Law Review* 611, 620.

<sup>146</sup> Eser (n 370) 122.

there cannot be just judgement without making an honest effort to seek the truth.<sup>147</sup>

Many civil law scholars often dislike the adversarial system tendency to focus on the ‘just settlement of dispute’, in particular, the willingness to ‘sacrifice’ the truth to other competing interests.

By contrast, the common law way of thinking regards justice almost as interchangeable with fairness.<sup>148</sup> The notion of fair play is deeply rooted in the common law’s society and philosophy.<sup>149</sup> Not only must the outcome be just, but the process must also be open and fair. This is also the reason why, in the Anglo-American literature, criminal trials are often referred as a ‘sporting contest’.<sup>150</sup> The courts in both the UK and the U.S. often emphasise that justice must also be *seen* to be done.<sup>151</sup> It has been described that the common law system is more fairness oriented and the dominant goal is to

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<sup>147</sup> E.g. *ibid* (‘Despite all the skepticism, truth and justice are “intimately intertwined” to such a degree that a judgment can be accepted as “just” only if it is at least based on an honest effort to find the truth’); Weigend (n 403) 161–2 (arguing that the truth is the absolute priority in criminal trials). Similarly see Heike Jung, ‘Nothing but the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure’ in Robin Antony Duff and others (eds), *The Trial on Trial: Volume One—The Truth and Due Process* (Hart Publishing 2004); Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure’ (n 265) 580 (describing civil law system as “more committed to the search for truth than an adversary system”); Damaška, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’ (n 403) 369–70 (noting a more recent decrease in emphasis on truth with an increase in procedural fairness).

<sup>148</sup> John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001).

<sup>149</sup> For the concept of fairness in common law countries, see George P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* (Oxford University Press 2007) 134–7 (noting that it is difficult to translate ‘fair’ to other languages since the notion does not really exist in civil law jurisdictions).

<sup>150</sup> See e.g. William J Brennan Jr, ‘The Criminal Prosecution: Sporting Event or Quest for Truth—A Progress Report’ (1990) 68 *Washington University Law Quarterly* 1.

<sup>151</sup> The original quote can be traced back to 1924: ‘*justice should not only be done, but should manifestly and undoubtedly be seen to be done.*’ - Lord Hewart, *R v Sussex ex parte McCarthy* [1924] 1 KB 256; [1923] All ER Rep 233.

resolve the conflict between the two parties: the prosecution and the defence.<sup>152</sup> In general, common law systems are seen as giving more prominence to the rights of the accused, which, often in the eyes of civil lawyers, may compromise the search for absolute truth.<sup>153</sup>

Consequently, the civil law systems generally reflects the emphasis on truth finding with fewer restrictive evidence rules than one could observe in the common law system, which involves more elaborate rules for the admission of evidence.<sup>154</sup> The theory is that if determining the absolute truth is a priority, it is preferable to have a system in which as much evidence as possible is admissible so that all relevant factors are known.

However, if resolving the dispute is the dominant goal, then establishing ‘the rules of the game’ that regulate what evidence is admissible helps to control the proceeding on the dispute. Possibly, common law commentators might not agree with this. Common law practitioners also criticise the inquisitorial approach towards finding the truth. For example, Findley contends that ‘the inquisition’s review process thus conflicts with the way we search for truth in a scientific context.’<sup>155</sup> Judge Murphy and Baddour argue that the ‘free proof’ approach, which came from civil law jurisdictions, is not only ‘far

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<sup>152</sup> Anglo-American writers, by contrast, tend to emphasize the conflict-resolving potential of the criminal process. See e.g. John D Jackson, ‘Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry’ in RA Duff and others (eds), *The Trial on Trial: Volume 1: Truth and Due Process* (Bloomsbury Publishing 2004) 124–5; Fairlie (n 330) 248.

<sup>153</sup> Eser (n 370) 120, 132 at fn 10. Eser criticised Fairlie (at 295) ‘seems only worried about the rights of the accused.’ Fairlie (n 330).

<sup>154</sup> Although some have argued, this is better for finding the truth: see e.g. Whiting (n 325) 86.

<sup>155</sup> Findley (n 379) 933. See also Chrisje Brants, RC Huff and M Killias, ‘The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction’ [2008] *Wrongful conviction: International perspectives on miscarriages of justice* 157, 172, 174.

from aiding in the search for the truth’, but also ‘wastes time, obscures the real issues and distracts the focus of the judges from the evidence that really matters.’<sup>156</sup>

In sum, the subtle difference between the goals pursued by different legal traditions is one of the causes for the procedural problems arising in international criminal tribunals. As pointed out by Pocar and Carter, for international criminal tribunals, in particular the ICC, it is not clear which goals – the truth or dispute settlement – should have the priority.<sup>157</sup>

## **V. The ‘Inquisitorial Drift’<sup>158</sup>**

### **A. More Efficient and Effective?**

A related issue is the efficiency and the effectiveness of international criminal trials. After a few years of the *ad hoc* tribunals operation, criticism arises. It mostly concerns three points: expense, ineffectiveness, and inefficiency.<sup>159</sup> Critiques often point to the party centric aspect of adversarial systems as a defect for expeditious trial and impediment for the search for the truth, and have advocated that the inquisitorial system would be better in achieving this aim.<sup>160</sup> This is because civil law system is generally

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<sup>156</sup> Judge Peter Murphy and Baddour (n 297) 379.

<sup>157</sup> Pocar and Carter (n 340) 22–3.

<sup>158</sup> Vogler (n 276) 106.

<sup>159</sup> See e.g. Ralph Zacklin, ‘The Failings of Ad Hoc International Tribunals’ (2004) 2 J. Int’l Crim. Just. 541; Higgins (n 237).

<sup>160</sup> E.g. Eser (n 370) (suggesting that adopting civil law model could enhance the efficiency of international trials). Similarly, Combs (n 283) 312; Tochilovsky, ‘International Criminal Justice: “Strangers in the Foreign System”’ (n 260) 342.

perceived as placing more importance on the truth-seeking and the efficiency of the trial.<sup>161</sup> In addition, commentators also argued that a less two-party-centred process also allows the crime victims a more pronounced role. Additionally, increased judicial control may enhance the efficiency of the proceedings and the acceptance of wide prosecutorial powers.<sup>162</sup> Accordingly, many have called for moving towards a more inquisitorial approach.<sup>163</sup>

Some have claimed that the adversarial settings, particularly the aspect of letting the parties determine the presentation of evidence, makes the proceedings lengthy and inefficient.<sup>164</sup> Nevertheless, this is not necessarily true, and it should be noted that there are many factors that would affect the length and speed of the trial proceedings, in particular the complexity and nature of the crimes. In fact, comparative studies of European procedures have suggested otherwise: in general, criminal proceedings are far more expeditious in England, a classic example of an adversarial system, than in Continental Europe.<sup>165</sup> The jurisprudence of the European Court of Human Rights shows that most civil law-based Continental European countries, in particular France,

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<sup>161</sup> Frase (n 265) 627.

<sup>162</sup> Cryer and others (n 15) 425.

<sup>163</sup> Others, while noting the confusion and delay of trials such as that of Milošević, call for an even more radical strengthening of inquisitorial features. E.g. Vladimir Tochilovsky, 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience' (2002) 10 *European Journal of Crime Criminal Law and Criminal Justice* 268; Gregory A McClelland, 'A Non-Adversary Approach to International Criminal Tribunals' (2002) 26 *Suffolk Transnational Law Review* 1; Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy' (n 162); Geoffrey Nice and Phillipe Vallieres-Roland, 'Procedural Innovations in War Crimes Trials' (2005) 3 *Journal of International Criminal Justice* 354.

<sup>164</sup> Pocar and Carter (n 340) 22.

<sup>165</sup> Spencer (n 366) 33.

Germany, Italy, have been brought against the European Court of Human Rights for violating Article 6(1) ‘a reasonable time’, but not the common-law based England.<sup>166</sup>

Admittedly, there are plenty of other factors which might affect the efficiency of the proceedings, for example, many countries of the Continents’ criminal justice system are overloaded, and people’s expectations may differ.<sup>167</sup> But at least empirical evidence suggests that notably serious and complex cases run faster in England, and at the Appeals stage there are much shorter delays.<sup>168</sup>

Regardless, scholars have continued claiming that by empowering the judges to manage the trial, in particular, their predominant control over the admission of evidence would enhance the efficiency of trials.<sup>169</sup> In this regard, both the *ad hoc* Tribunals have been criticised for their inefficacy due to their dominant adversarial structure. In particular, the experience of the Milošević trial has provided a perfect example of how detrimental it could be if parties are left to lead the proceedings themselves.<sup>170</sup> Therefore, particularly subsequent to the Milošević case, the suitability of the party-driven model for the international criminal tribunals has often been questioned.<sup>171</sup> In an attempt to

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<sup>166</sup> *ibid.* Spencer pointed out that although ‘various deficiencies in English criminal procedure have led to embarrassing condemnations from the European Court of Human Rights, until recently none of them have been for failing to do criminal justice within ‘a reasonable time’ as required by Article 6(1) of the Convention.’ By contrast, ‘the experience of many continental systems, including France, Germany and Italy, all of which have been condemned at least once for this – and in the case of Italy, repeatedly. The delays involved in some of these cases seem, to common lawyers, almost fantastic.’

<sup>167</sup> *ibid.* 34.

<sup>168</sup> *ibid.* 33.

<sup>169</sup> E.g. Pocar and Carter (n 340) 22.

<sup>170</sup> Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (n 328).

<sup>171</sup> E.g. Klamberg (n 54); Mundis, ‘From “common Law” towards “civil Law”’ (n 70) 368.



shorten trials and expedite proceedings, according to a recent report made by Langer and Doherty, the ICTY implemented the so-called managerial reforms, adopting measures such as, allowing judges to actively manage the pre-trial and trial phases, permitting more written witness statements in lieu of live testimony, granting trial chambers the authority to permit or reject applications for interlocutory appeals, and limiting, at the trial stage, the number of sites and incidents under review.<sup>172</sup> However, the outcome was not what the ICTY has hoped for: the ICTY actually lengthened the average duration of proceedings.<sup>173</sup> In addition, the analysis shows that the achieved reductions in the duration of trials were not due to procedural reforms, but rather resulted from increases in court capacity and plea-bargaining.<sup>174</sup> Hence, the report showed that ‘the procedural reforms that aimed to shorten procedure had the opposite effect: lengthening both pre-trial and trial.’<sup>175</sup>

The procedure rules of the ICC reflect a heavier civil law influence than the *ad hoc* tribunals.<sup>176</sup> One of the reasons is to avoid the lengthy experience of the *ad hoc* Tribunals. A notable structural change is the introduction of the Pre-Trial Chamber, whose purpose is to ensure better case management.<sup>177</sup> Nevertheless, as the practice of

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<sup>172</sup> Maximo Langer and Joseph W Doherty, ‘Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms’ (2011) 36 *Yale Journal of International Law* 241, 251, 253; Heidi L Hansberry, ‘Too Much of a Good Thing in Lubanga and Haradinaj: The Danger of Expediency in International Criminal Trials’ (2010) 9 *Nw. UJ Int’l Hum. Rts.* 357.

<sup>173</sup> Langer and Doherty (n 431) 252.

<sup>174</sup> *ibid* 259.

<sup>175</sup> *ibid* 243.

<sup>176</sup> Boas, Bischoff and Reid, *International Criminal Law Practitioner Library* (n 278) 15.

<sup>177</sup> See Calvo-Goller (n 313) 3; Håkan Friman, ‘Trial Procedures’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 923; Cryer and others (n 5)

the ICC has shown, the Pre-Trial Chamber is less efficient than it was hoped for, and disclosure issues have caused the *Lubanga* Trial to almost collapse.<sup>178</sup>

### **B. Dossier: The Cure?**

As mentioned, commentators have propounded that the civil law approach of dossier will work better for the international criminal tribunals.<sup>179</sup> However, it should be noted that the dossier approach is not a magic wand: the inherent problems of the international disclosure practice will not magically disappear by creating a *dossier*, and it is still uncertain that the prosecutors would put all the essential information inside the file. If the prosecutors would tend to exclude important material in order to secure convictions and ‘end impunity’, it would not matter whether the *dossier* approach is being adopted. In addition, from a practical aspect, switching to the dossier approach would have required a very complicated Statute amending process, which is considered to be highly unlikely.<sup>180</sup>

There are two crucial points which are often omitted when claiming the dossier is a better approach. Firstly, it should be highlighted that the timing of disclosure is different. Rarely mentioned by scholars is the fact that, although the defence will receive an entire dossier, it will be at a much later stage, that is, when the investigation

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(noting the functions of the Pre-Trial Chamber, which is inspired by civil law systems, can ensure the efficiency of the proceedings while protect the rights of the accused).

<sup>178</sup> Will be examined later in Chapter VII.

<sup>179</sup> Tochilovsky, ‘International Criminal Justice: “Strangers in the Foreign System”’ (n 1) 342; Heinsch (n 2) 489 (considering that dossier approach is easier to achieve than disclosure).

<sup>180</sup> Scheffer (n 240) 156 (stating the difficulties in amending Rome Statute).

phase is already closed.<sup>181</sup> By contrast, the common law disclosure rules have a certain time frame, and are mostly completed before the trial starts, accompanied by a continual obligation to disclose.

Secondly, the dossier works better for the inquisitorial judges, not the defence. As the judges take primary control in the proceedings and are expected to be well-informed of the case in civil law legal systems, a *dossier* is essential for judges to fulfil their role.<sup>182</sup> This is also associated with their function to find the truth. For such judicial questioning to be effective, judges must have substantial knowledge about the case. For this purpose, a collection of all relevant documents in the form of a *dossier* is prepared by all authorities involved in the pre-trial investigation. The completed *dossier* is then submitted to the presiding judge, among others.<sup>183</sup> By contrast, the disclosure rules employed in the common law system is to assist the defence to prepare its defence and the judges are supposed to have no knowledge about the case prior to trial.

In this regard, despite the dossier approach seemingly being more convenient and workable for the accused, it would not necessarily place the defence in a better position than in the common law disclosure system. The reason is obvious to the common law lawyers: it could easily create a bias for the judges, who are receiving the material

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<sup>181</sup> Damaška, *The Faces of Justice and State Authority* (n 373) 132. He noted that a fair comparison should be observed in a larger context: 'the Continental defendants acquires an unlimited right to 'discovery' from the prosecution only *after* pretrial investigators have had ample opportunity to obtain information from him and to convert this info into technical evidence; since the cat is already out of the bag, the prosecutor can well afford to give the defence a look.' At fn 64.

<sup>182</sup> Combs (n 264) 324.

<sup>183</sup> *ibid.*

solely prepared by the prosecution.<sup>184</sup> This is even more so in the international criminal tribunals, as the international settings are already heavily biased against the accused. After reviewing the dossier, the Judges are more likely to be inclined to side with the prosecutors. Accordingly, it is submitted that the proposed dossier approach is not necessary even on a principle level as it would not facilitate the process of finding the truth, and might undercut the due process rights of the defence.

## **VI. Concluding Remarks**

The Chapter established that the procedural and evidential rules in the international criminal tribunals, in essence, are an ‘amalgamation of the civil and common law systems.’<sup>185</sup> The illustrations of the procedural models exhibit that the fundamental differences between them are hard to solve, and explain the hardness in finding consensus on many core issues of procedure.<sup>186</sup> This battle between the different procedural models, inevitably, will cause some damage, and the defence, as shown, is hit the most.

The difference between each tribunal is the degree of mixture, with the ICC being infused with more civil law features, as it seeks to represent a wider consensus of states.

Scholars have recognised this combination to be a ‘precarious straddling’ of common

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<sup>184</sup> Fletcher and Sheppard (n 304) 547.

<sup>185</sup> Sara Stapleton, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation’ (1998) 31 NYUJ Int’l L. & Pol. 535, 575.

<sup>186</sup> Håkan Friman, ‘Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court’ (2003) 2 The Law & Practice of International Courts and Tribunals 373, 373–7.

and civil legal systems.<sup>187</sup> This blending approach, in combination with the contextual argument, has put the defence in an awkward position, as specific procedural protections, which normally would be warranted in domestic criminal trials, were dropped during the mix. However, instead of addressing the issues of the departures of domestic criminal law, a *sui generis* system view was developed for dealing with the special international context, and relatively weak arguments are put forward in order to justify a lower standard of fairness.

With regard to the disclosure system, the most contentious issue is whether the ICC should switch to the dossier approach, as employed by most civil law countries.

However, it is submitted that the dossier would not solve the current problems, and perhaps even further diminish the situation for the defence. Since the prosecution's disclosure obligation is based on good faith and proficiency, it would not make much difference if the prosecution wishes to hide relevant evidence or would simply be incapable of performing its duty properly.

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<sup>187</sup> E.g. Vincent M Creta, 'The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia' (1997) 20 *Hous. J. Int'l L.* 381, 415.

## CHAPTER V

# THE PROSECUTION'S DUTY OF DISCLOSURE IN COMMON LAW JURISDICTIONS I — UNITED STATES OF AMERICA

### I. Introduction

The purpose of these two chapters is to provide a comparative view of the law and practice of the prosecution's duty of disclosure in domestic jurisdictions. Only two common law jurisdictions, the United States of America ('United States' or 'U.S.') and England and Wales ('England') are selected. The reason for this approach is that civil law jurisdictions do not have disclosure rules; in most civil law countries, the prosecutors will prepare a dossier to the judges and the defence is entitled to receive a copy. However, it is submitted that the dossier approach is not necessarily a better approach for the international criminal tribunals, even though some might have claimed so.<sup>1</sup> More realistically, the international criminal justice system is unlikely to amend their rules to a dossier practice.<sup>2</sup> Accordingly, dossier approach would not be the focus of this thesis, although references will be made when necessary.

The choice of the United States and the English model is evident for a comparative

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<sup>1</sup> E.g. Tochilovsky, 'International Criminal Justice: "Strangers in the Foreign System"' (n 260); Heinsch (n 261).

<sup>2</sup> Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2014).

approach of the disclosure rules in the international criminal tribunals: the procedural rules since Nuremberg are based on an U.S. model,<sup>3</sup> and in the RPEs of *the ad hoc* tribunals, at least with regard to disclosure, the relevant disclosure Rules are almost identical to the United States Federal Rules of Criminal Procedure, Rule 16.<sup>4</sup> The judges of the ICTY and the ICTR, at least during the early days of the Tribunals, have made extensive references to the U.S. Federal Criminal Procedure Rules.<sup>5</sup> Accordingly, the U.S. federal disclosure system serves as a legitimate and necessary choice for this comparative purpose. As to England, it is the origin of common law and many concepts of the United States law originated from the English common law, albeit later developments lead to distinctive differences in the two systems. Similarly, some ICTY judges have made reference to the English jurisprudence when guidance is needed for interpreting disclosure rules.<sup>6</sup>

Through a comparative approach, it will be shown which sets of problems are identical in each adversarial jurisdictions, or if they are fundamental to criminal justice systems. By doing so, this Chapter will be able to identify and distinguish the issues from those

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<sup>3</sup> William Schabas and Gideon Boas, *International Criminal Law: Developments in the Case Law of the ICTY*, vol 6 (Martinus Nijhoff Publishers 2003) 3–4; Morris and Scharf (n 333) 177; M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996) 863; Jackson and Summers (n 279) 122; Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press 2011) 89.

<sup>4</sup> *Prosecutor v Tihomir Blaškić*, No. IT-95-14-T, Decision on the Production of Discovery Materials (27 Jan 1997) at paras. 35-38.

<sup>5</sup> See, e.g. *Prosecutor v Delalić et al*, No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence (26 September 1996) at para. 7 (citing the U.S. Supreme Court's jurisprudence, such as *United States v Jackson*, 850 F. Supp. 1481, 1503).

<sup>6</sup> See, e.g. *Prosecutor v Delalić et al*, No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence (26 September 1996) at para. 7 (citing *R v Keane*).

of the international context or related to the inherent problems of public international law, such as state cooperation. After an analysis of the two common law systems, it will help to clarify whether the approach taken by the international criminal tribunals are necessary, or if there are alternatives as provided in the domestic practice.

## **II. Aims and Purposes of Criminal Discovery<sup>7</sup>**

### **A. Assist the Adjudication of Guilt**

The primary goal in all criminal process is the same: to convict the guilty and acquit the innocent.<sup>8</sup> Sometimes this aim is referred to as the pursuit of truth,<sup>9</sup> although the so-called ‘truth’ cannot be equated with the truth in the general sense.<sup>10</sup> Note that, in the concept of American criminal procedure, ‘truth-finding’ is referred to the adjudication of the defendant’s guilt, or to ascertain facts.<sup>11</sup> The context of truth varies between the Anglo-American tradition, which focuses more on the ‘procedural truth’ that arises

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<sup>7</sup> In both the U.S. and the UK, the terms ‘discovery’ and ‘disclosure’ are commonly used to describe the process of pre-trial evidence collection and production.

<sup>8</sup> See e.g., *United States v. Nobles*, 422 U.S. 225, 238-239, 95 S. Ct. 2160, 45 L.Ed.2d 141 (1975) at page 422. ‘The dual aim of our criminal justice system is ‘that guilt shall not escape or innocence suffer’, *Berger v. United States*, 295 U. S. 78, 295 U. S. 88 (1935). To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made. See *United States v. Nixon*, 418 U. S. 683, 418 U. S. 709 (1974); *Williams v. Florida*, 399 U. S. 78, 399 U. S. 82 (1970); *Elkins v. United States*, 364 U. S. 206, 364 U. S. 234 (1960) (Frankfurter, J., dissenting). See also, Hannah Arendt, *Eichmann in Jerusalem* (Penguin 1963), 5. Steven Kay and Bert Swart, ‘The Role of the Defence’ in Antonio Cassese and others (eds), *The Rome statute of the International Criminal Court: a commentary* (Oxford University Press Oxford 2002) 1421–2.

<sup>9</sup> William J Brennan Jr, ‘The Criminal Prosecution: Sporting Event or Quest for Truth’ [1963] Washington University Law Quarterly 279. For an update, see Brennan Jr (n 409).

<sup>10</sup> See the discussions in Chapter IV.

<sup>11</sup> ‘Pre-Trial Disclosure in Criminal Cases Comment’ (1951) 60 Yale Law Journal 626. See also Joshua Dressler and Alan C Michaels, *Understanding Criminal Procedure: Adjudication*, vol 2 (LexisNexis 2006) Chapter 2.



from the tournament between the parties, and Continental Europe, which is more devoted to the search for ‘substantial truth’.<sup>12</sup>

In American literature, despite the common use of metaphors such as ‘contest’, ‘winning’, ‘gamesmanship’ to describe criminal trials, it is generally accepted that criminal prosecution should be a ‘quest for truth’ rather than a ‘sporting event’ between the prosecution and the defence.<sup>13</sup> This truth-seeking function will, arguably, be enhanced by a proper criminal discovery system.<sup>14</sup> Advance disclosure, which is allowing a criminal defendant to find out information relevant to the prosecution at an early stage,<sup>15</sup> would minimise the risk of convicting an innocent person.

### **B. Avoid trial at Surprise**

Furthermore, the truth is more likely to be revealed at trial if the defence has been given an early opportunity to investigate the evidence and prepare the case.<sup>16</sup> Surprise evidence may produce fine drama, but it leads to poor justice. The old tactic ‘trial by

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<sup>12</sup> Weigend (n 403) 168; Elisabetta Grande, ‘Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth’ in John Jackson, Máximo Langer and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* (Bloomsbury Publishing 2008) 145.

<sup>13</sup> See Brennan Jr (n 455); Bennett L Gershman, ‘Litigating Brady v. Maryland: Games Prosecutors Play’ (2007) 57 Case Western Reserve Law Review 531, 538.

<sup>14</sup> See Brennan Jr, ‘Criminal Prosecution’ (n 8), arguing that the rules of discovery would serve the basic function of the trial- determination of truth. Although Brennan’s argument is supported widely, some have argued against Justice Brennan’s proposition, and contended that broad discovery will diminish fairness in criminal trials. For example, see Edward SG Dennis Jr, ‘The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts’ (1990) 68 Wash. ULQ 63.

<sup>15</sup> Note that whether this obligation should be extended to pre-plea is still controversial. Although, the Supreme Court has ruled that the Constitution did not require discovery to apply before a guilty plea. See e.g. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

<sup>16</sup> Brennan Jr (n 409) 2.

ambush' is not accepted in the modern criminal trials.<sup>17</sup> As noted by Justice Douglas, 'modern instruments of discovery serves a useful purpose.... They together with pre-trial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'<sup>18</sup>

Although at first glance, the requirement to disclose the parties' own case seems to be contrary to the original intention of adversarial traditions, when 'ambush' used to be a legitimate strategy at trial. However, attacking the other party by surprise might not be the best way to achieve the objectives of criminal trials, and the victory of an individual advocate victory is not one of them.<sup>19</sup> In this regard, the discovery process will be able to assist the determination of truth.

### **C. Ensure Fairness – Due Process**

A related task of criminal discovery is to ensure the integrity and fairness of the trial and reach a more reliable outcome in criminal cases. The constitutional right to discovery, now commonly known as the '*Brady Rule*',<sup>20</sup> emerges from the concept of due process, which requires that the procedures by which laws are applied must be even

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<sup>17</sup> Roger J Traynor, 'Ground Lost and Found in Criminal Discovery' (1964) 39 *NyUL Rev.* 228, 249. ('The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.')

<sup>18</sup> *US v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

<sup>19</sup> See, e.g. *United States v. Gallo*, 654 F. Supp. 463 (E.D.N.Y. 1987), 477. Linda S Eads, 'Adjudication by Ambush: Federal Prosecutors' Use of Non-scientific Experts in a System of Limited Criminal Discovery' (1988) 67 *NCL Rev.* 577.

<sup>20</sup> *Brady v Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). The Court held that 'due process' requires that the prosecution disclose evidence favourable to the accused.

handed, so that individuals are not subjected to the arbitrary exercise of governmental power. This right will be examined at a later section.

Also required by due process, is the principle of presumption of innocence. The main effect of this principle in the criminal process is that the prosecution bears the burden of proof and must prove its case beyond a reasonable doubt.<sup>21</sup> Since the defence lawyers only have very imperfect opportunities to challenge the prosecution's cases,<sup>22</sup> liberal discovery rules are the essential tools for the defence to challenge the prosecution's case and prepare its defence. Thus, the principle of presumption of innocence could be seriously eroded by not giving the defence a sufficient opportunity to cast doubt on the prosecution's case. Damaška has commented accurately, that 'restraints placed on disclosure make it harder for the American defence to rebut the prosecution's evidence, thus indirectly decreasing prosecutorial evidentiary burdens.'<sup>23</sup> In other words, too limited discovery rights of the defendant could have a detrimental effect on the presumption of innocence.

#### **D. Procedural Safeguard and Judicial Efficiency**

Discovery rules also have the effect of reducing other common causes for wrongful

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<sup>21</sup> See e.g. *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Henderson v. Kibbe*, 431 U.S. 145, 153 (1977); *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979); *Sandstorm v. Montana*, 442 U.S. 510, 520–24 (1979). On the interrelated concepts of the burden of the prosecution to prove guilt beyond a reasonable doubt and defendant's entitlement to a presumption of innocence, see *Taylor v. Kentucky*, 436 U.S. 478, 483–86 (1978), and *Kentucky v. Whorton*, 441 U.S. 786 (1979).

<sup>22</sup> Brennan Jr (n 455) 3.

<sup>23</sup> Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure' (n 265) 534.

convictions, such as eyewitness misidentification, perjury and false confessions.<sup>24</sup>

Accordingly, it could promote the accuracy and confidence of criminal trials, and enhances judicial efficiency. The experience of those jurisdictions, which adopted more liberal discovery rules, also shows a more efficient process, with less reversals and retrials, and more cases resolved earlier in the process.<sup>25</sup>

In sum, as summarised in *State v. Tune*, the purpose of broad discovery is ‘to promote the fullest possible presentation of the facts, minimise opportunities for falsification of evidence, and eliminate the vestiges of trial by combat.’<sup>26</sup> It would seem that, without broad discovery in criminal adjudication, a serious limitation is imposed upon the achievement of the criminal proceeding’s aim. By obligating the timely exchange of all material collected by the prosecution in criminal cases, broad discovery laws can provide for a more fair and accurate criminal justice system.<sup>27</sup>

### **III. The Pre-Trial Discovery System – Inculpatory Evidence**

The American criminal discovery system is divided into two categories: inculpatory and exculpatory materials. Regarding these types of information the governing laws and procedures are different. The inculpatory evidence will form the prosecution case. The types of materials which are subjected to disclosure, and exceptions of disclosure are

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<sup>24</sup> The Justice Project, ‘Expanded Discovery in Criminal Cases: A Policy Review’ (2007).

<sup>25</sup> E.g. California.

<sup>26</sup> *State v. Tune*, 13 NJ 203, 210, 98 A2d 881, 884 (1953).

<sup>27</sup> The Justice Project, ‘Expanded Discovery in Criminal Cases: A Policy Review’ (2007).

mainly regulated by Stature and Court Rules. These rules vary in each jurisdiction, and they usually should be disclosed prior to trial so that the accused can prepare their defence. The exculpatory evidence, on the other hand, is governed by constitutional law, as interpreted by the Supreme Court. The Supreme Court has developed this obligation through *Brady v. Maryland* and its progeny case.<sup>28</sup> These categories will be discussed separately.

### **A. The Law of Criminal Discovery and its Development**

At the outset, it is important to note that the U.S. Supreme Court stated that a criminal defendant has no federal constitutional right to general discovery.<sup>29</sup> In the United States, the law of discovery in criminal cases is dominated by statute and court rules.<sup>30</sup> The types of discovery permitted vary in each jurisdiction, some states allow broad discovery<sup>31</sup> whilst some have very restrictive rules, and with the Federal Rules being the narrowest.<sup>32</sup>

Under most rules, the right of criminal defendants to obtain discovery of information material for the preparation of the defence involves a statutory right to discovery of evidence that is considerably broader than the constitutional right.

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<sup>28</sup> Also known as 'Brady material': material evidence favourable to the accused not handed over at the time of trial.

<sup>29</sup> *Weatherford v. Bursey*, 429 U.S. 545 (1977).

<sup>30</sup> Wayne R Lafave and others, *Criminal Procedure* (5th edn, West Publishing Company 2009).

<sup>31</sup> Similar to the ABA Standards Relating to Discovery and Procedure Before Trial. *ibid.*

<sup>32</sup> *ibid.*

Although the content is substantially different, the structure of discovery rules is roughly similar. The rules commonly will first establish a procedure by which the defence and prosecution can put into effect the other side's obligation to make pre-trial disclosure. Then it will state what information shall or may, upon court order, be disclosed by the prosecution to the defence, and vice versa. After that, the exceptions of disclosure are based on content (e.g. work product) or nature (e.g. witness statements). Under special circumstances, the Court is authorised to issue a protective order which will bar or limit disclosure. It imposes a continuing duty to disclose discoverable items so that the process automatically encompasses items acquired after the initial disclosure. Lastly, it provides a procedure for judicial administration and enforcement of the discovery provisions, including the imposition of sanctions.<sup>33</sup>

### **B. The Common Law: Pre-Trial Disclosure as an Exceptional Practice**

Originally pre-trial disclosure was rarely permitted.<sup>34</sup> The common law rule, from its English precedent, was that the judiciary lacked any inherent authority to order pre-trial discovery in criminal cases.<sup>35</sup> Without legislative authorisation a trial court could not order one party to make a disclosure of its evidence to the other. There was a feeling

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<sup>33</sup> *ibid.*

<sup>34</sup> John Henry Wigmore, *Evidence* (3rd edn, 1940) § 1859g, 1863; Francis Wharton, *Criminal Evidence* (12th edn, 1955) § 671; 'Pre-Trial Disclosure in Criminal Cases Comment' (n 457) 626; Robert L Fletcher, 'Pretrial Discovery in State Criminal Cases' [1960] *Stanford Law Review* 293, 294 (stating there was no right to criminal discovery under the common law as starting point).

<sup>35</sup> *People ex rel. Lemon v. Supreme Court* N.Y. 24, 156 N.E. 84 (1927) at 28.

that pre-trial disclosure would 'subvert criminal justice.'<sup>36</sup> Therefore, similar to the early development in England, the only pre-trial discovery available to the parties was the one that was obtained informally through mutual exchange of information or incidentally in the course of such pre-trial proceedings. Later in the 1930s, however, states started to regulate formal pre-trial discovery and, by the mid-century, a substantial number of states allowed or required pre-trial discovery. However, such discovery was treated primarily as an exceptional practice for a limited number of situations rather than as a standard element of pre-trial procedure.<sup>37</sup>

Where a discovery provision neither authorises nor prohibits discovery of a particular item, the jurisdiction now recognises an inherent discretionary authority of the trial court to grant discovery of that item.<sup>38</sup> However, they varied greatly with regard to the leeway that they would grant to the trial court in the exercise of the authority to compel discovery.

### **C. Federal Rules of Criminal Procedure**

In order to get a better understanding of the discovery rules, the current Federal Rules of Criminal Procedure will be briefly examined here.

The discovery obligations of federal prosecutors are generally established by Federal

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<sup>36</sup> 'Pre-Trial Disclosure in Criminal Cases Comment' (n 457) 627.

<sup>37</sup> Lafave and others (n 476).

<sup>38</sup> *ibid.*

Rules of Criminal Procedure 16 ('Rule 16') and the Jencks Act,<sup>39</sup> *Brady v. Maryland*,<sup>40</sup> and *Giglio v. United States*.<sup>41</sup> The federal criminal discovery system recognises a trial court's inherent authority to fill in the 'gaps' in the coverage of defence discovery provisions, that same discretionary authority is not extended to prosecution discovery provisions.

### **1. Types of Materials which should be disclosed**

Rule 16 requires the Prosecution to disclose, upon the Defence's request:

- a. Defendant's Written or Recorded Statement.*
- b. Defendant's Oral Statement.*
- c. Organizational Defendant.*
- d. Defendant's Prior Record.*
- e. Documents and Objects. if the item is within the government's possession, custody, or control and:*
  - i. the item is material to preparing the defense;*
  - ii. the government intends to use the item in its case-in-chief at trial;*or
  - iii. the item was obtained from or belongs to the defendant.*
- f. Reports of Examinations and Tests.*
- g. Expert Witnesses.*

The government is obligated to let the defence inspect and copy<sup>42</sup> certain materials, but only upon defence's request. The types of materials which should be disclosed are

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<sup>39</sup> The Jencks Act, 26.2, 18 U.S.C. § 3500.

<sup>40</sup> *Brady v. Maryland*.

<sup>41</sup> *Giglio v. US*, 405 U.S. 150 (1972).

<sup>42</sup> *United States v. Jeffers*, 570 F.3d 557, 572 (4th cir. 2009).



limited compared to other U.S. jurisdictions.

The prosecution must disclose a defendant's 'relevant' oral statement made in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. Rule 16(a) (1) (B) contains the written or recorded statement disclosure rules. Rule 16(a)(1)(C) contains the 'organizational' defendant statements which state that, upon request, the government must disclose a defendant's written or oral statements which meet the requirements of (a)(1)(A) as well as (a)(1)(B) and which were made by a person who could legally bind the defendant. Rule 16 (a) (1) (D) contains the rules regarding disclosure of a defendant's prior record. Rule 16(a)(1)(B)(i) requires the government to furnish to the defence: all relevant written or recorded statements made by the defendant which are in the custody or control of the government and which are known to the government or by the exercise of due diligence may become known to the government.<sup>43</sup>

There are two main points here. First, unlike England, reciprocal discovery exists in the U.S. federal discovery system. Under Rule 16(a) (1) disclosure only takes place when the defence *requests* the prosecution to do so. This requirement is potentially problematic to the defendant.<sup>44</sup> Because under Rule 16 (b) Defendant's Disclosure

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<sup>43</sup> Carol A. Brook, 2012 Federal Criminal Discovery Outline (2012), available at <https://www.fd.org/docs/select-topics/discovery/federal-criminal-discovery-outline.pdf?sfvrsn=8>

<sup>44</sup> Opponents might argue that the defendant 'invites' this choice. However, this 'invitation' is a false one. Few defendants, if any, will choose to forgo discovery, because they will not be able to adequately prepare their defenses without it. See e.g., *United States v. Tucker*, 249 F.R.D. 58, 60 (S.D.N.Y. 2008) ('[A]n innocent defendant has no *a priori* knowledge of the accusations against which she must defend

section, a defendant's request of disclosure under 16(a) (1) (E), (F) or (G) will trigger the government's entitlement to inspect the defence's documents.<sup>45</sup> The defence, therefore, is put in a strategic dilemma: whether to seek discovery at the high price of revealing its own case, or not to ask for any information from the prosecution at all. Furthermore, if a certain piece of material is not disclosed to the government, the defence bears the risk of exclusion from trial.<sup>46</sup> Commentators also worried that this reciprocity aspect would have undermined the defendant's Fifth Amendment privilege against self-incrimination.<sup>47</sup> The argument relates to the fact that the burden of proof lies with the government, and the defence is not obligated to assist the state in this matter.

Secondly, in comparison with English law, it is perhaps surprising that Rule 16 not only does not mention the prosecution witnesses, but also prohibits the disclosure of witness statement prior to testimony under the *Jencks Act*.<sup>48</sup> In this regard, it is quite

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herself, and thus must rely on the government's disclosures to calculate how best to present a defense.')

<sup>45</sup> Note that, reciprocal discovery obligations do not arise until after government has complied with its own discovery obligations, see e.g. *United States v Kraselnick*, 702 F. Supp. 480 (D.N.J. 1988). Also, reciprocal discovery obligations are not triggered by Brady requests alone, see e.g., *United States v. Marengi*, 893 F. Supp. 85 (D. Maine 1995).

<sup>46</sup> *Taylor v. Illinois*, 484 U.S. 400 (1988) (holding that preclusion of testimony was appropriate sanction for defense counsel's failure to disclose the names of alibi witnesses until second day of trial when counsel knew about the witnesses one week earlier and had been permitted to amend the witness list on the first day of trial.) See also *United States v. Rodriguez Cortes*, 949 F.2d 532 (1st Cir. 1991) (court did not abuse discretion in precluding admission of defense documents as sanction for reciprocal discovery violation).

See, e.g. Therese M Myers, 'Reciprocal Discovery Violations: Visiting the Sins of the Defense Lawyer on the Innocent Client' (1995) 33 Am. Crim. L. Rev. 1277.

<sup>47</sup> E.g. Robert P Mosteller, 'Discovery Against the Defense: Tilting the Adversarial Balance' [1986] California Law Review 1567, 1571-3, 1625.

<sup>48</sup> *The Jencks Act*, 26.2, 18 U.S.C. § 3500 requires the prosecution to produce a prosecution witness statement only after the witness has testified.

unfortunate that none of the reform proposals to expand the scope of Federal Rules of Criminal Procedure has succeeded.<sup>49</sup>

## 2. Types of Materials which are not subjected to Disclosure

Rule 16(a) (2) provided the exceptions to disclosure.<sup>50</sup> The government does not need to disclose their work-product<sup>51</sup> and witness statements which are only discoverable pursuant to the *Jencks Act*. In addition, if the government has other ‘good cause’, such as national security, the court may agree to inspect documents *ex parte*.<sup>52</sup>

### D. Arguments against broad Discovery

Inspired by the success of the expansion of civil discovery rules, there were calls for a

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§ 3500: ‘Demands for production of statement and reports of witnesses’

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

The purpose of this provision is said to serve as a precautionary measure to prevent witness intimidation and harassment by defendants. However, as a practical matter, federal prosecutors often provide Jencks Act material slightly in advance of a witness’ testimony. For a more detailed analysis on the *Jencks Act*, see Charles A Pulaski Jr, ‘Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional and Nonconstitutional Considerations’ (1978) 64 Iowa L. Rev. 1; Paul K Rooney and Elliot L Evans, ‘Let’s Rethink the Jencks Act and Federal Criminal Discovery’ (1976) 62 ABAJ 1313; David B Wexler, ‘The Constitutional Disclosure Duty and the Jencks Act’ (1965) 40 . John’s L. Rev. 206.

<sup>49</sup> Most recently, ‘Fairness in Disclosure of Evidence Act of 2012’, March 15 2012 (introduced but not enacted).

<sup>50</sup> Rule 16(a) (2) Federal Rules of Criminal Procedure ‘*Information Not Subject to Disclosure*’: Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.

<sup>51</sup> Government may waive and may be superseded by Brady. See *United States v. Musick*, 291 Fed. Appx. 706, 727 (6th Cir. 2008); *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984).

<sup>52</sup> *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010).

broader criminal discovery. Although the importance of liberal discovery in criminal cases is recognised, the law and practice varies, and the reluctance of the federal government to expand the rules further demonstrates the fears of expanding criminal discovery laws.

In comparison with England, there was little discovery required in criminal cases in the US. As mentioned, in the Federal Rules of Criminal Procedure, even the prosecution's witness list is prohibited from being disclosed pre-trial. As expressed by the infamous wording of Chief Justice Vanderbilt in *State v. Tune*,<sup>53</sup>

‘In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence... To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.’

It seems that the courts have been reluctant to impose any more duty on the prosecution to show its cards prior to trial, and a hostile attitude towards the defendants. One may wonder if the fears behind the rejection of liberal discovery are legitimate. For many criminal practitioners, the discovery process is more of a matter of litigation techniques,

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<sup>53</sup> *State v. Tune* (n 26), 884 (1953). Judge Vanderbilt: ‘In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence... To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.’

and the prosecutors often regards it as a way for the defence counsels to stir up the mud and make their jobs more difficult. However, the purpose of criminal discovery laws is certainly not about giving the prosecution a hard time, it is ‘a rule of fairness’,<sup>54</sup> a means to guarantee the right to a fair trial on the part of the accused. As the Court in *Brady v. Maryland* held, ‘[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.’<sup>55</sup>

Notwithstanding the fact that criminal trials in the US are generally recognised as fair, there are still many incidents of innocent defendants being convicted.<sup>56</sup> One of the main reasons for wrongful conviction is the government’s failure to disclose evidence.<sup>57</sup> The Ted Stevens case is a good example here. Stevens was a Senator in Alaska, he was accused of corruption and found guilty in 2008.<sup>58</sup> However, it was later revealed that the prosecutors had hidden evidence that could have proved his innocence. A federal

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<sup>54</sup> *United States v. Beasley* 576 F.2d 628, 630 (5th Cir. 1978).

<sup>55</sup> *Brady v. Maryland*, at 87. The Court affirmed that a prosecutor should not be the ‘architect of a proceeding that does not comport with standards of justice.’

<sup>56</sup> Alafair S Burke, ‘Talking About Prosecutors’ (2010) 31 *Cardozo Law Review* 2119.

<sup>57</sup> See Paul Gianelli and Myrna Raeder, *Achieving Justice: Freeing the Innocent, Convicting the Guilty. Report of the ABA Criminal Justice Section’s Ad Hoc Committee to Ensure the Integrity of the Criminal Process* (Washington, DC: American Bar Association 2006). See also, David Keenan and others, ‘The Myth of Prosecutorial Accountability after *Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect against Prosecutorial Misconduct’ (2011) 121 *Yale LJ Online* 203; Brandon L Garrett, ‘Judging Innocence’ [2008] *Columbia Law Review* 55; Peter A Joy, ‘The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System’ (2006) 2006 *Wisconsin Law Review* 399; Ronald L Carlson, ‘False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?’ [1969] *Duke Law Journal* 1171.

<sup>58</sup> For Prosecutorial misconduct, see e.g. Beth Brennan and Andrew King-Ries, ‘A Fall from Grace: *United States v. WR Grace* and the Need for Criminal Discovery Reform’ (2010) 20 *Cornell JL & Pub. Pol’y* 313. Ted Stevens was a long-time Republican senator from Alaska. Some Prosecutors concealed documents that would have helped Stevens defend him against false-statements charges in 2008.

court vacated his conviction in 2009.<sup>59</sup> The court also recognised the gravity of the prosecutorial misconduct and two prosecutors were suspended,<sup>60</sup> although the decision was reversed in 2013.<sup>61</sup>

What happened to the late Senator Stevens is very alarming, and brought us to the disturbing awareness of how powerful the prosecutors can be and, sometimes, without accountability. It has been half a century since *Brady* was delivered, and the prosecutors are still ignoring the disclosure rules. It also brings the public to the realisation that if someone with such high public visibility and media scrutiny can be played in the hands of the prosecutors, the danger for less privileged defendants could be even higher.

Many scholars have urged that it is time to call for a reform.<sup>62</sup> Attempts have been made, but none has succeeded on the federal level. The most recent proposal – *Fairness*

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<sup>59</sup> *United States of America v. Theodore F. Stevens*, No. 1:08-cr-00231-EGS Document 324 filed 04/01/2009. The district judge granted the prosecution's request to dismiss a few days later. *United States v. Stevens*, No. 08-cr-231, 2009 U.S. Dist. LEXIS 39046 (D.D.C. Apr. 7, 2009).

<sup>60</sup> Office of Professional Responsibility Report, Department of Justice (August 5, 2011). It ordered Mr. Bottini suspended for 40 days and Mr. Goeke for 15 days.

<sup>61</sup> Decision of the U.S. Merit Systems Protection Board Western Regional Office (April 5, 2013). The Decision is available at <http://legaltimes.typepad.com/files/mspb-stevens.pdf>

<sup>62</sup> E.g. Bruce A Green, 'Federal Criminal Discovery Reform: A Legislative Approach' (2013) 64 *Mercer Law Review* 639; Janet Moore, 'Democracy and Criminal Discovery Reform after Connick and Garcetti' (2012) 77 *Brooklyn Law Review*; Lissa Griffin, 'Pretrial Procedures for Innocent People: Reforming Brady' (2011) 56 *New York Law School Law Review*; D Michael Risinger and Lesley C Risinger, 'Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure' (2011) 56 *NYL Sch. L. Rev.* 869. See also, proposals to improve incentives of prosecution to comply with Brady, e.g. Steven K Berenson, 'Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?' (2000) 41 *Boston College Law Review* 789 (a 'do justice' standard instead of conviction rate). Tracey L Mearns, 'Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives' (1995) 64 *Fordham L. Rev.* 851 (suggesting financial awards). Daniel S Medwed, 'The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence' (2004) 84 *Boston University Law Review* 125 (advocating education prosecutors about its ethical obligations).

*in Disclosure of Evidence Act of 2012*<sup>63</sup> – which was made in light of the Ted Stevens case, has been another endeavour to amend the federal criminal rules, ultimately failed.

The three main arguments against the expansion of criminal discovery are: the criminal discovery rules are being unfair to the prosecution, the fear of perjury and the intimidation of witnesses. These arguments play a pivotal role in the position of the State, especially the federal government nowadays.

### **1. ‘We are Treating Criminal Defendants Too Well’**

The primary argument against broad discovery is the risks involved in the defence’s access to prosecutorial information.<sup>64</sup> It is concerning that the balance would be upset by being too favourable to the accused, since the defendants already enjoys certain privileges and protections under constitutional law, and the heavy burden which the prosecutors already bears to prove. These elements do not exist in the civil discovery laws.<sup>65</sup>

The constitutional protection, which is most commonly asserted, is the right against self-incrimination. Because the accused is protected under the Fifth Amendment, he may have tactical advantages and be able to surprise the prosecution, it is therefore

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<sup>63</sup> Fairness in Disclosure of Evidence Act of 2012, available at <https://www.govtrack.us/congress/bills/112/s2197#summary>

<sup>64</sup> Stephen A Saltzburg and Daniel J Capra, *American Criminal Procedure: Cases and Commentary* (10 edition, West Academic Publishing 2014).

<sup>65</sup> Opponents of broad discovery argued that adversary system relied on equal discovery for both sides, if both sides could not benefit, then neither side should benefit. See e.g. Thomas A Flannery, ‘The Prosecutor’s Case against Liberal Discovery’ [1963] F.R.D. 74, 78-79.

unfair to force the prosecution to disclose its case to the accused. The classic statement of this view was illustrated by Judge Learned Hand, in *United States v. Garsson*:<sup>66</sup>

‘Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.’<sup>67</sup>

Chief Justice Vanderbilt even went a step beyond Judge Hand and argued that giving the defendant non-reciprocal discovery rights would make the prosecution’s task ‘almost insurmountable.’<sup>68</sup>

The difference between the civil and criminal discovery system although might have a valid point, and it is true that the constitutional protection, as interpreted by the Supreme Court, made the prosecutor’s job more difficult to gather evidence from defence. Nevertheless, this argument is faulted in two key points and displays the hidden concern behind the proposed expansion.

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<sup>66</sup> *United States v. Garsson*, 291 F. 646 (S.D.Ny.Y 1923).

<sup>67</sup> *ibid*, 649. Although this position was later strongly challenged by Goldstein. See Abraham S Goldstein, ‘The State and the Accused: Balance of Advantage in Criminal Procedure’ [1960] Yale Law Journal 1149.

<sup>68</sup> *State v. Tune* (n 26).



Firstly, this argument seems to imply that a defendant is allowed to be treated poorly if he is treated well in other respects. But is this really a legitimate way of arguing when a person's liberty, or even life in some jurisdictions, is at stake? It also ignores the rationale of providing the right against self-incrimination at the very first place.<sup>69</sup> The government must prove its case without the assistance of the defendant. It is important to recall the reasons for the prosecution's high burden of proof – to prove beyond a reasonable doubt – are different than the ones to disclose documents to the accused.<sup>70</sup>

Justice Brennan is one of the strongest supporters of liberal discovery.<sup>71</sup> He rejected the contention that, because the defendant has other 'advantages in the criminal justice process', discovery can be appropriately denied. In *Tune*, he wrote a sharp dissenting opinion:

'If the privilege created a discovery imbalance [in favor of the defendant], that imbalance would be consistent with the intent of the framers; the defendant should not be denied a procedure essential to the establishment of the truth in an attempt to offset a protection granted by the Constitution.'<sup>72</sup>

Another problematic implication of this position is that it portrays the criminal process

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<sup>69</sup> Which is a valuable restriction of tyranny and the cornerstone of individual liberty. The right against self-incrimination is rooted in the Puritans' refusal to cooperate with interrogators in 17th century England. They often were coerced or tortured into confessing their religious affiliation and were considered guilty if they remained silent. English law granted its citizens the right against self-incrimination in the mid-1600s, when a revolution established greater parliamentary power.

<sup>70</sup> Saltzburg and Capra (n 510).

<sup>71</sup> Brennan Jr (n 455); Brennan Jr (n 409).

<sup>72</sup> Justice Brennan Dissenting Opinion, *State v. Tune* (n 26), 894 (N.J. 1953).

as a sporting contest. This view overlooks the true aim of a criminal trial, which is the adjudication of a person's guilt, and ignores the need to take every precaution to ensure that the innocent should not be convicted. Regardless, as pointed out by Goldstein, the alleged advantage of the defendant was largely a myth.<sup>73</sup> Even at trial, where the defence allegedly possesses his greatest advantage, many of his rights, such as the right not to testify, are of limited practical significance. Of more relevance was the defence's disadvantage in the preparation of his case. Here, the state will have all of the advantages—investigators, greater resources, search, and subpoena etc. that the defendants rarely can match.<sup>74</sup> Moreover, those investigators often could acquire extensive information from the accused through interrogation following his arrest that reached 'up to the point of coercion'.<sup>75</sup>

A relevant claim here is the reciprocity argument.<sup>76</sup> Discovery in criminal cases is frequently seen as a one-way street and therefore, as the opponents of broad discovery contend, it is unfair to the prosecution. This limitation, they argued, should not be ignored in determining the proper scope. They contended that in an adversary system, it would be unfair to give one side discovery rights that could not also be made available to the other side. Apart from considerations of equity, discovery simply would not be an

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<sup>73</sup> Goldstein (n 513) 1162.

<sup>74</sup> See e.g. Douglas J., Dissent in *Adams v. Illinois*, 405 U.S. 278, 291 (1972).

<sup>75</sup> Goldstein (n 513) 1187; Fletcher, 'Pretrial Discovery in State Criminal Cases' (n 480) 312.

<sup>76</sup> Similar question has been discussed in England and Australia recently. This has been the recent movement, while some expressed their concern as moving backwards, some argued that reciprocal actually is better, for the truth seeking process. See Cosmas Moisisdis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology 2008) 61–7.

effective tool in developing the truth unless it was a ‘two-way street’, as in civil discovery.<sup>77</sup> This concern might be an overstatement, however, since the modern discovery rules provide that the defence must give the prosecution an advance notice of some of the defence strategy, i.e. alibi or insanity, and the federal rules also obligate reciprocal discovery.

The point is, it is deficient to argue that this constitutes an opportunity for the defence to challenge the prosecution’s case: it operates at such an investigative disadvantage that the adversary system is substantially undermined without the partial equalisation provided by liberal defence discovery. The investigative advantage varies with the nature of the crime and the resources of the particular defence. This is not, in any event, truly relevant. Furthermore, in civil cases, it has rarely, if ever been suggested that the better-financed side should therefore be barred from equal discovery.

## **2. ‘Criminal Defendants will Commit Perjury’**

The common, though unwarranted, fear of disclosing materials to the criminal defendants is that they are very likely to commit perjury and obstructing justice. This line of reasoning against the broad discovery rules is seen as the ‘old hobgoblin’ based on ‘untested folklore’,<sup>78</sup> or even the ‘bogey man’ by the advocates of liberal

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<sup>77</sup> Flannery (n 511) 78–9.

<sup>78</sup> *United States v. Projansky*, 44 F.R.D. 550, 556 (S.D.N.Y. 1968) (Frankel J. ([T]he point is built one-sidedly of untested folklore.’ )

discovery.<sup>79</sup>

The opponents of broad criminal discovery argued that greater discovery would lead to an increased use of perjury by the defendants instead of achieving a more accurate fact-finding.<sup>80</sup> They believed that the accused can tailor his testimony, minimise conflict with the government's evidence and to take advantage of the weakest point in the prosecution's case, and hence makes the fabrication more likely to be successful.<sup>81</sup> While generally accepting the alleged success of civil discovery, they contended that criminal discovery should be treated differently because criminal cases offer a far greater risk of successful perjury.<sup>82</sup> The potential of committing perjury is greater, they claimed, because there is more at stake for the criminal defendant.<sup>83</sup> Some also suggested that more criminal defendants are likely to be basically dishonest than the parties in civil cases.<sup>84</sup>

But does this contention have any merits? Civil cases, too, often have considerable values at risk, and the incentive to commit perjury can be even greater when a large amount of money is involved.<sup>85</sup> The assertion that criminal defendants are more likely

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<sup>79</sup> William H Speck, 'The Use of Discovery in United States District Courts' [1951] Yale Law Journal 1132, 1154. ('Facilitation of perjury has been a bogey man of discovery for over a hundred year')

<sup>80</sup> See e.g. *State v. Tune* (n 26). Vanderbilt's opinion presented the majority view. Dennis Jr (n 460) 63. Dennis Jr. considered Vanderbilt's arguments are still compelling.

<sup>81</sup> See e.g. Dennis Jr (n 460).

<sup>82</sup> See Lafave and others (n 476) 955 (addressing the opponents' arguments). See also Chief Justice Vanderbilt in *State v. Tune* (n 26) 884.

<sup>83</sup> Lafave and others (n 30).

<sup>84</sup> Lafave and others (n 30) .

<sup>85</sup> See e.g. David W Louisell, 'Criminal Discovery: Dilemma Real or Apparent?' [1961] California Law Review 56.

to be dishonest is problematic and, therefore, should be rejected: it disregards a fundamental rule of criminal law, the presumption of innocence. More ironically, the prosecutors are also, if not more, likely to commit perjury.<sup>86</sup> Several cases dealt with the issues of prosecution perjury and this line of cases led to the requirement of *Brady*.<sup>87</sup>

Another problem of this argument is that it is not substantiated by any conclusive evidence, to prove or disprove it.<sup>88</sup> It is hard to deny that there is always a possibility for the partisan to commit perjury, but the success in the experience of civil discovery had proven many of these concerns are unjustified.<sup>89</sup> Notwithstanding several fundamental differences between the civil and criminal law system, the perjury claim is not a valid way to argue why the civil discovery can work but the criminal one cannot. For example, although the prosecution is unable to use deposition as a tool, there are plenty other devices (e.g. police interrogation) to ‘pin down’ the accused.<sup>90</sup>

It is important to bear in mind that the society has no interest in an innocent person’s suffering. The proper safeguard against perjury, as noted by Justice Brennan, ‘is not to refuse to permit any inquiry at all, or that will eliminate the true as well as the false, but

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<sup>86</sup> E.g. *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *White v. Ragen*, 324 U.S. 760 (1945); *Pyle v. Kansas*, 317 U.S. 213 (1942).

<sup>87</sup> See, e.g. *Mooney v. Holohan*, 294 U.S. 103; *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>88</sup> Speck (n 525) 1154. (‘Facilitation of perjury has been a bogey man of discovery for over a hundred years. No evidence can be produced conclusively to prove or disprove it, and the consensus among lawyers is to reject it. This investigation disclosed the variety of ways in which lawyers use discovery to thwart perjury.’)

<sup>89</sup> See e.g. Goldstein (n 513) 1193 (‘Every one of the many excellent arguments which carried the day for pretrial discovery in civil cases is equally applicable on the criminal side’); A Kenneth Pye, ‘The Defendant’s Case for More Liberal Discovery’ (1963) 33 F.R.D. 82, 83.

<sup>90</sup> Lafave and others (n 30) 955.

the inquiry should be conducted so as to separate and distinguish the one from the other.<sup>91</sup>

### **3. ‘Criminal Defendants will Intimidate Witnesses, Victims and their Families’**

This argument is perhaps the strongest one among all which opposes the expansion of criminal discovery. Indeed, even the strongest supporters of liberal discovery cannot ignore that the potential danger to the witness once his or her identity and whereabouts are revealed to the defendants.<sup>92</sup> It is also often argued that the witnesses will be more reluctant to testify.<sup>93</sup>

However, the question that should be asked here is whether this danger can justify a blanket limitation on discovery in a criminal case. Is it valid to postulate that, because of possible threats, discovery should be denied to *all* criminal defendants? Apparently the conclusion cannot be that black and white; it can be either granting discovery as a rule and withholding discovery in exceptional circumstances, or permitting discovery in some if not all cases. Rule 16(d) has adopted the latter approach.

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<sup>91</sup> Brennan Jr (n 455) 291.

<sup>92</sup> Similar contentions had already been rejected in civil discovery law. Justice Brennan stated ‘[this] fallacy has been starkly exposed through the extensive and analogous experience in civil cases where liberal discovery has been allowed and perjury has not been fostered. Indeed, this experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.’ *ibid* 289, 291. See also, H Lee Sarokin and William E Zuckerman, ‘Presumed Innocent-Restrictions on Criminal Discovery in Federal Court Belie This Presumption’ (1990) 43 Rutgers L. Rev. 1089. ([d]enying all defendants access to pre-trial statements made by government witnesses out of the fear that some will use such information wrongfully can be likened to outlawing the institution of bail on the theory that some of those arrested might commit further crimes.)

<sup>93</sup> Chief Justice Vanderbilt in *State v. Tunc* (n 26) 884.

The approach that only allows limited discovery is not without its problems. As the current practice of Federal Rules of Criminal Procedure has shown, it resulted in enormous hearings when one side or the other tries to overcome the presumption.<sup>94</sup>

Defence counsels file lots of discovery motions, prosecutions complain about wasting lots of time and resources in litigating these pre-trial motions, which can be resolved by expanding the discovery laws.

The other option, which is the approach adopted in England, might prove to be a better solution. Relevant materials should be presumed as appropriate and be disclosed, but the prosecution could file a protective order to the Court, or other motions explaining why disclosure in a particular case might threaten the fair administration of justice.<sup>95</sup>

Insofar as the concern here relates to actual intimidation, the appropriate response was to allow discovery generally, but grant the trial court authority to limit discovery when the prosecution can establish a realistic threat of physical or economic intimidation.<sup>96</sup>

This approach, however, has been met with the response that such a protective order procedure would place an impracticable burden on the prosecution by requiring it to establish a defendant's intent to intimidate. Nevertheless, it should not be assumed a defendant would act improperly without such a substantial showing. In addition, although the concern for the witnesses' safety should be accommodated, the search for

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<sup>94</sup> Lafave and others (n 476).

<sup>95</sup> See Chapter VI.

<sup>96</sup> Lafave and others (n 476) 973.

truth should not be made more difficult simply because witnesses have unfounded fears or do not want to be ‘bothered’ by the investigative efforts of the defence.<sup>97</sup> Similar contentions had already been rejected in civil discovery law.<sup>98</sup>

#### **4. The End of the Debate: Expanding the Laws**

The trend has been in the direction of consistently expanding the discovery laws. The issues raised in the classic debates during the 1950s and 60s have been largely resolved in each jurisdiction by court rules or statutes which detail that discovery which must or may be given to the defendant. The response uniformly was to provide for defence discovery where it did not previously exist or expand. The Supreme Court also recognised this expansion, saying ‘the growing realisation that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice’, and ‘the expanding body of materials, judicial and otherwise, favouring disclosure in criminal cases analogous to the civil practice.’<sup>99</sup>

Despite the expansion movement, the above arguments remain as powerful claims opposing broad federal criminal discovery. The perjury and danger to witness arguments are still having a strong stand, and the attempts to amend Rule 16, which required the prosecution to disclose its witnesses’ identity and addresses, have failed

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<sup>97</sup> Lafave and others (n 476).

<sup>98</sup> See also Federal Rules of Civil Procedure 26–37 (outlining the federal court rules related to discovery in civil cases).

<sup>99</sup> *Dennis v. United States*, 384 U.S. 855 (1966).



because of opposition by the Department of Justice. It stated that the prospect of prosecution's witness list was 'dangerous and frightening in that governmental witnesses and their families will even be more exposed than they are now to threats, pressures, and physical harm.'<sup>100</sup> In the end Congress abandoned the provision, and the Justice Department maintained its opposition to witness-list disclosure today.<sup>101</sup>

### **5. Open-File Policy as a Cure?**

Notwithstanding the arguments against liberal discovery, the road to expansion is already being taken.<sup>102</sup> The current popular trend in the United States is the so-called 'open file' policy, which is an informal discovery practice, permitting defence lawyers to inspect and copy the files of the prosecution. Some states have made this policy mandatory, requiring that the prosecutors must make their entire case file, including both inculpatory and exculpatory evidence, available to the defence.<sup>103</sup> This was seen as a great alternative to the liberal approach, which demands the change of federal criminal laws.

The advocates of open-file commonly argue that this policy could serve all legitimate needs of the defence while avoiding most of the dangers that may accompany formal

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<sup>100</sup> Brennan Jr (n 409) 6.

<sup>101</sup> Justice Department U.S. Attorneys' Manual § 9-21.

<sup>102</sup> The Justice Project, 'Expanded Discovery in Criminal Cases: A Policy Review' (2007).

<sup>103</sup> North Carolina, for example, has already introduced open file policies. See Robert P Mosteller, 'Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery' (2008) 15 *George Mason Law Review*. Another example is Ohio. See, Ellen Yaroshefsky, 'New Orleans Prosecutorial Disclosure in Practice After *Connick v. Thompson*' (2012) 25 *Georgetown Journal of Legal Ethics* 939.

discovery requirements.<sup>104</sup> The prosecutor readily can deny discovery where there is substantial likelihood that the defendant will use it to fabricate a defence or to intimidate witnesses. Where the prosecutor is concerned that discovery will upset the balance of the adversary system, he can condition an offer of discovery on the defence's willingness to reciprocate. The end result, it is argued, is a system that is preferable, at least when prosecutors are acting in an even handed manner.

This open file approach might seem promising but, it is submitted that, it is not the cure to the problems inherent in the discovery system.<sup>105</sup> Firstly, it might mislead the defence counsel into believing that the prosecutor indeed has disclosed everything and did not request further when he is entitled to do so.<sup>106</sup> Crucial information might not be included in the files, either because the prosecution is deliberately hiding them or due to negligence. Accordingly, this approach could become a 'weapon' for the prosecutors,<sup>107</sup> and increase the 'gamesmanship' attitude towards disclosure.<sup>108</sup>

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<sup>104</sup> Commentators who are advocating open-file policies, see e.g. Alafair S Burke, 'Revisiting Prosecutorial Disclosure' (2009) 84 *Indiana Law Journal* 481; Jenny Roberts, 'Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases' (2004) 31 *Fordham Urban Law Journal* 1097; Mosteller (n 493). See Mosteller (n 549). Open-file discovery is particularly favoured after the Duke Lacrosse Case.

<sup>105</sup> On the other hand, other commentators critically pointed out that open-file policy might not be the cure, see, e.g. Brian Fox, 'An Argument Against Open-File Discovery in Criminal Cases' (2013) 89 *Notre Dame Law Review* 425, 446.

<sup>106</sup> See e.g. *Strickler v. Greene*, 527 U.S. 263, 276 (1999) (defense counsel neglected to file a pretrial motion for discovery of possible exculpatory evidence because an open-file policy gave defendant access to all of the evidence in the prosecutor's files—except the *Brady* evidence). R Michael Cassidy, 'Plea Bargaining, Discovery and the Intractable Problem of Impeachment Disclosures' (2011) 64 *Vanderbilt Law Review* 1429, 1439 (noting that 'defense counsel might believe that he has all exculpatory material and need to conduct deeper into an investigating or question witnesses independently').

<sup>107</sup> Fox (n 551) 446.

<sup>108</sup> Gershman (n 459) 546.

Secondly, this policy is also questionable because of its availability. Even the definition of the term ‘open-file discovery’ varies considerably.<sup>109</sup> Not all prosecution offices provide this informal practice, and when they do the exact scope is determined by the respective prosecutor’s office.<sup>110</sup> It is problematic since it would result in different treatment before the law. Should a defendant’s right to access information depend on luck, or the mercy of a particular prosecutor? Some advocates suggested guidelines that have been issued in order to achieve uniformity.<sup>111</sup> However, the guidelines are sufficiently flexible with the effect that a defence counsel may be denied access and prosecutors may insist upon reciprocity that goes beyond what any Statute or court would or could permit. Furthermore the prosecution might threaten to withdraw all discovery to force the defence to give disclosure that the state could not compel consistent with the defendant’s privilege. Last but not least, the financial cost is high for both the prosecution and defence.<sup>112</sup>

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<sup>109</sup> Ellen Yaroshefsky, ‘Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously’ (2004) 8 UDC/DCSL L. Rev. 275.

<sup>110</sup> Bruce A Green and Ellen Yaroshefsky, ‘Prosecutor’s Ethics in Context: Influences on Prosecutorial Disclosure’ in Leslie C Levin and Lynn Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press 2012) 279–280.

<sup>111</sup> For example, one third of States have adopted the ABA Standards of Criminal Justice. *ABA Standards for Criminal Justice: Discovery and Trial by Jury* (3rd edn, American Bar Association 1996) <[http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/discovery\\_trialbyjury.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/discovery_trialbyjury.authcheckdam.pdf)>.

<sup>112</sup> Fox (n 551) 434–443.

## IV. Exculpatory Evidence: Constitutional Obligation

### A. The Prosecution's Duty to Disclose Favourable Evidence: Development by the Supreme Court

Although there is no general right to discovery for criminal defendants, prosecutors have a constitutional duty to disclose *favourable* evidence to the defence under the *Brady* rule. This duty stems from the constitutional right to due process, and is developed through a series of cases by the Supreme Court, which will be addressed as follows.

#### *Mooney v. Holohan* (1935)<sup>113</sup>

The first form of this obligation, although only dealing with perjury, can be traced back to *Mooney v. Holohan*. It was recognised that the prosecutor's 'knowing use' of perjured testimony to convict a criminal defendant violated due process of law.<sup>114</sup> The Court argued that the 'due process requirement is not satisfied by mere notice and hearing if the state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as a means of depriving defendant of liberty through deliberate deception of court and jury by presentation of

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<sup>113</sup> *Mooney v. Holohan*, 294 US 103 (1935).

<sup>114</sup> The Due Process Clause of the Fifth Amendment is violated if government engages in deliberate deception of court and jury by the presentation of testimony known to be perjured. See also *Mooney's* progeny: *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942). But note that the test for perjury is different from *Brady*. Reversal was required if false testimony could have affected the judgment of the jury (not about outcome).

testimony known to be perjured.’<sup>115</sup>

As stated in *Brady*, ‘the principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.’<sup>116</sup>

### ***Brady v. Maryland* (1963)**

Almost thirty years later, this principle was observed again and expanded in *Brady v. Maryland*, which became the landmark decision of the prosecution’s duty to disclose exculpatory materials to the defence. Brady confessed that he participated in the crime, but it was his accomplice who performed the act of killing. However, the prosecution withheld the statement of his co-accused, who admitted that he did the actual killing. This statement was not shown to Brady’s lawyers until Brady was convicted and sentenced. The Supreme Court reversed the conviction, saying that

‘[T]he suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’<sup>117</sup>

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<sup>115</sup> *Mooney v. Holohan*, at 112.

<sup>116</sup> *Brady v. Maryland*, at 87.

<sup>117</sup> *ibid.*

This paragraph, later known as the *Brady* rule, was further interpreted and developed in the subsequent cases.

***Giglio v. United States (1972)***<sup>118</sup>

*Giglio* was an important case which has an impact on the prosecution's duty to disclose *impeaching* materials. In *Giglio*, the government's star witness had been given a promise, by the *grand jury* prosecutor, that he will not be indicted if he testified against *Giglio*. This information was not revealed to the defendant because it was unknown to the *trial* prosecutor. During the proceedings, the government first argued that the witness did not receive any promises and then later denied perjury since the trial prosecutor did not have any knowledge about it.

The Court, however, held that the trial prosecutor's actual knowledge of the information was irrelevant to his *Brady* disclosure obligation, and stated that impeachment information fell under *Brady*: 'When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*].'<sup>119</sup> Impeachment evidence is also referred as '*Giglio* materials'.

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<sup>118</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>119</sup> *ibid* at 154.

*United States v. Agurs* (1976)<sup>120</sup>

In *Agurs*, the Court set out three different standards of materiality for *Brady* violations: knowing perjury and false evidence: the highest threshold, it is material unless the government can show beyond a reasonable doubt that it was harmless;<sup>121</sup> when a specific request is made;<sup>122</sup> and when a general or no request is made.<sup>123</sup>

Even when no or only a general *Brady* request is made, the prosecutor still has a disclosure obligation. But the standard of review is more lenient: whether, after viewing everything, there is any reasonable doubt about the conviction.<sup>124</sup> Nevertheless, the distinction between specific request and no or general request has been rejected in a later case, *Bagley*.<sup>125</sup> When the prosecutors are in doubt, they should err on the side of disclosure.<sup>126</sup>

*Agurs* thus provided a tidy framework for analysing alleged prosecutorial breaches of duty. The type of alleged breach — knowing use of perjury, failure to produce potentially exculpatory evidence following a specific request, or failure to produce potentially exculpatory evidence absent such a request — first had to be identified.

Then, the appropriate standard for judging the materiality of the evidence at issue was

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<sup>120</sup> *United States v. Agurs*, 427 U.S. 97 (1976).

<sup>121</sup> *ibid* at 110.

<sup>122</sup> *ibid* at 106.

<sup>123</sup> *ibid* at 112-13.

<sup>124</sup> *ibid* at 112-13.

<sup>125</sup> *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>126</sup> *United States v. Agurs*, at 108 ('[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure').

selected. Finally, the relevant test was applied to the specific case facts for a decision. However, the *Agurs* analytical framework did not endure long.

***United States v. Bagley (1985)***<sup>127</sup>

The *Agurs* distinction between specific request and general or no request situations was abandoned by the Court in this case. The standard of materiality was revisited by the Court, and held that the standard to show a *Brady* violation is the same: whether ‘there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different.’ A ‘reasonable probability’ is a probability ‘sufficient to undermine confidence in the outcome.’<sup>128</sup> It is, however, important to note that the Court held that specific requests still matter, because the prosecution’s failure to respond may mislead the defence and thus impair the adversary process: the more specifically the defence requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defence to assume from the nondisclosure that the evidence does not exist, and to make pre-trial and trial decisions on the basis of this assumption.<sup>129</sup>

The Supreme Court explained that *Brady* is a rule of fairness, which is a ‘departure from a pure adversary model,’<sup>130</sup> and which requires the prosecutor to ‘assist the

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<sup>127</sup> *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>128</sup> *ibid* at 682.

<sup>129</sup> *ibid* at 682-3.

<sup>130</sup> *ibid* at 675, fn.6. (The Prosecutor ‘is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that



defense in making its case.’<sup>131</sup> This, in effect, narrowed the reach of *Brady*. For a *Brady* violation to result in the reversal of a conviction the suppressed evidence now had to be both ‘exculpatory’ and ‘material’. The evidence is material, Justice Blackmun wrote in *Bagley*, ‘only if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different.’<sup>132</sup>

***Kyles v. Whitley (1995)***<sup>133</sup>

*Kyles* is a case in which the Court made clear that the duty of disclosure extended to the police and other governmental agencies. The Court imposed an affirmative duty to the prosecutors that they have ‘a duty to learn of any favorable evidence known to the others acting on the government’s behalf in a case.’<sup>134</sup>

Another important clarification made by the Court is the meaning of the materiality standard: ‘a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculcate the defendant.’<sup>135</sup> The point is that materiality does not need to have a demonstration of acquittal, but rather, if the

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justice shall be done.’ Citing *Berger v. United States*, 295 U. S. 78, 295 U. S. 88 (1935); *Brady v. Maryland*, 373 U.S. at 373).

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid* at 682.

<sup>133</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995).

<sup>134</sup> *ibid* at 437.

<sup>135</sup> *ibid* at 434.

suppressed evidence will undermine the integrity of a trial, and did not ‘result in a verdict worthy of confidence.’<sup>136</sup> The Court concluded that disclosure of suppressed evidence in *Kyles* would have made a different result reasonably probable.

***Strickler v. Greene (1999)***<sup>137</sup>

In *Strickler*, it was found that although the State failed to disclose exculpatory evidence it did not violate the *Brady* rule. The Court reiterates the three key elements for a ‘true’ *Brady* violation: 1) the evidence must be favourable, including exculpatory or impeaching material; 2) it is suppressed by the State, either wilfully or inadvertently; and 3) prejudice has been ensued.<sup>138</sup>

The Court stated that the first and second components were without dispute in this case. It was the third one, whether the necessary prejudice has been established, that has not been proved. By saying that it was the most difficult element of the *Brady* violation claims, the fact that the prosecution has suppressed documents which should have been disclosed to the accused alone was not enough; the documents had to be material for *Brady* purposes and the suppression must give rise to ‘sufficient prejudice to overcome the procedural default.’<sup>139</sup>

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<sup>136</sup> *ibid.*

<sup>137</sup> *Strickler v. Greene*, 527 U.S. 263 (1999).

<sup>138</sup> *ibid* at 263.

<sup>139</sup> *ibid* at 264.

Another point made clear by the Court was that the prosecution has a broad duty to disclose materials at the pre-trial stage; however, the standard to establish a *Brady* violation post-trial is not the same. In other words, although the government has a duty to disclose favourable evidence, not every violation of that duty will result in an unjust outcome. The confusing part is that the term ‘*Brady* violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called ‘*Brady* material’ – although, strictly speaking, there is never a real *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.<sup>140</sup>

## **B. The Curious Case of *Brady v. Maryland***

### **1. *Brady*: a Unique Positive Obligation of Fairness**

It would seem that under *Brady*, as interpreted by the U.S. Supreme Court, the prosecution team, including the police and other law enforcement, is under an obligation to disclose favourable, material evidence to the defence. As a requirement based on due process, the disclosure of exculpatory evidence is crucial to a fair and just criminal system, no matter which trial model was adopted, because it has the important function of preventing a miscarriage of justice from occurring.<sup>141</sup>

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<sup>140</sup> *ibid* at 281.

<sup>141</sup> Eugene Cerruti, ‘Through the Looking-Glass at the *Brady* Doctrine: Some New Reflections on White

Because this duty is accessed under the requirements of due process, the way it is handled is not very ideal, at least for from the point of view of the defence.<sup>142</sup> Many will imagine the *Brady* rule as a discovery rule that requires prosecutors to turn over all exculpatory evidence to the defence prior to trial. However this is not the approach taken by the Supreme Court.

Notwithstanding its good intention, *Brady* and its progeny cases perhaps have created more problems than it wished to solve. With each new interpretive turn by the Supreme Court, the academic literature has responded with a collective dissent.<sup>143</sup> The critics mainly attacked the materiality standard established by the Supreme Court, which was considered a very heavy burden for the defence. But the standard, arguably, is not the greatest issue in the current criminal discovery system. For example, an underlying question for the *Brady* claim is, how does a defendant even *know* the existence of the favourable evidence at the first place? If the defence lawyer has nothing in his hand, how can he prove the evidence will have the character to be disclosed? The problem is on the prosecution. The American criminal discovery system places the fate of an accused on its opposing party, whose duty is, supposedly, to seek justice but not just victory. Since the prosecutor is the one who possess the materials and is also the one who decides what to disclose, if he wishes to conceal the information it is very likely

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Queens, Hobgoblins, and Due Process' (2005) 94 Kentucky Law Journal 211.

<sup>142</sup> The standard used for due process claims usually is 'harmless error'. See, in general, Michael T Fisher, 'Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line' [1988] Columbia Law Review 1298.

<sup>143</sup> Cerruti (n 587).

that the defence will never be able to find out what evidence has been withheld.

If, luckily, the defence somehow finds out the prosecution has not disclosed a piece of evidence, then the next question will be addressed: how to *establish* there is a *Brady* violation? According to the Court's current approach, the burden is on the defence, and the standard of materiality is very difficult to reach. The failure of a prosecutor to disclose evidence does not automatically mean that there is a violation of the *Brady* rule, there must be a prejudice against the defendant. This gap between 'the failure to disclose' and 'a violation has occurred' generates the main difficulty for the defence, and gives the prosecutor space to play games.

Assuming that eventually hidden evidence has come to light, and a violation is recognised, the judiciary's relatively high degree of reluctance of the judiciary to impose sanctions on the prosecution is disappointing. The fact that a *Brady* violation does that mean the accused will necessarily be acquitted, usually the best he can get is a new trial. Except in rare occasions, the prosecutors who violated his *Brady* obligation do not get any sanctions from the Court, sometimes not even internal disciplines.<sup>144</sup>

The prosecution's constitutional obligation to disclose favourable evidence to the defence is not working as it intended to be. The problems will be addressed as follows.

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<sup>144</sup> Keenan and others (n 503) 217; Daniel S Medwed, *Prosecution Complex: America's Race to Convict, and Its Impact on the Innocent* (NYU Press 2012) 30; Richard A Rosen, 'Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger' (1986) 65 NCL Rev. 693, 731; Angela J Davis, 'The Legal Profession's Failure to Discipline Unethical Prosecutors' (2007) 36 Hofstra Law Review.

## 2. The Long, Hard Road to Find Evidence

*Brady* material is, by definition, unknown to the defence. This has immense implications: since the defendant does not know if the prosecution possesses these materials in its case file, how can the defence claim they exist and try to find out the exculpatory evidence through a discovery motion? How does the defence know if the prosecution is playing a game of hide and seek? The answer is very unfortunate to most defendants: they do not know and cannot do anything if the prosecutors are withholding evidence, either intentionally or inadvertently. Reports have shown that, in the overwhelming majority of cases, the defence learns of *Brady* evidence by pure accident.<sup>145</sup>

Previous studies show that the prosecution team routinely withheld evidence.<sup>146</sup>

Scholars indicated that the current disclosure system has made it very easy for the prosecution to evade their *Brady* duty, and even encouraged them to do so.<sup>147</sup> If withholding a piece of exculpatory material means that ‘the bad guys will be put behind bars’ or winning the case, why would any (sensible) prosecutor disclose evidence that could likely result in a personally undesirable outcome? This line of thinking is even

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<sup>145</sup> Michael D Cicchini, ‘Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence’ (2006) 37 Seton Hall L. rev. 335, 339.

<sup>146</sup> Bill Moushey, *Win at All Costs: Government Misconduct in the Name of Expedient Justice* (Pittsburgh Post-Gazette 1998). He examined over 1500 cases in the United States, discovered that many prosecutors routinely withhold evidence that might assist to prove an accused innocent. He found that prosecutors intentionally withheld evidence in hundreds of cases during the past decade, but courts overturned verdicts in only the most extreme cases). Ken Armstrong and Maurice Possley, ‘The Verdict: Dishonor’ (1999) 10 Chicago Tribune (a national study from 1963 to 1999).

<sup>147</sup> See Gershman (n 459); Cerruti (n 587); Mary Prosser, ‘Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities’ [2006] Wis. L. Rev. 541.

encouraged by the fact that, the prosecution teams are aware, if they are willing to hide something, it is very unlikely for the evidence ever to come to light.

### **3. The Materiality Standard: A Bar too high**

A major problem with materiality as the standard for pre-trial disclosure is that it actively encourages non-disclosure.<sup>148</sup> However, the defence counsel is not automatically in a better position after a piece of material is discovered. Simply claiming that the State failed to disclose exculpatory evidence in a timely manner is not enough for a *Brady* claim to succeed.

#### **Prejudice requirement**

This gap between the prosecution's failure to disclose and the actual recognition of a *Brady* violation has been developed by the Supreme Court itself during the post-*Brady* cases. The requirement for evidence to be disclosable in *Brady* was 'material', but the Court in *Brady* did not specify what the actual standard should be. In *Agurs*, the Court attempted to set out a test for material that, in the case of nondisclosure, might have affected the outcome of the trial.<sup>149</sup> Then in *Bagley*, the 'reasonable probability' test was formulated.<sup>150</sup> This does not mean that the evidence has to be capable of reversing the conviction, as the Court clarified in *Kyles*: the materiality depends on whether the

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<sup>148</sup> Janet C Hoeffel and Stephen I Singer, 'Activating a Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice' (2014) 38 NYU Rev. L. & Soc. Change 467, 476; Cerruti (n 587) 214.

<sup>149</sup> *United States v. Agurs*, 427 U.S. 97 (1976).

<sup>150</sup> *United States v. Bagley*, 473 U.S. 667 (1985).

defence can prove that the absence of the evidence ‘undermines confidence’ in the verdict.<sup>151</sup>

For the defence, in order to establish a *Brady* violation, there are three elements which must be demonstrated to the appellate Court:

- 1) The evidence is favourable to the accused because it is exculpatory or impeaching;
- 2) The evidence is suppressed by the Government, either intentionally or negligently;
- 3) The suppression is prejudicial to the accused.<sup>152</sup>

The key here is the ‘prejudice’ to the defence. This applies only if the suppressed evidence is ‘material.’ According to the Supreme Court, evidence is *material* only if ‘there is a reasonable probability that the result of the trial would have been different if the suppressed evidence had been disclosed to the defence.’<sup>153</sup>

What the Supreme Court is doing here, is in fact asking the prosecution to make a *pre*-trial decision to disclose based on a *post*-trial assessment. While the wording in *Brady* seems to mean that the prosecutor should disclose *all* favourable evidence, the later amendment of the ‘prejudice’ element limited the possibility to make a successful *Brady* claim.<sup>154</sup>

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<sup>151</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995).

<sup>152</sup> *Strickler v. Greene*, 527 US 263 (1999).

<sup>153</sup> *ibid* at 289.

<sup>154</sup> It is because *Brady* carries this prejudice requirement that some courts have developed the so-called ‘due diligence’ rule. For a list of courts and cases, see Kate Weisburd, ‘Prosecutors Hide, Defendants



## **Making a Post-Trial Assessment at the Pre-Trial Stage**

One may wonder, how is one party, either the defence or prosecution, supposed to know what type of evidence is going to make a difference for the outcome even before the trial is over? It is difficult, if not impossible, to name the value of any piece of favourable information concerning the result of a trial, because the trial has not started yet. It is ludicrous to ask a prosecutor to make such determination.<sup>155</sup>

This standard, apparently, is troublesome and has drawn lots of criticism among scholars.<sup>156</sup> One main point is the high threshold of its appellate review standard, that is, merely demonstrating that the prosecutor is withholding a piece of evidence is not enough, and it must have an impact on the outcome.

The test has put both parties in a difficult situation, in particular the defence. For the defendant, it means that he has to depend on a speculative post-trial review to determine the effect such evidence would have had on his case.<sup>157</sup> The value of the undisclosed evidence to the defence is not always obvious in a post-trial review. An appellate court, without the benefit of knowing what the defence counsel knew, whether the undisclosed

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Seek: The Erosion of Brady Through the Defendant Due Diligence Rule' (2012) 60 UCLA L. Rev. 138, 153–4.

<sup>155</sup> Alafair S Burke, 'Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science' (2005) 47 William & Mary Law Review: 1587, 1610 ('requires that prosecutors engage in a bizarre kind of anticipatory hindsight review'); Cerruti (n 587) (describing the process as a 'looking glass'). See also Justice Scalia's comments in the oral argument in *Kyles v. Whitley*, at 33:22.

<sup>156</sup> See, e.g. Hoeffel and Singer (n 594) 474.

<sup>157</sup> Daniel J Capra, 'Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review' (1984) 53 Fordham L. Rev. 391.

evidence could have corroborated other evidence available to the defence, or why the defence counsel pursued certain strategies, has to speculate about how defence counsel might have made use of the undisclosed evidence.<sup>158</sup> For the prosecutor, although originally it was expected that he would make prospective decisions and disclose *all* favourable evidence in his possession to the defence, the materiality standard in effect has limited the scope of his constitutional duty. A prosecutor would have to, prior to trial, use this appellate review standard to decide whether he should disclose exculpatory materials to the defence.

Lower courts charged with enforcing the *Brady* mandate have repeatedly ruled that *Brady* does not require pre-trial disclosure even when the government is aware of the favourable evidence prior to trial.<sup>159</sup> Prosecutors only need to disclose favourable evidence to the defence ‘in time for its effective use at trial.’<sup>160</sup> Accordingly, prosecutors can, and sometimes will, intentionally withhold *Brady* evidence as long as they could, being completely aware that the essential information in their exclusive possession could crucially support the defendant case or seriously undermine the government’s case.<sup>161</sup>

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<sup>158</sup> Cerruti (n 587).

<sup>159</sup> *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001); *US v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988); Lafave and others (n 476) 1143.

<sup>160</sup> *Coppa*, at 142.

<sup>161</sup> E.g. *Padgett v. State*, 668 So. 2d 78 (Ala. Crim. App. 1995); *People v. Jackson*, 637 N.Y.S.2d 158 (N.Y. Sup. Ct. 1995); *Page v. Roberts*, 611 N.Y.S.2d 214 (N.Y. App. Div. 1994).

## Encouraging Gamesmanship –‘Let’s play a game: I will win anyway’

Another worrying consequence is that this retrospective, post-conviction aspect of the materiality standard has added even more power into the hands of the prosecution, which further worsens the inequality of arms between the two adversaries, and encourages the prosecutors to play games. The materiality standard has been repeatedly condemned by scholars,<sup>162</sup> some even used descriptions as strong as ‘perverse standard’.<sup>163</sup>

By adopting this material standard to define the scope of the defendant’s constitutional right to certain evidence prior to trial, the Court has made it easier for prosecutors to evade their *Brady* duty simply by claiming that they believed it was inconceivable that any evidence they possessed would create a reasonable probability that the defendant would be found not guilty.<sup>164</sup> As Justice Marshall criticised in *Bagley*, rather than promoting full and complete disclosure, the materiality standard legitimises non-disclosure by allowing prosecutors to determine which favourable evidence is not

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<sup>162</sup> Often on the premise that: it all too easily empowers overzealous prosecutors, to engage in gamesmanship to dodge their obligations to disclose. See Gershman (n 459) (outlining the numerous methods prosecutors can use to altogether avoid or minimise the effects of disclosing exculpatory evidence); Scott E Sundby, ‘Fallen Superheroes and Constitutional Mirages: The Tale of *Brady v. Maryland*’ (2001) 33 *McGeorge L. Rev.* 643, 647 (‘it’s the Court’s materiality decision that essentially have robbed *Brady*... and transformed the doctrine from a pre-trial discovery right into a post-trial remedy for government misconduct’). Similarly, Cynthia E Jones, ‘A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence’ [2010] *The Journal of Criminal Law and Criminology* 415 (noting that non-disclosure of favourable evidence does not result in a *Brady* violation unless the defendant can establish that the withheld evidence was material or prejudicial to the defendant).

<sup>163</sup> Gershman (n 459).

<sup>164</sup> Bennett L Gershman, ‘Bad Faith Exception to Prosecutorial Immunity for *Brady* Violations’ [2010] *Pace Law Faculty Publications* 635, 22.

material and can be constitutionally withheld.<sup>165</sup>

#### 4. Prosecutors in Power

The way this disclosure duty is designed is another problematic feature. As practice has shown, the prosecutors can easily violate the rules with little consequences. The materiality standard has been repeatedly condemned. However, it is submitted, the key towards a better disclosure system is not *what* standard should be applied, rather than *who* is applying it.

It is the prosecution who has the exclusive possession of materials collected during the criminal investigation, and they alone are entrusted to determine whether favourable evidence exists. It is also the prosecutors' discretion to decide *when*, if at all, this evidence will be disclosed to the defence. The prosecution not only has more cards in their hands, but also has the power to decide what their opponents, the defence, are allowed to see. This fact has made the prosecutors very powerful, and has given them room and possibility to abuse their power. Davis noted that prosecutors make most disclosure decisions behind closed doors and defence attorneys are ill equipped to discover potentially material evidence in the prosecutor's possession.<sup>166</sup>

Defence counsels, on the other hand, for all their incentives to find exculpatory

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<sup>165</sup> Dissenting opinion of Justice Marshall in *US v. Bagley*, 473 U. S. 685.

<sup>166</sup> Angela J Davis, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press 2009) 432.

information, usually lack ‘the time, resources, or expertise’ to conduct the type of tremendous pre-trial investigation needed to uncover this evidence.<sup>167</sup> As noted by Medwed, ‘when a prosecutor chooses not to disclose evidence, that decision is only seldom revealed to outsiders unless he or she later has a change of heart or it somehow finds its way into defence hands.’<sup>168</sup>

It is important, however, to bear in mind the reasons for the prosecutors, police and other law enforcement to be in charge of these powers. Their function is to pursue justice, not to seek victory. Therefore, the constitutional right of criminal defendants to acquire exculpatory evidence for use at trial should not depend on sheer luck or the industriousness of the defence’s investigation team. As the Court recognised in *Banks*: ‘[a] rule . . . declaring “prosecutor may hide, defendant must seek,” is not tenable in a system constitutionally bound to accord defendants’ due process.’<sup>169</sup>

## 5. Judiciary’s permissive Approach

The judicial evolution of the *Brady* rule has made it easier for prosecutors to violate *Brady*, and the lack of an effective mechanism to sanction or deter violations invites a rethinking of the perception in continuing to afford prosecutors the shield of absolute immunity for deliberate and serious *Brady* violations. *Brady* violations appear to be

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<sup>167</sup> Daniel S Medwed, ‘Brady’s Bunch of Flaws’ (2010) 67 Washington and Lee Law Review 1533, 1541, citing Davis, *ibid*, 432.

<sup>168</sup> *ibid* 1541, 2; Gershman (n 459) 537. Noting the defendants might have to rely on chance to discover evidence post-trial.

<sup>169</sup> *Banks v. Dretke*, 540 U.S. 668 (2004) at 695-698.

more common than ever and, as Justice White noted in his concurrence in *Imbler*, ‘the stakes are high.’<sup>170</sup> *Brady* violations deny the defendant his right to a fair trial, undermine the integrity of the judicial process, and tarnish the public’s perception of the judicial process. Davis heavily criticised the Supreme Court for ‘fostering a cultural misconduct.’ By establishing nearly impossible standards for obtaining the necessary discovery to seek judicial review, the Supreme Court is covering these prosecutorial misconducts.<sup>171</sup>

The lack of judicial oversight of *Brady* disclosure decisions is compounded by the fact that, absent extraordinary circumstances, it is very likely that the defence will never learn of the existence of favourable evidence and, accordingly, cannot seek leave of the court to compel disclosure. Nor are prosecutors required to seek an in camera review of potential *Brady* evidence prior to making the decision that evidence will not be disclosed.<sup>172</sup> Consequently, the courts would only have a limited ability to make pre-trial determinations of whether the prosecutor has wholly adhered to *Brady*.

## **C. Analysis**

### **1. A Task too noble for Prosecutors?**

The prosecution’s frequent violation of their *Brady* obligations, however, is

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<sup>170</sup> *Imbler v. Pachtman*, 424 U.S. 409 (1976) at 444.

<sup>171</sup> See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, (2001) 86 IOWA L.REV. 393, 414.

<sup>172</sup> Jones (n 608) 433.

unsurprising. As Jones noted, the duty to disclose *Brady* evidence is governed by ‘an unrealistic “honour code” system.’<sup>173</sup> Also pointed out by Gershman, the criminal discovery system, in particular the disclosure of *Brady* evidence, as in other areas of criminal procedure, relies heavily on the ‘integrity, good faith, and professionalism of the prosecution for its effectiveness.’<sup>174</sup> But this exactly is the problem here: are the expectations towards the American prosecutors too high? Studies of cognitive bias have shown that even a bona fide prosecutor ‘might underestimate the potential exculpatory value of the evidence whose disclosure is at issue.’<sup>175</sup> Burke’s research pointed out that naturally, prosecutors will have cognitive bias towards guilt and the inevitable cognitive bias of human beings makes the noble task to achieve justice even more impossible.<sup>176</sup>

The central failure of the *Brady* doctrine is, accordingly, its underlying commitment to an idealised regime of prosecutorial privilege, rather than to a modern regime of adversarial transparency and fair play. Scholars have written extensively about the failure of *Brady*. For example, Cerruti has criticised that ‘the *Brady* doctrine has failed not only with respect to that it should be but even regard to what it purports to be.’<sup>177</sup>

*Brady* is supposed to be a rule of constitutional discovery designed to entitle a criminal

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<sup>173</sup> *ibid* 431–2.

<sup>174</sup> Gershman (n 459) 533.

<sup>175</sup> Burke, ‘Improving Prosecutorial Decision Making’ (n 601) 1612. See also Ellen Yaroshefsky, ‘Foreword-New Perspectives on Brady and Other Disclosure Obligations: What Really Works?’ (2010) 31 *Cardozo Law Review* 1943, 1950.

<sup>176</sup> Burke, ‘Improving Prosecutorial Decision Making’ (n 601) 1605–9; Alafair S Burke, ‘Neuroscience, Cognitive Psychology, and the Criminal Justice System: Prosecutorial Agnosticism’ (2010) 8 *Ohio St. J. Crim. L.* 79.

<sup>177</sup> Cerruti (n 587).

defendant to obtain favourable materials collected by the state to be used by the defence in order to prepare its case. Instead of being a rule to promote a fair and just criminal system, *Brady* is now a rule that encourages and shields pre-trial nondisclosure by the prosecutor.

## 2. Undermining the Adversary System?

The concept of this duty of disclosure is not compatible with the *pure* adversarial system settings.<sup>178</sup> It requires the prosecution, to some extent, to assist the defence. Accordingly, it is often alleged that the duty will upset the adversary system,<sup>179</sup> and prosecutors are doing jobs for the defence counsels.<sup>180</sup> In order to address and rebut this argument, it would be useful to briefly examine the adversary system and its impact.

The American criminal justice process is structured to adjudicate guilt through a process that is, in general, adversarial in character. Interestingly, disclosure rules are a product of the common law legal system but the idea itself is a departure of the traditional, adversarial model of criminal litigation.<sup>181</sup> The adversary system is preferred because, as it is believed, it will produce more accurate verdicts. There are two main reasons for this superiority: firstly, the parties, motivated by self-interests, will ensure that all relevant evidence is produced, the strengths and weaknesses of the evidence will be

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<sup>178</sup> *ibid*; Prosser (n 593); Gershman (n 459) 533.

<sup>179</sup> Lafave and others (n 476).

<sup>180</sup> *ibid*.

<sup>181</sup> *United States v. Bagley*, at 675, fn. 6.



fully explored, and eventually the truth will come out.<sup>182</sup> Secondly, it is argued that the adversary system avoids the kind of decision-maker bias likely to be found in inquisitorial proceedings. In the adversary system, the decision makers are much more neutral when assessing the evidence at hand and tend to postpone any decision until the case has been fully reviewed. This is largely due to the fact that they are not personally involved in the fact-finding process.<sup>183</sup>

For the adversary system to operate perfectly, each side must have the resources needed to fully dispute the other. However, this is almost never the case in a criminal trial. As the critics pointed out, there is a serious inequality in the resources available to the two parties.<sup>184</sup> The defence rarely possesses approximate equality with the prosecution, and there is no practical method of providing it. Nevertheless, there is little doubt that the system could be improved if the weaker litigant could know in advance the disputing points and to have access to all available information so that he could investigate properly beforehand. Until he knows what evidence is likely to be available for or against him, he cannot prepare to meet or insinuate objections.

Since it is impossible, and not needed,<sup>185</sup> to equip both parties in criminal trials with the

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<sup>182</sup> Lafave and others (n 476).

<sup>183</sup> *ibid* 29. This is challenged of course. Disagreements also exist as to whether certain obligations imposed upon both sides, detract from or add to the effectiveness of the adversary system in seeking the truth.

<sup>184</sup> E.g. Traynor (n 463).

<sup>185</sup> *McNeil v. Wisconsin*, 501 U.S. 171, 183 (1991) at fn.2. 'Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable.'

same investigate facilities, the only reasonable way to attain advance equality in access to the evidence is through the system, that is, through a discovery procedure. In fact, taking a comparative look at civil procedure systems, this is exactly the route that is followed: the discovery of documents, interrogatories, oral examinations for discovery, medical examinations, and pre-trial production of documents in the hands of any person are all procedures in the system that provide discovery as of right and made it possible for the reasoning of the adversary model to be fulfilled.<sup>186</sup>

In sum, because the adversary system is structured based on some flawed presumptions, such as both parties having equal resources, in order to make the system work in accordance with its design, both parties should have equal access to the evidence. Thus, the claim of undermining the adversary system is unfounded. Discovery will only aid it in achieving its purposes.

### **3. The Presumption of Guilt**

A dominant perspective that explains this resistance and the overall limitations on discovery in criminal cases is the unspoken presumption of the defendant's guilt. This line of thinking is well expressed in the claims of intimidating witness and perjury. It is based on the assumption that the defendant had committed a crime and, therefore, he must have all the information, so there is no need to disclose information to him. The

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<sup>186</sup> See e.g. Stephen Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules' (1998) 39 Boston College Law Review 691.

idea behind this is: if the defendant found out what the prosecution has on him, he would tailor his testimony and even threaten the witness whose names are known to him. Then, using his protection under the constitutional law, he would not be compelled to tell the truth because he has the right not to incriminate himself, along with the right to remain silent. These advantages of an accused will put the prosecution in a severe disadvantage, and therefore the prosecution is entitled not to give up their evidence to the defence. Otherwise the burden on the prosecution will become even heavier – he already has to prove the defence is guilty beyond a reasonable doubt!

This line of thinking partially unfolds the reasons behind the narrow federal discovery rules as it currently stands, and explains the inconsistencies and illogical reasoning in judgments. As exhibited in the early case law, the judges were not shy to show their hostile attitude toward criminal defendants, and focused on the disadvantages the State could be put in disadvantage if allow liberal disclosure rules.<sup>187</sup>

## **V. Concluding Remarks**

This Chapter examined the law and practice of the criminal discovery system in the United States. Policy arguments against liberal criminal discovery rules were reviewed, and it was established that they lack merits. Nevertheless, U.S. Federal Rules of Criminal Procedure still provide a relatively narrow discovery regime compared to most States Rules.

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<sup>187</sup> See above statements of Judge Learned Hand and Judge Vanderbilt.

The internal solution of many prosecution offices is to adopt an open file policy and voluntarily disclose material to the defence, which is beyond their statutory obligation. Further internal training and resources for prosecutors with regard to discovery are also provided, and it would seem that most U.S. prosecutors intend to do their jobs properly. Recent high profile cases such as Ted Stevens, however, reveal that some prosecutors still withhold important evidence from the accused without being held accountable. This is partly due to the Courts' notorious high threshold in establishing a *Brady* violation, the materiality standard and prejudice requirement, which further encourages a gamesmanship. The key for the *Brady* obligations to work is the prosecutors must be acting bona fide; but this is hard to detect when the prosecutors are not fulfilling their obligations.

Both the government and scholarship have attempted to find alternative solutions to the problem of prosecutorial misconducts such as internal disciplinary proceedings from the Bar Association or the Department of Justice,<sup>188</sup> and legislative reforms. However, they were not successful, as the former treats *Brady* violations as a mere breach of prosecutors' ethical standards, and the recent reform in 2012 died down for both political and legal reasons. Accordingly, it is submitted that the most possible solution is that the Courts should take a different approach, i.e. a lower standard than the current one, in dealing with *Brady* violations.

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<sup>188</sup> Rule 3.8(d) of the Model Rules of Professional Conduct. See also e.g. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

## CHAPTER VI

# THE PROSECUTION'S DUTY OF DISCLOSURE IN COMMON LAW JURISDICTIONS II – ENGLAND AND WALES

### I. Introduction: Pre-Trial Disclosure in England and Wales

Disclosure of evidence at the pre-trial stage is a crucial part in adversarial criminal trials.

The process of pre-trial disclosure will determine 'who' knows 'what' and 'when'.

Accordingly, the disclosure process will affect the parties' strategies at trial. In England, the prosecution's disclosure duty is one of the most important safeguards for the accused's right to a fair trial.<sup>1</sup> It also serves other purposes, such as preventing unnecessary surprises and facilitating the search for truth and trial procedural management.<sup>2</sup>

It is worthwhile to note that, in England, the Courts have generally regarded the prosecution's duty of disclosure as a basic requirement of natural justice,<sup>3</sup> or the duty to

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<sup>1</sup> E.g. John Sprack, *A Practical Approach to Criminal Procedure* (14th ed, Oxford University Press 2012) para.9.01.

<sup>2</sup> Ashworth and Redmayne (n 29) 259.

See also Robin Auld, *Review of the Criminal Courts of England and Wales: Report, October 2001* (Stationery Office 2001) Chapter 10, para 115. 'Advance disclosure by the prosecution serves two main purposes. The first is its contribution to a fair trial looked at as a whole. The second is its contribution to the efficiency, including the speed, of the pre-trial and trial process and to considerate treatment of all involved in it.' (footnotes omitted) .

<sup>3</sup> John Arnold Epp, *Building on the Decade of Disclosure in Criminal Procedure* (Cavendish Pub 2001) 50.

act fairly,<sup>4</sup> in criminal proceedings.<sup>5</sup> For example, in *ex parte Hawthorn*,<sup>6</sup> the failure of prosecution's disclosure was seen as a denial of natural justice, even though it was the fault of the prosecution and not of the Tribunal. In this case, the prosecutor failed to provide the defence witness statements which might have assisted the defence case and, as a consequence, the conviction was quashed. The notion of fairness has been central to the English legal systems for centuries. A trial must be fair, and this means the parties must be given a fair chance to prepare for the charges against him. In the words of Lord Widgery CJ in *ex parte Peach*,<sup>7</sup> 'it is elementary that if a charge is being made against a person, he must be given a fair chance of meeting it. That often means he must be given documents necessary for the purpose.'<sup>8</sup>

The idea of the common law principle of natural justice fits roughly with Article 6 of the ECHR.<sup>9</sup> In the European human rights context, it is broadly accepted that the obligation of the prosecution to disclose evidence to the defence prior to trial represents

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<sup>4</sup> Matthews and Malek (n 262) 23. Citing Brian Harris, *Disciplinary and Regulatory Proceedings* (Jordans 2009) Chapter 10.

Natural justice is an old principle of common law, it also means procedural fairness, to ensure a fair decision could be reached by decision-makers, instead of 'the actual outcome'. It requires a fair and proper procedure be used when making a decision.

<sup>5</sup> Although, as pointed out by Ashworth, the reasoning behind prosecution disclosure has never been entirely clear. See Ashworth (n 29) 32.

<sup>6</sup> *R v Leyland Justices, ex parte Hawthorn* [1979] Q.B. 28.

<sup>7</sup> *R v H.M. Coroner for Hammersmith, ex parte Peach* [1980] QB 211.

<sup>8</sup> *ibid*, Lord Widgery CJ, at 286.

<sup>9</sup> Article 6(1) and (3)(b) and (d) of the ECHR relates to disclosure of both evidence and unused material. Article 6(3) (b): to have adequate time and facilities for the preparation of his defence; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 6(3) (d): to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

an inherent part of the right to a fair trial.<sup>10</sup> Although Article 6 of the ECHR itself does not explicitly contain ‘a right to disclosure’, the European Court of Human Right has confirmed this right in its jurisprudence.<sup>11</sup> For example, in *Natunen v Finland*,<sup>12</sup> it was held that ‘Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.’ In *Jespers v Belgium*,<sup>13</sup> in line with the principle of equality of arms, the European Court of Human Right reasoned that due to the State’s superior resources the defence should have access to all relevant evidence that has been or could be gathered by the prosecution.

In England, it is undisputed that fair disclosure to the defence is an inseparable part of a fair trial.<sup>14</sup> As pointed out by Lord Steyn in *R v Brown*, in an adversarial system, it is the prosecution, including the police, which would be responsible for the investigatory process.<sup>15</sup> Also recognizing the disparity of recourses between the prosecution, which has many investigative facilities at its disposal,<sup>16</sup> and the accused, it is only fair if the defence is provided access to the prosecution materials, which could compensate for the inequality in resources and raise them to an approximately equal position.<sup>17</sup> In order to achieve the equality of arms at its maximum, and the effort to guarantee a fair trial for

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<sup>10</sup> See *Edwards v United Kingdom* (1992) 15 EHRR 417; *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1; *Jaspar v UK* (2000) 30 EHRR 441.

<sup>11</sup> *ibid.*

<sup>12</sup> *Natunen v Finland* (2009) 49 EHRR 32, para. 39.

<sup>13</sup> *Jespers v Belgium* (1981) 27 DR 61.

<sup>14</sup> *R v Brown (Winston)* [1995] 1 Cr App R 191, CA, Steyn LJ, at 198.

<sup>15</sup> *ibid.*

<sup>16</sup> Sprack (n 635) para.9.01.

<sup>17</sup> Ashworth (n 29) 32.

the defendant, a common law duty of disclosure by the prosecution has been developed in England, and was then settled in its current statutory regime. However, because the entitlement to disclosure is not an absolute right,<sup>18</sup> when competing interests (e.g. national security, sensitive information) come into play, the prosecution will seek to withhold evidence and, in that case, the defence's right could be limited. The Criminal Cases Review Commission has recently noted that failure to disclose material to the defence to which they were entitled remains the biggest single cause of miscarriages of justice,<sup>19</sup> and non-disclosure has been identified as one of the most common reasons for referring convictions to the Court of Appeal,<sup>20</sup> which has noted that it hears 'countless' cases on the issue.<sup>21</sup>

## **II. The Prosecution's Duty to Disclose Used Material**

In England, the prosecution's duty of disclosure has two aspects. The used material, which forms the prosecution case before trial, and the unused material, which by definition means it is not part of the prosecution case, but might be useful for the defence to prepare its case.

It has long been recognised that the prosecution is required to disclose its case, i.e.

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<sup>18</sup> *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.

<sup>19</sup> Judicial Protocol on the Disclosure of Unused Material in Criminal Case 2013, available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/Disclosure+Protocol.pdf>

<sup>20</sup> Criminal Cases Review Commission Annual Report 2012/13, p.15, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/246539/0482.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246539/0482.pdf)

<sup>21</sup> *R v Pomfrett* [2009] ECA Crim 1471, [4]. See, e.g., *R. v Giles* [2009] EWCA Crim 1388; *Tucker v CPS* [2008] EWCA Crim 1368.



evidence he intends to rely, to the defence prior to trial.<sup>22</sup> If the evidence is not disclosed in a proper manner, i.e. a bundle of witness statements presented after the case has been transferred, it may not be admissible at trial.<sup>23</sup> This duty is also referred as the ‘duty to provide advance information’.<sup>24</sup> If there is any further evidence which the prosecution wishes to adduce as part of his case, he must notify the defence by way of a notice of additional evidence.<sup>25</sup> The disclosure obligation of the prosecution is uncontroversial for trial on indictment whilst in summary trial<sup>26</sup> has left with some ambiguity.<sup>27</sup>

This obligation needs little justification. Due to the responsive nature of the defence’s case, it is vital for the accused to have knowledge of the prosecution’s case prior to the trial, if that were not the case, the defence would not be able to prepare his case nor call the evidence for trial.<sup>28</sup>

### **III. The Prosecution’s Duty to Disclose Unused Material and its Development**

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<sup>22</sup> Although see Auld (n 636) para.117-9. (‘In all cases there is a legal duty on or a practical requirement for a prosecutor to supply its proposed evidence in advance of the hearing. But it is still a bit of a muddle.’)

<sup>23</sup> Ashworth and Redmayne (n 29) 259.

<sup>24</sup> Sprack (n 635) 9.01. It should be noted that in England, the prosecution’s duty of disclosure generally refers to the duty to disclose the evidence the prosecution did *not* intend to rely at trial (unused evidence). See Criminal Procedure Rules 2015, part 15.

<sup>25</sup> *ibid.*

<sup>26</sup> See Magistrates’ Courts (Advance information) Rules 1985.

<sup>27</sup> Ashworth and Redmayne (n 29) 263; Redmayne (n 29). For a summary of the current position, see Sprack (n 635) 9.54-56.

<sup>28</sup> See Criminal Cases Review Commission, *Annual Report 1999-2000* (2000) 11. Also see, Laurie Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (Justice 2008) 309–11.

What really troubles the English criminal trials is the application of the prosecution obligation to disclose *unused* material, that is, material gathered during the investigation but not put forward at trial. It is upon this aspect of the prosecution's duty of disclosure which will be the focus in this Chapter.

The duty of the prosecution to disclose unused material to the defence is firstly developed through common law in England. It is imperative to understand the historical development of the law of disclosure. Disclosure was dependent on the common law and the fairness of the prosecution concerned.<sup>29</sup> Curiously, the duty of disclosure appeared rather late in England, which did not truly exist until the 1980s and, perhaps surprisingly, there was no formal system of disclosure until the *Criminal Procedure and Investigations Act 1996* ('CPIA 1996').<sup>30</sup> Originally, the position derived from the notion of 'fair play' which was considered a characteristic of all those who acted for the Crown in criminal cases.<sup>31</sup> The premise was that the prosecutors would act as 'ministers of justice whose prime concern is its fair and impartial administration.'<sup>32</sup> Disclosure, therefore, was more of a professional courtesy than a proper legal duty which 'depends on the integrity and skills of the prosecuting counsel.'<sup>33</sup>

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<sup>29</sup> David Rhodes, 'Disclosure' in Madeleine Colvin and Jonathan Cooper (eds), *Human Rights in the Investigation and Prosecution of Crime* (Oxford University Press 2009) para.10.13.

<sup>30</sup> The *Criminal Procedure and Investigations Act 1996* (CPIA) came into force on 1 April 1997.

<sup>31</sup> David Corker and Stephen Parkinson (eds), 'Disclosure in Criminal Proceedings' (Oxford University Press 2009) para.1.03.

<sup>32</sup> *Linton Berry v R* [1992] 2 A.C. 364, per Lord Lowry; *Randall v R* (Cayman Islands), [2002] UKPC 19 (noting that the minister of justice whose prime concern is its *fair and impartial* administration).

<sup>33</sup> Corker and Parkinson (n 665) para.1.04.

## A. The Emergence of the Duty

The beginning of the change of attitude towards recognising an obligation to disclose was the case of *Bryant and Dickson*,<sup>34</sup> which involved malicious prosecution due to the withholding of exculpatory material. The courts then began to identify the duty of the prosecution to disclose material which might affect the outcome of the result. In this case, it was established that while there was no duty on the prosecution to supply a copy of a witness statement which it did not intend to call evidence, it did have a duty to notify the defence of a witness whom the prosecution knew could give material evidence.<sup>35</sup> Although the ruling of the case was quite narrow, it shows that the prosecution's obligation of disclosure to the accused is slowly shifted from solely professional ethics to an individual right.

The next important leading case was *Dallison v Caffery*.<sup>36</sup> Lord Denning adopted a different approach than in *Bryant and Dickson*, holding that the statement of a credible witness should always be disclosed to the defence, and not simply their name and address.<sup>37</sup> Although a distinction was drawn, if it is not a credible witness, then *Bryant*

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<sup>34</sup> *R v Bryant and Dickson* (1946) 31 Cr App R 146.

<sup>35</sup> *R v Bryant and Dickson* (1946) 31 Cr App R 146.

<sup>36</sup> *Dallison v Caffery* [1965] 1 Q.B. 348 CA.

<sup>37</sup> *Dallison v Caffery* [1965] 1 Q.B. 348, 369. Lord Denning: 'The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.'

and *Dickson* would continue to apply.<sup>38</sup> The wider significance of Lord Denning was that he conceptualised disclosure in a new manner: disclosure was about ensuring that justice was done, not simply whether a particular rule was followed. The spirit of common law should prevail, not its letter.<sup>39</sup> Accordingly, unless there were good reasons to believe that disclosure of witness statements was apt to cause injustice by facilitating an accused's fabrication of false evidence, disclosure was necessary.

However, because the two cases were conflicting with each other, it had caused some confusion in practice, and the issue of disclosure soon became one of the main grounds leading to an appeal.<sup>40</sup> By 1970s, the Court of Appeal had to deal with a great number of non-disclosure cases. In many of these cases, the Court of Appeal has emphasized the importance of full disclosure by the prosecution and of the accused being informed of material which might assist them in his or her defence.<sup>41</sup> In *R v Hennessy*,<sup>42</sup> with regard to the rules relating to disclosure by the prosecution, Lawton LJ stated that the courts must: 'keep in mind that those who prepare and conduct prosecutions owe a duty to the

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Cf. Lord Diplock: 'A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or, although not inconsistent with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence.'

See Henry LJ. in *R v Saunders* (unreported) 29 September 1989, recognizing the conflict between the two Lords, in favour of Lord Denning.

<sup>38</sup> *Dallison v Caffery* [1965] 1 Q.B. 348, 369.

<sup>39</sup> *Corker and Parkinson* (n 665) para.1.14.

<sup>40</sup> Patrick O'Connor, 'Prosecution Disclosure: Principle, Practice And Justice' (1992) 4 Criminal Law Review 464, 469.

<sup>41</sup> See, e.g. *R v Hassan and Kotaish* (1968) 52 Cr App R 291 (failure to disclose previous convictions); and see the case of *Laszlo Virag*, in the *Devlin Report 1969*, at para. 1.20 and 3.108 ('A duty of disclosure is not discharged by frankness in cross-examination if the point happens to be raised.')

<sup>42</sup> *R v Hennessey (Timothy)* (1978) 68 Cr App R 419.

courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if it ever should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.<sup>43</sup> This demonstrates how, by 1978, the courts' attitude to the subject of disclosure had moved on dramatically from that shown in *Bryant and Dickson*. As Corker puts it, 'an accused's right to disclosure, not the purported integrity and skill of prosecution counsel, was the best guarantor of fairness in criminal trials.'<sup>44</sup>

## **B. Miscarriages of Justice**

During the 70s, the prosecution had been failing to disclose, in particular exculpatory, materials. These failures had led to several notorious 'miscarriages of justice' cases, e.g. the Birmingham Six,<sup>45</sup> the Guildford Four,<sup>46</sup> and the Maguire Seven.<sup>47</sup> In light of the occurring of these miscarriages of justice cases, critics have provided assessments and recommendations outside the courts before a formalised system of disclosure was eventually established. For example, in both of the Devlin<sup>48</sup> and the Fisher Reports<sup>49</sup>

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<sup>43</sup> *ibid*, at 426.

<sup>44</sup> Corker and Parkinson (n 665) para.1.16.

<sup>45</sup> *R v McIlkenny, Hunter, Walker, Callaghan, Hill and Power (1991) 93 Cr App R 287 ('the Birmingham Six')*.

<sup>46</sup> *R v Richardson, Conlon, Armstrong and Hill EWCA Crim 1989 ('the Guildford Four')*.

<sup>47</sup> *R v Anne Maguire, Patrick Joseph Maguire, William John Smyth, Vincent Maguire, Patrick Joseph Paul Maguire, Patrick O'Neill and Patrick Conlon (1991) 94 Cr App R 133 ('the Maguire Seven')*.

<sup>48</sup> Lord Devlin, Report to the Secretary of State for the Home Department of the Departmental Committee on the Evidence of Identification in Criminal Cases (London: HMSO, 1976) (reviewing wrongful convictions and discussing procedures relating to identification evidence).

the inadequacies in the disclosure system and the link with miscarriages of justice were highlighted. Later, in 1981, the *Royal Commission on Criminal Procedure* made a report,<sup>50</sup> which focused on the unethical police practices, however, it still expressed confidence in the prosecutors. The main theme of the *Royal Commission Report* suggested that the prosecution should have discretion in matters of the disclosure of information. These reports generally agreed that the situation would be improved if the prosecution disclosure system was properly defined and formalised.

### **C. Attorney General's Guidelines**

In an attempt to solve the confusing policy of disclosure by both the police and the prosecuting authorities, the *Attorney General's Guidelines* ('the *Guidelines*') was issued in December 1981.<sup>51</sup> The general idea was that the *Guideline* could improve the disclosure system comprehensively. In addition, to ensure that the rights of the defence will not be affected, it was stated that the application of the *Guidelines* would not be inconsistent with the rights of disclosure which was already established by the common law.<sup>52</sup> It was hoped that the courts would also invoke the *Guidelines* as an authoritative

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<sup>49</sup> Hon. Sir Henry Fisher, *Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6* (London: HMSO, 1977) (reviewing the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait). Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228759/0090.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228759/0090.pdf)

<sup>50</sup> Reports of Royal Commission on Criminal Procedure (Philips Commission) 1977-1981.

<sup>51</sup> The *Attorney-General's Guidelines*, issued in 1982, 74 Cr App R 302 – later revoked and replaced, the most recent is AG Guidelines 2013. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262994/AG\\_Disclosure\\_Guidelines\\_-\\_December\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf)

<sup>52</sup> *ibid.*

source in their judgments, despite it did not have the force of law. However, without involving a proper new legislation, it seemed that the Government intended to change the situation in a soft manner without imposing any actual legal consequences on the prosecution. This soft approach induced the later failure of the *Guidelines*.

The *Guidelines* still had a remarkable importance concerning the improvement of disclosure practice. It can be summarized as the following two points. Firstly, it used the term of ‘unused material’ and defined it in a distinctive way that basically stated that everything in the possession of the Crown should be disclosed. Secondly, it tried to set up a standard for the disclosability of such materials: ‘if it has some bearing on the offence charged.’<sup>53</sup> This test was very wide and presumed automatic disclosure unless some exceptional circumstances, e.g. national security, the identity of informants, existed.<sup>54</sup> In the *Guinness I* case,<sup>55</sup> it was held that the defence was entitled to see all preparatory notes and memoranda which led to the making of witness statements. The rationale was since the defence has the right to cross-examine on prior inconsistent statements, ‘so the defence should, as a general rule, in normal circumstances, be given the right to see information that would enable the right to be exercised, *i.e.* to give the right meaning.’<sup>56</sup> This means that the scope of what should be disclosed has been put to its maximum by recognising that it was for the defence, not the prosecution, to decide

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<sup>53</sup> *ibid.*

<sup>54</sup> *R v Saunders* (unreported) 29 September 1989, Henry LJ: ‘it is hard to imagine wider words than that’, at page 6D.

<sup>55</sup> *R v Saunders*, *ibid.*

<sup>56</sup> *R v Saunders*, at page 4F.

whether unused material had some bearing on the case.<sup>57</sup>

However, the Court's ruling in *Saunders* did not fit into the other premise of the *Guidelines*: it would be in the prosecuting counsel's discretion to decide what to disclose without referring to the court or the defence.<sup>58</sup> A related problematic issue was that the *Guidelines* did not mention any principle such as Public Interest Immunity, and the prosecution can decide whether to disclose sensitive material depending on its own assessment of the assistance of the information to the defence case. In other words, the prosecution could withhold materials even if it is not in fact sensitive material. An interesting note here is the decision whether relevant material should be disclosed to the defence. The *Guidelines* gave this responsibility solely to the prosecuting barrister in the case, not to the investigators, nor to the Crown prosecution Service prosecutor. It seems to have the assumption that the criminal bar would and could act as ministers of justice, which could ensure fairness and impartiality in the disclosure decision-making.<sup>59</sup>

Despite all the good intentions of the *Guidelines*, however, it appeared that the Courts were highly critical of the manner of the prosecuting counsels when they are exercising their discretion.<sup>60</sup> In several occasions, the Court of Appeal had ruled that the prosecutor exercised his discretion improperly and, consequently, resulting in the

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<sup>57</sup> *ibid.*

<sup>58</sup> *The Guidelines* (n 51).

<sup>59</sup> Corker and Parkinson (n 665) para.1.32.

<sup>60</sup> *ibid* para.1.33.



quashing of convictions.<sup>61</sup> More fatally, the fundamental weakness of the *Guidelines* was that it lacked the force of law. Therefore, the Courts merely treated the *Guidelines* as instructions and did not make them binding at all.<sup>62</sup>

#### **D. The Common Law Development**

##### **1. Ward: Expanding the Duty of Disclosure**

The case of Judith Ward<sup>63</sup> – one of the most notorious miscarriage of justice cases – demonstrates the apparent link between miscarriage of justice and improper non-disclosure of the prosecution.<sup>64</sup> Although the common duty in *Ward* is now superseded by the disclosure scheme set out in the CPIA 1996, it was an important case in the historical development regarding disclosure.<sup>65</sup> The occurrence of *Ward* shows that the then disclosure regime was operating without fairness and, thus, causing wrongful convictions. More critically, the reoccurring of these miscarriage of justice cases appears to rebut the assumption that the prosecutors could be trusted to handle the disclosure process in a fair manner, which was the central premise in the *Guidelines*.

It is generally considered that *Ward* managed to improve the flaws of the *Guidelines*, and expanded the scope of the prosecution's obligation to disclose considerably. The

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<sup>61</sup> E.g. *R v Lawson* [2005] EWCA Crim 1840; *R v Phillipson* (1989) 91 Cr App R 226.

<sup>62</sup> See e.g. in *R v Brown* (n 648). Steyn LJ said it is merely a set of instructions to CPS lawyers and prosecuting counsels.

<sup>63</sup> *R v Ward (Judith)* [1993] 2 All ER 577.

<sup>64</sup> Roger Leng, 'The Exchange of Information and Disclosure' in Michael McConville and Geoffrey Wilson (eds), *The handbook of the criminal justice process* (Oxford University Press 2002) 210.

<sup>65</sup> *ibid.*

*Guidelines*' concept of unused material was replaced by a new standard of 'relevance', or 'materiality', in which the court held that:

'We could emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.'<sup>66</sup>

The ruling in *Ward*, in effect, broadened the scope of the prosecution's duty to disclose to include everything gathered and collected by the police during their investigation, with the sole exception of Public Interest Immunity.<sup>67</sup> This wide entitlement to disclosure of all material evidence was later approved by House of Lords in *R v Preston*,<sup>68</sup> and had been the common law standard of disclosure duty until the enforcement of the CPIA 1996. Although, note that the exact meaning of 'material evidence' appears to be less clear than the term 'unused material' in the *Guidelines*, and 'evidence' in this context is not the same meaning in the procedural sense.<sup>69</sup>

The most significant improvement of *Ward*, however, is the rejection of the broad concept of sensitive materials and the wide discretion of the prosecution. Instead, the

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<sup>66</sup> *R v Ward* (n 63), 601.

<sup>67</sup> *R v Ward* (n 697). See per Gildewell J.

<sup>68</sup> *R v Preston* [1993] All ER 638.

<sup>69</sup> *Corker and Parkinson* (n 665) para.1.45.

principle of Public Interest Immunity was established which is a much narrower concept and would be supervised by the Court, not the prosecution.<sup>70</sup> Since *Ward*, the prosecution can no longer withhold any material from disclosure on the ground of its 'sensitivity' or 'Public Interest Immunity', unless obtaining a favourable ruling from the court. The Court recognised that the presumption 'non-disclosure is a potent source of injustice'.<sup>71</sup> As held by Gildewell J, 'if, in a wholly exceptional case, the prosecution are not prepared to have the issue of Public Interest Immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.'<sup>72</sup> In other words, the unsatisfying procedure of the prosecution being both the player and referee was overcome by allocating this obligation to the court itself.

In subsequent cases, e.g. *R v Davis, Johnson, and Rowe*,<sup>73</sup> *R v Keane*,<sup>74</sup> *R v Brown*,<sup>75</sup> the Courts continued to expand and clarify the duty of the prosecution to disclose material in its possession to the defence. In *R v Davis, Johnson, and Rowe*,<sup>76</sup> Lord Taylor summarized this change as follows: Before *Ward*, the defence would have been totally unaware that, within the prosecution authority, the question of whether to disclose sensitive material or not was being resolved. The effect of *Ward* is to give the court the role of monitoring the prosecution regarding what material could be withheld,

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<sup>70</sup> For an introduction of the doctrine of Public Interest Immunity, see Corker and Parkinson (n 665).

<sup>71</sup> *R v Ward* (n 697) at 599.

<sup>72</sup> *ibid* at 632-33.

<sup>73</sup> *R v Davis, Johnson and Rowe* [1993] Cr App R 110.

<sup>74</sup> *R v Keane* [1994] 1 WLR 746.

<sup>75</sup> *R v Brown (Winston)* [1998] 1 Cr App R 66 HL.

<sup>76</sup> *R v Davis, Johnson and Rowe* (n 707).

and it is for the court to decide.<sup>77</sup>

## 2. Keane: The Materiality Standard

The standard of materiality was clarified further in *R v Keane*.<sup>78</sup> Lord Taylor C. J. adopted the test in *R v Melvin*<sup>79</sup> as to what documents are ‘material’ that should be *prima facie* disclosed by the prosecution: 1) to be relevant or possibly relevant to an issue in the case; 2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; 3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to 1) or 2).<sup>80</sup>

The common law duty of disclosure established in *Keane* reflected the requirements of Article 6 ECHR. Further clarifications of the terms were made in later cases. For instance, in *R v Brown*,<sup>81</sup> Lord Steyn held that ‘an issue in the case’ is not to be construed as narrowly, as it is in civil proceedings;<sup>82</sup> the duty to disclose applies equally to written and oral statements;<sup>83</sup> and, in *R v Preston*, it was held that materiality is not dependent on the admissibility of the evidence.<sup>84</sup>

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<sup>77</sup> *R v Davis, Johnson and Rowe* (n 73) Lord Taylor of Gosforth CJ, at 114.

<sup>78</sup> *R v Keane* (n 708).

<sup>79</sup> Jowitt J in *R v Melvin and Dingle*, 20 December 1993, unreported, at p.5 of the transcript.

<sup>80</sup> *R v Keane* (n 74) at pp.751-752D. Cf. *R v Hennessey* (n 42): relevant evidence was material which was helpful to the accused; Cf. *R v Ward* (n 697). Material evidence meant evidence which tend to weaken the Prosecution case or strengthen the defence case, and relevant evidence was not limited to evidence which would obviously advance the accused’s case; Cf. *AG Guidelines (n 51)*: has a bearing on the offence charged and the surrounding circumstances of that case.

<sup>81</sup> *R v Brown* (n 648).

<sup>82</sup> *ibid.* See per Lord Steyn, 198.

<sup>83</sup> *R v Brown* (n 75), per Lord Hope, p73.

<sup>84</sup> *R v Preston* (n 68).

### 3. Problems

Although *Keane* has set out a much clearer standard for disclosure, however, the materiality test, in practice, was hard to apply because it was simply too wide and, indeed, more preparatory work was needed. Both the prosecution and the defence sought to the court regarding disclosure decisions, despite Lord Taylor's ruling that the court should be asked to rule only in exceptional cases,<sup>85</sup> the applications were not as exceptional as envisaged.<sup>86</sup> This new workload apparently was undesirable for the Court of Appeal and, consequently, the Court of Appeal began to side with the prosecution and encouraged it to be more courageous in refusing disclosure.<sup>87</sup>

Also, the common law standard attracted strong criticisms of the Government, which prompted the later legislation reform. The report of the *Royal Commission on Criminal Justice 1993* concluded that the disclosure system could be open to abuse by the defence, and that the defence either hopes to cause delay or induce the prosecution to drop the case, rather than disclosure of the material concerned.<sup>88</sup> In other words, the Government, at least partially, blamed the unworkability of the disclosure system on the defence, and was concerned that the common law system placed too much burden on the prosecution.

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<sup>85</sup> *R v Keane* (n 708). Lord Taylor CJ.

<sup>86</sup> David Ormerod, 'Improving the Disclosure Regime' (2003) 7 *International Journal of Evidence & Proof* 102, 127.

<sup>87</sup> For an example of this Shift, see e.g. *R v Bromley Magistrates Court, ex parte Smith* [1995] 1 WLR 944.

<sup>88</sup> Lord Runciman, *Report of the Royal Commission on Criminal Justice* (Cm 1993) 93-97. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271971/2263.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf)

## E. Statutory Regime: Criminal Procedure and Investigations Act 1996

### 1. Limiting the Prosecution's Duty of Disclosure

The CPIA 1996 replaced the common law rules with a two-stage approach and entered into force in 1997. It provides the statutory framework governing the disclosure of unused material in criminal proceedings.<sup>89</sup> It is supplemented by a Code of Practice<sup>90</sup> and the Attorney General's Guidelines on Disclosure,<sup>91</sup> which gives various details as to how relevant material obtained in a criminal investigation should be managed, including being recorded, retained and revealed to the prosecutor. The regime will apply once the accused has been committed, or sent, to Crown Court for trial on indictment.<sup>92</sup>

The aim of the CPIA 1996 is to limit the scope of prosecution's disclosure duty under common law, as mentioned previously starting from *Ward*, in order to lessen the workload of the prosecuting authorities, in particular the police.<sup>93</sup> The police have been making claims that the common law disclosure of duty imposed too heavy a burden on them. The CPIA 1996 was introduced and presented to Parliament as a scheme designed to secure efficiency and sound judicial administration of the criminal trial process by

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<sup>89</sup> Rhodes (n 663) 10.18; Sprack (n 635) 9.13.

<sup>90</sup> The Code of Practice, made under Part II of the CPIA 1996.

<sup>91</sup> *Attorney General's Guidelines on Disclosure* published in November 2000 and updated in April 2005 and 2011, now replaced by *Attorney General's Guidelines* December 2013. It provides guidance that in some areas 'goes beyond the requirements of the legislation where experience suggests that some guidance is desirable'. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262994/AG\\_Disclosure\\_Guidelines\\_-\\_December\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf)

<sup>92</sup> *R v DPP ex parte Lee* [1999] 2 CR App R 304 DC.

<sup>93</sup> Ashworth and Redmayne (n 29) (noting the 1996 reforms were introduced as a result of claims by the police that the common law disclosure regime imposed too heavy a burden on them); Kate Maleson, *The Legal System* (Oxford University Press 2007) 145.

early identification of issues and as a way of eliminating unjustifiable defence tactics resulting in unmerited acquittals.<sup>94</sup> Thus, the legislative reforms were widely perceived as having restricted the defence's ability to access important information.<sup>95</sup> Contrasting to the development of common law,<sup>96</sup> which focuses on the link between non-disclosure and miscarriages of justice, the CPIA 1996 is rather concerned about not to overburden the prosecution with having to disclose massive material to the defence. The CPIA 1996 also introduces the requirements for defence Disclosure, to reduce the incidents of the so-called 'ambush defences'.<sup>97</sup> In addition, it attempts to limit the court's supervisory powers over prosecution discretion in disclosure.<sup>98</sup>

## **2. A Two-Stage Approach**

The original CPIA 1996 regime split the prosecution disclosure into two stages, namely, primary and secondary disclosure. Primary disclosure, in Section 3 of the CPIA, imposes a duty on the prosecution to disclose automatically any prosecution material which has not been previously disclosed and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. This test is a subjective one and the scope is limited.

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<sup>94</sup> Tim Owen, 'Disclosure', *Criminal Justice, Police Powers and Human Rights* (Blackstone 2001) 137.

<sup>95</sup> Ashworth (n 29) 260.

<sup>96</sup> See, *R v DPP ex parte Lee* (n 726). In this case the court examined the relationship between the common law rules and the CPIA 1996.

<sup>97</sup> Malleon (n 727) 145.

<sup>98</sup> See Epp (n 637) 2. The courts have no power at that stage of the proceedings to direct or interfere with a prosecutor's decisions concerning primary disclosure. This remained unchanged under the Criminal Justice Act 2003.

The second stage is called 'secondary disclosure'. After primary disclosure, the defence has to serve a defence statement under Section 5 of the CPIA,<sup>99</sup> which should state the general nature of its case and matters in issues between the two parties. Following this, the prosecution must disclose any further material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement.<sup>100</sup> However, if the defence failed to do so, or advances a defence differ from the content of such statement at trial, adverse inferences might be drawn<sup>101</sup> and the prosecution need not to provide secondary disclosure.<sup>102</sup> Contrary to primary disclosure, secondary disclosure is an objective test. If the Crown failed to provide such material, then the defence can apply to the Court for an order of specific disclosure.<sup>103</sup>

As the standard applied by the CPIA 1996 is potentially confusing and somewhat overlapping between primary and secondary disclosure, the CPIA 1996 attracted several criticisms and was considered unsatisfactory.<sup>104</sup> Consequently, the Government introduced the Criminal Justice Act 2003 ('CJA'),<sup>105</sup> which amended and slightly improved the disclosure regime of CPIA 1996 with a single, objective test for the prosecution duty of disclosure. The current test as set out in the new regime aims to

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<sup>99</sup> Note that in Crown Court cases, the defence case statement must be served; in Magistrate's' Courts, this is voluntary.

<sup>100</sup> Section 7 of CPIA 1996.

<sup>101</sup> In Crown & Magistrates' Court, the Prosecution need not provide any secondary disclosure.

<sup>102</sup> Section 11 of CPIA 1996.

<sup>103</sup> Section 8 of CPIA 1996.

<sup>104</sup> Rhodes (n 663) paras. 10.24-32 (noting the incompatibility of CPIA 1996 with the ECHR); Ormerod (n 720); Leng (n 698); John Sprack, 'The Criminal Procedure and Investigations Act 1996: (1) The Duty of Disclosure' [1997] Criminal Law Review 308.

<sup>105</sup> *Criminal Justice Act 2003*.



determine whether the unused material ‘might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused’.<sup>106</sup> Note that it specifically includes assistance to the defence case as criteria for disclosure.<sup>107</sup> In addition, the prosecutor now has a continuing duty of disclosure under Section 7A of the CPIA, which meant that he must continuously keep the materials under review throughout the proceedings. Although the defence is still obligated to serve a defence case statement, the new test arguably removed the risk that the prosecution might withhold useful material on the grounds that the defence had not served a case statement.<sup>108</sup>

### **3. Schedules**

The CPIA 1996 regime places an obligation on the police to prepare ‘schedules’ – they are charged with the responsibility in listing and describing the unused material, so that the prosecutors can make decisions regarding the disclosability of the material. The schedules, signed and dated by the disclosure officer, should be submitted to the prosecutor with a full file. The schedule is pivotal to the operation of the CPIA disclosure scheme. There are two separate schedules which should be listed, when applicable: any and non-sensitive unused material (MG6C) and sensitive unused

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<sup>106</sup> Section 3(1)(a) of CPIA: (a) ‘disclose to the accused any prosecution material which has not previously been disclosed to the accused which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.’ At the same time section 7 was repealed.

<sup>107</sup> Redmayne (n 29) 444.

<sup>108</sup> Rhodes (n 663) para.10.22.

material (MG6D).<sup>109</sup> The schedule itself is disclosed to the defence, and is thus the primary means by which the defence can make a claim that material relevant to its case has not been disclosed. This test should be kept under review. The defence has no access to the sensitive material. However, as pointed out by Ashworth and Redmayne, the heavy reliance on police is bound to cause problems since it requires a certain motivation on the part of the police to help the defence damaging the Crown's case, which is unlikely to say the least.<sup>110</sup> The schedules are often incomplete or improperly categorised,<sup>111</sup> as the defence would not have access to sensitive material and accordingly would not be able to request disclosure. The CPSI noted its concern about this, as only 20 per cent of cases are properly categorised as such, but the prosecutions would rarely question the accuracy of these schedules.<sup>112</sup>

#### **4. Sensitive Material and Public Interest Immunity**

In *R v H and C*,<sup>113</sup> the House of Lords summarised the current state of the disclosure regime. It said that 'fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence.

Bitter experience has shown that miscarriages of justice may occur where such material

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<sup>109</sup> Section 24 of CPIA 1996.

<sup>110</sup> Ashworth and Redmayne (n 29) 262.

<sup>111</sup> Michael Zander, *Cases and Materials on the English Legal System* (Cambridge University Press 2007) 295.

<sup>112</sup> Her Majesty's Crown Prosecution Service Inspectorate, *Disclosure: A Thematic Review of the Duties of Disclosure of Unused Material Undertaken by the CPS* (London: HMCPSI 2008), 51.

<sup>113</sup> *R v H and C* [2004] 2 AC 134.

is withheld from disclosure. The golden rule is that full disclosure of such material should be made.’<sup>114</sup>

Following this ruling, the applications to the court for the withholding of sensitive material should be rare. If sensitive material is identified by the prosecutor as meeting the disclosure test, it should be disclosed. However, if the prosecution considers that there is sufficient evidence to show that disclosure would create a real risk of serious prejudice to an important public interest, the prosecution has the following options: 1) disclose the material in a way that does not compromise the public interest in question; 2) obtain a court order to withhold the material; 3) abandon the case; 4) disclose the material because the overall public interest in pursuing the prosecution is greater than in abandoning it.<sup>115</sup>

## **5. Neutral Material**

Despite the emphasis of the importance of full disclosure, the significance of *R v H and C* is that the Lords in fact limited the scope of unused material which the prosecution is obliged to disclose. It was held that ‘if material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. [...] Neutral material or material damaging to the defence need not be disclosed and should not be brought to the attention of the court.’<sup>116</sup> Lord Bingham considered that this was not in

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<sup>114</sup> *ibid*, at 147.

<sup>115</sup> Disclosure Manual – Crown Prosecution Service, Chapter 13.

<sup>116</sup> *R v H and C* (n 112) para. 35.

conflict with any principle of fairness, since a defendant cannot complain that the defence are not alerted to the existence of material which, if revealed, would lessen his chance of acquittal.<sup>117</sup>

## 6. Defence Disclosure

Another controversial feature of the CPIA regime is the introduction of the defence disclosure, which represents a substantial departure from the common law tradition<sup>118</sup> and gives rise to questioning its compatibility with the ECHR standards.<sup>119</sup> Although defence disclosure is not in the realm of this thesis, it has some relevance here. In contrast to what critics have suggested,<sup>120</sup> the reform of the CJA 2003 made the disclosure duties of the defence even more burdensome and, consequently, aggravates the disparity between the burdens on the prosecution and defence.<sup>121</sup> The defence is now required to disclose his legal defence at an early stage, while the prosecution is under no such duty and may reverse their case at will during the trial. As to the previous concerns of the prosecution being ambushed by the defence,<sup>122</sup> it is now the defence

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<sup>117</sup> *R v H and C* (n 112) para. 17.

<sup>118</sup> See Leng (n 698) 217; Michael Zander, 'A Note of Dissent', *Royal Commission on Criminal Justice, Report* (Cm 2263, HMSO 1993). Zander, in particular, argued that it would be 'contrary to principle' to make a defendant respond to the prosecution case prior to trial. It is not the job of the defence to be helpful either to the system of the prosecution, at para. 1-2.

<sup>119</sup> E.g. the requirement of the defence to notify the prosecution of an intention to call defence witnesses [Section 6C] and the names of any expert witness consulted, even if they are not being relied upon [Section 6D]. All of those duties will be enforced by way of sanctions for failure to disclose [S11].

<sup>120</sup> E.g. Leng (n 698) 217; Redmayne (n 29).

<sup>121</sup> E.g. Richard D Taylor, Martin Wasik and Roger Leng, *Blackstone's Guide to the Criminal Justice Act 2003* (Oxford University Press 2004) para.3.01.

<sup>122</sup> *Home Office Consultation Paper Disclosure* (Cm 2864, 1995).

who might risk the possibility of legal ambush in Court under the CPIA regime.<sup>123</sup>

Furthermore, the CPIA 1996 continues to turn a blind eye to the clear empirical research and anecdotal evidence of disclosure failure by the prosecution,<sup>124</sup> and provides sanctions only for such failures by the accused.<sup>125</sup>

In sum, although the CPIA have solved some problems of the disclosure duty under the common law, doubts arise concerning its workability and fairness. Ashworth and Redmayne have pointed out that there is no easy solution to the disclosure problems<sup>126</sup>

Some commentators even contended that the CPIA has failed in achieving its objectives, that is, its intention to replace the former procedure in common law.<sup>127</sup> Such aim, however, is dubious in itself, as common law exists in both rules and principles. While the former can be superseded, the latter cannot be abolished.<sup>128</sup>

## **IV. Analysis of the Disclosure System**

### **A. The Intersection between Pre-Trial and Trial**

The elephant in the room here is why disclosure problems are so difficult to resolve?<sup>129</sup>

To answer this question, first, it is crucial to note that the disclosure system falls at the

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<sup>123</sup> Taylor, Wasik and Leng (n 755) para.3.01.

<sup>124</sup> Joyce Plotnikoff, Richard Woolfson and Great Britain, *'A Fair Balance'?: Evaluation of the Operation of Disclosure Law* (Home Office Research, Development and Statistics Directorate 2001).

<sup>125</sup> Taylor, Wasik and Leng (n 755) para.3.01.

<sup>126</sup> Ashworth and Redmayne (n 29) 262.

<sup>127</sup> Leng (n 698) 217.

<sup>128</sup> Owen (n 728) 140.

<sup>129</sup> For recent cases, see e.g. *R v Sadakat Ali Malook* [2011] EWCA Crim 254; *R v Olu, Wilson & Brooks* [2010] EWCA Crim 2975.

intersection between the investigative and trial phases.<sup>130</sup> These two phases have certain fundamental differences, as their objectives and the means to reach these aims can be very different, and they do not easily cope with each other. To start with, the focus at the investigation stage is to search for an offence and offender. The process is inherently sensitive in nature and normally requires secretive techniques, e.g. surveillance, informants, etc. and, accordingly, it is essential for the police to have the discretion in deciding how to conduct the investigation and which inquiry line they wish to pursue. By contrast, the main goal of the trial is to answer a particular, closed question: is the accused guilty of the offence charged?<sup>131</sup> It is very specific and, as a result, the trial process is a more formal, transparent and public one. Unlike the investigation phase, the trial process must ensure equality of arms and guarantee the requirement of fairness. Accordingly, at the investigation stage, in contrast to the individual the Crown would have an inherently larger power and the inequality of arms between the Crown and the accused is justified, at least to a certain extent.<sup>132</sup> However, because the discrepancy of resources is a potential source of injustice, the prosecution should exercise its disclosure duty in a proper manner in order to cure the inequality between the two parties.

### **B. *'Trust Me, I am a Prosecutor'* - The Prosecutor's Dual Role**

The prosecutors play a crucial role in the English criminal justice system. Their image is complicated, as they are portrayed as wearing two hats in modern adversarial criminal

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<sup>130</sup> Ormerod (n 720) 103.

<sup>131</sup> *ibid* 104.

<sup>132</sup> *ibid*.

trials. On the one hand, traditionally, he is supposed to be a zealous advocate and actively pursuing criminals. On the other hand, he is expected to play a neutral role as the ‘minister of justice,’ to assist in the administration of justice, which follows that he must show respect for due process and look out for the interests of the defence simultaneously.<sup>133</sup>

In theory, these dual characters of a prosecutor do not conflict with each other because prosecutors have no interests in convicting the innocent. The premise, which underlines the English criminal justice system, is that prosecutors can be trusted to act impartially and serve the interests of justice. It is also important to note that there has always been an ethical dimension to the duty to disclose. The decision in *DPP ex parte Lee*<sup>134</sup> serves as a manifestation that this duty survives the introduction of the CPIA 1996, which aims to limit the scope of the obligation of prosecution’s disclosure.<sup>135</sup> A Crown Prosecutor is personally responsible for conducting prosecutions fairly in accordance with the common law duty of the prosecutor.<sup>136</sup>

### **Trusteeship**

Nevertheless, the reality is that tension does exist between the two roles in practice, which is demonstrated by the prosecution’s often-improper manner in disclosing unused

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<sup>133</sup> David QC Jeremy, ‘The Prosecutor’s Rock and Hard Place’ [2008] Criminal Law Review 925, 926.

<sup>134</sup> *R v DPP ex parte Lee* [1999] Cr App R 304.

<sup>135</sup> Anthony Hooper and David C Ormerod, *Blackstone’s Criminal Practice 2012* (Oxford University Press 2011) 1491.

<sup>136</sup> Owen (n 728) 141.

material to the defence. One might ask why the prosecutors and the police should disclose collected information to the accused if it might damage the Crown's case? The principle argument is that the police are regarded as 'trustees.'<sup>137</sup> The material and information gathered by the police during the investigation is a form of public property and, accordingly, does not belong to the Crown prosecution exclusively and the defence should also have access to it. That is, the Crown cannot claim the 'ownership' of the evidence, despite the information is in their possession and under their control. The concept of the police acting as trustees was best described in by Sopinka J of the Canadian Supreme Court in the landmark judgment *Stinchcombe*,<sup>138</sup> which was adopted by Lord Hutton in *Mills and Poole*:<sup>139</sup> '...the fruits of the investigation ...are not the property of the Crown for use in securing conviction, but the property of the public to be used to ensure that justice is done.'<sup>140</sup> Because the aim of the Crown is to pursue justice rather than winning or victory,<sup>141</sup> there is nothing improper in opening up the evidence to the defence. However, if this 'trusteeship' doctrine is not accepted, the risk of repeating the notorious miscarriage of justice cases still remains.<sup>142</sup>

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<sup>137</sup> O'Connor (n 674) 476; Ashworth (n 29) 32; Ashworth and Redmayne (n 29) 260.

<sup>138</sup> *R v Stinchcombe* [1991] 3 SCR 326.

<sup>139</sup> *R v Mills and Poole* [1998] 1 Cr App R 43 HL.

<sup>140</sup> Lord Hutton, in *R v Mills and Poole*, p. 62, adopted Sopinka J, in *Stinchcombe*, at 333.

<sup>141</sup> *R v H and C* [2004] 2 A.C. 132, para.13; *Randall v The Queen* [2002] a W.L.R. 2237, para.10. See also *Boucher v The Queen* [1955] S.C.R. 16, 23-24: 'Counsels have a duty to see all available legal proof of the fact is presented: it must be done firmly and pressed to its legitimate strength but it must be done firmly.'

<sup>142</sup> Ashworth (n 29) 32.



## The Role of the Police

In England, it is often argued that disclosure problems are more of a result of the police, rather than the Crown prosecution.<sup>143</sup> Unsurprisingly, the police, and sometimes the Crown prosecutors, are reluctant to disclose materials that might be helpful to the defendants. The reason is both intentional and negligent. Some of the disclosure problems are caused by inadequate training and resources, and as noted by Quirk, adversarial attitudes make the police rather reluctant to share the information with the accused, and the idea that helping the accused to escape conviction certainly has an impact on their work.<sup>144</sup> Meanwhile, the Crown Prosecutors might share this attitude.<sup>145</sup> Studies of investigation work and case construction have suggested that once the police has identified a suspect, there is a tendency to collect evidence pointing to that suspect, whilst ignoring alternative hypotheses and the lines of inquiry, which these might require.<sup>146</sup> Furthermore, it is not difficult for the prosecuting authorities to hide information if they wish to do so. They may know that undisclosed material would often not be discovered and lack incentive to reveal information which might damage the Crown's case.<sup>147</sup> In addition, working cultures may also be taken into account.<sup>148</sup>

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<sup>143</sup> See e.g. Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (Fourth edition, Oxford University Press 2010) 388–93.

<sup>144</sup> Hannah Quirk, 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' (2006) 10 *International Journal of Evidence & Proof* 42, 48–50.

<sup>145</sup> *Blackburn* [2005] EWCA Crim 1349.

<sup>146</sup> Michael McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991).

<sup>147</sup> Although the CPSI found no evidence of deliberate non-disclosure by the police, Quirk's interview based study found that police officers admitted that they were reluctant to help the defence through disclosure.

The Crown Prosecutors may not be even aware of the existence of such evidence because of the heavy reliance on police disclosure officers.<sup>149</sup> Nevertheless, even if this is the case, the prosecutors are not supposed to sit back and leave the disclosure issues to the disclosure officers. The prosecutors should, as suggested by the *Attorney General Guidelines*, actively review schedules and, if necessary, take action to improve their quality and content, in order to facilitate proper disclosure.<sup>150</sup>

### **Discretion of the Prosecutor**

The fundamental difficulty, however, lies in the fact that it is the prosecutor who has to make an initial assessment of what should be disclosed. The CPIA 1996 bestows a very wide discretion in the prosecution to determine relevance. Some have argued such design is problematic and might result in injustice, as the accused does not have free access to all material kept on the part of the prosecution.<sup>151</sup> Instead, access depends upon a judgement of relevance made by the prosecutor.

Critics have pointed out two main problematic aspects.<sup>152</sup> Firstly, in an adversarial system, it is the defence who will be the best judge of whether or not evidence will be of assistance to its case. Leng, for example, has argued that it should be the function of the

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<sup>148</sup> Quirk (n 778).

<sup>149</sup> Zander (n 745) 313 (noting that the prosecutors are dependent on what they get from the police). Quirk stated that 'it is rare for prosecutors to examine material that the disclosure officer has not identified as potentially undermining [the prosecution case].' Quirk (n 778) 52.

<sup>150</sup> Hooper and Ormerod (n 769) 1490.

<sup>151</sup> Emmerson, Ashworth and Macdonald (n 206) paras. 9-115.

<sup>152</sup> E.g. *ibid* paras. 9-112-115; Leng (n 698) 216; Rhodes (n 663) 10.24-32.

defence counsel to select evidence for the defence case.<sup>153</sup> By placing this responsibility on the prosecution, the CPIA denies the accused that opportunity. Furthermore, leaving this with the prosecution is arguably a breach of Article 6(3)(b) and (c) ECHR, which entitles a defendant to ‘adequate time and facilities for the preparation of his defence’ and to ‘legal assistance of his own choosing.’ But it should be noted that disclosure is not an absolute right and Article 6 ECHR certainly did not provide such readings.

Secondly, the procedure may be criticised on the ground that in the great majority of cases the task of vetting for the defence will be left to the non-legally trained police disclosure officer, as discussed previously.<sup>154</sup>

The first point supports the contention for wide disclosure, although the Government argued that it might raise concerns of ‘fishing expeditions.’ It follows that the test for disclosure should not be too narrow. The original wording of the CPIA 1996 provided two possible interpretations, and the Crown had opted for the narrow one.<sup>155</sup> The consequence is that in some cases certain material would be withheld from primary disclosure, which would then provide an incentive for the accused to disclose his defence in order to gain access to any further material that might assist him. In other

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<sup>153</sup> Leng (n 698) 216.

<sup>154</sup> Plotnikoff, Woolfson and Britain (n 758) 11. Plotnikoff and Woolfson noted that most police forces regard the training that they provide on disclosure as inadequate; the average length of training given to disclosure in volume and serious crime cases is less than a day; the schedules drawn up by the police are often incomplete or insufficiently detailed, prosecutors judged the descriptions on the principal schedule to be poor in the majority of case, good one only 3 %. Prosecutors do not generally have the resources to chase up poor schedules, the result being that they are not able to make informed decisions.

<sup>155</sup> Redmayne (n 29) 442–3.

words, the CPIA 1996 regime makes the prosecution disclosure conditional on the service of a defence statement. This interpretation of the legislation was strongly criticised because it invites the prosecutor to play a tactical game with justice and also on the ground that it might prejudice some defendants who might genuinely be unaware of the matters which might support their defence. Furthermore, this reading is also incompatible with Article 6 of the ECHR, as the Article 6 duty of disclosure is not dependent on the disclosure of the defence case. The obligation on the defence to serve a defence case statement may, in itself, be considered a violation of the privilege of self-incrimination.<sup>156</sup>

### **Total Disclosure?**

Similar to the movement in the United States, some commenters have been advocating for an approach of automatic disclosure, or at least an open access option.<sup>157</sup> That is, the prosecution should disclose all the evidence in its possession to the defence. It is noted that, in practice, blanket disclosure is fairly common in England.<sup>158</sup> However, it is submitted that the total disclosure approach might not be in the best interest for the defence. The Crown Prosecution Service Inspectorate also does not endorse this as a solution, because the role of a prosecutor is fundamental, and it is the responsibility of

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<sup>156</sup> Emmerson, Ashworth and Macdonald (n 206) paras. 14-127 – 129; Keir Starmer, Michelle Strange and Quincy Whitaker, *Criminal Justice, Police Powers and Human Rights* (Blackstone 2001) 139.

<sup>157</sup> Auld (n 636) paras. 449-54.

<sup>158</sup> Her Majesty's Crown Prosecution Service Inspectorate, *Disclosure: A Thematic Review of the Duties of Disclosure of Unused Material Undertaken by the CPS* (London: HMCPSI 2008).

the prosecutor, not the defence counsels or the judges, to ensure the disclosure of any unused material which may assist defence's case. The prosecutor must make decisions by applying the disclosure test on his own, and the wording and demands for disclosure contained in a defence statement should not be allowed to determine what is disclosable *per se*. The existing legal framework imposes such obligation on the prosecution for practical reasons, because if massive amounts of information are handed to the defence, resources will still be needed to cover defence claims on legal aid in relation to the scrutiny of the material.<sup>159</sup> As summarised by the Attorney General's *Guidelines*, 'the prosecutors must not abdicate their role, nor allow it to be usurped.'<sup>160</sup>

## V. Concluding Remarks

It is clear that the prosecution's duty to disclose unused material is well established in the English criminal system under both the common law and the CPIA 1996 as amended by the CJA 2003. The prosecution's duty of disclosure, at least in principle, is not disputed. Interestingly, in the recent development, the focus is shifting to the issues arising from defence disclosure.

In recent years, police and prosecutors have been accused of systematically concealing evidence collected by undercover officers.<sup>161</sup> As pointed out by commentators, there is

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<sup>159</sup> Ashworth and Redmayne (n 29) 262.

<sup>160</sup> *Attorney General's Guidelines on Disclosure (2005)*, updated in 2011. Available at <https://www.gov.uk/guidance/attorney-general-s-guidelines-on-disclosure-2005-and-2011>

<sup>161</sup> For a recent high profile case, see *Prosecutors improperly withheld crucial evidence from trial of protesters*,

no obvious solution to the shortcomings of the disclosure regime, because the disclosure system will always be reliant on the police, and the police are inevitably reluctant to disclose unused material that may be helpful to the defence. However, this could be rectified by providing more training and funding to the police, as suggested by Plotnikoff and Woolfson.

When a prosecutor makes a non-disclosure application, English judges usually require the prosecution to disclose unused material unless they can justify non-disclosure on the ground of Public Interest Immunity. In other words, the ‘golden rule’ is full disclosure and, in situations when the prosecution considers the material non-disclosable due to its sensitivity, but, from the viewpoint of the Court, does not fulfil the Public Interest Immunity requirements, the prosecution should still exercise full disclosure or abandon its case.

## CHAPTER VII

# THE PROSECUTION'S DUTY OF DISCLOSURE BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

### I. Introduction

Given the complexity of disclosure obligations and its importance to the right of a fair trial, it is unsurprising that disclosure issues have been one of the main causes for litigation before a criminal court. In the United Nations *ad hoc* Tribunals and the permanent International Criminal Court, almost every element of the rule has become a litigation point. Although the jurisprudence has established that the norm is to disclose relevant material and non-disclosure is the exception,<sup>1</sup> the current practices in these Courts exhibit the opposite: redactions of prosecution witness statements are routinely applied instead of prompt and full disclosure.

This Chapter is mainly built upon the jurisprudence of the *ad hoc* Tribunals with a supplement of the ICC jurisprudence. Rule 66 – 70 of the ICTY and ICTR RPEs

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<sup>1</sup> *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 ('Lubanga case'), Appeals Chamber, Judgment on the Prosecutor's Appeal of 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), at para. 39; *Prosecutor v Katanga*, No. ICC-01/04-01/07—475 (OA) ('Katanga case'), Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request to Redact Witness Statements" (13 May 2008) at para. 70; *Lubanga case*, Appeals Chamber, *Decision on Prosecutor's Second Request for Redactions for the Purposes of Disclosure* (14 November 2014) at para. 8.

regulates the disclosure of evidence.<sup>2</sup> Rule 66 is the heart of the disclosure regime at the *ad hoc* Tribunals, which regulates prosecution disclosure throughout the entire proceedings, including appeals. Nevertheless, despite being fairly prescriptive in setting out the prosecution's disclosure obligations, the proper scope of Rule 66 is regularly litigated at both the trial and appellate level. Rule 68 sets out the obligation of the prosecution to disclose exculpatory evidence. This duty is central to the accused's fundamental right to prepare his defence. The problem is that, it is extremely difficult for the defence to establish such violation of this duty when the prosecution fails to do so. In addition, the permissive attitude of the Chamber in imposing sanctions on the prosecution does not help to discourage further violations. Rule 69 and Rule 70 deals with exceptions to disclosure, that is, if exceptional circumstances exist, e.g. the protection of witnesses and victims, and other matters that are not subject to disclosure, e.g. work product of the prosecution.

The ICC Statute moves certain disclosure obligations of the prosecution to a statutory level and introduced a two-stage disclosure system, that is, prior to the confirmation hearing 'within a reasonable time' and prior to the commencement of trial. These ICC specifics will be dealt with in a separate chapter. In addition, as mentioned in Chapter II, Article 54(1) (a) imposes a duty on the prosecution to investigate incriminating and exonerating circumstances equally. Otherwise, the ICC disclosure rules of the

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<sup>2</sup> Rule 66-70 ICTY/R RPEs, titled 'Production of Evidence'.



prosecution's duty to disclose are similar to the *ad hoc* Tribunals. Rule 76,<sup>3</sup> which is similar to Rule 66(A) ICTY/R RPEs, provides that the prosecution should disclose names and prior statements of prosecution witnesses. Rule 77 ICC RPEs<sup>4</sup> is a copy of Rule 66(B) ICTY/R RPEs, which deals with inspection. Article 67 (2) of the ICC Statute<sup>5</sup> addresses the prosecution's duty to disclose exculpatory evidence<sup>6</sup> to the defence 'as soon as practicable' which corresponds to Rule 68 of the ICTY/R RPEs, but replaced the requirement 'in the actual knowledge of the prosecution' with 'in the prosecutor's possession or control'. Note that this obligation applies in addition to any other disclosure required by the Rome Statute.<sup>7</sup>

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<sup>3</sup> Rule 76 ICC RPEs— 'Pre-Trial disclosure relating to prosecution witnesses'

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

<sup>4</sup> Rule 77 ICC RPEs— 'Inspection of material in possession or control of the Prosecutor'

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

<sup>5</sup> Article 67 (2) ICC Statute— 'Rights of the accused'

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

<sup>6</sup> But note that, the ICTY has changed the wording of Rule 68 'evidence' to 'material' in its July 2001 amendment, which reflected the ICTY jurisprudence to interpret the word 'evidence' in Rule 68 widely. The Chambers also emphasized that 'It is not restricted to material which is in a form that would be admissible in evidence'. See *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, Decision on Motions to extend Time for filing Appellant's Briefs (11 May 2001) at para. 9; *Prosecutor v Brđjanin & Talic*, No. IT-99-36-PT, Decision on Motion by Momir Talic for Disclosure of Evidence (27 June 2000) at para. 8.

<sup>7</sup> Tochilovsky, 'Defence Access to the Prosecution Material' (n 192) 1089.

Many problems regarding prosecution disclosure in the ICC is almost identical to the ones in the *ad hoc* Tribunals, as they mostly concern the manner and timing of prosecution disclosure. The two-stage approach of disclosure, however, could place additional burden on the defence<sup>8</sup> and, contrary to the original intention, make the proceeding unnecessarily lengthy.

## **II. Rule 66 (A) ICTY RPEs— Disclosure by the Prosecutor**

ICTY Rule 66 (disclosure by the Prosecutor) reads as follows:

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and

(ii) within the time-limit prescribed by the Trial Chamber or by the pretrial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 bis, Rule 92 ter, and Rule 92 quater; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

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<sup>8</sup> Karim AA Khan and Anand A Shah, 'Defensive Practices: Representing Clients before the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 191, 197.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

ICC Rule 76 (Pre-Trial disclosure relating to prosecution witnesses) read as follows:

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

#### **A. Purpose**

Rule 66 is of fundamental importance to the accused's right to a fair trial. In particular, Rule 66(A) (ii) is to enable the defence to confront witnesses with all their prior statements and transcripts.<sup>9</sup> It is an essential element of Rule 66(A) (ii) that the disclosures occur within a specific time limit so as to provide adequate time and

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<sup>9</sup> *Prosecutor v Stanišić & Župljanin*, No. IT-08-91-PT, *Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (31 August 2009) at para. 19.

resources for the accused to examine the material and prepare its case.<sup>10</sup> In *Krajišnik and Plavšić*, the Trial Chamber also held that disclosure obligations of the prosecution are necessary for the defence to be properly prepared. Non-disclosure may lead to a violation of the equality of arms principle.<sup>11</sup>

## **B. The Duty to Disclose Copies of Inculpatory Materials**

According to Rule 66(A) ICTY RPEs, the prosecution shall disclose to the accused (i) (ii) supporting material, within thirty days of the initial appearance, and (iii) within the time-limit, disclose copies of the statements of prosecution witnesses, copies of all written statement – Rule 92bis, 92ter, 92quarter’ and subsequently, additional witnesses’ statements. Rule 66(A) of the ICTR RPEs has similar requirements, although the wording is slightly different.<sup>12</sup>

### **Inculpatory Materials**

#### **1. Copies of the Supporting Material which accompanied the Indictment when Confirmation was sought**

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<sup>10</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Second Motion for Finding Disclosure Violation and for Remedial Measures* (17 June 2010) at para. 8.

<sup>11</sup> *Prosecutor v Momčilo Krajišnik and Biljana Plavšić*, No. IT-00-39-PT, *Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65 ter, 66 (B) and 67 (C) (1 August 2001)* at para.7.

<sup>12</sup> Rule 66 ICTR RPEs— ‘Disclosure of exculpatory and other relevant material’

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence:

- i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and
- ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

‘Supporting material’ refers to the material, submitted to the confirming judge, upon which the charges are based.<sup>13</sup> It does not include other material such as a brief of argument or statements of facts.<sup>14</sup> The supporting material is supposed to contain the same information relied upon by the confirming judge.<sup>15</sup>

## **2. Statements obtained from the Accused**

The prosecution is required to disclose the accused own statements in the pre-trial phase. Although the wording of the Rule seems to limit disclosure to ‘all prior statements obtained by the prosecution from the accused’, the Trial Chamber has read this language expansively, and held that the prosecution must disclose all statements made by the accused which are in the prosecution’s custody or control, regardless of whether they were made to the prosecution or to a third party.<sup>16</sup>

Accordingly, an accused at the *ad hoc* Tribunals will be in possession of, at least, copies of all his own statements, as well as all materials (albeit might in redacted form) relied upon by the judge who confirmed the indictment against him, no later than 30 days after his initial appearance. However, given the lengthy gap which normally exists between

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<sup>13</sup> *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-I, Order on Motion to Compel Compliance by the Prosecutor with Rules 66(a) and 68 (26 February 1999) at p.3.

<sup>14</sup> *ibid.*

<sup>15</sup> *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, Decision on an Oral Application by Defence Counsel Concerning Witness X (19 January 2002), at para.7.

<sup>16</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused (29 September 2003) at para. 11; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-97-21-I, Decision on Defence Motion for Disclosure of Evidence (1 November 2000) at para. 36.

an initial appearance and the start of a trial before the international criminal tribunals, there is often a long wait for the accused before he receives any meaningful disclosure from the prosecution.<sup>17</sup>

### 3. Prosecution Witnesses' Statements

A witness statement is 'an account of a person's knowledge of a crime which is recorded through due procedure in the course of an investigation into the crime.'<sup>18</sup> The term 'witness statements' has been broadly interpreted by the Chambers, finding that 'nothing in the text of Rule 66(A)(ii) allows for differentiating the witnesses statements in the prosecution's control on the basis of the form in which these statements exist.'<sup>19</sup>

The same definition of a 'statement' of an accused applies to the definition of a 'statement' of a witness.<sup>20</sup>

Both Trial Chambers of the *ad hoc* Tribunals have gradually expanded Rule 66(A) (ii) through its jurisprudence, making the scope of prosecution disclosure unarguably broad. This is because the Chambers have recognised that the prosecutor's disclosure obligations apply not only in his capacity as an organ of the Tribunal, but also as an

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<sup>17</sup> Kate Gibson and Cainnech Lussiaá-Berdou, 'Disclosure of Evidence' in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in international criminal justice* (Oxford University Press 2010) 318.

<sup>18</sup> *Prosecutor v Blaškić*, No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, *Suspension or Extension of the Briefing Schedule, and Additional Filings* (26 September 2000) at para. 15.

<sup>19</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures (20 October 2003) at para. 5.

<sup>20</sup> *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at fn. 18.

organ of international criminal justice.<sup>21</sup> This third category now has included a wide range of material. For instance, ‘witness statement’ also includes:

- a. As with statements of the accused, the prosecution is under an obligation to disclose all statements of prosecution witnesses in its possession, regardless of who took the statement.<sup>22</sup>
- b. Statements taken by national authorities in the course of other judicial proceedings involving a witness.<sup>23</sup> Rule 66(A) (ii) does not distinguish between statements taken by the prosecutor and those taken by national authorities in the course of other judicial proceedings involving a witness.<sup>24</sup> The same criteria as those identified in respect of the accused’s previous statements must apply *mutatis mutandis* to the previous statements of the witnesses also indicated in Sub-Rule 66(A).<sup>25</sup> In the ICTR, the Chamber has emphasised that it is the prosecutor who

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<sup>21</sup> *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 13.

<sup>22</sup> *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 15, fn. 17; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Decision on Postponement of Cross-Examination of the Testimony of Witness Milovanovic* (22 July 2010) at para. 8.

<sup>23</sup> *Prosecutor v. Karadžić*, No. IT-95-5/18-T, *Decision on the Accused’s Motion for Order to Obtain Witness Statements and Testimony from National Courts* (12 January 2011) at para. 7.

<sup>24</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 6.

<sup>25</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 8.

‘bears the responsibility of obtaining the said statements from the Rwandan

Authorities and of providing them to the defence, pursuant to Rule 66(A)(ii).’<sup>26</sup>

- c. The transcripts or prior testimony of the witness in other trials.<sup>27</sup>
- d. Interview notes, if concerning a witness’ recollection of events also is ‘witness statement’ and therefore must be disclosed.<sup>28</sup>
- e. Statements given to sources other than the prosecution.<sup>29</sup>
- f. Statements of prosecution witnesses taken by humanitarian organisations and furnished to the prosecution.<sup>30</sup>
- g. Statements given by detained witnesses (including confessions).<sup>31</sup> If the prosecution intends to call witnesses who are detained in third states, it is obliged

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<sup>26</sup> *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses* (15 November 2001) at para. 25; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli’s Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 20.

<sup>27</sup> *Prosecutor v Kupreskic et al*, No. IT-95-16-T, *Decision on the Prosecutor’s Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session Under Rule 79 of the Rules* (29 July 1998); *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 23.

<sup>28</sup> *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para. 12; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 42; *Prosecutor v Haradinaj et al*, No. IT-04-84bis-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 32.

<sup>29</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 6; *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 22; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 15.

<sup>30</sup> *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 14.

<sup>31</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001)



to have in its possession, or make all necessary efforts to procure and disclosure statements that might have been given to the national authorities of the third state.

### **C. Problems**

Despite of the breadth of the obligation, there are still many concerns regarding the accused's rights. The problems is that the defence teams might receive literally hundreds of statements from witnesses who may not even testify, and the use of redacted statements, which means the complete statements will not be disclosed until 30 days prior to the witness's testimony. However, the most significant concern as regards the application of Rule 66 is the lack of remedies in the case of violation by the prosecution.

#### **1. The (Over) Use of Redacted Witness Statements**

In order to conduct a proper examination of the witnesses, it is important for the defence to know the identity of the witness and the original version of the statement. In practice, however, the prosecution often used redacted version of witness statements to discharge its obligation with regard to disclose supporting material under Rule 66(A). The purpose of redactions is to prevent the disclosure of certain prosecution witnesses' identity in case of concerns regarding safety of witnesses when his or her identity is revealed.<sup>32</sup> This practice is permitted by the Chambers which confirmed that the

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at para. 6.

<sup>32</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused Motion for Full Disclosure of*

delayed disclosure of the identity of witnesses is permissible even *after* the trial commences.<sup>33</sup>

According to the case law of the *ad hoc* Tribunals, delaying the disclosure of a witness's identity should be allowed only in 'exceptional circumstances'—specific evidence of an identifiable risk to the security and welfare of the particular witness or his family,<sup>34</sup> which should be determined by a case-by-case basis and objectively.<sup>35</sup> However, the Chambers normally would grant prosecution's applications for redacted disclosure, and this practice have become the norm.<sup>36</sup> The identity of the witness and the unredacted version of the statement, however, must still be disclosed to the defence in sufficient time to allow adequate time for preparation.<sup>37</sup>

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*Supporting Material* (25 November 2008) at para. 19.

<sup>33</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Sixth Disclosure Violation Motion* (8 February 2012) at para. 17.

<sup>34</sup> *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 2.

<sup>35</sup> *Prosecutor v Blaškić*, No. IT-95-14-T, Decision of Trial Chamber I on the Applications of the Prosecutor dated 24 June and 30 August 1996 in respect of the Protection of Witnesses (2 October 1996); *Prosecutor v Radoslav Brdanin & Momir Talic*, No. IT-99-36-PT, *Decision on Motion by Prosecution for Protective Measures* (3 July 2000) at para. 11 and 26; *Prosecutor v Gotovina*, No. IT-01-45-PT, Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68 (14 July 2006) at 6-7.

The ICTR sometimes found the security situation in Rwanda or other countries per se to constitute exceptional enough to justify Rule 69 measures. E.g. *Prosecution v Bizimungu*, No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (22 September 2000) at para. 10; *Prosecutor v Rukundo*, No. ICTR-2001-70-PT, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses* (24 October 2002) at para.16; *Prosecutor v Rukundo*, No. ICTR-2001-70-PT, *Decision on Prosecutor's Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS, and BLJ* (28 November 2006); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others (6 May 2009) at paras. 15, 18-9; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Decision on Defence Motion for Protective Measures for Defence Witnesses* (6 July 2004) at paras. 2, 8-11.

<sup>36</sup> E.g. *Prosecutor v Mpambara*, No. ICTR-2001-65-I, Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures (28 February 2002), at para. 13 and 19.

<sup>37</sup> Rule 69(C) ICTY/R RPEs:

Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as

The ICTY Trial Chambers have now recognised the ‘en bloc’ disclosure of un-redacted statements and witness identities, which is normally 30 days prior to the commencement of trial, and not, as was the previous practice, on a rolling basis prior to the testimony of each witness.<sup>38</sup> In contrast, some Trial Chambers of the ICTR still only require disclosure of original witness statements on a rolling basis, as the trial progresses.<sup>39</sup> For example, in *Karemera*, the Chamber considered that the disclosure of unredacted statements 30 days before the beginning of the trial session at which the witness is to testify would not result in injustice.<sup>40</sup> The practice of ‘rolling disclosure’ has attracted criticisms, since Rule 69 (C) only requires the disclosure to be made sufficient time left *prior to* trial.<sup>41</sup> Some Chambers now also have opted for ‘en bloc’ disclosure of full statements and witness identities, particularly in single accused trials.<sup>42</sup>

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determined by the Trial Chamber to allow adequate time for preparation of the Prosecution or Defence.  
<sup>38</sup> ‘Disclosure of identities of protected witnesses need not occur until 30 days before trial commences in accordance with standard practices of ICTY trial chambers.’ See *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Confidential Prosecution Motions for Protective Measures and Non-Disclosure* (9 March 2005) at page 4; *Prosecutor v Milutinovic and Others*, No. IT-99-37-PT, *Decision on Prosecution’s Motion for Protective Measures* (17 July 2003) at para. 4.

<sup>39</sup> *Prosecutor v Nindiyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu’s Motion for Reconsideration of the Chamber’s 19 March 2004 Decision on Disclosure of Prosecution Materials* (3 November 2004); *Prosecutor v Nindiyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu’s Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses* (7 April 2005) at para. 31 (Disclosure of the identity of protected witnesses ordered 35 days prior to trial); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses* (5 December 2001) at para. 22 (35 days before the witness is to testify); *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005) at para.16 (21 days); *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007) at para. 12 (30 days).

<sup>40</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005) at para. 11.

<sup>41</sup> Göran Sluiter, ‘The ICTR and the Protection of Witnesses’ (2005) 3 *Journal of International Criminal Justice* 962, 972.

<sup>42</sup> E.g. *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Prosecution Motion for Protective Measures*

The danger of a long gap between disclosure of the witness's identity and his or her testimony is therefore substantially decreased.<sup>43</sup>

It is evident that the redaction of identifying information by the prosecution from the supporting material without authorisation from a Chamber is not appropriate. One may, however, wonder to what extent the defence, once engaged in the trial, is still in a position to adequately prepare its defence in relation to that witness.<sup>44</sup> Accordingly, disclosed supporting material often contains witness statements in redacted form, with this redaction receiving *ex post facto* sanction by the Trial Chamber upon ruling on motions for prosecution materials.<sup>45</sup>

## 2. Time Limits / Untimely Disclosure of Witness Statements

It is an essential element of Rule 66(A) (ii) that disclosure of material falling under this Rule must occur within a specific time limit.<sup>46</sup> As held by the Court, the prosecutor is required to disclose to the defence as soon as possible and as they come into his or her possession, without waiting for a date to be set for the commencement of trial, copies of

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(18 September 2007) at para. 6; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, Decision on Prosecution Motion for Protective Measures (8 November 2007) at para. 6; *Prosecutor v Gatete*, No.

ICTR-2000-61-PT, Decision on Defence Motion for the Disclosure of Identifying Information in Relation to Witnesses to be Called by the Prosecution at Trial (11 September 2009) at para. 15.

<sup>43</sup> Gibson and Lussiaá-Berdou (n 18) 317. *Prosecutor v Nchamihigo*, No. ICTR-01-63-PT, Decisions on Motion for Protective Measures for Prosecution Witnesses (26 July 2006) at para. 8; *Prosecutor v Aloys Simba*, No. ICTR-2001-76-I, Decision on Prosecution Request for Protection of Witnesses (4 March 2004) at para. 6.

<sup>44</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses* (5 December 2001) at para. 22.

<sup>45</sup> Gibson and Lussiaá-Berdou (n 18) 317.

<sup>46</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, Decision on Accused's Motion to Set Deadlines for Disclosure (1 October 2009) at para. 13.

all prior statements of all the witnesses she intends to call;<sup>47</sup> or ‘at the earliest available opportunity, and at least prior to the date of testimony by the witness copy of any items she intends to use at trial during the testimony of its witnesses.’<sup>48</sup> The purpose of the disclosure requirement is ‘to enable the defence to have sufficient notice of the case for which it has to prepare.’<sup>49</sup>

Although Rule 66(A) (ii) of the ICTR RPEs stated ‘no later than 60 days before the date set for trial’, this sixty-day limit has been interpreted by the Trial Chamber as a final date for disclosure.<sup>50</sup> The Trial Chamber expects that disclosure will be made prior to 60 days if possible. In the ICTY, it is the Trial Chamber or a Pre-Trial judge who will determine the time frame.

It is important to note that disclosure under Rule 66 is also continuous,<sup>51</sup> and essential to the right to a fair trial. The ICTR Trial Chamber has emphasised that in essence, Rule 66(A) (ii) is intended to assist the defence in its understanding of the case, in

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<sup>47</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-97-21-I, *Decision on Defence Motion for Disclosure of Evidence* (1 November 2000) at para. 39

<sup>48</sup> *Prosecutor v. Nsabimana*, No. ICTR-97-29-T, *Decision on the Defence Motions for Disclosure of Copies of the Prosecutor’s Exhibits* (18 September 2001) at para.22.

<sup>49</sup> *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures* (14 September 2001) at para. 17.

<sup>50</sup> *Prosecutor v Bisengimana*, No. ICTR-2000-60-I, *Decision on Bisengimana’s Motion for Disclosure of Materials* (28 March 2003) at para. 9; *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 24.

<sup>51</sup> *Prosecutor v Bisengimana*, No. ICTR-2000-60-I, *Decision on Bisengimana’s Motion for Disclosure of Materials* (28 March 2003) at para. 9; *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 24.

accordance with the accused's rights under ICTR Articles 20 and 21.<sup>52</sup> Accordingly, disclosure should be provided to the defence in advance of the trial in order to ensure sufficient time for case preparation and investigation. Late disclosure would constitute a violation of the disclosure duties. For example, in *Nyiramasuhuko*, after weighing the statutory rights of the defence to prepare their defence in sufficient time prior to trial with the orders for protective measures, the Chamber found the prosecution's explanation for lack of disclosure unacceptable and ordered full disclosure of the prosecution witness statements accordingly.<sup>53</sup> In *Karadžić*, the ICTY Trial Chamber also stated that disclosure of witness statements during trial and several months after they had been in the possession of the prosecution violated Rule 66(A) (ii) and was unacceptable.<sup>54</sup>

#### **D. Remedies**

When a disclosure violation occurs, other than ordering disclosure, there are several options as remedies for the Chamber to choose from, including postponement,<sup>55</sup> recalling witnesses,<sup>56</sup> exclusion of evidence,<sup>57</sup> and a stay of proceedings.<sup>58</sup> To a great

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<sup>52</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions by Nyiramasuhuko, Ndayambaje, and Kanyabashi on, Inter Alia, Full Disclosure of Unredacted Prosecution Witness Statements* (13 November 2001) at para. 16.

<sup>53</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions by Nyiramasuhuko, Ndayambaje, and Kanyabashi on, Inter Alia, Full Disclosure of Unredacted Prosecution Witness Statements* (13 November 2001) at para. 17.

<sup>54</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Seventh Disclosure Violation Motion* (10 March 2014) at para. 12.

<sup>55</sup> E.g. *Prosecutor v Nzabonimana et al*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for Stay of Proceedings ...* (13 November 2009) at paras. 49-50.

<sup>56</sup> E.g. *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Elie Ndayambaje's and Alphonse Ntezirayo's Request for the Recall of Witness FAG Following the Disclosure of a New Confessional*

extent, the problem of prosecution's failure to disclose evidence is owed to the Chamber's unwillingness to employ meaningful sanctions. While the Chambers have been repeatedly recognising the importance of full and timely disclosure, they seem reluctant to take actions in discouraging the prosecution's violation of these duties.<sup>59</sup> This situation is drastically different when one turns to the domestic level. In national courts, if a violation of disclosure obligations occurs, the Court would often exclude the evidence in question.<sup>60</sup> However, the Trial Chambers have rarely opted for this measure. On the contrary, the Chamber has considered that exclusion of evidence is 'at the extreme end of measures available.'<sup>61</sup> Accordingly, the exclusion of witness testimony would only be used in exceptional circumstances,<sup>62</sup> and only if the defence is able to demonstrate prejudice.<sup>63</sup>

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*Statement* (18 June 2004).

<sup>57</sup> E.g. *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Stay Disclosure Until Protection Measures are Put in Place* (27 March 2002) (Trial Chamber struck witnesses from witness list where prosecutor had not disclosed their statements as ordered and rejected prosecution application to delay disclosure until witnesses could be located or persuaded to testify).

<sup>58</sup> *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-T, *Decision on Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings...* (12 March 2009) at para. 12 (A stay of proceedings is an exceptional measure. The Trial Chamber must consider whether the continuation of the trial would have an impact on the conduct of a fair and expeditious trial).

<sup>59</sup> Gibson and Lussiaá-Berdou (n 18).

<sup>60</sup> E.g. England, see e.g. Section 78 of the Police and Criminal Evidence Act, 1984.

<sup>61</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motions Under Rule 66(C) of the Rules* (15 February 2006) at para. 25; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation of the Government of Rwanda* (27 Nov 2006) at paras. 3-4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Testimony of Witness QBG* (11 July 2007) at para. 6.

<sup>62</sup> *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Prosecutor Ex Parte Confidential Application et al* (10 October 2005).

<sup>63</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures* (17 June 2010) at paras. 12-18; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 41; *Prosecutor v Karadžić*, No. IT-95-5/18-T,

The most common form of prosecution's disclosure violations is late disclosure. As mentioned, despite the Courts' repeated emphasis on prompt disclosure, the prosecution often failed to disclose witness statements in a timely manner. An ICTY Chamber has held that late disclosure of Rule 66(A) (ii) material could give rise to exclusion of the material from evidence or a decision not to allow the affected witness' testimony at all.<sup>64</sup> But the judges have set the threshold for exclusion of testimony very high. Often, the prosecution would be given a chance to provide explanation for the late disclosure first.<sup>65</sup>

Unless the defence can establish 'prejudice', the Courts rarely sanctions the prosecution for late disclosure, even if it was repeatedly and deliberately.<sup>66</sup> For example, in *Nahimana*, the Chamber stated that, the aim of Rule 66 (a) is not frustrated by late disclosure 'where the defence is not caught by surprise as to the nature of the evidence

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*Decision on Accused's Seventh and Eighth Motions for Finding Disclosure Violation and for Remedial Measures* (18 August 2010); *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Ninth and Tenth Motions for Finding Disclosure Violation and for Remedial Measures* (26 August 2010); *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Eleventh through Fifteenth Motions for Finding Disclosure Violation and for Remedial Measures* (24 September 2010); *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Seventh Disclosure Violation Motion* (17 November 2010) at para.14; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Ninth Disclosure Violation Motion* (11 January 2011) at para.16; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Forty-Eighth Disclosure Violation Motion* (30 May 2011) at para. 12 (Late disclosure of items violated Rule 66(A)(ii) but did not warrant any remedy given lack of prejudice and large volume of disclosure in the case).

<sup>64</sup> *Prosecutor v Stanišić & Župljanin*, No. IT-08-91-PT, *Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (31 August 2009) at para. 19.

<sup>65</sup> *Stanišić & Župljanin*, *ibid*, at para. 19.

<sup>66</sup> E.g. *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for Stay of Proceedings...* (13 November 2009) at paras. 49-50 (The Chamber found that the prosecution deliberately misled the Chamber by characterizing the witness statement as Rule 66(B) material).



to be given by the witness and is not unduly prejudiced.’<sup>67</sup> Nevertheless, demonstrating specific prejudice has proven to be a remarkably difficult task for the defence.

Accordingly, the Trial’s Chamber preferable remedy has been the postponement of testimony, and this remedy has generally been the only one granted.<sup>68</sup> At times, the Chamber would provide the defence an opportunity to recall previously heard witnesses for cross-examination.<sup>69</sup>

As demonstrated by the Chamber’s attitude towards prosecution disclosure failure, it seems that the Courts have little or no regard for the difficulties experienced by the defence, in particular, their struggles in trying to conduct last minute investigations on recently disclosed witness statements, whilst at the same time, being sympathetic to the same arguments when being used by the prosecution to explain the reasons for delays in disclosure.<sup>70</sup> Even though sanctions are available to enforce compliance with disclosure obligations, the Chambers generally would choose for the minimal sanction, and refuse to hold the responsible prosecutor in contempt.<sup>71</sup> In fact, the postponement of testimony,

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<sup>67</sup> *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures* (14 September 2001) at para. 17. (‘The purpose of the disclosure....not frustrated by late disclosure where the Defence...prejudiced.’)

<sup>68</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Notification of Failure to Comply With Trial Chamber Order and Motion for Remedial Measures* (20 October 2003) at paras. 9-10.

<sup>69</sup> *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses* (26 June 2001) at para. 32; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Elie Ndayambaje’s and Alphonse Nteziryayo’s Request for the Recall of Witness FAG Following the Disclosure of a New Confessional Statement* (18 June 2004) at para. 11.

<sup>70</sup> Gibson and Lussiaá-Berdou (n 18) 321.

<sup>71</sup> E.g. *Prosecutor v Furundžija*, No. IT-95-17-PT, *The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution* (5 June 1998) at para. 11. The Trial Chamber, despite its explicit disapproval of the prosecutions late disclosure of witness statements (describing the prosecution’s conduct as ‘falls short of knowing and wilful interference with the administration of justice’, and issued a formal complaint to the Prosecution, did not hold the prosecution in contempt.

as well as recalling witnesses, has no practical effect on the conduct of the prosecution, or the overall record of evidence it builds against an accused, and as such will do nothing to encourage compliance with the rules.<sup>72</sup> Therefore, without any meaningful sanctions, the utility of the numerous decisions issued by the Trial Chambers to both broaden and comprehensively delineate the scope of pre-trial disclosure is substantially reduced.<sup>73</sup>

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<sup>72</sup> Gibson and Lussiaá-Berdou (n 18) 322.

<sup>73</sup> *ibid.*

### III. Rule 66(B):<sup>74</sup> The Right to Inspect

ICTY Rule 66 (B) provides that

‘The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.’

Similarly, ICTR Rule 66(B) provides that

‘At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.’

ICC Rule 77 (inspection of material in possession or control of the Prosecutor) states that:

‘The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.’

Rule 66(B) of the ICTY/R RPEs obliges the prosecution to permit the defence to inspect material in certain circumstances. It should be noted that, the defence is only required to show one of the three conditions enumerated in Rule 66(B) exists to obtain inspection:

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<sup>74</sup> Rule 66(B) ICTY RPEs: ‘The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.’

(1) it is material to preparation of the defence; (2) it is intended to be used by the prosecution as evidence at trial; or (3) it was obtained from or belonged to the accused.

The conditions are not cumulative.

Here, the resemblance of Rule 66(B) and the U.S. Federal Rule 16 is noteworthy, although the scope of Rule 66(B) is broader than the U.S. Federal Rule 16. As mentioned, the extent of pre-trial discovery has been controversial and is a highly litigated issue in the U.S. criminal proceedings.<sup>75</sup> Accordingly, U.S. Federal Rule 16 has been amended several times due to its perplexity and lack of clarity. The fact that Rule 66(B) of the ICTY/R RPEs has become a battleground for the parties before the *ad hoc* Tribunals is hardly a surprise as measured by the domestic experience.

## **I. Requirements**

### **1. Reciprocity**

ICTY Rule 67(C): [Original Deleted]

ICTR Rule 67 (C): If the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.

This sub-rule of the ICTY and ICTR RPEs has gone through several changes and the wording in the ICTY and ICTR is slightly different now. In the ICTY, in contrast with

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<sup>75</sup> See Chapter V.

the ICTR, the application of this Rule seems not to be subjected to Rule 66 (C) anymore. In addition, the original Rule 67 (C) of the ICTY was deleted,<sup>76</sup> which would have triggered reciprocal disclosure. The ICTR still maintains Rule 67 (C), which stated if the defence makes a request pursuant to Rule 66 (B), the prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

However, the ICTR has made clear that the prosecution's Rule 66(B) disclosure obligation is not contingent on defence compliance with other disclosure rules, e.g. Rule 73 ter.<sup>77</sup> The ICC Chamber holds a similar position that the right of an accused to receive full prosecution disclosure is not contingent on his providing of any information as to his defence.<sup>78</sup>

Note that although the Rule 77 of ICC RPEs is a copy of Rule 66(B), it is not subjected to a defence's request. Unlike the rules of the ICTY and ICTR, the ICC prosecutor has an obligation to disclose items material to the preparation of the defence independently of any request of the defence.<sup>79</sup> But the prosecution in the ICC also has broader

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<sup>76</sup> The current ICTY 67(C) provides that 'Failure of the Defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.'

<sup>77</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 6.

<sup>78</sup> *Lubanga case*, Appeals Chamber, *Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I on 18 January 2008* (11 July 2008) at para. 50.

<sup>79</sup> *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Appeals Chamber, No. ICC-02/05-03/09, *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

inspection rights with regard to defence's material than in the *ad hoc* Tribunals.

## 2. Material to the Preparation of the Defence Case – Materiality test

This is the pivotal element of the Rule 66(B) disclosure regime. In order to trigger the prosecution's obligation under this Rule, the defence must, first, make a request for inspection to the prosecution.<sup>80</sup> If the request is not successful, the defence can then turn to the Trial Chamber.

With regard to the test of materiality, the Chambers have laid down three principal requirements, which are identical to the U.S. standard, in order to obtain an order pursuant to Rule 66(B). The defence must: (1) specifically identify the items sought; (2) demonstrate *prima facie* that the requested items are material to the preparation of the defence; and (3) demonstrate *prima facie* that the requested items are in the custody and control of the prosecution.<sup>81</sup> Each requirement will be examined here.

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on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor" (28 August 2013) at para. 34.

<sup>80</sup> 'Request for inspection must be made to the prosecution first before the Trial Chamber will entertain it', see *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused Motion for Inspection and Disclosure* (9 October 2008); *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka* (4 December 2008) at para. 5.

<sup>81</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 10; *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 13; *Prosecutor v Bagosora et al*, No. ICTR-96-7-T, *Decision on the Motion by the Defence Counsel for Disclosure* (27 November 1997); *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 23; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's*

## Specificity

The defence must specify the items they wish to inspect. A request for production of documents should be sufficiently specific as to the nature of the evidence sought.<sup>82</sup> The Trial Chambers of the *ad hoc* Tribunals have emphasised many times that Rule 66(B) is only triggered by a sufficiently specific request by the defence.<sup>83</sup> Therefore, requests which lack sufficient specificity will be denied. The defence may not rely on a mere general description of the requested information but is required to define the parameters of its inspection request with sufficient detail. Suitable parameters for such specification may be an indication of a specific event or group of witnesses which the request focuses on, a time period and/or geographic location which the material refers to, or any other features defining the requested items with sufficient precision.<sup>84</sup> For example, request for correspondence between prosecution witnesses and the prosecutor is considered insufficiently specific.<sup>85</sup> Request for receipts showing the chain of custody of documents to be offered during testimony of defence investigator was sufficiently

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*Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Uphendra Baghel* (30 October 2007) at para. 4

<sup>82</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses* (27 September 2005) at para. 3.

<sup>83</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence* (25 September 2006) at para 10; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66 (B) of the Rules* (21 February 2007) at paras. 8-9.

<sup>84</sup> *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 32.

<sup>85</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 10.

specific.<sup>86</sup> In *Karadžić*, the Trial Chamber considered the defence's request for memoranda and correspondence related to a specific meeting too broad and stated that it did not meet the specificity requirement.<sup>87</sup> In *Bagosora*, the Chamber held that request for all documents relevant to accused's alibi is too vague for an order to be made for prosecution to produce such material prior to the testimony of the accused.<sup>88</sup> However, inspection of a precise category of documents is permitted, as held in *Karemera*.<sup>89</sup>

### **Materiality Test: Relevance**

The crucial question here is, what information is considered 'material' to the preparation of the defence under Rule 66(B)? As the experience of the discovery regime in the U.S. has demonstrated, materiality is the most problematic feature when applying this Rule.

The *ad hoc* Tribunals have long recognised that the test for materiality is the 'relevance of the documents sought to the preparation of the defence case.'<sup>90</sup> 'Preparation' is a broad concept,<sup>91</sup> but it generally includes information with regard to witnesses, both

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<sup>86</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Uphendra Baghel* (30 October 2007) at para.7.

<sup>87</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 20.

<sup>88</sup> *Prosecutor v Bagosora et al* No. ICTR-96-7-T, *Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B)* (6 December 2006) at para. 5.

<sup>89</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Uphendra Baghel* (30 October 2007) at para. 6.

<sup>90</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 3.

<sup>91</sup> *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 26; *Prosecutor v*



prosecution and defence. For instances, the preparation of the cross-examination of a witness,<sup>92</sup> or the evaluation of whether to call a particular witness,<sup>93</sup> are considered material.

The defence can make an application pursuant to Rule 66(B) for disclosure of copies of witness interviews, either in the form of original tape recordings, and/ or transcripts of the tape recordings.<sup>94</sup> The prosecution must allow the defence to inspect videotapes made during its investigation, which contain statements of persons who will testify as prosecution witnesses.<sup>95</sup> Rule 66(B) also applies to witness statements taken by prosecution investigators who the prosecution does *not* intend to call.<sup>96</sup> Where

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*Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 December 2008 on Disclosure* (19 February 2009) at para. 27.

<sup>92</sup> *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 26.

<sup>93</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 3.

<sup>94</sup> *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Defense Motion Seeking to Interview Prosecutor's Witnesses or Alternatively to be Provided with a Bill of Particulars* (12 March 2001) at paras 11-12. But see, with regard to the disclosure of tape recordings: in *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at paras. 155-9, the Appeals Chamber agreed with the Trial Chamber that, on their face, the Rules do not provide for disclosure of tape recordings of interviews conducted with witnesses. The Appeals Chamber stated that it was unclear whether the Prosecution even had possession of the tape recordings, but even if they did, it was under no obligation to disclose them. The Appeals Chamber held that ultimately each case had to be determined on a case by case basis. In contrast, the Trial Chamber in *Karemera* uses a more definitive language.

<sup>95</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Motion of the Defence of Joseph Nzirorera for Disclosure of Videotape Regarding Prosecution Witnesses* (1 December 2003).

<sup>96</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006) at para. 14.

prosecution interviewed defence witnesses, their statements were material to the defence and inspection should be allowed.<sup>97</sup>

There is no requirement for the defence to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. The Chambers reasoned that a request under Rule 66(B) is one of the methods available to the defence for carrying out investigations.<sup>98</sup> Furthermore, the defence is not obligated to explain how the information will affect its evaluation of the credibility of the potential witness.<sup>99</sup>

### ***prima facie* showing of materiality**

The Rules itself did not define materiality. In the early days of the Tribunals, the Court sought domestic cases for support to interpret the meaning. In *Delalić*, the Trial chamber noted that the Rules provide no guidance regarding the process of determining the materiality of evidence.<sup>100</sup> However, since Sub-Rule 66(B) is substantially similar to

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<sup>97</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 14-16; *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor* (29 August 2002) at para. 27; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 11; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence...Second Motion for Inspection of Materials in the Prosecution's Custody* (27 September 2011) at para. 42.

<sup>98</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para 15; *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence* (25 September 2006) at para 11; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at para. 10; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 7.

<sup>99</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 8.

<sup>100</sup> *Prosecutor v Delalić*, No. IT-96-21-T, *Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence* (26 September 1996) at para. 6.

Rule 16(a) (1) (C) of the U.S. Federal Rules of Criminal Procedure, accordingly, interpretations of the U.S. rule as well as a review of its application will provide some guidance in analysing Sub-Rule 66(A).<sup>101</sup>

In addition to the U.S. Federal Rules of Criminal Procedure and relevant U.S. case law, the Trial Chamber also referred to the standard applied by the English Court of Appeal in *Keane*, to support its test for materiality. They are: (1) to be relevant or possibly relevant to an issue in the case; 2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).<sup>102</sup> The Chamber then noted, by quoting a U.S. District Court case,<sup>103</sup> ‘the phrase “material to the preparation of the defendant’s defense” is one that causes practical problems on both sides of the discovery equation.’

The concept of materiality is considered by the Appeals Chamber in *Bagosora*. At trial, during the presentation of the defence case, the prosecution failed to provide certain defence witnesses’ immigration documents to the defence team, notwithstanding these documents were in its possession. The defence then made a disclosure request for those materials to the Trial Chamber but was denied on the grounds that, ‘immigration documents were not material to the preparation of the defence case because they did not

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<sup>101</sup> *ibid.*

<sup>102</sup> *ibid* at para. 7.

<sup>103</sup> *United States v. Liquid Sugars, Inc. & Mooney*, 158 F.R.D. 466 (U.S. Dist. Ct. E.D. Cal. 1994).

counter the prosecution's evidence presented during its case-in-chief, but rather concerned the credibility of defence evidence.'<sup>104</sup>

However, the Appeals Chamber reversed this decision, noting that in accord with the plain meaning of Rule 66(B), the test for materiality is the 'relevance' of the documents to the preparation of the defence case. Rule 66(B) does not necessarily require that the material itself counter the prosecution evidence.<sup>105</sup> The Appeals Chamber then held that the immigration documents are material to the preparation of their defence because these documents 'may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence' and there are 'few tasks more relevant to the preparation of the defence case than selecting witnesses.'<sup>106</sup>

This approach was later applied by a different ICTR Trial Chamber in *Zigiranyirazo*.<sup>107</sup>

This Trial Chamber stated that the following categories are considered sufficiently specific: immigration-related materials, statements of prospective defence witnesses and Gacaca materials. But 'other impeachment material' of defence witnesses was not

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<sup>104</sup> *Prosecutor v Bagosora et al.*, ICTR-98-41-AR73, *Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness* (20 October 2006) at paras. 5, 6.

<sup>105</sup> *Prosecutor v Bagosora et al.*, ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunals Rules of Procedure and Evidence* (25 September 2006) at para. 9.

<sup>106</sup> *ibid* at para. 9. The ICC seems to adopt a similar position by citing the decision of the Appeals Chamber, see *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08 ('*Bemba*' case), Public Redacted version of Defence request for a stay of proceedings and request for further disclosure (19 June 2015) at para. 7.

<sup>107</sup> *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules (TC)* (21 Feb 2007.)

specific enough.<sup>108</sup> This decision is noteworthy because, while the categories are quite broadly drafted, this particular Trial Chamber recognised the need for the documents to be disclosed and their ‘materiality’ for the purpose of preparing the defence.<sup>109</sup> Yet, at the same time, ICTR Trial Chamber I – the same chamber that had seen its ruling overturned by the Appeals Chamber, refused to order the inspection of ‘personal agendas, diaries, travel documents and correspondence’ sent to or by the accused, considering the description too broad and vague to create an obligation.

Accordingly, it is difficult to reconcile these two contemporary decisions, which together provide a clear example of the difficulties faced by both parties in determining whether evidence should properly be characterised as ‘material’ to defence preparation, and is the reason why litigation under this sub-rule continues to contribute to the prolongation of trials at the international courts.<sup>110</sup>

### **Initial Determination**

It is the prosecutor who bears the responsibility to make the initial determination of materiality of evidence in its possession.<sup>111</sup> This is due to the simple fact that the prosecution is the one who has the evidence. If the defence believes that the prosecution

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<sup>108</sup> *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at paras. 8-9.

<sup>109</sup> Gibson and Lussiaá-Berdou (n 18) 324.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Prosecutor v Delalić*, No. IT-96-21-T, *Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence* (26 September 1996) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 21.

has withheld evidence material to its preparation, it can challenge the prosecution by reasserting its right to the evidence.

### **3. Intended for Uses at Trial**

The prosecution should let the defence inspect the information if he or she intends to use it at trial. It is to be noted that, the scope of 66(B) is wider than the U.S. Federal Rules 16, that is, Rule 66(B) does not limit itself to the prosecution case only, as is the case of the U.S. Rule.

In *Kristić*, the Appeals Chamber held that the prosecution's disclosure obligation under the Rules must be interpreted broadly in accord with their plain meaning.<sup>112</sup> Nothing in Rule 66(B) limits an accused's right to inspection only of material related to the prosecution's case-in-chief. In this case, the prosecution refers extensively to domestic legal provisions, in particular United States Federal Rule of Criminal Procedure 16(a) (1) (E), in support of the Trial Chamber's approach. However, the Appeals Chamber found the Trial Chamber's ruling as an 'unduly restrictive interpretation' of Rule 66(B), since the language of Rule 66(B) does not support this restrictive approach. Therefore, documents the prosecution intends to use as evidence during the cross of defence witnesses fall within the scope.

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<sup>112</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Uphendra Baghel* (30 October 2007) at para. 6.

The ICTR Appeals Chamber in *Bagosora* also made clear that, ‘at trial’ indicates its applicability throughout the proceedings, and not only during the prosecution case.<sup>113</sup> As in the *Krstić* Appeals Judgment, the Chamber considers the meaning of Rule 66(B) to be sufficiently clear so as not to require resort to domestic legal provisions in determining its scope.<sup>114</sup> The prosecution was obligated to disclose immigration records of defence witnesses upon request, and not simply at the commencement of cross examination.<sup>115</sup>

A critical question which arises in the application of this category is the time frame within which the disclosure must be made. Evidence would only become ‘subject to inspection’ under this category from the moment the prosecution forms the intention to use it as evidence. However, as fairness considerations require that the prosecution provides disclosure to the defence within a reasonable period, the Trial Chamber in *Butare* held that the prosecution should permit inspection under Rule 66(B) as soon as practicable and ‘cannot argue that she intends to comply with...on her own timetable.’<sup>116</sup>

#### **4. Obtained from or Belonged to the Accused**

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<sup>113</sup> *Prosecutor v Bagosora et al.*, ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence* (25 September 2006) at para. 8.

<sup>114</sup> *ibid.*, at para. 8; *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 179.

<sup>115</sup> *Prosecutor v Bagosora et al.*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence* (25 September 2006).

<sup>116</sup> *Gibson and Lussiaá-Berdou* (n 18).

A plain interpretation of this rule can be concluded that as long as items are in custody of the prosecution at the time an inspection request is made, the prosecution needs not to be the authority that seized the item in the first place. Also, it is the right of the accused to demand access to items that were not intended to be used as evidence during the trial.<sup>117</sup>

## II. Limitation

Since the prosecution's disclosure obligation pursuant to Rule 66(B) is very broad in nature, as it covers both inculpatory and exculpatory materials, it can be too immense and difficult for the prosecution to comply sometimes. The prosecution has tried to limit its disclosure obligation in several occasions. For example, it had argued that Rule 66(B) only encompasses material disclosable under Rule 66(A), but this argument was rejected by the Trial Chamber, reasoning that Rule 66(A) and (B) are independent sub-rules, therefore Rule 66(B) need not to be read in the context of Rule 66(A).<sup>118</sup>

Another attempt made by the prosecution, by referring extensively to domestic legal provisions, is that attempting to limit its obligation to the examination-in-chief only. As mentioned, this argument was accepted by the Trial Chamber but overturned by the

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<sup>117</sup> *Prosecutor v Ngirumpatse*, No. ICTR-98-44-I, *Decision on the Defence Motion Challenging the Lawfulness of the Arrest or Detention and Seeking Return or Inspection of Seized Items* (10 December 1999) at para. 76; *Prosecutor v Ntagerura et al*, No. ICTR-98-46-I, *Decision on the Defence Motion by Emmanuel Bagambiki for the Restitution of Documents and Other Personal and Family Property* (26 September 2000) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order* (13 October 2003) at para. 33.

<sup>118</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on the Motion for Inspection of Non-Rule 68 Material* (9 March 2006).



Appeals Chamber, which considered the meaning of Rule 66(B) to be sufficiently clear so as not to require resort to domestic legal provisions in determining its scope.<sup>119</sup>

Nonetheless, after facing the seemingly endless disclosure motions, the Courts decided to lay down some restrictions itself to limit the scope of this Rule. The Trial Chamber in *Bagosora* has expressed its concern regarding this issue and held that, Rule 66(B) cannot be interpreted as laying down a blanket obligation for the prosecution to disclose documents pertinent to its cross examination of defence witnesses.<sup>120</sup> In particular, with regard to materiality, the Trial Chamber in *Karadžić* held that an item will only be material to the preparation of the defence where it is used in an argument that has some prospect of success.<sup>121</sup>

It is important to note that a showing of materiality by the defence is not required pursuant to Rule 66(B) for the disclosure of evidence that is (i) intended for use as evidence by the prosecution at trial or (ii) that was obtained from or belonged to the accused.<sup>122</sup> Thus, the materiality test only applies to the first part of Rule 66(B).<sup>123</sup>

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<sup>119</sup> *Prosecutor v Bagosora et al.*, ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunals Rules of Procedure and Evidence* (25 September 2006) at para. 8; *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 179.

<sup>120</sup> *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses* (27 September 2005) at para. 6.

<sup>121</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 23.

<sup>122</sup> See *Prosecutor v Delalić*, No. IT-96-21-T, *Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence* (26 September 1996) at para. 5.

<sup>123</sup> Jones and Powles (n 64) 654.

### III. Overlap with Rule 68

Another point which should be emphasised here is that Rule 66(B) might contain both inculpatory and exculpatory material. That is to say, the information falling within Rule 68 will also necessarily be material to the preparation of the defence under Rule 66(B).<sup>124</sup> The concept of materiality, in the U.S. practices, is examined both under *Brady* and Rule 16. Many scholars also noted that the materiality standard in Rule 16 is similar to *Brady*.<sup>125</sup> However, as seen in the domestic practices, the scope of exculpatory material is usually broad, notwithstanding the difficulty to establish a disclosure violation by the prosecution.

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<sup>124</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 14.

<sup>125</sup> E.g. Jones and Powles (n 64) 653.

#### **IV. Rule 68 – Disclosure of Exculpatory Material**

Rule 68 of the ICTY RPEs regulates the prosecution's 'disclosure of exculpatory material'. It reads as follows:

Subject to the provisions of Rule 70,

- (i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the *actual knowledge* of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;
- (ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;
- (iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;
- (iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;
- (v) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

Similarly, Rule 68 of the ICTR RPEs ('Disclosure of Exculpatory and other relevant Material') reads as follows:

(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the *actual knowledge* of the Prosecutor may suggest the innocence or mitigate the guilt of the

accused or affect the credibility of Prosecution evidence.

(B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.

(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.

(D) The Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

As to the ICC, Article 67(2) of the Rome Statute provides that:

‘In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.’

This provision should be read together with Rule 83: ‘The Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.’

Rule 68 of the ICTY and ICTR RPEs regulates the duty of the prosecution to disclose exculpatory evidence.<sup>126</sup> The ICC has upgraded this obligation to a statutory level; now this disclosure obligation is explicitly set out in Article 67 paragraph 2, under the title of ‘Rights of the Accused’. The wording ‘he or she believes shows or tends to show’ is slightly different from Rule 68 ICTY RPEs, which the subjective requirement of the prosecutor is ‘in the actual knowledge of the Prosecutor’.

### **A. Importance of the Duty**

It is well recognised that the disclosure of exculpatory material is fundamental and of paramount importance to the fairness of proceedings before the international criminal tribunals.<sup>127</sup> As one of the most demanding responsibilities of the prosecution, the disclosure of exculpatory evidence should always be interpreted broadly since it is indispensable to a fair trial.<sup>128</sup> The Tribunals have held that considerations of fairness are the overriding factor in any determination of whether the governing Rule has been

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<sup>126</sup> See Rule 68 ICTY/R RPEs.

<sup>127</sup> *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 172; *Prosecutor v Orić*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 20; Lubanga case, Appeals Chamber, *Decision on Request of the Defence in relation to Investigations Conducted Pursuant to Article 70...* (17 June 2014) at para. 22.

<sup>128</sup> *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-A, *Decision on Milan Lukić’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 13; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 7; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 7.

breached.<sup>129</sup> It is also emphasised many times that the onus on the prosecution, to comply with Rule 68, to the best of its ability, is not a secondary obligation; the prosecution's obligation to disclose under Rule 68 is as important as the obligation to prosecute.<sup>130</sup>

The rationale of this duty is that the prosecution has superior – and sometimes even sole – access to the exculpatory information.<sup>131</sup> The prosecution's duty to disclose exculpatory evidence is one of the best available ways to rebalance the inequality of arms between the two parties.

## **B. Continuing Obligation**

The prosecution's duty to disclose exculpatory evidence is a continuing, ongoing one.<sup>132</sup>

It extends to the post-trial stage, including appeals,<sup>133</sup> and even to the point after a final

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<sup>129</sup> *Prosecutor v Stakić*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 188.

<sup>130</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 10; *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72.

<sup>131</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 17.

<sup>132</sup> 'Continuous nature' *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI* (14 September 2004) at para. 8; 'Ongoing' *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 16.

<sup>133</sup> *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 17; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 29;

judgement.<sup>134</sup> The term ‘continuing obligation’ has been defined to be understood as ‘the Prosecution must, on a continuous basis, search all material known to the Prosecution, including all its files, in whatever form and in relation to all accused, for the existence or may affect the credibility of Prosecution evidence, and disclose the existence of such material completely to the defence.’<sup>135</sup>

The focus on the continuity of the prosecution’s disclosure obligations underlines the rationale of disclosure in general. As held by the Court, the prosecution has the duty ‘to participate in the process of administering justice and to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused.’<sup>136</sup> Note that, the fact that the prosecution has a continuing duty to disclose exculpatory evidence does not suggest that the prosecution can delay disclosure of material already in its possession or identify and disclose exculpatory material on a ‘rolling basis’.<sup>137</sup>

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*Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision* (10 December 2010) at para. 11; *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on the Prosecutor’s Motion to Move for Decision on Niyitegeka’s Requests for Review Pursuant to Rules 120 and 121* (28 September 2005) at page 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 13.

<sup>134</sup> *Prosecutor v Milosević*, No. IT-98-29/1-A, *Decision on Motion Seeking Disclosure of Rule 68 Material* (7 September 2012) at para. 10. The Appeals Chamber also held that the stage of a proceeding is not a factor to be considered when discharging the prosecution’s disclosure obligations. *ibid*, at para. 12.

<sup>135</sup> *Prosecutor v Blagojević & Jokic*, No. IT-02-60-T, *Joint Decision on Motions Related to Production of Evidence* (12 December 2002) at para. 29; *Prosecutor v Blaškić*, No. IT-95-14-T, *Decision on the Defence Motion for Sanctions for the Prosecutor’s Failure to Comply with Rule 66 (A) of the Rules and the Decision of 27 January 1997 Compelling the Production of all Statements of the Accused* (15 July 1998).

<sup>136</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para.9.

<sup>137</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision* (10 December 2010) at para. 11; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Seventeenth bis and Twenty-Eighth Disclosure Violation Motions* (16 December 2010) at para. 23; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s 47th*

However, this seems to be the current practice of the *ad hoc* Tribunals.

### C. Initial Determination

Similar to Rule 66 (B), it is the prosecutor who makes the initial determination whether a particular piece of material is exculpatory under Rule 68. It is primarily a fact-based judgement which the prosecutor is supposed to be acting in good faith.<sup>138</sup> The prosecution is not under any legal obligation to consult with an accused to reach a decision on which material constitutes exculpatory. The Trial Chambers observed that, in view of the imperative to provide a fair trial to an accused, considerations of fairness must be the overriding factor in making that determination.<sup>139</sup> Accordingly, the Courts will not intervene in the prosecution's exercise of his freedom in such matters, unless it can be proved that there is an error in the prosecutor's judgement.<sup>140</sup> If the prosecution states that the requested material was reviewed and no exculpatory information was

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*Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings* (10 May 2011) at para. 11.

<sup>138</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183; *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 21; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para 30; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at paras. 16-17; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (6 October 2006) at para. 2; *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motions on Rule 68 Disclosure* (5 October 2007) at para. 5.

<sup>139</sup> *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 21.

<sup>140</sup> *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Decision On the Motion for a Review of the Decision by the President of the Appeals Chamber; on the Motion Pursuant to Article 73 of the Rules of Procedure and Evidence Praying the Chamber to Order the Prosecutor to Disclose to the Defence the Tapes Containing the Recordings of Radio Muhabura; On the Motion for a Review of the Decision by the President of the Appeals Chamber* (6 February 2002)



found, the Trial Chamber will accept it so.<sup>141</sup>

In addition, the Trial Chamber has the discretion to order the prosecution to disclose material which contains information contradicting a prosecution witness, but it would not be wrong if the Trial Chamber refuses to do so.<sup>142</sup> It is also not necessary for the Trial Chamber to conduct an *in camera* inspection of the disputed material, given that the prosecution has the primary responsibility for determining whether material falls within Rule 68.<sup>143</sup>

Nonetheless, there are certain categories of material that do not fall in the prosecution freedom of determination as to whether they constitute exculpatory or not. An ICTR Chamber has considered that witness' criminal records, guilty pleas, confessions to crimes, or inconsistent statements are exculpatory as a matter of law and therefore must be disclosed to the defence.<sup>144</sup> The ultimate determination of whether such evidence actually affects the credibility of prosecution evidence is for the Chamber in its final assessment.<sup>145</sup> The premise is that the prosecution is acting *bona fide*; although the presumption is rebuttable,<sup>146</sup> in effect, means that the accused will be under a heavy

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<sup>141</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (6 October 2006).

<sup>142</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at para. 17.

<sup>143</sup> *ibid*, at para. 20.

<sup>144</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-lement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009) at paras. 9-10.

<sup>145</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 39.

<sup>146</sup> *Prosecutor v Mladić*, No. IT-09-92-AR73.2, *Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods* (28 November 2013) at para. 24.

burden to prove a disclosure violation.

#### **D. Requirements of Rule 68**

In the *ad hoc* Tribunals, the test now to be applied for disclosure under Rule 68 is threefold: First, if the defence believes that the prosecution has not complied with Rule 68, it must establish that additional evidence exists that might prove exculpatory or mitigating for the accused and is in the possession of the prosecution. Second, it must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.<sup>147</sup> Third, the items requested by the defence must be sufficiently specific.

The defence can challenge the prosecution's compliance with Rule 68 at any time.

Although the duty to disclose material is on the prosecution, the burden to prove the breach of this duty is on the defence.<sup>148</sup> The problem of disclosure violation is similar to the situation in the U.S., that there is a gap between recognising a disclosure failure and an imposition of remedy. With regard to the establishment of disclosure violations under Rule 68, the Courts have set out the above conditions for the defence to fulfil. But when it comes to addressing the appropriate remedy, the Chambers held an additional

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<sup>147</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para 179; *Prosecutor v Tihomir Blaškić*, No. IT-95-14-PT, *Decision on the Production of Discovery Materials* (27 January 1997) at para. 49; *Prosecutor v Brđjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials* (7 December 2004) p.3; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 31.

<sup>148</sup> E.g. *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para 179.

requirement: even if the defence can establish that the prosecution has violated its duty under Rule 68, the Chamber will further examine whether the defence has been prejudiced by that breach of Rule 68.<sup>149</sup> ICTY has added Rule 68bis to address the power of the Chamber to impose sanctions on a party should a disclosure violation occur. These requirements will be examined now.

### **1. Exculpatory Nature**

The jurisprudence of the ad hoc Tribunals, reflecting the text of the Rule itself, has established the ambit of exculpatory evidence. That is, if information tends to suggest the innocence or mitigate the guilt of the accused, or affects the credibility of prosecution evidence, it will fall within the scope of Rule 68.

However, as the countless disclosure motions demonstrated, there is still a degree of uncertainty regarding the actual scope of which type of material should be disclosed.

Interestingly, the Chamber of the SCSL considers the plain meaning of what constitute exculpatory material to be ‘clear and ambiguous’.<sup>150</sup> The SCSL Chamber held that under Rule 68, exculpatory evidence is simply evidence favourable to the accused.<sup>151</sup>

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<sup>149</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 179; *Prosecutor v Blaškić*, No. IT-95-14-A, *Judgement* (29 July 2004) at para. 268; *Prosecutor v Brdjanin & Talić*, No. IT-99-36-T, *Decision on “motion for relief from rule 68 violations by the prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved”* (30 October 2002) at para. 23; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 31.

<sup>150</sup> *Prosecutor v Norman, Fofana, Kondewa*, No. SCSL-04-14-T, *Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure* (6 November 2006) at para. 3.

<sup>151</sup> *Prosecutor v Norman, Fofana, Kondewa*, No. SCSL-04-14-T, *Decision on Motion to Compel the*

This seems to be inconsistent with the reality of the ad hoc Tribunals.

## 2. Not Admissibility

It is important to note that Rule 68 material is not restricted to those which would be admissible in evidence. Rather, according to the Chambers, it includes all information that tends to ‘suggest the innocence or mitigate the guilt of an accused or may affect the credibility of prosecution evidence in any way, as well as material which may put an accused on notice that such material exists’.<sup>152</sup> In addition, as clarified by the Trial Chamber, the threshold for disclosure of exculpatory material under Rule 68 is much higher than the standard for admissibility of evidence under Rule 89(C).<sup>153</sup>

## 3. Standard: Relevance

According to the *ad hoc* Tribunals’ jurisprudence, the standard for evaluating a certain piece of information to be considered exculpatory is whether there is any possibility, in light of the submissions of the parties, that the given material could be *relevant* to the defence of the accused.<sup>154</sup> This standard of relevancy, however, is very difficult to

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Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68 (8 July 2004) at para. 23.

<sup>152</sup> *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 178; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak’s Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 6; *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Decision on Motion by Dario Kordić for Access to Unredacted Portions of October 2000 Interviews With Witness AT* (23 May 2003) at para. 24.

<sup>153</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Motions for Admission of Written Statements and Witness Testimony* (15 July 2009) at para. 106.

<sup>154</sup> *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-A, *Decision on Milan Lukić’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion*

implement, as seen in the practices before the domestic criminal courts and Rule 66 (B).

The Chambers have to assess the exculpatory nature often on a case-by-case basis.

There are three main categories of exculpatory evidence qualified in Rule 68: (i) evidence which might suggest the innocence of the accused, (ii) mitigate his guilt, or (iii) discredit the prosecution's evidence. Given that the chances to establish defences in cases of international crimes are almost futile, the defence teams tend to adopt the strategy of the third type, to undermine the prosecution's case. In this context, it is crucial for the accused to have access to all material that possibly might have this effect.

As long as the material is favourable to the accused in the preparation of his defence, the prosecutor should disclose it, regardless of the nature and type of the material.<sup>155</sup> In addition, Rule 68 does not merely require the prosecution to disclose to the defence the existence of exculpatory evidence, but to physically disclose any such evidence in the prosecution's control, custody or possession.<sup>156</sup>

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(14 May 2008) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 12.

<sup>155</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI* (14 September 2004) at para. 8.

<sup>156</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (7 October 2003) at para. 8.

#### **4. Suggests innocence and Mitigation of Guilt or Sentence**

If the information might suggest the innocence of the accused, it should be disclosed.

The Chambers have pointed out that the disclosure obligation under Rule 68 is not limited to material which is exculpatory on its face. For material to fall within the ambit of Rule 68, it is not required that it in fact suggests the innocence of the accused; it is sufficient that it *may* so suggest.<sup>157</sup>

Recordings or notes of meetings at which the accused claimed he was promised immunity if he resigned from public office may mitigate an eventual sentence and was within Rule 68.<sup>158</sup>

#### **5. Affecting the Credibility of the Prosecution's Evidence**

##### **Contradicts Prosecution Evidence**

What kind of material will 'affect the credibility of the prosecution's evidence'? As clarified by the ICTY Chambers, if the said evidence could undermine the case presented by the prosecution at trial.<sup>159</sup> This is in line with the jurisprudence of the

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<sup>157</sup> *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence* (2 June 2006) at para. 9; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 11.

<sup>158</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 21.

<sup>159</sup> *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 178; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 6.

common law countries.<sup>160</sup> Accordingly, information which contradicts or calls into doubt the information provided by any prosecution witness, or which affects their credibility, as well as any information tending to show that the accused attempted to stop the killings would qualify as exculpatory evidence.<sup>161</sup>

## **Inconsistency**

In the context of the ICTY and ICTR, it is common for the witnesses to testify in multiple proceedings, the testimonies of that witness given in other trials must be disclosed pursuant to Rule 68.<sup>162</sup> If there are any inconsistencies in a witness's account, the prosecution has a general obligation to make a record of it and disclose it to the defence. For example, notes of a prior witness statement which was inconsistent with the later statement,<sup>163</sup> if a witness statement was contradictory to testimonies of other prosecution witnesses;<sup>164</sup> if a witness statement contradicts facts judicially noticed, they must be disclosed.<sup>165</sup> Information contradicting the testimony of a prosecution witness,

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<sup>160</sup> See Chapter V and VI.

<sup>161</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (7 October 2003) at para. 12-13; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006) at para. 9.

<sup>162</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para.20.

<sup>163</sup> *Prosecutor v Haradinaj et al*, No. IT-04-84bis-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 33; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at paras. 146, 148.

<sup>164</sup> *Prosecutor v Oric*, No. 03-68-T, *Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66(B) and 68(i)* (29 September 2005).

<sup>165</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Fourth Disclosure Violation Motion* (14 October 2014) at para. 14.

even if that testimony was later excluded, were required to be disclosed because it nevertheless affects the credibility of the prosecution witness.<sup>166</sup>

The burden is on the prosecution to refute the possibility that disclosure of prior testimony of a witness in another case at the Tribunal contains exculpatory evidence or affects the credibility of prosecution witnesses.<sup>167</sup>

### **Benefits to prosecution witnesses**

Any material in the possession of the prosecution establishing that the prosecution has provided or may provide any objective form of assistance, such as benefits or promises, to prosecution witnesses or their families would fall squarely within the purview of Rule 68.<sup>168</sup> If a witness has requested and/or received benefits from being a prosecution witness, it may affect the credibility of the said witness and therefore should be disclosed pursuant to Rule 68.<sup>169</sup> For example, letter or the request of a letter which

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<sup>166</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15<sup>th</sup> Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 8.

<sup>167</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Juvenal Kajelijeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits, and Pre-Trial Statements of Prosecution Witnesses GBU and GFA* (24 November 2004).

<sup>168</sup> *Prosecutor v Haradinaj*, No. IT-04-84bis-T, *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011) at para. 45; *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (7 October 2003) at para. 16.

<sup>169</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions* (22 November 2011) at para. 23; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Fifth Disclosure Violation Motion* (12 January 2012) at para.16; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Sixth and Sixty-Seventh Disclosure Violation Motions* (1 March 2012) at para. 17.



would assist a witness's asylum application, must be disclosed.<sup>170</sup>

The burden of showing that undisclosed benefits have been given to witnesses is, however, on the defence.<sup>171</sup> Undoubtedly, proving the existence of such undisclosed benefits is far from easy for the defence team, due to the simple fact that this would require undisclosed information. When dealing with situations concerning the prosecution payments to the witnesses, the ICTR has set up a high threshold. For example, in *Karemera*, the Chamber held that the payments need only be disclosed when they are beyond reasonable payments required for the management of witnesses such as expenses for transportation in connection with investigation and hearings.<sup>172</sup> From a practical point of view, it is difficult to imagine how the defence team will be able to prove such 'beyond reasonable payments', since the defence simply will not have such information available.

In contrast, the approach taken by the ICTY appears to be more reasonable. For instance, in *Halilović*, the prosecution was ordered by the Trial Chamber to provide the defence with 'a list identifying those proposed witnesses who have entered into favourable

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<sup>170</sup> *Prosecutor v Haradinaj*, No. IT-04-84bis-T, *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011) at para.51; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions* (22 November 2011) at paras. 25,27,29,31; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Third Disclosure Violation Motion* (21 November 2013) at para. 10.

<sup>171</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses* (23 August 2005) at para. 7.

<sup>172</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses* (23 August 2005) at para. 6.

arrangements’.<sup>173</sup>

The witnesses might be recalled for cross-examination after late disclosure of the promises or benefits. However, it must be shown that witness’ statements or testimonies have materially changed after the promise or benefit relating to their immigration status.<sup>174</sup> Records of the detention of the witness in Rwanda may affect his credibility where he may have sought a benefit by cooperating with the Tribunal, and such records ordered disclosed pursuant to Rule 68.<sup>175</sup>

With regard to the record of payments made to witness protection programs, the Trial Chamber will decide *in camera* whether they should be disclosed to the defence.<sup>176</sup> In *Bizimungu*, the Chamber ordered the prosecution to disclose to the defence amounts paid for witness protection as well as future payments.<sup>177</sup>

### **Criminal records**

Criminal records of prosecution witnesses also fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence.<sup>178</sup> The character of the witness, including evidence of involvement in crimes, is relevant to and therefore ‘may affect’

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<sup>173</sup> *Prosecutor v Halilović*, No. IT-01-48-PT *Decision on Defence Motion for Identification of Suspects and other Categories Among its Proposed Witnesses*, (14 November 2003) at para. 3.

<sup>174</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Sixty-Fifth Disclosure Violation Motion* (12 January 2012) at para. 23; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Eighty-Third Disclosure Violation Motion* (21 November 2013) at para. 11.

<sup>175</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi’s Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 17.

<sup>176</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D* (28 September 2006).

<sup>177</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D* (18 February 2008) at para. 8.

<sup>178</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (7 October 2003) at para. 19.

the witness' credibility. Moreover, desires to obtain lesser punishment or shift blame for one's crimes to another are motives which may affect a witness' credibility.<sup>179</sup>

### **Alibi**

If the prosecution has information which might support an alibi of the accused, it must disclose them. In *Niyitegeka*, the Chamber found that the prosecutor violated its disclosure obligation by failing to disclose documents once it had learned of the specifics of the alibi.<sup>180</sup>

### **Failure to implicate the accused**

If an item fails to mention the presence of the accused at a particular event, it is not considered exculpatory.<sup>181</sup> However, the absence of any reference to the accused in the testimony with regard to the same events examined in another trial is potentially exculpatory.<sup>182</sup> In addition, in the context of the ICTR, documents indicating that the United States government was not aware of evidence that genocide was planned was exculpatory considering that United States government conducted active intelligence

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<sup>179</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009) at para. 8.

<sup>180</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (7 March 2007) at para.29; *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review* (23 January 2008) at para. 26.

<sup>181</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para.70; *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Oral Decision on Defence Motion to Exclude Evidence or Recall Witnesses Filed on 9 February 2009* (13 February 2009).

<sup>182</sup> *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 20.

gathering in Rwanda, and failure to disclose it violated Rule 68.<sup>183</sup>

## Public Material

An attempted limitation put forth by the prosecution is that public material should be exempted from its disclosure duty pursuant to Rule 68. The prosecution often contended that its Rule 68 obligations are relieved if it feels that the accused might be able to find the information on his own.<sup>184</sup> The ICTY seemed to accept this contention. In the *Blaškić Appeals Judgment*, the Chamber further made a distinction between ‘material of a public character in the public domain’ and ‘material reasonably accessible to the defence’. Only when the material is available to the defence through the exercise of due diligence, then the prosecution may be relieved from its duty.<sup>185</sup> The Appeals Chamber, citing its reason pursuant to a previous *Blaškić* decision,<sup>186</sup> stated that there would be no prejudice to the defence ‘if the exculpatory nature of the evidence is known and the material is accessible to the accused.’<sup>187</sup> For example, when the material is already

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<sup>183</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera’s Tenth Notice of Rule 68 Violation* (16 April 2008) at para. 10.

<sup>184</sup> E.g. *Prosecutor v Blaškić*, No.IT-95-14-A, *Judgement* (29 July 2004) at para. 287.

<sup>185</sup> *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 30; *Niyitegeka v The Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 51; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004) at para. 4; *Prosecutor v Blaškić*, No.IT-95-14-A, *Judgement* (29 July 2004) at para. 296.

<sup>186</sup> *Prosecutor v Blaškić*, No. IT-95-14-A, *Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings* (26 September 2000).

<sup>187</sup> *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 30.

available on the Tribunal website, the Rule 68 obligation is considered relieved.<sup>188</sup>

This view, however, is not completely shared by the ICTR.<sup>189</sup> One Trial Chamber recalls that the duty to disclose exculpatory material is of a positive and continuing nature and, therefore, the public nature of the material should have no impact upon the issue of whether the prosecution has discharged its disclosure obligations under Rule 68.<sup>190</sup> Another Trial Chamber found that the prosecution has a duty to disclose the material open session testimony from another trial when it is exculpatory, even though transcripts may be publicly available unless it can show that the accused was put on notice of the testimony.<sup>191</sup>

The central question then boils down to the determination of whether the particular exculpatory material is reasonably accessible, and whether its existence is known to the defence. This would require a careful examination, depending on the relevant circumstances.<sup>192</sup> As regard with the ICC, the single judge in *Katanga* held that the

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<sup>188</sup> *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 12.

<sup>189</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15<sup>th</sup> Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 21 (The Chamber disagrees with, and finds absolutely lacking in merit, the prosecution's contention that it does not have to abide by established Rule 68 obligations when it feels that the accused might be able to find the information on his own.)

<sup>190</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the Ndingilyimana Proceedings* (4 November 2008) at paras. 10, 19.

<sup>191</sup> *Prosecutor v Niyitegeka*, No. ICTR-96-14-R, *Decision on Third Request for Review* (23 January 2008) at para. 27.

<sup>192</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations*, 30 June 2006, para.15.

prosecution is obligated to disclose exculpatory material regardless of whether it is in the public domain.<sup>193</sup>

## 6. Possession of the Prosecution

Rule 68 requires the prosecution to disclose material which is in its ‘actual knowledge’.

This term, however, was narrowly interpreted by the *ad hoc* tribunals, to mean material which was within the ‘custody, control or possession’ of the prosecution. The Trial Chamber in *Bagilishema* recognised that, thereby adopting a literal interpretation of Rule 68, extreme circumstances would allow for innumerable motions to engage the prosecutor into investigating materials in the hands of a third party. This would affect the independency of the prosecution. Therefore, the Trial Chamber decided to treat the term ‘known’ as ‘custody, control of possession’. This interpretation, as stated by the Chamber, is also in line with the wording used in Rules 66 (B) and 67 (C) of the Rules. The point being, the disclosure obligation of the prosecution will only be effective when the prosecutor is in actual custody, control or possession of the said evidence. The prosecution cannot disclose that which he does not have.<sup>194</sup>

The main effect of this requirement, is that there is no presumption of possession – the

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<sup>193</sup> *Katanga* case, Single Judge: *Decision on the 19 June 2008 Prosecution Information and Other Matters concerning Articles 54(3)(e) and 67(2) of the Statute and Rule 77 of the Rules* (25 June 2008) at para. 11.

<sup>194</sup> *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA* (8 June 2000) at paras. 6-7; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence* (5 July 2001) at para. 14.

accused must show that a document claimed to be exculpatory is in the possession of the prosecution.<sup>195</sup> In addition, Rule 68 *prima facie* obliges the prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.<sup>196</sup>

### **Specificity**

Similar to Rule 66(B), a request for materials pursuant to Rule 68 must be specific as to the nature of the evidence sought and its being in the possession of the prosecution, but need not precisely identify which documents should be disclosed.<sup>197</sup> Accordingly, the request for evidence of all crimes committed by Serb forces in the South sector from 1991-95 was sufficiently specific under Rule 68.<sup>198</sup> However, in some cases it might prove difficult to assess what is specific enough for the Chambers. For example, in *Karadžić*, despite the trial Chamber found that the evidence of agreement that the accused would not be prosecuted at ICTY was relevant to mitigation, the request for ‘any items in the possession of the prosecution supporting the accused’s contention that such an agreement was made’ was considered insufficiently specific to require

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<sup>195</sup> *Kanyurikiga v Prosecutor*, No. ICTR-2002-78-AR73, *Decision on Kanyurikiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents* (19 February 2010) at para. 16.

<sup>196</sup> *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 206; *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-A, *Decision on Milan Lukić’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 14.

<sup>197</sup> *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 30.

<sup>198</sup> *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak’s Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para.10.

production pursuant to Rule 68.<sup>199</sup>

### **E. Form of Disclosure**

The purpose of Rule 68 could only be properly fulfilled if the prosecution identify the relevant exculpatory part and disclose the material in its original form. As noted by Zappalà, ‘the very heart of the disclosure of exculpatory material is their identification and characterisation as exculpatory.’<sup>200</sup> However, the current practice seems to be somewhat unclear in the *ad hoc* tribunals.

### **Identification**

The early practice of the ICTY indicates that the prosecution should identify the exculpatory material in light of its general disclosure duty. The Trial Chamber, in *Krajisnik*, noted that albeit Rule 68 is silent on its face, ‘as a matter of practice and in order to secure a fair and expeditious trial, the prosecutor should normally indicate which material it is disclosing under the Rule and it is no answer to say that the defence are in a better position to identify it.’<sup>201</sup> In the same vein, in *Brdanin*, the Chamber stated ‘the prosecution alone is responsible for identifying which evidence might be

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<sup>199</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure* (9 April 2009) at para. 27.

<sup>200</sup> Salvatore Zappalà, ‘The Prosecutor’s Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE’ (2004) 2 J. Int’l Crim. Just. 620, 620.

<sup>201</sup> *Prosecutor v Krajisnik and Plavsic*, No. IT-00-39&40-PT, *Decision on Motion from Momcilo Krajisnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68* (19 July 2001) at page 2.



exculpatory and for disclosing Rule 68 material.<sup>202</sup>

This position seems to be changed by the *Kristić* Appeals Chamber in 2004. It held, instead, that while it might be fairer for the prosecution to do so, Rule 68 does not require the prosecution to identify the material being disclosed to the defence as exculpatory.<sup>203</sup> It is interesting to note that the *Kristić* judgment is delivered after the December 2003 amendment to Rule 68, which introduced Rule 68(B), stating that the prosecution can disclose exculpatory material via electronic means.<sup>204</sup> This created a new field of disclosure disputes before the Trial Chambers. The prosecution, equipped with the judgement in *Kristić* and a new mandate to disclose electronically, starting to make claims that they have fulfilled its Rule 68 obligation by placing the material on the Electronic Disclosure System ('EDS').<sup>205</sup> However, in *Karemera*, the Appeals Chamber did not accept this argument. It made clear that the EDS does not relieve the prosecution from complying with its obligations under Rule 68(A) to disclose 'as soon as practicable'.<sup>206</sup> Rule 68(B) disclosure is merely the 'digital equivalent' of disclosure

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<sup>202</sup> *Prosecutor v Brdanin & Talic*, No. IT-99-36-T *Decision on "Motion for Relief from Rule 68 Violation by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters affecting Justice and a Fair Trial can be Resolved"* (30 October 2002) at para. 23. This is later confirmed by the ICTR Appeals Chamber. See *Prosecutor v Karemera et al.*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 9.

<sup>203</sup> *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 190.

<sup>204</sup> Tochilovsky, 'Defence Access to the Prosecution Material' (n 192) 1089.

<sup>205</sup> Gibson and Lussiaá-Berdou (n 18) 330. See e.g. *Prosecutor v Karemera*, No. ICTR-98-44-AR.73.7, *Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations* (6 March 2006) at paras. 2, 20, 26.

<sup>206</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to*

under Rule 68(A). It does not provide a license to fail to identify the exculpatory material to the defence.<sup>207</sup> Accordingly, placing a particular piece of material on the EDS does not necessarily make that piece of material ‘reasonably accessible’ to a particular accused.<sup>208</sup>

After few years of litigations, it has been established that the EDS cannot be used as a substitute for positive disclosure.<sup>209</sup> However, the Trial Chamber seems to accept that the prosecution’s Rule 68 obligations are satisfied if the material on the EDS is placed in a separate folder and if the accused is notified of that material posted on the EDS.<sup>210</sup> The Chamber considered that disclosure on the EDS is, however, insufficient if the defence has not consented.<sup>211</sup> The conclusion is that the prosecution’s Rule 68 obligations extend beyond simply making available its entire evidence collection in searchable format.<sup>212</sup> In addition, the prosecution cannot use its failure to update its

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*Compel Inspection and Disclosure* (5 July 2005) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 8.

<sup>207</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 13.

<sup>208</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 15.

<sup>209</sup> *Prosecutor v Mladic*, No. IT-09-92-AR73.2, *Decision on Defence Interlocutory Appeal Against the Trial Chamber’s Decision on EDS Disclosure Methods* (28 November 2013) at para. 25.

<sup>210</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Motions for Rule 68 Material and Reconsideration of Decision on Adequate Facilities* (10 March 2009) at para. 20; *Prosecutor v Mladic*, No. IT-09-92-AR73.2, *Decision on Defence Interlocutory Appeal Against the Trial Chamber’s Decision on EDS Disclosure Methods* (28 November 2013) at para. 25.

<sup>211</sup> *Prosecutor v Nzambonimana*, No. ICTR-98-44D-PT, *Oral Decision on Disclosure Motion* (29 June 2009) at p.3.

<sup>212</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 10.

electronic records as an excuse for failing to comply with its Rule 68 obligations.<sup>213</sup> It is essential that the prosecution actively review the material in its possession for exculpatory material, and, at the very least, inform the accused of its existence.<sup>214</sup>

From another perspective, Rule 68(B) does not create new disclosure obligations on the prosecution. The Trial Chamber in *Bizimungu* observed that, the provision does not give the defence the right to conduct an unrestricted search of the electronic databases of the prosecution. It merely provides for the use of modern technology to discharge existing obligations of the prosecution under Rules 66 and 68.<sup>215</sup>

As to the ICC, although Article 67(2) did not explicitly require the prosecution to identify which part of the material is exculpatory, the Chamber has held that the prosecution is required to highlight the exculpatory portion of the document being disclosed under Article 67(2).<sup>216</sup> Proper identification of exculpatory material is in line with the purpose of securing a fair and expeditious trial.<sup>217</sup>

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<sup>213</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para.61.

<sup>214</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirerera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 8.

<sup>215</sup> *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material* (1 December 2004) at para. 9.

<sup>216</sup> *Gbagbo case*, Single Judge: *Decision Establishing a Disclosure System and a Calendar for Disclosure* (24 January 2012) at para. 25.

<sup>217</sup> *Prosecutor v Mrkšić et al.*, No. IT-95-1 /1-PT, *Order Setting a Time-Limit for Disclosure Pursuant to Rule 66(A)(ii)* (24 November 2004) at p.3; *Prosecutor v Krajišnik and Plavšić*, No. IT-00-39 & 40-PT, *Decision on Motion from Momcilo Krajišnik to compel Disclosure of exculpatory Evidence pursuant to Rule 68* (19 July 2001) at p. 2.

The position of the ad hoc Tribunals is that the prosecution should disclose exculpatory material in its original form, and not in the form of a summary, as implied by the Rule 68 obligation.<sup>218</sup> For example, if a witness statement contains exculpatory material, the statement needs to be disclosed. For the material to be effectively useful for the defence, the prosecution should provide the defence the material in its original form, although some parts might be redacted when the prosecution deems appropriate. That is, the sections which might contain exculpatory material should be provided to the defence, the entire piece is not necessary. The redacted versions of exculpatory material that will be disclosed should however be ‘sufficiently cohesive, understandable and usable and not taken out of context.’<sup>219</sup>

#### **F. Overlapping with Rule 66 (B)**

Another important point to make here is that information falling within Rule 68 will also necessarily be material to the preparation of the defence under Rule 66(B).<sup>220</sup> In a *Blaškić* Decision, the Trial Chamber held the view that material of an exculpatory nature will always be material for the preparation of the defence.<sup>221</sup> In addressing this

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<sup>218</sup> Vladimir Tochilovsky, ‘Prosecution Disclosure Obligations in the ICC and Relevant Jurisprudence of the Ad Hoc Tribunals’ in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (BRILL 2009) 846–7.

<sup>219</sup> *Prosecutor v Blagojević & Jokic*, No. IT-02-60-T, Joint Decision on Motions Related to Production of Evidence (12 December 2002) at para. 24; *Prosecutor v Brdjanin & Talic*, No. IT-99-36-T, Decision on “motion for relief from rule 68 violations by the prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved” (30 October 2002) at para.26; *Prosecutor v Blaškić*, No. IT-95-14-T, Decision on the Defence Motion to admit into Evidence the prior Statement of Deceased Witness Midhat Haskic (29 April 1998) at para. 19.

<sup>220</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 14.

<sup>221</sup> *Prosecutor v Thomir Blaškić*, IT-95-14-PT, Decision on the Production of Discovery Materials (27

issue, it is necessary to consider the context of Rule 66 or disclosure duty in general, that any request by the defence for exculpatory material alleged to be in the prosecutor's possession, custody or control must be specific as to such material.

The Chamber in *Karemera* found that, in the context of Rule 68, material relevant to the defence of the accused, should be understood to be material 'which may tend to dispute a material fact against the accused, undermine the credibility of evidence intended to prove these material facts, or even serve to sustain a valid excuse or justification for the alleged criminal conduct.' Therefore, information which may or may not be useful to the defence case is better treated under Rule 66.<sup>222</sup>

However, if the evidence contains a mixture of exculpatory and inculpatory material, it should be disclosed pursuant to Rule 68. In *Karemera*, the Appeals Chamber found that the Trial Chamber, by reasoning that exculpatory material in a document could be rendered nugatory by the existence of inculpatory material, applied an incorrect legal standard which resulted in an abuse of its discretion.<sup>223</sup>

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January 1997) at para. 50, where Trial Chamber I decided that the defence 'must submit to the Trial Chamber all *prima facie* proof tendering to make it likely that the evidence is exculpatory and is in the Prosecutor's possession.'

<sup>222</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 19.

<sup>223</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12.

## IV. Problems

### 1. Voluminous Nature

A special feature of international criminal trials, which distinguishes it from its national counterpart, is the size and scale of the trial. The cases in the ICTY, ICTR and the ICC have often involved a significant number of victims in a long lasting or even ongoing conflict. This is different from the domestic criminal cases, that usually only involve a single victim. In order to build a case before an international criminal tribunal, the prosecutor normally spends several years conducting the investigation, collecting material and interviewing witness. With regard to evidence, there are often millions or even billions of pages of documents and other material for the parties to process.

The prosecution has tried to justify its disclosure failure by mentioning the ‘voluminous nature’ of this obligation. The Chambers, however, did not accept this argument. It was held, in multiple occasions, voluminous material is no excuse for failing to disclose exculpatory material.<sup>224</sup> The Appeals Chamber also noted that the voluminous nature of materials in the possession of the prosecutor does not excuse the prosecution from its obligation to review and assess it,<sup>225</sup> although it might give rise to delays in

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<sup>224</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 19; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s 13th, 14th, and 15<sup>th</sup> Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 24.

<sup>225</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 10, fn 33; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Eleventh*

disclosure.<sup>226</sup> The proper way to deal with extensive amount of material is, as held by the Appeals Chamber in *Blaškić* and later in *Krstić*, that the parties should request an adjournment in order to properly prepare themselves.<sup>227</sup>

A similar issue is the effect of cumulative documents. Although the Chamber held that even if the accused already had the same information in other documents, the prosecution's Rule 68 obligation is not exempt.<sup>228</sup> These types of disclosure violation, however, are rarely considered as prejudicing the accused, and no remedy would be warranted.<sup>229</sup> This, in effect, means that the prosecutor will just simply not disclose the documents, since non-disclosure has no consequences.

## 2. Late Disclosure

As mentioned in the previous discussion regarding disclosure under Rule 66, late disclosure is one of the most problematic features. The Appeals Chamber has held that notwithstanding the practical difficulties, the prosecution is required to disclose evidence of an exculpatory nature to the defence forthwith.<sup>230</sup> In addition, regardless of the prosecution's internal practices, Rule 68 requires that disclosure be made as soon as

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*Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 19.

<sup>226</sup> *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 21.

<sup>227</sup> *Prosecutor v Blaškić*, No. IT-95-14-A, *Judgement* (29 July 2004) at para. 301; *Prosecutor v Krstić*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 206.

<sup>228</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15<sup>th</sup> Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 24.

<sup>229</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Seventh Disclosure Violation Motion* (10 March 2014) at paras. 13-14.

<sup>230</sup> *Prosecutor v Kordić and Čerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 243.

practicable.<sup>231</sup> The Trial Chamber in *Karadžić* also stated that it is no excuse for the failure to make timely disclosure of exculpatory material that the accused had requested a large volume of disclosure under Rule 66(B).<sup>232</sup> However, even if a violation of the Rule is recognised, the defence must be able to demonstrate that the accused suffered material prejudice as a result of the late disclosure, in order to receive remedies.<sup>233</sup>

It is clear that the prosecution's repeated violations of its obligations under Rule 68 could have negative impact on the conduct of the proceedings and prejudiced the interests of justice.<sup>234</sup> The Appeals Chambers have firmly emphasised its expectation that the prosecution should take the necessary steps to prevent such disclosure violations from occurring in the future,<sup>235</sup> and that any further violations of the prosecution's disclosure obligation under Rule 68 could lead to appropriate sanctions, if warranted in the circumstances.<sup>236</sup> However, despite the Chambers have been

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<sup>231</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 11.

<sup>232</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 30; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty-Sixth Motions for Disclosure Violation* (11 November 2010) at para. 31; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 14.

<sup>233</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 17; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 21; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 18; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009) at para. 3.

<sup>234</sup> *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para. 63.

<sup>235</sup> *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-A, *Decision on Milan Lukić's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 23.

<sup>236</sup> *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68*



constantly reminding the prosecution of the paramount importance of its positive and continuous obligation to disclose exculpatory material under Rule 68, the prosecution seems indifferent to this duty.

### 3. Certification

A related issue is, does the prosecution need to certify it has completed its disclosure obligations?

It is within a Chamber's discretion to order the prosecution to submit a signed report to certify it has fulfilled its obligation under Rule 68. In *Krnojelac*, before the Pre-Trial judge, the prosecution was ordered to certify that 'a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence.' However, this practice was not followed by the Appeals Chamber, for example, in *Blaškić*, the Appeals Chamber considered this type of order rare, and denied the defence request since the defence could not satisfy the Chamber in proving that the prosecution had failed to discharge its obligations.<sup>237</sup> Later in *Kordić*, the Appeals chamber held that, there is no requirement for the prosecution to certify that it has met its disclosure obligations, and it is not for the Chamber to impose such requirement.<sup>238</sup>

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*Violations* (24 September 2012) at para. 40.

<sup>237</sup> *Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings* (26 September 2000) at para.45.

<sup>238</sup> *Prosecutor v Kordić and Čerkez, No. IT-65-14/2-A, Judgement* (17 December 2004) at para. 182.

In contrast, the practice in the ICTR seems to be more relaxed, although the Chambers also stated that it would not require the prosecution to certify that it has complied with its Rule 68 obligations unless the defence can show that the obligations under this rule have not been complied with.<sup>239</sup> Nonetheless, it was found that a certification is deemed necessary for the adequate enforcement of Rule 68 in certain circumstances. For example, in *Bizimungu*, the prosecution was ordered, either to disclose exculpatory material related to witness who had given inconsistent testimony in subsequent trial, or to certify that none of the materials related to the witness contained exculpatory information.<sup>240</sup> In *Nshogoza*, the Chamber ordered the prosecution to certify, in writing, that it had complied with Rules 66 and 68 after earlier disclosure violations.<sup>241</sup>

#### **V. Remedy: Rule 68 *bis*—Failure to Comply with Disclosure Obligations**

Rule 68 *bis* ICTY RPEs provides that ‘the pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a

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<sup>239</sup> *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure* (15 January 2004) at para. 8; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi’s Motion for Further Certified Disclosure and Leave to Reopen his Defence* (10 June 2008) at para. 24.

<sup>240</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi’s Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at page 6.

<sup>241</sup> *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Order to the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations* (5 February 2009). In this case the Prosecution previously claimed that an audio recording of a particular witness did not exist, but after the Defence filed a motion, it explained that the information was overlooked and then disclosed it.

party which fails to perform its disclosure obligations pursuant to the Rules.’<sup>242</sup> The Rules do not require a showing of malice before sanctions may be imposed.<sup>243</sup>

### **1. Prejudice requirement**

The most fatal component for the defence to acquire a remedy for disclosure violation is the *prejudice* requirement. As the U.S. Supreme Court cases have demonstrated, it is almost impossible to establish this requirement. It is often seen that while on the one hand the Courts recall the fundamental importance of the duty to disclose exculpatory evidence and recognise the prosecution failure to discharge its duty pursuant to Rule 68, on the other hand, the Courts often find that the defence suffer no prejudice and therefore no remedies are warranted. So the question is, what will constitute prejudice to the accused, in the eyes of a Chamber? In the *Karemera* Judgment, the ICTR Trial Chamber has considered the following:

In determining whether the defence was prejudiced by the late disclosure or nondisclosure of exculpatory material, relevant considerations include: the potentially low probative value of the evidence; whether the defence had sufficient time to analyse the material and the opportunity to challenge it during cross-examination; whether the defence could seek admission of the material as additional evidence; and whether the defence could call the relevant witnesses to testify. Also relevant is the extent to which

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<sup>242</sup> Rule 68bis ICTY RPEs.

<sup>243</sup> *Prosecutor v Stakić*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 190.

the defence knew about the exculpatory evidence and if the defence was able to access it.<sup>244</sup> For example, when a newly disclosed document is found, the Trial Chamber will consider if it adds anything new to the material already available to the accused, or if the accused has the opportunity to use the document through another witness. If the answer is no, then the Chamber will hold that the accused has suffered no prejudice from the late disclosure.<sup>245</sup> The Chamber also found that there is no prejudice from disclosure violation where the accused will have the opportunity to introduce the information in its defence case.<sup>246</sup>

But, one may ask, is the prosecution, or the Chamber, really in a position to decide if the accused is prejudiced from the late disclosure? In the *Karadžić* case, the defence team has filed nearly 100 disclosure motions.<sup>247</sup> In these disclosure motions, the Trial Chamber usually found that there is some information which is potentially exculpatory and that the prosecution has violated its disclosure obligations pursuant to Rule 68. However, the accused was not prejudiced by this disclosure violation because ‘this material adds nothing new or of significance to material already disclosed to the Accused.’ Therefore, ‘in the absence of prejudice to the Accused, there is no basis to

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<sup>244</sup> *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 818; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 20.

<sup>245</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-PT, *Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 48; *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Eighty-Fifth Disclosure Violation Motion* (21 January 2014) at para. 22.

<sup>246</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s Fifty Fifth Disclosure Violation Motion* (19 August 2011) at para. 12.

<sup>247</sup> Until November 2015, there are 103 of them, the most recent one: see *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused’s 102<sup>nd</sup> and 103<sup>rd</sup> Disclosure Violation Motions* (4 November 2015).

grant the remedies sought by the Accused for this specific violation or as a sanction against the prosecution.’ The typical result is granting the disclosure motion in part (recognising a disclosure violation) but denying the rest – no remedies. The Presiding Judge, Judge Kwon even, in most situations, dissents that in the absence of prejudice to the Accused, the Motion should be dismissed ‘in its entirety’.<sup>248</sup>

## 2. Difference to the Outcome

The ICTR Chambers, in some cases, has opted for the U.S. standard: even if the accused can satisfy that the information is exculpatory and in the possession of the prosecution, if the undisclosed material would not make a difference to the outcome, there will be no prejudice from the prosecution’s violation of Rule 68.<sup>249</sup> For example, when the undisclosed material was unlikely to have significantly affected the testimonies, the Chamber considers no material prejudice was present.

## 3. Other Remedies

Some have suggested appointing a special master<sup>250</sup> to supervise disclosure, however,

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<sup>248</sup> E.g. *Prosecutor v Karadžić*, No. IT-95-5/18-T, Partially Dissenting Opinion in the Decision on Accused’s Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon (29 March 2011).

<sup>249</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para.57; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at paras. 15,22,27,33,38.

<sup>250</sup> Similar to the appointment of Special Counsel in England. For some time, judges in England and Wales have had power to call for special counsel to safeguard the interests of the defendant in *ex parte* PII hearings (ie type 2 and type 3 hearings). At present this power is normally used in certain categories of cases involving national security, such as cases involving offences under the Terrorism Act 2000. Special counsel are appointed and funded by the Attorney General. In *R v H and C*, the House of Lords held that appointment of special counsel should only be ordered if the trial judge was satisfied that no

the Chambers did not view it as an appropriate remedy for Rule 68 violations.<sup>251</sup> As to the remedy of a stay of proceedings, the *ad hoc* Tribunals rarely consider it appropriate for disclosure violations, as it is understood that Rule 68 material may appear as the trial proceeds.<sup>252</sup> This is also due to the Tribunals' completion strategy,<sup>253</sup> as the goal is to finish the trials.

## VI. Concluding Remarks

This chapter provided a detailed review of the prosecution's duty of disclosure and the relevant practice in international criminal tribunals. The importance of the prosecution's duty of disclosure to the defence's right to a fair trial has long been recognised and established. However, it is apparent that the prosecution often failed to disclose in a timely and proper manner, as exhibited by the numerous disclosure violation decisions.

As shown, the main difficulty for the defence is that although the prosecution has repeatedly violated its disclosure obligations, it is hard to demonstrate prejudice in order to persuade the Chamber to impose meaningful remedies, let alone to sanction the

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other course would adequately meet the overriding requirement of fairness to the defendant. On this view, the use of special counsel will always be exceptional and a course of last resort.

<sup>251</sup> *Prosecutor v Karadžić*, No. IT-95-5/18-T, *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 52.

<sup>252</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15<sup>th</sup> Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 31.

<sup>253</sup> See e.g. Fausto Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) 6 *Journal of International Criminal Justice* 655; Erik Møse, 'The ICTY's Completion Strategy—challenges and Possible Solutions' (2008) 6 *Journal of International Criminal Justice* 667; Dominic Raab, 'Evaluating the ICTY and Its Completion Strategy Efforts to Achieve Accountability for War Crimes and Their Tribunals' (2005) 3 *Journal of International Criminal Justice* 82.

prosecution. This is similar to the situation in the U.S courts, since the standard adopted by the international criminal tribunals is almost identical to the U.S. ones. On the other hand, for the prosecution, it is common to complain that the voluminous nature of the documents, in light of the context of international crimes, causes their failure to disclose material in a timely fashion. Although the Chambers have ruled that this is not an acceptable justification, it nevertheless rarely provides any remedies other than adjournment. Another problematic practice is the heavy reliance of redacted witness identities and statements, which should only be permitted in exceptional circumstances; it has however become a norm in the *ad hoc* Tribunals and routinely applied in the ICC. This apparently has a significant negative impact on the accused's ability to prepare his or her case and, accordingly, the right to a fair trial.

## CHAPTER VIII

# DISCLOSURE ISSUES BEFORE THE INTERNATIONAL CRIMINAL COURT

### I. Introduction

It has been established that the prosecution's duty to disclose evidence is essential to an accused's right to a fair trial. In both domestic and international criminal proceedings, courts have recognized the importance of the proper implementation of this duty. Not only should the prosecutors disclose relevant material, they must meet this obligation in a timely fashion. Full disclosure is the rule, whereas non-disclosure should be exercised with care and only in exceptional circumstances. However, prosecutorial practice regarding the obligation to disclose is often half-hearted and, unsurprisingly, has turned out to be one of the controversial matters in criminal litigations.

The experience of the *ad hoc* tribunals further illustrates that because of the high complexity of international criminal cases, disclosure issues are more problematic before international criminal courts than its national counterparts. It is observed that the context of the ICC gives rise to even higher hurdles than the *ad hoc* Tribunals, as the ICC has to deal with situations where the conflict is still ongoing, and the issues pertain



to protection of witnesses and victims are more pressing. Hence, prosecutors have often argued that there are more challenges and obstacles to the fulfilment of their disclosure obligations and, as a result, non-disclosure and redactions instead of full disclosure to the defence were justifiable. Late disclosure by the prosecution is also a common practice before the international criminal courts. Because of the international context, the ICC Chambers are more likely to accept these late or non-disclosure applications, which could have a negative impact on the accused's right to a fair trial.

Since disclosure issues have resulted in numerous litigations before the *ad hoc* tribunals, in addition to its unfamiliarity with civil law background practitioners, during the negotiation of the Rome Statute, alternative models had been proposed and discussed, such as the use of a *dossier*.<sup>1</sup> Nevertheless, the main disclosure framework has not been changed in the ICC. The ICC Statute and its RPEs has maintained the majority of the disclosure provisions that are similar to the ones at the *ad hoc* Tribunals. As a consequence, disclosure issues before the ICC in general most closely approximate those at the ICTY and ICTR, and, therefore, will not be further analysed here. However, there are several areas that distinguish the ICC trials from the *ad hoc* Tribunals. These will be the focus of this chapter.

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<sup>1</sup> See the French proposal at Preparatory Commission Proposal by France on Rules of Procedure and Evidence (PCINCC/1999/DP.8) See Kate Gibson and Caineach Lussiaá-Berdou, 'Disclosure of Evidence' in Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in international criminal justice* (Oxford University Press 2010) 311–2.

This Chapter will be divided into four parts, the prosecution's duty to search for both incriminating and exculpatory pursuant to Article 54(1); the prosecution's duty to disclose exculpatory material under Article 67(2) and its potential conflict between Article 54(3)(e); the duty to disclose inculpatory material at the confirmation hearing, and the issue of redactions; protective measures concerning intermediaries. It will be shown that from the ICC's very first case, *Lubanga*, to the recent case *Kenyatta*, disclosure has proved to be one of the most controversial issues, drawing wide attention in the academia.

## **II. The Duty to Search for Both Incriminating and Exculpatory**

### **Evidence**

A distinct feature of the ICC is the prosecution's duty to search for both incriminating and exonerating evidence. The scope of disclosure obligations of the ICC prosecutors has been expanded because of this duty to search for evidence equally. Article 54(1)(a) of the ICC Statute states that, the Prosecutor shall:

'(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.'

It is noted that certain aspects of the ICC discourse framework shows a greater combination of civil and common law characteristics. This is, arguably the result of the greater involvement of lawyers from the Continent when negotiating the Rome Statute and its Rules of Procedure and evidence of the ICC.<sup>2</sup> Article 54(1) is a clear illustration of such ‘melding of judicial paradigms’,<sup>3</sup> a blend of the adversarial prosecutor and the inquisitorial prosecutor of various continental models.<sup>4</sup>

Article 54(1) regulates the role of the prosecutor. In common law systems, the prosecutor is seen as a zealous advocate and a party of the proceeding. However, the ICC Statute put more emphasis on its role of searching the truth. Germany, in particular, insisted upon the ‘duty of the prosecutor to ascertain not only incriminating but also exonerating circumstances.’<sup>5</sup> Focusing on searching for both inculpatory and exculpatory material, this provision shows the greater commitment of finding the truth and, hence, giving the Prosecutor greater power and responsibility.

The jurisprudence of the ad hoc Tribunals shows the different expectation regarding the role of a prosecutor. As noted by a Trial Chamber at the ICTY, the obligation to disclose exculpatory evidence ‘is not intended to serve as means through which the prosecution is forced to replace the defence in conducting investigations or gathering

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<sup>2</sup> *ibid* 350–1.

<sup>3</sup> William Schabas, *The International Criminal Court : A Commentary on the Rome Statute* (Oxford University Press 2010) 673.

<sup>4</sup> Morten Bergsmo and Pieter Kruger, ‘Article 54’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes* (2nd edn, CH Beck 2008) 1078.

<sup>5</sup> UNGA ‘German proposal to Article 44 of the Draft Statute for an International Criminal Court in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of proposals)’ 51 Session, Supplement (1996) UN Doc. 22A (A/51/22) 207.

material that may assist the Defence.’<sup>6</sup> Another ICTR Trial Chamber stated that, the prosecutor has no obligation ‘to hunt for and disclose materials which are not in its possession or control’ unless the defence can specifically identify such requested material, and establish that the prosecutor is in a better position than the defence to procure the material.<sup>7</sup>

At least in theory, such an approach would not be applicable in the ICC since the prosecution has the duty to investigate both inculpatory and exculpatory material equally. However, it is arguable if such imposition on the ICC prosecutor is that different from the ones at the ad hoc Tribunal. Some ICC prosecutors have expressed the view that, in practice, the Article 54(1)(a) obligation to investigate incriminating and exonerating circumstances ‘equally’ did not mean that prosecutors must regard their duty to search out exculpatory material as equal to the search for inculpatory information.<sup>8</sup> This way of interpretation the Article 54 duty indicates that the prosecutorial obligation might not vary considerable from the common law approach, that is, to investigate anything exculpatory that one comes across in the course of an

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<sup>6</sup> *Prosecutor v Blagojević & Jokic*, No. IT-02-60-T, Joint Decision on Motions Related to Production of Evidence (12 December 2002) at para. 26.

<sup>7</sup> *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Judicial Notice of 8th December 2000 Rwandan Judgement* and in the *Alternative Order Disclosure of Exculpatory Evidence* (15 Dec 2004) at paras. 22 and 26; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence* (23 April 2004) at para. 9.

<sup>8</sup> John D Jackson and Yassin M Brunger, ‘Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 181.

investigation and then disclose it.<sup>9</sup> But under this interpretation, the obligation does not extend as far as proactively seeking out information that counteracts what the evidence is pointing to, as that is what the defence is there to do. As observed by Jackson and Summers, perhaps this serves as an enlightening example of how lawyers ‘harmonize practice with what they have been used to doing previously in work at another tribunal.’<sup>10</sup>

It should be borne in mind that the ICC Statute expects that the prosecutors play a stronger role in the course of achieving justice. As summarised brilliantly by Professor Cassese:

‘The Prosecutor is not simply, or not only, an instrument of executive justice, a party to the proceedings whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee’s conviction. The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truth-seeker or organ of justice.’<sup>11</sup>

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<sup>9</sup> John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 307–10.

<sup>10</sup> Jackson and Brunger (n 8) 181.

<sup>11</sup> Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 *European Journal of International Law* 144, 168.

### **III. The Potential Conflict between Article 67(2) and Article 54(3)(e)**

As mentioned, the Rome Statute has upgraded the prosecution's duty to disclose exculpatory information to the statutory level. This duty is closely related to the obligation imposed by Article 54(1)(a). Article 67(2) reads that:

'In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.'<sup>12</sup>

However, Article 54(3)(e) seems to create an exception to this rule, by which the Prosecutor is enabled to promise information providers that their evidence is given on a confidential basis. Article 54(3)(e) provides that:

'The Prosecutor may 'agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.'

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<sup>12</sup> 'In addition to its other disclosure duty required by Rome Statute', other duties includes Articles 61(3), 64(3)(c). See also Rule 76 77 of the ICC Rules of Procedure and Evidence. Article 61(3): 'Within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.'

Article 64(3)(c):

'Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.'

This provision empowers the Prosecutor; it does not act as a bar to the production of evidence.<sup>13</sup> Rule 82 of the Rules of Procedure and Evidence completes this provision.<sup>14</sup>

As noted by the *Lubanga* Appeals Chamber, Art 54(3)(e) serves as an important investigative tool for the Prosecutor,<sup>15</sup> particularly with respect to investigations in countries such as the Democratic Republic of the Congo that are dangerous for the prosecutor to enter.<sup>16</sup> It is noted that in the context of the ICC, the prosecutor's investigations often occurred during an active armed conflict, necessitating reliance on

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<sup>13</sup> Schabas (n 3) 678. But see, for the contrary view, *Lubanga* (ICC-01/04-01/06 (OA 6)), Separate Opinion by Judge Georgios M. Pikis, 14 December 2006, at para. 12.

<sup>14</sup> Rule 82 of ICC RPEs reads:

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.
4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.
5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.

<sup>15</sup> *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 ('*Lubanga*' case) Appeals Chamber: *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'* (21 October 2008) at para. 42. See also Bureau of Democracy, Human Rights, and Labor - US Department of State, 2009 Human Rights Reports: DEMOCRATIC REPUBLIC OF THE CONGO (2010) (commenting on the DRC's poor human rights record and serious abuses of security forces). Milan Markovic, 'The ICC Prosecutor's Missing Code of Conduct' (2011) 47 *Texas International Law Journal* 215–6; Karim AA Khan and Caroline Buisman, 'Sitting on Evidence: Systematic Failings in the ICC Disclosure Regime - Time for Reform' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP Oxford 2015) 1060–2.

<sup>16</sup> *Lubanga* case, *ibid.*, at para. 42.

third parties to suggest leads, identify potential witnesses, and directly provide evidence in some cases.<sup>17</sup> Commentators have supported the prosecutor's claim of the central importance of this power under Article 54(3)(e).<sup>18</sup>

The language of Article 54(3)(e) suggested that inculpatory material, which the prosecution case is based on, obtained through Article 54(3)(e) would not be able to be produced at trial without the consent of the provider and adequate disclosure to the accused.<sup>19</sup> However, controversy forms when the prosecutor enters into a confidentiality agreement, and the material turns out to be potentially exculpatory, in which case the duty under Article 67(2) arises. The problem is that the information provider may deny permission to disclose the relevant material, placing the prosecutor in a difficult position, whereby he cannot comply with his duty under Article 67(2). The stay imposed by the *Lubanga* Trial Chamber illustrated this issue between the prosecution's obligation to disclose exculpatory evidence under Article 67(2) and the prosecution's duty not to disclose if entered into confidentiality agreement under Article 54(3)(e).

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<sup>17</sup> Heikelina Verrijn Stuart, 'The ICC in Trouble' (2008) 6 *Journal of International Criminal Justice* 409, 414; Markovic (n 15) 216; Alex Whiting, 'Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case' (2009) 14 *UCLA J. Int'l L. Foreign Aff.* 207, 210.

<sup>18</sup> Whiting (n 17) 227–30; Otto Triffterer (ed), 'Commentary on the Rome Statute of the International Criminal Court' [2008] Beck/Hart 1086.

<sup>19</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07 ('*Katanga*' case), Single Judge, *Decision Requesting Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing* (02 June 2008) at para. 20.



## The Lubanga Saga – First Stay

*Lubanga* was the first case before the ICC. Mr. Lubanga was charged with war crimes, mainly for enlisting child soldiers in the Democratic Republic of Congo.<sup>20</sup> On 13 June 2008, shortly before the commencement of the trial, the Trial Chamber found a ‘wholesale and serious abuse’<sup>21</sup> by the prosecution, and imposed a stay on the proceedings claiming a fair trial is not possible.<sup>22</sup> On 2 July 2008, the Trial Chamber ordered the release of Mr. Lubanga.<sup>23</sup> The prosecution immediately appealed this decision.<sup>24</sup> The Appeal Chamber affirmed the stay on 21 October 2008,<sup>25</sup> but reversed the release order after the prosecution appealed the Trial Chamber’s decision.<sup>26</sup> This case has drawn a lot of attention and was widely discussed among academics.<sup>27</sup>

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<sup>20</sup> *Lubanga Case*, Pre-Trial Chamber: *Decision on the Confirmation of Charges* (20 January 2007).

<sup>21</sup> *Lubanga case*, Trial Chamber: *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) (hereinafter ‘*Decision on the Consequences of Non-Disclosure of Exculpatory Materials*’) at para. 73.

<sup>22</sup> *Lubanga case*, Trial Chamber: *Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at paras. 37, 39 (‘impossible to piece together the constituent elements of a fair trial’).

<sup>23</sup> *Lubanga Case*, Trial Chamber: *Decision on the release of Thomas Lubanga Dyilo* (02 July 2008).

<sup>24</sup> *Lubanga case*, *Prosecution’s Appeal against “Decision on the release of Thomas Lubanga Dyilo” and Urgent Application for Suspensive Effect* (02 July 2008)

<sup>25</sup> *Lubanga case*, Appeals Chamber: *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’* (21 October 2008).

<sup>26</sup> *Lubanga Case*, Appeals Chamber: *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”* (21 October 2008).

<sup>27</sup> See e.g. Rachel Katzman, ‘Non-Disclosure of Confidentiality Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused’s Right to a Fair Trial, The’ (2009) 8 *Nw. UJ Int’l Hum. Rts.* 77; Whiting (n 17); Kai Ambos, ‘Confidential Investigations (Article 54 (3)(e) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law’ (2009) 12 *New Criminal Law Review: An International and Interdisciplinary Journal* 543; Markovic (n 15); Jenia Iontcheva Turner, ‘Accountability of International Prosecutors’ in Carsten Stahn (ed), *Law and Practice of the International Criminal Court* (Oxford University Press 2014); Michele Caianiello, ‘Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?’ (2010) 10 *International Criminal Law Review* 23.

The reason for this seemingly drastic decision was the prosecution's failure to disclose exculpatory material to the accused which the prosecution had obtained by widely using Article 54(3)(e) to enter confidentiality agreements with information providers. It was found that the prosecution obtained a large amount (more than 50%) of evidence through the United Nations mission in Congo and several NGOs, promising that these documents will remain confidential.<sup>28</sup> Some of these documents contain exculpatory information, but the prosecutor, subject to its confidentiality agreement with the information providers, was unable to disclose them to the defence.

The Trial Chamber decided that this practice of the prosecution violated the accused's right to a fair trial and that the prosecution had incorrectly applied this provision.<sup>29</sup> Emphasizing that Article 54(3)(e) only allows the prosecution to receive evidence confidentially 'in very restrictive circumstances', the Trial Chamber held that Article 54(3) should be used *exceptionally*,<sup>30</sup> as its sole purpose is to generate new evidence'.<sup>31</sup> It was found that instead of using Article 54(3)(e) solely for the purpose of generating new evidence, the prosecution seemed to use this provision as a standard mechanism to obtain evidence.<sup>32</sup> Considering that the prosecution's approach is questionable, the Trial Chamber held that:

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<sup>28</sup> Sabine Swoboda, 'The ICC Disclosure Regime—A Defence Perspective', *Criminal Law Forum* (Springer 2008) 468.

<sup>29</sup> *Lubanga* case, Trial Chamber: *Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at paras. 71–72.

<sup>30</sup> *Ibid.*, at para. 73. But see Whiting (n 17) 217–9.

<sup>31</sup> *Ibid.*, at paras. 71–72.

<sup>32</sup> Ambos (n 27) 554–56.

‘The prosecution's general approach has been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information- provider's consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents which are not for use at trial but which are instead intended to “lead” to new evidence.’<sup>33</sup>

In *Katanga*, the Single Judge made similar remarks regarding the practice of the prosecution.<sup>34</sup> This approach was described as ‘reckless’, given the potential for conflict with the obligation to disclose, especially when exculpatory evidence is concerned.<sup>35</sup> The prosecutor conceded that this was ‘excessive’<sup>36</sup> and stated that corrective measures have since been taken.<sup>37</sup> As a result of the failure to disclose exculpatory evidence, which flowed from the prosecutor’s undertakings, the Trial Chamber found that there was no prospect that a fair trial could be held.<sup>38</sup> The Appeals

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<sup>33</sup> *Lubanga* case, Trial Chamber: *Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at para. 73.

<sup>34</sup> *Katanga* case, Single Judge: *Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing* (20 June 2008) at paras. 9–12.

<sup>35</sup> *Ibid.*, at para 56.

<sup>36</sup> *Lubanga* case, Transcript (02 October 2007) p. 2, lines 6–9.

<sup>37</sup> *Katanga* case, Transcript (03 June 2008) p. 26, lines 5–8.

<sup>38</sup> *Lubanga* case, Trial Chamber: *Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at para 39.

Chamber confirmed this finding.<sup>39</sup>

In addition, the prosecution also refused to provide the documents to the judges of the Trial Chamber, by invoking Article 18(3) of the Negotiated Relationship Agreement with the United Nations.<sup>40</sup> Article 18(3) essentially repeats the terms of Article 54(3)(e), but adds that any documents or information provided on a confidential basis ‘shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations’.<sup>41</sup> However, the Trial Chamber did not accept this argument. The Chamber implied that this was an invalid clause, as its effect will impede the Chamber in exercising its jurisdiction in accordance with Articles 64(2), Article 64(3)(c) and Article 67(2), in that it could not determine whether non-disclosure of potentially exculpatory material constituted a breach of the right to a fair trial.<sup>42</sup>

Facing the real possibility of releasing its first accused, the prosecution managed to secure the consent of most of the information providers.<sup>43</sup> On 18 November 2008, the Trial Chamber lifted the stay and ordered the prosecution to disclose to the defence all

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<sup>39</sup> *Lubanga case, Appeals Chamber: 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’* (21 October 2008) paras. 37ff.

<sup>40</sup> *Lubanga case, Trial Chamber: Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at para. 44.

<sup>41</sup> Schabas (n 3) 63–86.

<sup>42</sup> *Lubanga case, Trial Chamber: Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at para. 92. Approved by the Appeals Chamber, at paras. 45, 48.

<sup>43</sup> *Lubanga Case, Trial Chamber: Reasons for Oral Decision lifting the stay of proceedings* (23 January 2009) at para. 30.

the evidence that was the subject of the stay of proceedings.<sup>44</sup> The prosecution had two days to comply.<sup>45</sup> Accordingly, the prosecution turned over the evidence,<sup>46</sup> and trial proceedings began on 26 January 2009.

Although the issue was largely resolved in *Lubanga*, the Chambers did not provide a definite answer in the event when the prosecution is unable to gain the consent of information provider. The Appeals Chamber has rejected the Prosecutor's argument that Article 67(2) is inapplicable to material obtained on the basis of confidentiality.<sup>47</sup> The Trial Chamber remarked that if used appropriately, any tension between Article 54(3)(e) and the disclosure obligation under Article 67(2) was likely to be insignificant. It stated that:

‘Although exculpatory material may be included in the springboard or lead evidence, in the limited circumstances in which this provision should be used, it is likely that a mechanism can be established which facilitates all necessary disclosure; for instance, the prosecution may need to make arrangements with the information provider for disclosure of such parts of the Article 54(3)(e) material as will enable it to provide any potentially exculpatory evidence to the accused’.<sup>48</sup>

The Appeals Chamber set out the methodology for dealing with conflicts between

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<sup>44</sup> *Lubanga* case, Prosecution's Notification of Disclosure of Exculpatory and Rule 77 Material to the Defence on 18 and 20 November 2008( 21 November 2008) at para. 1.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, at paras. 2-4

<sup>47</sup> *Lubanga* case, Appeals Chamber: *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'* (21 October 2008) at para. 44.

<sup>48</sup> *Lubanga* case, Trial Chamber: *Decision on the Consequences of Non-Disclosure of Exculpatory Materials*, at para. 76.

Article 67(2) and Article 54(3)(e). It emphasised that agreements by the Prosecutor would have to be respected, and that a Chamber could not order disclosure if confidentiality was promised. It said that the issue would be litigated before the Chamber in *ex parte* proceedings with only the prosecutor present. However, it is left unclear whether a Chamber could order the prosecutor to provide the material in question, and whether agreements requiring the Prosecutor not to reveal such materials, even to the judges, were contrary to the *Statute*.

After playing a major role in the ICC's first case, Article 54(3)(e) is unlikely to have a similarly starring role in future litigation.<sup>49</sup> In light of the undeniable importance of the disclosure of exculpatory material to the rights of the accused, the judges in *Lubanga* made it clear that the prosecutor's disclosure obligations should prevail if in conflict with confidentiality agreement under Article 54(3)(e). This serve as a powerful reminder for the prosecution that they should exercise its power with extreme care when gathering information under this provision.<sup>50</sup> In the event where disclosure of the material to the defence is deemed necessary, but the prosecution is unable to obtain the information providers' consent, the prosecution should disclose the relevant material to the Chamber. Then the judges will decide 'whether and, if so, which counterbalancing

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<sup>49</sup> Alex Whiting, 'Disclosure Challenges at the ICC' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, USA 2014) 1016.

<sup>50</sup> *Katanga* case, Single Judge: *Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing* (20 June 2008) at para. 36.

measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the nondisclosure of the information'.<sup>51</sup>

#### **IV. A Two-Stage Disclosure Framework: Disclosure prior to Confirmation of Charges Hearing**

One aspect that distinguishes the proceedings in the ICC from the ad hoc Tribunals is its two-stage disclosure framework. Disclosure is separated into two phases, one prior to the confirmation hearing and one prior to trial. This section will mainly address the disclosure issues prior to the confirmation hearing, as the one prior to trial has already been discussed.

##### **1. Timing**

According to Article 61 of the ICC Statute, the Pre-Trial Chamber shall hold a hearing to confirm the charges.<sup>52</sup> This provision should be read together with Rule 121 (Proceedings before the confirmation hearing).<sup>53</sup> Article 61(3) sets out the requirements for prosecution disclosure at this stage, providing that:

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<sup>51</sup> *Lubanga case, Appelas Chamber: 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' (21 October 2008) at para. 48.*

<sup>52</sup> Article 61(1): Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

<sup>53</sup> Rule 121 ICC RPEs.

‘[W]ithin a reasonable time before the hearing, the person shall: (a) be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

Rule 121(3) reads that: ‘the Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.’

In addition, Article 61(4) and (5) of the ICC Statute regulates the prosecution’s amendments to the charges and the list of evidence. If the prosecution intends to do so, it must notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing.<sup>54</sup> Article 61(6) sets out the deadline for the defence to provide a list of evidence it wishes to present at the confirmation hearing.<sup>55</sup>

In comparison with the disclosure framework at the *ad hoc* Tribunals, these are short deadlines. At the ICTY, Rule 66 ICTY RPEs obligates the prosecution to disclose the material it intends to rely upon to obtain the indictment against the accused within 30

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<sup>54</sup> Article 61(4): Where the Prosecutor intends to amend the charges pursuant to article 61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing.

5. Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence no later than 15 days before the date of the hearing.

<sup>55</sup> Article 61(6): If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay. The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.



days of his or her initial appearance.<sup>56</sup> By contrast, Rule 121(3) ICC RPEs imposes a timeframe of ‘30 days before the date of the confirmation hearing’. Because Article 61(3) of the Statute requires the prosecution to disclose all inculpatory material ‘within a reasonable time’, it leaves room for the interpretation regarding the timing of prosecution’s disclosure. In practice, the prosecution has been using the 30 days before the confirmation hearing under Rule 121(3), rather than Article 61(3), as its timeframe for disclosure.

This practice is problematic for the defence, as they have their own deadlines to meet pursuant to Article 61(6). The defence is required to file its list of evidence 15 days prior to the commencement of the confirmation hearing.<sup>57</sup> With the prosecution disclosing that late, it left the defence with very little time to prepare for the confirmation hearing and conduct its investigation. In addition, as previously noted, defence teams suffer inequality of arms in terms of time and resources. The defence teams usually are understaffed and have to analyse and digest thousands of documents within a very short period of time. In some cases, for example *Abu Gardu*, the defence did not even have access to the states where the alleged crimes took place.<sup>58</sup>

Defence counsels have argued that the prosecution’s interpretation of these provisions is

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<sup>56</sup> Rule 66(A) ICTY RPEs.

<sup>57</sup> Article 61(6) ICC Statute.

<sup>58</sup> *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, No. ICC-02/05-03/09 (*‘Banda’ case*), *Defence Request for a Temporary Stay of Proceedings*, Defence teams of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (06 January 2012).

hardly satisfying as it could ‘significantly hamper effective defence preparation and the material ability to effectively confront charges.’<sup>59</sup> As suggested by Khan and Buisman, the prosecution should disclose the relevant information to the defence at the earliest opportunity, and then Rule 121(3) should apply. As originally intended, it should serve as a ‘final cut-off point’ for the prosecution to identify the evidence it wishes to rely upon at the confirmation hearing.<sup>60</sup>

## 2. Purpose and Scope

The purpose and scope of the confirmation hearing has to be distinguished from the trial proceedings. The main purpose of the confirmation hearing is to streamline and expedite the proceeding by filtering the prosecution’s allegations and separating the cases which should proceed to trial from those which should not.<sup>61</sup> It has a limited purpose and is not intended to be a ‘mini-trial’ or a trial before the trial,<sup>62</sup> but merely as a means to protect suspects against ‘wrongful and wholly unfounded charges’.<sup>63</sup>

Perhaps ironically, in practice, the confirmation hearings have been long and

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<sup>59</sup> Khan and Buisman (n 15) 1032.

<sup>60</sup> *ibid.*

<sup>61</sup> *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10 (‘*Mbarushimana*’ case) Pre-Trial Chamber: Decision on the Confirmation of Charges (16 December 2011) at para. 41; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, No. ICC-01/09-02/11 (‘*Kenyatta*’ case), Pre-Trial Chamber: *Decision on the Confirmation of Charges* (26 January 2012) at para. 52; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, No. ICC-01/09-01/11 (‘*Ruto*’ case), Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) at para. 40; *Prosecutor v Laurent Gbagbo*, No. ICC-02/11-01/11 (‘*Gbagbo*’ case), Pre-Trial Chamber: Decision Adjourning the Hearing on the Confirmation of Charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013) at para. 18.

<sup>62</sup> *Katanga* case, Pre-Trial Chamber: *Decision on the confirmation of charges* (30 September 2008) at para. 64.

<sup>63</sup> *Ibid.*, at para. 63.

time-consuming instead of shortening the trial preparation.<sup>64</sup>

In line with this objective, the scope of disclosure for confirmation hearing is different from the one at trial. Pursuant to Article 61, the standard of proof at the confirmation stage is ‘substantial grounds to believe’,<sup>65</sup> while the standard at trial is ‘beyond reasonable doubt’ – a much higher standard – as the purpose is to secure convictions. A Pre-Trial Chamber held that if it applied such high standard at the confirmation hearing, it would not be compatible with the standard under Article 61(7).<sup>66</sup> ‘Substantial grounds to believe’ has been interpreted as meaning strong grounds for believing.<sup>67</sup>

Hence, in view of the nature of a confirmation hearing, the Appeals Chamber held that it is permissible to withhold material from the defence which would not be able to be withheld at the trial.<sup>68</sup> As a consequence, an accused is not entitled to disclosure of the full prosecution file of the investigation and case in preparation for the confirmation hearing.

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<sup>64</sup> Ignaz Stegmiller, ‘Confirmation of Charges’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 892.

<sup>65</sup> Article 61(5) ICC Statute.

<sup>66</sup> *Prosecutor v Bahr Idriss Abu Garda*, No. ICC-02/05-02/09, Pre-Trial Chamber: *Decision on the Confirmation of Charges* (8 February 2010) at para. 40.

<sup>67</sup> *Mbarushimana* case, Pre-Trial Chamber: *Decision on the Confirmation of Charges* (16 December 2011) at para. 40; *Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilomo Mussamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu, and Narcisse Arido*, No. ICC-01/05-01/13 (‘Kilolo’ case), Pre-Trial Chamber: *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute* (11 November 2014) at para. 25.

<sup>68</sup> *Katanga* case, Appeals Chamber: *Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request to Redact Witness Statements”* (13 May 2008) at para. 68.

### 3. Summary and Documentary Evidence

Article 61(5) explicitly permits the use of summary and documentary evidence at the confirmation hearing. Article 61(5) reads that

‘[A]t the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.’

Although at this stage the Prosecution is under an obligation to disclose inculpatory material to the defence, it is not required to submit the entirety of the material in his possession that is relevant to the charges. At the confirmation hearing, the prosecution has been heavily relying on this provision as grounds to provide huge amounts of summaries and redacted statements instead of full disclosure to the defence.<sup>69</sup> Since these summaries tend to be very brief,<sup>70</sup> from a defence perspective, it is exceedingly difficult to conduct proper investigations in preparation of the confirmation hearing.

It should be noted that with regard to exculpatory material, there is no longer a distinction between pre-confirmation hearings and trial. The prosecutor’s duty to disclose exculpatory evidence is a continuing one and has to be met ‘as soon as practicable’.<sup>71</sup> In the beginning, the Pre-Trial Chamber adopted the ‘bulk’ rule of

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<sup>69</sup> See e.g. *Katanga Case*, Pre-Trial Chamber: *Public redacted version of the ‘Decision on the Use of Summaries of the Statements of Witnesses 267 and 243’ issued on 3 April 2008 (25 June 2008)*, authorizing the use of summaries for witnesses 267 and 243.

<sup>70</sup> Khan and Buisman (n 15) 1036 (noting that in the *Katanga* and *Kenya I and II* confirmation proceedings, such summaries were often no longer than one page).

<sup>71</sup> Article 67(2) ICC Statute.

disclosure. For example, in *Katanga and Ngudjolo*, the Single Judge held that, given the limited nature of the confirmation hearing, only ‘the bulk’ of the prosecution’s evidence must be disclosed before the confirmation hearing.<sup>72</sup> Subsequent Pre-Trial Chambers, however, have taken a different view and considered that there is no legal or practical reason as to why the prosecution would be unable to comply with its duty to disclose all exculpatory and relevant materials in its possession prior to the confirmation hearing.<sup>73</sup> Nevertheless, it is observed that the consequences of breaches of this obligation may be more severe when they occur closer, or in the course of trial, than during the confirmation stage.<sup>74</sup>

## **V. Protective measures and the Use of Intermediaries**

### **1. The Duty to Disclose v The Need to Protect Witnesses**

The prosecution’s duty to disclose evidence and the need to protect witnesses and their families has proved to be a particularly challenging issue at the ICC. It is observed that the need to protect witnesses appears to be one of the major obstacles to full disclosure of evidence at the ICC, as it has become apparent in the Kenyan cases.<sup>75</sup> These needs

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<sup>72</sup> *Katanga case*, Single Judge: *Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing* (20 June 2008) at paras. 8-10.

<sup>73</sup> *Ruto case*, Pre-Trial Chamber: *Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’* (02 May 2011) at paras 24–8.

<sup>74</sup> See *Katanga case*, Single Judge: *Decision on Art 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing* (20 June 2008) at paras 8, 65–6, 70, and 124–5.

<sup>75</sup> E.g. *Kenyatta case*, *Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, Muthaura and Kenyatta* (11 March 2013) at para. 11.

are exacerbated by the fact that many international prosecutions relate to ongoing conflicts. Accordingly, it is often asserted that there is a need to balance the defendant's right to adequate time and facilities to prepare for trial by redactions and other protective measures.<sup>76</sup>

The ICC Statute provides protective measures for witnesses. Right after Article 67 titled the rights of the accused, Article 68 regulates 'the protection of victims and witnesses and their participation'.<sup>77</sup> Article 68(5) states the situation when disclosing information may lead to security issues of the witnesses, providing that:

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<sup>76</sup> Håkan Friman, 'Trial Procedures' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 924.

<sup>77</sup> Article 68 ICC Statute—protection of victims and witnesses and their participation:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which 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 Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be

‘Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’

Another relevant provision here is Article 64(2) of the Rome Statute, which states that it is the function and power of a Trial Chamber to ‘ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’ The Trial Chamber is thus given the responsibility and power to determine what protective measures are necessary and appropriate in each case.

From the languages of the two Articles, it would seem that the framework of the ICC Statute places the need to protect witnesses subordinated to the rights of the accused. It is submitted that, at least in theory, this is less controversial as the wording of the Rome Statute appeared to suggest that the fair trial rights of the accused should have primacy over witnesses.<sup>78</sup> When the prosecution withholds information pursuant to Article 68(5), it should be strictly limited to the exigencies of the situation, and not infringe the

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exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

<sup>78</sup> See Salvatore Zappalà, ‘The Rights of Victims v. the Rights of the Accused’ (2010) 8 *Journal of International Criminal Justice* 137.

rights of the defence.<sup>79</sup>

Furthermore, Article 68(5) only allows the prosecution to withhold evidence ‘for the purposes of any proceedings conducted prior to the commencement of the trial’. In other words, the relevant information regarding the witnesses must still be disclosed to the defence in due time prior to trial. However, in practice, these material are usually withheld until shortly before the trial begins, and sometimes even later. This practice may impede the defence’s ability to prepare its case. Similar to the practice in the ad hoc Tribunals, the identities of the witnesses and their statements would only be revealed shortly before they testify at trial.

## **2. Redactions – Rule 81**

Article 61 does not permit the use of redactions at the confirmation of charges phase. If the prosecution wishes to redact certain documents or witness statements, it must apply to the relevant Chamber for approval under Rule 81. Rule 81 (Restrictions on Disclosure) reads:

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

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<sup>79</sup> *Lubanga Case, Single Judge: Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute* (26 May 2006); *Lubanga Case, Single Judge: Decision on the Final System of Disclosure and the Establishment of a Timetable* (15 May 2006); *Lubanga Case, Appeals Chamber: Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’* (14 December 2006) at para. 34 (the Chamber must assess whether the redactions are ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’).



2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

It should be noted that redactions would not be authorized if the evidence contained exculpatory material.<sup>80</sup> In *Lubanga*, the Single Judge held that potentially exculpatory

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<sup>80</sup> *Lubanga* case, Single Judge: *Decision on the Prosecution Amended Application Pursuant to Rule 81(2)* (2 August 2006) at p. 6

excerpts from statements of witnesses upon whom the prosecution intends to rely at the confirmation hearing may not be redacted.<sup>81</sup>

Redactions will only be granted if they satisfy the following requirements, as set out by the Trial Chamber: (i) the existence of an objectively justifiable risk to the safety of the person or interest concerned, or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the receiving party, as opposed to the public; (iii) the infeasibility or insufficiency of less restrictive protective measures and (iv) an assessment as to whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Additionally, if the redaction is granted, there is an ongoing obligation to periodically review the decision authorising the redactions should circumstances change.<sup>82</sup>

It should be noted that ‘general security concerns in a region’ alone does not suffice to justify redactions from disclosure to the defence.<sup>83</sup> Unless it could be shown that such security problems are prompted by the defendant.<sup>84</sup> The Chamber must determine on a case-by-case basis based on the criteria above.

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<sup>81</sup> *Lubanga case, Single Judge: Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and 81(4) of the Statute* (19 May 2006) at para. 38.

<sup>82</sup> *Kilolo case, Trial Chamber: Decision on Modalities of Disclosure* (22 May 2015) at para. 11.

<sup>83</sup> *Lubanga case, Appeals Chamber: Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’* (14 December 2006) at para. 21; *Katanga Case, Trial Chamber: Public Redacted Version of the Decision on the Prosecutor’s Application to Redact Information Falling under Art 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (Witnesses 6, 83, 102, and 221) of 18 May 2009* (23 December 2009) at para. 9.

<sup>84</sup> *Katanga Case, Appeals Chamber: Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’* (13 May 2008) at para. 71.

In addition, the Single Judge in *Katanga* has considered that providing summaries of the statements of witnesses to be preferable to providing redacted statements, since the approval of redactions is a time consuming task falling upon the Single Judge, eventually delaying the confirmation hearing.<sup>85</sup>

Despite redaction applications made under Rule 81 should be subjected to strict judicial supervision, the ICC practice shows that redactions requests from the prosecution are generally granted before the Chamber during the confirmation hearing.<sup>86</sup> This is partly because the review of redaction applications is a time-consuming process. In the Kenyan cases, in order to minimise the burden and delays, the Trial Chamber approved a proposal by the parties in which redactions to certain standard categories of information were imposed *inter partes*, without the chamber's direct involvement.<sup>87</sup> As a consequence, until the trial stage of *Ruto and Sang* and *Kenyatta* cases, the practice of the ICC pre-trial and trial chambers had been to approve each and every redaction applied for by the prosecution for, at the very least, all inculpatory disclosure.<sup>88</sup> In *Al-Mahdi*, the Pre-Trial Chamber devised a procedure for redactions. The prosecution can make redactions under Rule 81(2) and Rule 81(4) without application to the

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<sup>85</sup> *Katanga* case, Single Judge: *Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation, and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules* (25 April 2008) at para. 110.

<sup>86</sup> Karim AA Khan and Anand A Shah, 'Defensive Practices: Representing Clients before the International Criminal Court' (2013) 76 *Law and Contemporary Problems* 191, 213.

<sup>87</sup> *Ruto* case, Trial Chamber: *Decision on the protocol establishing a redaction regime* (27 September 2012); *Kenyatta* Case, Trial Chamber: *Decision on the protocol establishing a redaction regime* (27 September 2012) at para. 13-15.

<sup>88</sup> *Ibid.*

Chamber. Although the defence may challenge the redactions, the Chamber held that the defence should approach the prosecutor and try to resolve the redactions issue informally first.<sup>89</sup> If they are unable to agree, the prosecutor then has the burden to justify redaction and five days to request authorization for the redaction from the Pre-Trial Chamber.<sup>90</sup> However, this does not apply to the non-disclosure of the witnesses' identities prior to the commencement of trial and to the non-disclosure of entire items of evidence.<sup>91</sup>

It is submitted that this practice is problematic for the defence as a high volume of redactions has been approved even without the review of a chamber at the ICC. Defence counsels are particularly concerned with this prosecutorial practice of redactions, contending that summary, redacted evidence and anonymous witness evidence might be 'significantly lacking in substance, coherence, or both.'<sup>92</sup> The complaints of the defence are not unfounded. This is because, in case of heavily redacted items, it is tremendously difficult for the defence counsels to analyse the disclosed materials and conduct investigations.<sup>93</sup> In addition, it switches the burden to lift the redactions falling upon the defence, which is indeed a very heavy one.

It should be reminded that the overriding principle is full disclosure and authorization

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<sup>89</sup> *Al-Mahdi* case, Single Judge: *Decisions on Issues Related to Disclosure and Exceptions Thereto* (30 September 2015) at paras. 4,6.

<sup>90</sup> *Ibid.*, at para. 6.

<sup>91</sup> *Ibid.*, at para.7.

<sup>92</sup> *Khan and Shah* (n 86) 200.

<sup>93</sup> *Khan and Buisman* (n 15) 1036.

for non-disclosure is the exception, rather than the rule.<sup>94</sup> The practice of routinely applied redactions has proved to be prejudicial to the fair-trial rights of the accused, as significant time and investigatory opportunities would be lost as a result of the delayed lifting of these redactions. Furthermore, the manner in which the redactions are applied, even at the trial stage, may render the disclosed material of limited value to the defence.<sup>95</sup> This is particularly concerning when comparing with the *ad hoc* tribunals, the ICC has adopted a permissive approach in authorizing redactions from and defence, sometimes even on a permanent basis.<sup>96</sup>

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<sup>94</sup> *Katanga* case, Appeals Chamber: *Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request to Redact Witness Statements"* (13 May 2008) at para. 70; *Lubanga* case, Appeals Chamber: *Decision on Prosecutor's Second Request for Redactions for the Purposes of Disclosure* (14 November 2014) at para. 8.

<sup>95</sup> Khan and Shah (n 86) 208.

<sup>96</sup> *Katanga* case, Trial Chamber: *Public Redacted Version of the Decision on the Prosecutor's Application to Redact Information in the Second Statement of Prosecution Witness 249 of 18 May 2009* (13 January 2010) at para. 27; *Katanga* case, Trial Chamber: *Decision on the Prosecutor's Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (18 November 2009) at paras 26–7; *Katanga* case, Trial Chamber: *Decision on the Prosecutor's Application to Redact Information and to Maintain and Reinstate Redacted Passages in Certain Documents under Rule 77 of the Rules of Procedure and Evidence (Witnesses 26, 36, 158, and 180)* (18 November 2009) at para. 21. See also *Katanga* case, Trial Chamber: *Decision on the Defence Request to Redact the Identity Source of DRC-D03-0001-0707* (22 August 2011) at 9, where the permanent redaction of a defence source was authorized for the first time in international justice. But see *Katanga* case, Trial Chamber: *Decision on the Prosecutor's Application to Redact Information from Certain Evidence under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (30 December 2009) at paras 13–18; *Decision on the Prosecutor's Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (5 May 2009).

### 3. The Use of Intermediaries<sup>97</sup>

In both the *Lubanga* and the *Katanga* case, it was found that the prosecutor had relied excessively on intermediaries whose identities were unknown.<sup>98</sup>

#### The Second Stay of Lubanga

On 8 July 2010, the Trial Chamber suspended the *Lubanga* proceedings again. This time is due to the prosecution's repeated refusal to comply with the Chamber's order to disclose the identity of an intermediary to the defence. The Trial Chamber found that 'fair trial of the accused [was] no longer possible, and justice [could not] be done,'<sup>99</sup> and subsequently ordered the release of Mr. Lubanga.<sup>100</sup> The prosecutor soon appealed on this decision.<sup>101</sup> On 8 October 2010, the Appeals Chamber reversed the stay, considering that less drastic measures were available for the Trial Chamber as sanctions.<sup>102</sup> Notwithstanding the reversal, the Appeals Chamber held that the prosecution should comply with the Trial Chamber's order, and that the ultimate

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<sup>97</sup> An intermediary is a person who provides assistance to the Office of the Prosecutor with discrete aspects of its investigations, including by identifying leads or witnesses. Intermediaries are considered crucial to the investigations of the ICC prosecutions, because they perform many tasks that the OTP would not otherwise have the capacity or the resources to perform. Further, they have often been present in an affected area for a long period of time, have a deep understanding of the historical and prevailing conditions of that area, and have the trust of the communities in which they work. See Elena A. Baylis, 'Outsourcing Investigations' (2009) 14 *UCLA Journal of International and Foreign Affairs* 121, 144.

<sup>98</sup> Khan and Buisman (n 15) 1051.

<sup>99</sup> *Lubanga* case, Trial Chamber: *Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (08 July 2010) at para. 31.

<sup>100</sup> *Lubanga* case, Trial Chamber oral decision to release Mr Thomas Lubanga Dyilo (15 July 2010) p.17, line 8 to p. 22, line 8.

<sup>101</sup> *Lubanga* case, *Prosecution's Appeal against Trial Chamber I's oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect* (16 July 2010).

<sup>102</sup> *Lubanga* case, Appeals Chamber: *Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay* (08 October 2010) .

decision of whether or not to disclose an identity of a witness lies with the Chamber, not the prosecution.<sup>103</sup>

The disclosure order is mainly regarding prosecution's intermediary 143. The judges of the Trial Chamber have ordered the prosecution twice that his identity is to be disclosed to the defence. Without knowing the identity of intermediary 143, the *Lubanga* defence team would not be in a position to conduct effective cross-examinations against another intermediary who was currently testifying before the court.<sup>104</sup>

The ICC prosecutorial practice of using intermediaries could be questionable. As claimed by some defence counsels, the identities of these intermediaries were withheld from the defence for a long period of time and, to a great extent, during the trial phase, notwithstanding various attempts on the part of the defence to have them disclosed;<sup>105</sup> some have never been disclosed.<sup>106</sup> The Chambers both in *Lubanga* and in *Katanga* ordered disclosure of the identities of the intermediaries only in cases when their

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<sup>103</sup> *Ibid.*, at paras 47-8.

<sup>104</sup> *Lubanga* case, Trial Chamber: *Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (08 July 2010) at para. 12

<sup>105</sup> See e.g. *Lubanga* case, Trial Chamber: *Public Submissions and Decision* (7 July, 2010, 15–22; *Lubanga* case, Trial Chamber: *Redacted Decision on Intermediaries* (31 May 2010) at paras 5, 6, 15–16, 34, 50, 56, 66–74, 81, 85–7, 112, and 115.

<sup>106</sup> For instance, the identity of intermediary P-310 in the *Katanga and Ngudjolo* case has not been disclosed to the defence. In *Lubanga*, the defence is still unaware of the identities of intermediaries 81, 123, 154, 254, and 290. See *Lubanga* case, Trial Chamber: *Redacted Decision on Intermediaries* (31 May 2010) at paras 139-40 and 145-6; *Lubanga* case, Trial Chamber: *Judgment Pursuant to Art 74 of the Statute* (14 March 2012) at para. 293. *Katanga* case, *Second Corrigendum to the Defence Closing Brief* (29 June 2012) at paras 487, 488, 492, and 509–10.

credibility was put in question.<sup>107</sup> Furthermore, it is noted that in both *Lubnaga* and *Katanga* cases, some of the defence witnesses have testified that they had been paid or coached by the prosecution's intermediaries to lie.<sup>108</sup> Some witnesses also alleged that part of their motive for giving false statements and testimony was that the intermediary who contacted them promised them money, education, and free re-housing.<sup>109</sup> Therefore, in order to enable Lubanga's team to fully investigate these allegations, the judges ordered the prosecution to disclose the identity of certain intermediaries.

The *Lubanga* Trial Chamber also expressed its concern regarding the prosecution's practice in this matter. It is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries, notwithstanding the extensive security difficulties it faced. The prosecution's negligence in failing to verify and scrutinize this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Given their youth and likely exposure to conflict, the witnesses were vulnerable to manipulation.<sup>110</sup>

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<sup>107</sup> *Lubanga* case, Trial Chamber: *Redacted Decision on Intermediaries* (31 May, 2010) at paras. 5, 6, 138–9, and 150.

<sup>108</sup> *Opening statement of Thomas Lubanga Dyilo's defence team* (27 January 2010).

<sup>109</sup> *Lubanga* case, Trial Chamber: *Judgment Pursuant to Art 74 of the Statute* (14 March 2012) at para.293; *Lubanga* case, Trial Chamber: *Redacted Decision on Intermediaries* (31 May, 2010) at paras 140 and 146; *Katanga* case, Second Corrigendum to the Defence Closing Brief (29 June 2012) at paras 487, 488, 492, and 509–10.

<sup>110</sup> *Lubanga* case, Trial Chamber: *Judgment Pursuant to Art 74 of the Statute* (14 March 2012) at para. 482.



Nevertheless, the prosecution deliberately refused to comply with the Chamber's order, claiming that if the identity of intermediary 143 were revealed without protective measures in place, his life would be at risk.<sup>111</sup> In fact, negotiations were still ongoing regarding intermediary 143 protective measures. The implementation of the protection measures were delayed by intermediary 143 himself, as he wanted more protection and did not want his identity to be disclosed.<sup>112</sup>

More problematically, it reflected the prosecution's attitude that it seems to consider it has the autonomy to decide whether or not to comply with the Trial Chamber's orders under Article 68. Thus, the Trial Chamber found it necessary to stay the proceedings as these circumstances constituted an abuse of the process of the Court because of the material non-compliance with the Trial Chamber's orders, and more generally, because of the prosecution had 'clearly evinced an intention not to implement the Trial Chamber's orders made in the context of article 68, if it considers they conflict with their interpretation of the prosecution's other obligations.'<sup>113</sup>

The Appeals Chamber reversed the decision to stay, however, because it considered that the Trial Chamber had not lost control of the proceedings. Instead, the Appeals

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<sup>111</sup> *Lubanga case, Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process* (30 July 2010).

<sup>112</sup> *Lubanga case, Trial Chamber: Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (08 July 2010) at paras 2–17.

<sup>113</sup> *Ibid.*, at para. 31.

Chamber found that fines or other sanctions would be appropriate under Article 71,<sup>114</sup> in order to ensure the prosecution's compliance with the Trial Chamber's orders and maintaining control of proceedings.<sup>115</sup> It should be noted that the Appeals Chamber essentially agreed with the Trial Chamber's finding that the prosecution should comply with the Chamber's order, stating that 'there is no exception to the general principle that the Prosecutor must follow the orders of the Trial Chamber when it comes to issues of protection.'<sup>116</sup>

The Appeals Chamber further emphasized that although Article 68 imposes protective obligations on the prosecution when investigating and prosecuting crimes, these remain subject to the Trial Chamber's overarching responsibility to ensure that the accused receives a fair trial.<sup>117</sup> It also noted that the protections available to witnesses and intermediaries under article 68 may not be absolute. In other words, the ICC cannot grant protective measures which would be 'prejudicial to or inconsistent with the rights

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<sup>114</sup> Article 71—sanctions for misconduct before the court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

<sup>115</sup> Lubanga case, Appeals Chamber: Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay (08 October 2010) at para. 59.

<sup>116</sup> Ibid., at para. 50.

<sup>117</sup> Lubanga case, Trial Chamber: *Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (08 July 2010) at para. 27.

of the accused and a fair and impartial trial.’<sup>118</sup>

## VI. Concluding Remarks

The Rome Statute has granted more power to the ICC prosecution in order to fulfill its role of the organ of justice. Alongside with these powers come greater obligations. The problem is that these obligations might not all sit well together. The potential conflict between the prosecution’s duty to disclose exculpatory evidence to the defence and the duty not to disclose under confidentiality agreement reflects the difficulty in international prosecutions. Nevertheless, as stated by the Chambers, the prosecution should exercised its power with extremely care and carefully follow the law, this potential conflict would only be negligible.

Despite the ICC Statute requires the prosecution to disclose information to the defence within a certain timeframe, and redactions regarding the witnesses identities and statements should only be applied in restrictive circumstances, in practice, this exceptional measure has been routinely applied. Particularly by comparison with the ad hoc tribunals, the ICC has adopted a permissive approach in authorizing redactions from and defence, sometimes even on a permanent basis.<sup>119</sup>

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<sup>118</sup> Article 68(5) ICC Statute.

<sup>119</sup> *Katanga case, Trial Chamber: Public Redacted Version of the Decision on the Prosecutor’s Application to Redact Information in the Second Statement of Prosecution Witness 249 of 18 May 2009* (13 January 2010) at para. 27; *Katanga case, Trial Chamber: Decision on the Prosecutor’s Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (18 November 2009) at paras 26–7; *Decision on the Prosecutor’s Application to Redact Information and to Maintain and Reinstate Redacted Passages in Certain Documents under Rule 77 of the Rules of Procedure*

Therefore, it is submitted that redactions should be approached more prudently. The ICC prosecution has been redacted too much material and given too few justifications support such measures. Since lifting the redactions is a time-consuming task for both the defence and prosecution, and burdensome for the work of the Chamber, the prosecutions should limited its use of redactions.

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*and Evidence (Witnesses 26, 36, 158, and 180)* (18 November 2009) at para. 21.

# CHAPTER IX

## CONCLUSION

‘Quis custodiet ipsos custodies (Who will guard the Guardians)?’

— Juvenal, Satire VI.

### **I. Disclosure, Fairness and Legitimacy**

This research puts forward the question ‘is the current disclosure regime workable in the international criminal tribunals? If not, how so?’ To answer this question, this thesis analysed the current disclosure framework in the international criminal tribunals, and found certain problems, unworkability, and lack of coherence in them. It highlighted the pluralist nature of international criminal law and assessed the disclosure problems both in the context of public international law and the context of criminal law. Also, this research focussed on the unique challenges and problems of international criminal law that derive from its political framework, paying particular attention to the unique expectations in form of the wider goals the courts have to live up to that are largely unknown in the national context.

Disclosure is one, if not the only, of the most important methods to redress the structural imbalance between the prosecution and defence. Regardless the procedural model, since the structure of most criminal justice systems heavily relies on the prosecution to conduct investigations and carry out the important task of searching the truth, the

prosecutor enjoys a lot of investigative resources and tools at his disposal. Sometimes the prosecutor even has the sole access to certain material. However, this creates a structural gap between the two parties and an inequality of arms. As a consequence, the prosecutor is under a duty to disclose evidence to the defence. Without proper disclosure from the prosecution, the inequality of arms between the prosecution and defence could not be rectified, and there is a danger that the accused would not receive a fair trial. Due to the context of international investigations, it is further observed that the inequality is more significant before the international criminal tribunals, and the importance of this duty could not be gainsaid.

It has been established that the prosecution's duty to disclose relevant material to the defence is inextricably linked to the accused's right to a fair trial. As stated explicitly in the *Blaškić Discovery Decision*, the purpose of disclosure is to enable the defence to 'have a clear and cohesive view of the prosecution's strategy and to make the appropriate preparations'.<sup>1</sup> Only by making essential information available to the defence should he or she be able to prepare the case. Evidently, any violation of this duty has a negative influence on the accused's rights and directly affects the ability to prepare the defence. Despite the imperativeness of this duty and its significance to the defence, the prosecutors routinely keep the cards to themselves and enjoy tactical advantages at trial at the expense of the accused rights and, equally questionable,

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<sup>1</sup> *Prosecutor v Tihomir Blaškić*, No. IT-95-14-T, *Decision on the Production of Discovery Materials* (27 January 1997) at para. 22.

fundamental principles of law like the right to a fair trial and the presumption of innocence.

In a criminal justice system where the prosecutors are considered as the 'guardian of justice', naturally, they possess power and discretion. While the necessity of this allocation of power is not in dispute, like in every institution that was legitimized to wield power over others by a political body, one question arises from a democratic point of view: who controls those who control power? Given the plenitude of the prosecutor's power, who ensures that that this power is not being abused? When we assess the possibilities and the likelihood of an abuse of power, we have to take a look on the motivations of the prosecutors both in general and with regard to conduct proceedings in a proper manner.

As to the motivation in general, the current system bears a certain flaw. The prosecutor is on the one hand entrusted with fairness and to guarantee fundamental rights of the accused but on the other hand he feels the pressure of winning the case. This is even truer considering the high political pressure the international criminal tribunals have to face and the implications of the wider goals. Since evidence has a great bearing on the outcome of the trial, one wonders if the prosecutor can always be trusted to disclose exculpatory evidence, which might harm its own case. As this thesis has demonstrated, there are many cases where the prosecutors failed to do so motivated by the goal of being in a strategically better position. It is submitted that this is at the expense of the

accused's rights to a fair trial and is in great conflict with fundamental principles of law. Ultimately, this could jeopardize the legitimacy of the international criminal courts themselves.

Regarding the point of the prosecutor's motivation to refrain from such abuse of power, this thesis observes the sanctions of the court in case such an abuse occurred. It was shown that in many cases despite the formal disapproval of the court the prosecutors were not sanctioned in a manner proportional to the abuse of power. If anything, the prosecutors were only rebuked by the court. To only have blind faith that the prosecutors will behave in good faith is not enough. It is submitted that the courts should be more active in supervising the prosecutors, especially with regard to the disclosure of evidence.

Nevertheless, the Chambers seem to be tolerant of this problematic prosecutorial disclosure practice. Although the judges explicitly disapprove of such practices in their statements, sanctions are rarely imposed. In the event of the judges do sanction the prosecutors, they usually opt for the least severe option and therefore do not accomplish any real effects in discouraging disclosure violations.

The context of international criminal justice indeed brings numerous challenges to the operation of the international criminal courts. While many commentators have focused on the obstacles faced by the Tribunals and the prosecution, this thesis assessed the



impediments to the defence. The political pressure to secure convictions on the Tribunals and the international prosecutors is immense; however, it should not serve as an excuse to hinder the defence rights. Besides, the implementation of the wider goals, apparently, is causing the Courts to lower standards of fairness thereby setting aside fundamental principles of law. Ironically, the underlying wish to create institutions that can serve as universal and public symbols of justice led to a system that must accept lower standards of justice to fulfil this very goal.

This thesis examined the common arguments in favour of a different treatment of the accused compared to national jurisdictions owing to the special context of international criminal justice. In particular:

### **The Reliance on State Cooperation**

This paper underscored the disadvantaged position of the defence before the international criminal tribunals. As mentioned, there is a noteworthy inequality of arms between the prosecution and the defence, which could only be improved by the proper disclosure of evidence. Furthermore, the international accused has to deal with much more unfavourable circumstances than his or her national counterpart as the preparation of its case is often obstructed by cross-states investigations.

It is true that both parties rely on States' cooperation in evidentiary matters, in particular regarding to collecting evidence and interviewing witnesses. However, it is submitted

that the current discourse is paying too much attention to the challenges faced by the prosecution. It is also observed that when it comes to state cooperation and the impact on the parties' ability to present their case, the disparity between the prosecution and defence has often been downplayed. Whilst this thesis recognizes the difficulty at the prosecution side, it should be reminded that the defence suffers as much as, if not more, than the prosecution. Since the lack of state cooperation could affect both the prosecution and defence in preparation of their case, the courts should assess this argument on a case-by-case basis.

It is submitted that the state cooperation argument should not be over-emphasized, as the issue essentially depends on the particular state. For example, in the context of the ICTY, states are in generally more inclined to cooperate with the prosecution. In *Tadić*, the defence has alleged that they are significantly more in need to call in the assistance of the Tribunal than the prosecution when dealing with non-cooperation; however, the Appeals Chamber merely emphasised that the equality of arms principle is not applicable to matters beyond the control of the Court. But in the Kenyan cases, although there is not enough proof concerning Kenyatta's direct involvement in witness intimidation, there are reports showing that his people is paying off witnesses; threatening the families of witnesses who have accepted witness protection; publicising the identity of witnesses; and violence against witnesses, including mysterious

disappearances.<sup>2</sup> However, the ICC prosecutor's strategy of using intermediaries, without timely and proper disclosure caused the failure to prosecute Kenyatta and Ruto.

### **Politically Motivated Goals**

It is submitted that the importance of the so-called wider goals should not be overemphasised. A potential danger of focusing on these wider goals is that it could lead to a so-called 'balanced' approach of international criminal justice. As seen, many have already contended that the defence rights should be balanced against these goals. However, this thesis questioned whether it is appropriate to 'balance away' the fundamental rights of the defence to achieve these politically motivated goals. It is highlighted that they can create unrealistic expectations of what a criminal court can be capable of achieving. Also, from a practical point of view, the effectiveness of these goals is hard to evaluate.

This is not to suggest that these wider goals should not be pursued at all, but rather they should not overtake the primary objective – to adjudicate a person's guilt in a fair and just manner. To attach such excessive importance to these wider goals could easily risk the Court to be overstretched and to give in to compromises right up to a point where

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<sup>2</sup> See 'Claims of Witnesses in Kenya ICC Trial "Disappearing"' *BBC News* (8 February 2013) <<http://www.bbc.co.uk/news/world-africa-21382339>>. 'Disappearance of Key Witness Raises Concerns Over Tampering in ICC Kenya Case' (*VICE News*) <<https://news.vice.com/article/disappearance-of-key-witness-raises-concerns-over-tampering-in-icc-kenya-case>>.

objectives cannot be fulfilled at all or only on a rudimentary level. Ultimately, if the Courts cannot guarantee fairness to the accused, the integrity of the proceedings could be compromised.

### **Compromised Procedures**

This thesis noted the awkward position of the international accused resulting from the hybrid nature of international criminal procedure. While many have recognised that international criminal procedure is a *sui generis* system, it should be reminded that the procedure adopted for these courts is essentially a mixture between the common and civil law models. It is therefore not a 'new' system but more a combination of existing rules.

The application of such hybrid, or indeed compromised, procedures could be incoherent and confusing. This is exacerbated by the fact that practitioners before international criminal tribunals come from different legal cultural backgrounds and, naturally, have different approaches to similar issues. More problematically, the *sui generis* claim could have the effect of disregarding or overlooking the traditional safeguards provided for the accused in domestic jurisdictions. Although international criminal tribunals are entitled to have their own procedure as they see fit, it should be highlighted that such departures require justifications, especially when the rights of the defence are affected. In other words, being *sui generis* as such is not a valid justification for departing from the existing fundamental principles and the current *sui generis* claim failed to provide

such justifications.

As to the contention that the unique circumstances of international criminal justice ought to justify a departure from the traditional standard of fairness, this thesis has rebutted that this departure lacks substantial grounds. The complexity and hardship in securing reliable evidence for international prosecution does not in itself warrant a lower evidentiary standard, although this is already the case in the *ad hoc* Tribunals. The International Criminal Court is on a similar path. It further argued that there is a danger in advocating such contextual claims regarding the application of fairness, as not only the accused would be affected, but also the very legitimacy of the international criminal tribunals themselves.

## **II. Analysis**

There are three main findings for the research question ‘why is the current disclosure regime unworkable?’

### **The Context of International Criminal Justice**

The complexity of the international context seems to give rise to the belief that a lower standard of fairness could be justified. Firstly, the international community is generally more sympathised with the prosecution. The ghastly nature of international crimes can

easily affect people's attitude towards fairness and the presumption of innocence.

Although this may be understandable from a human standpoint, the Courts must not give in to such subjective opinions. This would contradict fundamental principles of law.

Justice is impartial – there is a good reason why Justitia is wearing a blindfold. Despite the horrendous and disturbing nature of the crimes, justice can only prevail if objectivity and impartiality are upheld.

It should be emphasised that the prosecution has considerably more support and resources than the defence. This is particularly more so in the context of the international criminal tribunals: the institutional designs, the allocation of budget, the number of staff, assistance from the NGOs, cooperation of States and other international institutions, etc. all points to a noteworthy disparity of resources between the prosecution and the defence. Although, admittedly, the principle of equality of arms cannot possibly be satisfied to the fullest extent by virtue of the nature of criminal prosecution, an imbalance that great is very questionable.

Secondly, the gravity and magnitude of international crimes further broadens people's expectations of what a criminal court ought to achieve. The wider objectives that are imposed on international criminal tribunals in light of these expectations often impede the primary objective. This can rarely be observed in national criminal courts. As things stand, it would seem that the international criminal courts themselves are somewhat uncertain what their priorities are.

The third point refers to the argument that the difficulties and challenges of international prosecutions justify both a lower standard of fairness and quality of justice. However, this argument could go both ways, since similar obstructions equally apply to the defence. Whilst this research acknowledged the struggles of the international prosecutors, the thesis argued that the affliction on the international defence is significantly higher than the one on the prosecution. Nonetheless, much less attention is paid to the international accused. As the desire to secure convictions is much higher in the international context, certain defence rights are even seen as hurdles to achieve 'justice' or the 'truth'.

### **The Nature of the Prosecutor's Role**

Criminal justice systems rely on prosecutors to make several key decisions. This is true in both the domestic and the international context,<sup>3</sup> regardless which procedural model has been adopted. However, the nature of the role of the prosecutor in the adversarial settings, which is employed in the common law jurisdictions and international criminal tribunals, is more conflicting than the prosecutors in civil law countries. This is because the adversarial system expects the prosecutors to wear two hats: he must be a zealous advocate, who pursues criminals valiantly and also aims to win;<sup>4</sup> and at the same time,

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<sup>3</sup> See Antonio Cassese, *Address to the General Assembly of the United Nations (Nov. 14, 1994)*, 1994 *ICTY Y.B.* 134, 137, *UN Sales No. E.95.III. p.2* (describing the prosecution is 'the key to the Tribunal's action').

<sup>4</sup> See e.g. Ken Armstrong and Maurice Possley, 'Trial and Error: How Prosecutors Sacrifice Justice to Win' [1999] *Chicago Tribune* 10.

he is the minister of justice, who has a duty to do and seek justice.<sup>5</sup> By comparison, the inquisitorial model places more faith in the prosecutor's ability to act as a minister of justice and substantially less in his role as an advocate.

Theoretically, these two hats can be worn together, since the duty to seek justice could be equal to the conviction of guilty persons. However, in reality it is difficult to know if the 'criminal' is in fact guilty at all. Because a prosecutor's conviction rate signifies his competence,<sup>6</sup> if a prosecutor successfully secures a conviction of someone he believes to be guilty, but factually innocent, he succeeds as his role as an advocate, but fails his task of doing justice. After all, justice would not be achieved if innocent people were convicted while the persons responsible remain free. Also demonstrated by empirical cognitive research,<sup>7</sup> even an ethical prosecutor could not avoid cognitive bias to influence his decision-making. Accordingly, there is a high degree of tension between

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<sup>5</sup> In the US, there is extensive discussions regarding the Prosecutor's role, see e.g. Fred C Zacharias, 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice' (1991) 44 Vanderbilt Law Review 45. Here is worth to mention *Berger v. United States* again, the Court's description of the role of the prosecutor:

'[The Prosecution] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'

*Berger v. United States* 295 U.S. 78 (1935), at 88.

<sup>6</sup> See e.g. Eric Rasmusen, Manu Raghav and Mark Ramseyer, 'Convictions versus Conviction Rates: The Prosecutor's Choice' (2009) 11 American Law and Economics Review 47.

<sup>7</sup> See e.g. Quirk (n 778); Burke, 'Improving Prosecutorial Decision Making' (n 601); Paul C Giannelli, 'Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias' [2010] Utah Law Review 247.



the two roles of the prosecutor and disclosure has been one of the tactical advantages at his or her disposal. The result turns out to be: the prosecutor is both the player as well as the referee and, unsurprisingly, he is expected to win the game.

As stated at the outset of this thesis, *information is power*. What makes the prosecutors powerful is their possession of vital information which the defence does not have. The prosecutor knows and owns most of the cards in the game and he is the one dealing them. Why should he give the defence a winning hand when he is supposed to win the game? The prosecutors can hide exculpatory evidence from the defence, delay the disclosure of inculpatory evidence, hinder the preparation of the defence's case and even provide falsified evidence which could lead to a wrongful conviction. However, prosecutors who violate disclosure rules are rarely held accountable. This is true for both domestic and international prosecutors. Nevertheless, it appears that, so far, there are no better options than to rely on the prosecutors to perform their duties in good faith. What is called for is to make the prosecutors more accountable in their decisions making,<sup>8</sup> together with more judicial supervision. To impose more severe sanctions when the prosecutors fail to disclose evidence to the defence could arguably motivate the prosecutors to do their jobs more properly.

### **Attitudes of the Courts**

The third reason for the unworkability of the disclosure regimes is the permissive

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<sup>8</sup> See Turner (n 31).

attitudes of the judges. Both national and international criminal judges are reluctant to impose severe sanctions on the prosecutors who fail to perform their disclosure duties. An application for a permanent stay of the proceedings is rarely granted, since it is in public interests to reach the conclusion of a trial. The Courts will only do so when they consider a fair trial is not possible. In other words, the purpose of sanctions or remedies is not to 'punish' a prosecutor, but to guarantee a fair trial. However, it would seem that some prosecutors have been exploiting this fact as they are aware they can get away with violations of their disclosure duties without any serious consequences.

For the international criminal tribunals, political pressure and other practical concerns certainly have influenced their judgments regarding the appropriate remedies for prosecutor's disclosure violations. Factors such as the influence of the Security Council, the resistance of particular States in handing over information due to national security concerns, and the fact that the Tribunals have to operate with limited budgets and resources, all affect the Tribunals' decisions. The pressure on the ICC is particularly high, since the conflict could be still ongoing and the ICC Prosecutor might have to pursue someone who is still in power. To cope with these concerns, the Tribunals strive to reach a legally and politically balanced decision. However, from a legal point of view, this represents a highly doubtful development.

National practice also shows that domestic judges are unwilling to adopt drastic measures against the prosecutors. This is particularly so in the U.S. practice, as

generally the judicial branch tends to not interfere with the decisions of the administrative branch. Also, since the presumption is that the prosecutor is acting in good faith, the standard to reverse a prosecution's decisions is a very high one. Even decades after *Brady v Maryland*, the U.S courts still rarely sanction prosecutions' failures to disclose exculpatory evidence. Instead, the courts employ a demanding threshold of a showing of 'materiality' and the establishment of 'prejudice', which makes the defence claims almost impossible to be successful. In addition, internal solutions are preferred in domestic jurisdictions.<sup>9</sup> Accordingly, it would be fair to say that this issue is not entirely unique to the international criminal tribunals. No court can be completely independent from the boundaries of political reality.

The problem of this permissive attitude is that it is shifting the burden of proof to the defence. Since the prosecution's applications for redactions and summaries are normally granted when involving the protection of victims and witnesses, even though they should only be authorised in exceptional circumstances, this practice has become the norm. The result is that the defence has to apply for lifting such redactions and seek full disclosure, which has an acute impact on its ability to access information and prepare its case. Others also noted the use of redactions has been excessive and often proved to be unnecessary in these international criminal tribunals.<sup>10</sup>

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<sup>9</sup> Finally, the ICC passed the Code of Conduct for the Office of the Prosecution in 2013, entry into force: 5 September 2013. Available at <https://www.icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF>

<sup>10</sup> E.g. Buisman (n 37). She noted that the defence is 'genuinely prejudiced by excessive redactions'.

In the event of a disclosure violation, in practice, there is usually a high degree of judicial tolerance. Although the Chambers often reprimand the prosecutors that their ‘disclosure practice had not been satisfactory’<sup>11</sup> or the repeated disclosure violations ‘reflected badly on the Prosecution’, the judges normally consider there is no prejudice and therefore remedies are not needed. It is clear that this permissive attitude of the judges has a detrimental impact on the accused’s right to a fair trial. As Zahar puts it, the accused’s fundamental rights have been redefined and a ‘reduced fairness’ is applied to the international defendant.<sup>12</sup>

From a defence point of view, such results are plainly frustrating. It is very difficult to access information held by the prosecution in the first place: how could the defence know and identify the prosecution material that would or could be useful to its case? Even after successful identification, the defence must prove to the Court that the prosecution indeed failed to disclose evidence. For both the parties and the Courts, disclosure motion is a burdensome and time-consuming process. If the prosecution has done its jobs properly in the first place, everyone in the criminal justice system can save a lot of time and resources.

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<sup>11</sup> *Prosecutor v Orić*, INo. IT-03-68-T, *Judgment* (30 June 2006) at para. 815; or such as ‘the numerous disclosure violations reflected badly on the Prosecution, see e.g. see *Prosecutor v Karadžić*, IT-95-5/18-I, *Decision on Accused’s Motion for New Trial for Disclosure Violations* (3 September 2012) at para. 14.

<sup>12</sup> Alexander Zahar, ‘Pluralism and the Rights of the Accused in International Criminal Proceedings’ in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 237.

### III. Recommendations

This thesis concludes that the current prosecutorial practice concerning disclosure is problematic and has severely interfered with the accused's fundamental rights.

Alongside to the impact on the defence the repeated failure of the prosecution to disclose important evidence can also lead to devastating consequences for the international criminal tribunals, as their abilities to reach fair and just decisions are put into question. If international trials serve as a symbol of justice for the world to be seen, how can the international courts live up to these high standards if fairness is impaired? In turn, the legitimacy of these courts could be significantly weakened. With the two *ad hoc* Tribunals drawing to a close, the world is looking at the International Criminal Court more closely than ever.

The conclusion can only be that the disclosure regime in the International Criminal Court calls for a complete review.<sup>13</sup> However, despite the difficulties arising from the prosecution's disclosure obligations, this thesis does not recommend the use of a dossier as employed in most civil law systems. In addition to the procedural difficulty and complexity of amending the ICC Statute and Rules, at a theoretical level, this will not solve the core problem. In that, it is still the prosecution who will be collecting the evidence, making an initial assessment of whether a piece of information is relevant,

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<sup>13</sup> Commentators have also proposed a reform: see Karim AA Khan and Caroline Buisman, 'Sitting on Evidence: Systematic Failings in the ICC Disclosure Regime - Time for Reform' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP Oxford 2015) 1060–2.

and be responsible for preparing the *dossier*. Similar reviews have been provided in both England and the US, regarding whether or not to adopt an open file policy.<sup>14</sup>

Rather, this thesis is in the view that the disclosure regimes in fact could work in the International Criminal Court. For this purpose significant efforts would be required from both the Office of the Prosecutor and the Chamber.

Firstly, the Office of the Prosecutor at the ICC should examine its internal disclosure practice and devise an adequate disclosure system. It is suggested that the Office of the Prosecutor assigns a disclosure officer in each team and have a ‘Schedule’ system, as applied in England,<sup>15</sup> to certify that disclosure obligations have been fulfilled, in particular when exculpatory information is involved. Whiting, a former prosecutor at the ICTY, has suggested that assigning a senior lawyer to manage disclosure would be ideal.<sup>16</sup> Training concerning proper disclosure should also be considered.

Secondly, when making applications of protective measures and redaction, the prosecution should address its reasons in a clear and proper manner. In addition, the use of intermediaries should be exercised with much more care and only under specific conditions.

On the side of the Chamber, it should ensure that the prosecution provides full

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<sup>14</sup> See Chapter V.

<sup>15</sup> See Chapter VI.

<sup>16</sup> Whiting (n 142) 1026. In addition, he suggested that ‘the OTP must focus on devising an adequate disclosure *system* to manage all of the disclosure challenges outlined in this chapter, in addition to ensuring that individual prosecutors are properly trained and motivated to do their work.’

disclosure to the accused in a timely fashion. If the prosecutors fail to do so, the Chambers should impose more serious and sustainable remedies, and consider appropriate sanctions. For example, if the prosecution has repeatedly been disclosing inculpatory material late, the material in question could be excluded from evidence. In addition, the Chamber can take disciplinary action against the individual prosecutor, or delay the approval of warrants of arrest and the confirmation of charges.<sup>17</sup> Prior to Trial, the Chamber could set up a deadline for unredacted disclosure of all material which the prosecutor intends to rely on at trial, as it is essential to the defence's case preparations. Also, Rule 81(4) should be interpreted restrictively regarding the non-disclosure of identities of 'innocent third parties', 'potential witnesses', and 'prosecution sources'. As proposed by Khan and Buisman,<sup>18</sup> these types of redactions should only be withheld from the defence for a limited period of time. Without pressure from the judges, the prosecution lacks motivation to perform their disclosure duty properly.

As to a more technical matter, regarding the materiality test, this thesis considers that the current standard applied by the international criminal courts is too high, as it requires the defence to demonstrate prejudice. As mentioned, the *ad hoc* Tribunals have been applying the standard similar to the one before the U.S. Supreme Court, which is in fact applying an appellate prejudice standard to determine pre-trial disclosure. It is noted that this standard imposes an unnecessarily high burden on the defence, impeding

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<sup>17</sup> Scheffer (n 240) 162.

<sup>18</sup> Khan and Buisman (n 1) 1060.

the purpose of the prosecution's duty of disclosure. Numerous disclosure decisions at the ICTY and ICTR demonstrated that whilst the Chambers regularly found the prosecution violating its disclosure obligation, it is reluctant to impose any meaningful remedy to the defence, because the 'prejudice' requirement was not met.

It is to be recalled that similar discussions took place in the American context. The U.S. Supreme Court in *Brady v Maryland* first set out the prosecution's duty to disclose to the defence favourable evidence, which is a due process requirement. However, in a later case *Bagley*, the Supreme Court read a prejudice requirement into the language of 'material' from the *Brady v Maryland* ruling. The consequence was that the Court would not consider undisclosed exculpatory evidence to be 'material' unless there is a 'reasonable probability' that the result of the trial would have been different. In *Kyles v Whitley*, although *Kyles* was ordered a new trial, the Court held that the prosecutor's duty to disclose favourable evidence pretrial is limited to materiality, and that by claiming 'the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation'.<sup>19</sup> The 'prejudice' requirement is confirmed and elaborated in *Strickler v Greene*.<sup>20</sup> However, this standard in the US has

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<sup>19</sup> *Kyles v Whitley* 514 U.S. at 437. Further, the Court stated that "the rule in *Bagley* (and hence *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id.*

<sup>20</sup> Quoting *Kyles* (at 435), in *Strickler*, it was asked 'whether the 'favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' *Strickler* failed to satisfy this burden and was executed by lethal injection.



drawn significant criticism among commentators, often being described as ‘perverse’<sup>21</sup> because it turns a due process right of the accused into an entitlement of the prosecution to withhold favourable evidence. This is hardly satisfying as it could lead to potential miscarriages of justice.

Hence, it is submitted that the standard applied by England is arguably better and more suitable to be applied at the international criminal tribunals. In contrast to the high standard applied by the U.S. Supreme Court, the current English law requires the prosecution to disclose to the accused any prosecution material ‘which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.’<sup>22</sup> When English courts apply the law, the defendant is not required to establish a prejudice requirement. If the prosecution has material that ‘might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused’, it should be disclosed. In the event when the prosecution fails to disclose evidence, the courts have the power to impose different sanctions.<sup>23</sup>

To conclude, the task of both prosecuting and defending international accused is not for the faint-hearted. It is noted that the ICC Prosecutor and her Office is under numerous

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<sup>21</sup> See, e.g. Eugene Cerruti, ‘Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process’ (2005) 94 Kentucky Law Journal 211, 469.

<sup>22</sup> 5.23 Section 3(1)(a) of the CPIA 1996, as amended by the Criminal Justice Act 2003

<sup>23</sup> Of course, there is also room for improvement in England. See, e.g. Chris Taylor, ‘Disclosure Sanctions Review: Another Missed Opportunity’ (2013) 17 International Journal of Evidence & Proof 272.

political pressure to investigate and prosecute international crimes, however, at the same time the defendant's fundamental rights should be respected. 'Not only must justice be done; it must also be *seen* to be done.'<sup>24</sup>

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<sup>24</sup> R v Sussex Justices, Ex parte McCarthy [1923] All ER Rep 233

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## CASES, DECISIONS AND JUDGMENTS

### A. INTERNATIONAL CRIMINAL COURT

#### ***Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09)***

- Appeals Chamber: *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 Possession of the Office of the Prosecutor”* (28 August 2013)
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#### ***Prosecutor v Callixte Mbarushimana (ICC-01/04-01/10)***

- Pre-Trial Chamber: *Decision on Issues Relating to Disclosure* (30 March 2011)
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#### ***Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (ICC-01/09-02/11)***

- Single Judge: *Corrigendum to Decision on the Defences' Requests for a Compliance Order* (12 July 2011)
- Pre-Trial Chamber: *Decision on the Confirmation of Charges* (26 January 2012)

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- Pre-Trial Chamber: *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute* (11 November 2014)

#### ***Prosecutor v Laurent Gbagbo (ICC-02/11-01/11)***

- Single Judge: *Decision Establishing a Disclosure System and a Calendar for Disclosure* (24 January 2012)
- Pre-Trial Chamber: *Decision Adjourning the Hearing on the Confirmation of Charges pursuant to article 61(7)(c)(i) of the Rome Statute* (3 June 2013)

#### ***Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)***

- Appeals Chamber: *Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request to Redact Witness Statements”* (13 May 2008)
- Appeals Chamber: *Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case* (13 May 2008)

- Trial Chamber: *Decision on the Prosecutor's Application to Redact Information under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (5 May 2009)
- Trial Chamber: *Decision on the Prosecutor's Application to Redact Information and to Maintain and Reinstate Redacted Passages in Certain Documents under Rule 77 of the Rules of Procedure and Evidence (Witnesses 26, 36, 158, and 180)* (18 November 2009)
- Trial Chamber: *Public Redacted Version of the Decision on the Prosecutor's Application to Redact Information Falling under Art 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (Witnesses 6, 83, 102, and 221) of 18 May 2009* (23 December 2009)
- Trial Chamber: *Decision on the Prosecutor's Application to Redact Information from Certain Evidence under Art 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence* (30 December 2009)
- Trial Chamber: *Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219* (3 September 2010)
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- Appeals Chamber: *Decision on Request of the Defence in relation to Investigations Conducted Pursuant to Article 70* (17 June 2014)
- Appeals Chamber: *Decision on Prosecutor's Second Request for Redactions for the Purposes of Disclosure* (14 November 2014)
  
- Trial Chamber: *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)
- Trial Chamber: *Decision on the release of Thomas Lubanga Dyilo* (02 July 2008)
- Trial Chamber: *Decision on the Prosecutions Application for the Admission of the Prior Recorded Statements of Two Witnesses* (15 January 2009)
- Trial Chamber: *Reasons for Oral Decision lifting the stay of proceedings* (23 January 2009)
- Trial Chamber: *Redacted Decision on Intermediaries* (31 May 2010)
- Trial Chamber: *Public Submissions and Decision* (07 July 2010)
- Trial Chamber: *Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU* (08 July 2010)
- Trial Chamber oral decision to release Mr Thomas Lubanga Dyilo (15 July 2010)
- Trial Chamber: *Judgment Pursuant to Art 74 of the Statute* (14 March 2012)
  
- Single Judge: *Decision on the Final System of Disclosure and the Establishment of a Timetable* (15 May 2006)
- Single Judge: *Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute* (26 May 2006)
- Single Judge: *Decision on the Prosecution Amended Application Pursuant to Rule 81(2)* (2 August 2006)
- Pre-Trial Chamber: *Decision on the Final System of Disclosure and the*



*Establishment of a Time Table (15 May 2006)*

- Pre-Trial Chamber: *Decision on the confirmation of charges (29 January 2007)*
- *Opening statement of Thomas Lubanga Dyilo's defence team (27 January 2010).*
- *Prosecution's Appeal against "Decision on the release of Thomas Lubanga Dyilo" and Urgent Application for Suspensive Effect (02 July 2008)*
- *Prosecution's Notification of Disclosure of Exculpatory and Rule 77 Material to the Defence on 18 and 20 November 2008 (21 November 2008)*
- *Prosecution's Appeal against Trial Chamber I's oral decision to release Thomas Lubanga Dyilo and Urgent Application for Suspensive Effect (16 July 2010).*  
*Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July 2010 to stay the proceedings for abuse of process (30 July 2010)*

***Prosecutor v Uhuru Muigai Kenyatta (ICC-01/09-02/11)***

- Trial Chamber: *Decision on the protocol establishing a redaction regime (27 September 2012)*
- Trial Chamber: *Decision on the withdrawal of charges against Mr Kenyatta (13 March 2015)*
- *Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, Muthaura and Kenyatta (11 March 2013)*

***Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang (ICC-01/09-01/11)***

- Trial Chamber: *Decision on the protocol establishing a redaction regime (27 September 2012)*
- Pre-Trial Chamber: *Decision Setting the Regime for Evidence Disclosure and Other Related Matters (6 April 2011)*
- Pre-Trial Chamber: *Decision on the 'Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (02 May 2011)*
- Pre-Trial Chamber, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012)*

***Situation in Uganda (ICC-02/04-01/05-20-US-Exp)***

*Pre-Trial Chamber: 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 Unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005 (19 August 2005)*

## **B. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

### ***Prosecutor v Zlatko Aleksovski (IT-95-14/1)***

#### **Appeals Chamber**

- *Decision on Prosecutor's Appeal on Admissibility of Evidence* (16 February 1999)
- *Judgement* (24 March 2000)

### ***Prosecutor v Vidoje Blagojević and Dragan Jokić (IT-02-60)***

**Trial Chamber** *Joint Decision on Motions Related to Production of Evidence* (12 December 2002)

### ***Prosecutor v Tihomir Blaškić (IT-95-14)***

#### **Trial Chamber**

- *Decision of Trial Chamber I on the Applications of the Prosecutor dated 24 June and 30 August 1996 in respect of the Protection of Witnesses* (2 October 1996)
- *Decision on the Production of Discovery Materials* (27 January 1997)
- *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena duces Tecum* (18 July 1997)
- *Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Rule 66 (A) of the Rules and the Decision of 27 January 1997 Compelling the Production of all Statements of the Accused* (15 July 1998)
- *Decision on the Defence Motion to Admit into Evidence the prior Statement of Deceased Witness Midhat Haskic* (29 April 1998)

#### **Appeals Chamber**

- *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)
- *Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings* (26 September 2000)
- *Judgement* (29 July 2004)

### ***Prosecutor v Ljube Bošković and Johan Tarčulovski (IT-04-82)***

**Trial Chamber** *Decision on the motions on fair trial and extensions of time* (19 May 2006)

### ***Prosecutor v Miroslav Bralo (IT-95-17)***

**Appeals Chamber** *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006)

### ***Prosecutor v Radoslav Brđanin and Momir Talić (IT-99-36)***

#### **Trial Chamber**

- *Decision on Motion by Momir Talić for Disclosure of Evidence* (27 June 2000)
- *Decision on Motion by Prosecution for Protective Measures* (3 July 2000)
- *Public version of the confidential decision on the alleged illegality of rule 70 of 6 May 2002* (23 May 2002)

- *Decision on “Motion for Relief from Rule 68 Violation by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters affecting Justice and a Fair Trial can be Resolved”* (30 October 2002)

**Appeals Chamber** *Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004)

***Prosecutor v Zejnil Delalić et al (IT-96-21)***

**Trial Chamber**

- *Order on Defence Applications for Amendment of the Directive on Assignment of Defence Counsel, Forwarding the Documents in the Language of the Accused and Confirmation of the Status of the Witnesses for the Defence* (31 May 1996)
- *Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence* (26 September 1996)
- *Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence* (4 February 1998)
- *Judgement* (16 November 1998)

***Prosecutor v Anto Furundžija (IT-95-17)***

**Trial Chamber** *The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution* (5 June 1998)

***Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač (IT-06-90)***

**Trial Chamber**

- *Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68* (14 July 2006)
- *Decision on Ivan Cermak’s Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009)

***Prosecutor v Sefer Halilović (IT-01-48)***

**Trial Chamber** *Decision on Defence Motion for Identification of Suspects and other Categories Among its Proposed Witnesses* (14 November 2003)

***Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (IT-04-84)***

**Appeals Chamber**

- *Judgement* (19 July 2010)
- *A Corrigendum to Judgement of 19 July 2010* (23 July 2010)

**Trial Chamber**

- *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006)
- *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011)
- *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011)

***Prosecutor v Radovan Karadžić (IT-95- 5/18)***

**Trial Chamber**

- *Decision on Accused's Seventh and Eighth Motions for Finding Disclosure Violation and for Remedial Measures* (18 August 2010)
- *Decision on Accused's Twenty-Seventh Disclosure Violation Motion* (17 November 2010)
- *Decision on Accused Motion for Inspection and Disclosure* (9 October 2008)
- *Decision on Accused Motion for Full Disclosure of Supporting Material* (25 November 2008)
- *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008)
- *Decision on Motions for Rule 68 Material and Reconsideration of Decision on Adequate Facilities* (10 March 2009)
- *Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure* (9 April 2009)
- *Decision on Accused's Motion to Set Deadlines for Disclosure* (1 October 2009)
- *Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures* (17 June 2010)
- *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010)
- *Decision on Accused's Seventh and Eighth Motions for Finding Disclosure Violation and for Remedial Measures* (18 August 2010)
- *Decision on Accused's Ninth and Tenth Motions for Finding Disclosure Violation and for Remedial Measures* (26 August 2010)
- *Decision on Accused's Eleventh through Fifteenth Motions for Finding Disclosure Violation and for Remedial Measures* (24 September 2010)
- *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010)
- *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty-Sixth Motions for Disclosure Violation* (11 November 2010)
- *Decision on Accused's Twenty-Seventh Disclosure Violation Motion* (17 November 2010)
- *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010)
- *Decision on Accused's Seventeenth bis and Twenty-Eighth Disclosure Violation Motions* (16 December 2010)
- *Decision on Accused's Twenty-Ninth Disclosure Violation Motion* (11 January 2011)
- *Decision on the Accused's Motion for Order to Obtain Witness Statements and Testimony from National Courts* (12 January 2011)
- *Partially Dissenting Opinion in the Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon* (29 March 2011)
- *Decision on Accused's Forty-Eighth Disclosure Violation Motion* (30 May 2011)
- *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011)

- *Decision on Accused's Fifty-Fifth Disclosure Violation Motion* (19 August 2011)
- *Decision on Accused's 47th Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings* (10 May 2011)
- *Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions* (22 November 2011)
- *Decision on Accused's Sixty-Fifth Disclosure Violation Motion* (12 January 2012)
- *Decision on Accused's Sixty-Sixth Disclosure Violation Motion* (8 February 2012)
- *Decision on Accused's Sixty-Sixth and Sixty-Seventh Disclosure Violation Motions* (1 March 2012)
- *Decision on Accused's Eighty-Third Disclosure Violation Motion* (21 November 2013)
- *Decision on Accused's Eighty-Fifth Disclosure Violation Motion* (21 January 2014)
- *Decision on Accused's Eighty-Seventh Disclosure Violation Motion* (10 March 2014)
- *Decision on Accused's Ninety-Fourth Disclosure Violation Motion* (14 October 2014)
- *Decision on Accused's 102<sup>nd</sup> and 103<sup>rd</sup> Disclosure Violation Motions* (4 November 2015)

***Prosecutor v Radovan Karadžić and Ratko Mladić (IT-95-5-R61, IT-95-18-R61)***  
**Trial Chamber** *Review of the Indictments pursuant to Rule 61* (11 July 1996)

***Prosecutor v Dario Kordić and Mario Čerkez (IT-95-14/2)***

**Appeals Chamber**

- *Decision on Appeal Regarding Statements of a Deceased Witness* (21 July 2000)
- *Decision on Motions to extend Time for filing Appellant's Briefs* (11 May 2001)
- *Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief* (11 September 2001)
- *Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2000 Interviews With Witness AT* (23 May 2003)
- *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004)
- *Judgement* (17 December 2004)

**Trial Chamber** *Order on Motion to Compel Compliance by the Prosecutor with Rules 66(a) and 68* (26 February 1999)

***Prosecutor v Momčilo Krajišnik and Biljana Plavšić (IT-00-39 & 40)***

**Trial Chamber**

- *Decision on Motion from Momcilo Krajišnik to compel Disclosure of exculpatory Evidence pursuant to Rule 68* (19 July 2001)
- *Decision on Prosecution Motion for Clarification in respect of Application of Rules 65ter, 66(B) and 67(C)* (1 August 2001)
- *Decision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence* (2 June 2006)

***Prosecutor v Radislav Krstić (IT-98-33)***  
**Appeals Chamber** *Judgement* (19 April 2004)

***Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić (IT-95-16)***

**Trial Chamber** *Decision on the Prosecutor's Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session Under Rule 79 of the Rules* (29 July 1998)

***Prosecutor v Milan Lukić and Sredoje Lukić (IT-98-32/1)***

**Appeals Chamber** *Decision on Milan Lukić's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011)

**Trial Chamber** *Decision on Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings...* (12 March 2009)

***Prosecutor v Dragomir Milošević (IT-98-29/1)***

**Appeals Chamber** *Decision on Motion Seeking Disclosure of Rule 68 Material* (7 September 2012)

***Prosecutor v Slobodan Milošević (IT-02-54)***

**Appeals Chamber** *Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit* (16 May 2002)

**Trial Chamber** *Decision in relation to Severance, Extension of Time and Rest* (12 December 2005)

***Prosecutor v Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić (IT-99-37)***

**Appeals Chamber** *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003)

**Trial Chamber**

- *Decision on Prosecution's Motion for Protective Measures* (17 July 2003)
- *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006)
- *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007)

***Prosecutor v Ratko Mladić (IT-09-92)***

**Appeals Chamber** *Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods* (28 November 2013)

***Prosecutor v Momčilo Krajišnik and Biljana Plavšić (IT-00-39)***

**Trial Chamber** *Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65ter, 66 (B) and 67(C)* (1 August 2001)

***Prosecutor v Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin (IT-95-1 /1)***

**Trial Chamber**

- *Order Setting a Time-Limit for Disclosure Pursuant to Rule 66(A)(ii)* (24 November 2004)
- *Decision on Confidential Prosecution Motions for Protective Measures and Non-Disclosure* (9 March 2005)

***Prosecutor v Naser Orić (IT-03-68)***

**Appeals Chamber** Interlocutory Decision on Length of Defence Case (20 July 2005)

**Trial Chamber**

- *Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66(B) and 68(i)* (29 September 2005)
- *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005)

***Prosecutor v Momčilo Perišić, (IT-04-81)***

**Trial Chamber** *Decision on Motion to Appoint Amicus Curiae to Investigate Equality of Arms* (18 June 2007)

***Prosecutor v Jadranko Prlić et al (IT-04-74)***

**Appeals Chamber**

- *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case* (6 February 2007)
- *Decision on Slobodan Prajlak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008)

***Prosecutor v Milomir Stakić (IT-97-24)***

**Appeals Chamber** *Judgement* (22 March 2006)

***Prosecutor v Jovica Stanišić and Franko Simatović (IT-03-69)***

**Trial Chamber** *Reasons for Decision on Postponement of Cross- Examination of the Testimony of Witness Milovanovic* (22 July 2010)

***Prosecutor v Mićo Stanišić and Stojan Župljanin (IT-08-91)***

**Trial Chamber** *Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (31 August 2009)

***Prosecutor v Duško Tadić (IT-94-1)***

**Appeals Chamber**

- *Judgement* (15 July 1999)
- *Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements* (27 Nov 1996)

**Trial Chamber** *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* (10 August 1995)

## C. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

### ***Prosecutor v Jean-Paul Akayesu (ICTR-96-4)***

**Appeals Chamber** *Judgement* (1 June 2001)

### ***Prosecutor v Ignace Bagilishema (ICTR-95-1A)***

**Appeals Chamber** *Decision On the Motion for a Review of the Decision by the President of the Appeals Chamber; on the Motion Pursuant to Article 73 of the Rules of Procedure and Evidence Praying the Chamber to Order the Prosecutor to Disclose to the Defence the Tapes Containing the Recordings of Radio Muhabura; On the Motion for a Review of the Decision by the President of the Appeals Chamber* (6 February 2002)

**Trial Chamber** *Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA* (8 June 2000)

### ***Prosecutor v Théoneste Bagosora et al. (ICTR-96-7)***

#### **Trial Chamber**

- *Decision on the Motion by the Defence Counsel for Disclosure* (27 November 1997)
- *Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses* (5 December 2001)
- *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses* (27 September 2005)
- *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006)
- *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (6 October 2006)
- *Decision on Kabiligi Motion for Inspection of Documents Under Rule 66(B)* (6 December 2006)

**Appeals Chamber** *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence* (25 September 2006)

### ***Prosecutor v Paul Bisengimana (ICTR-2000-60)***

**Appeals Chamber** *Decision on Bisengimana's Motion for Disclosure of Materials* (28 March 2003)

### ***Prosecutor v Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza (ICTR-99-50)***

#### **Trial Chamber**

- *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (22 September 2000)
- *Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence* (23 April 2004)
- *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI* (14 September 2004)



- *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material* (1 December 2004)
- *Decision on Jerome-Clement Bicamumpaka's Motion for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence* (15 December 2004)
- *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D* (28 September 2006)
- *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007)
- *Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D* (18 February 2008)
- *Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence* (10 June 2008)
- *Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire's Evidence in the Ndindilyimana Proceedings* (4 November 2008)
- *Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009)
- *Judgement* (30 September 2011)

***Prosecutor v Jean-Baptiste Gatete (ICTR-2000-61)***

**Trial Chamber** *Decision on Defence Motion for the Disclosure of Identifying Information in Relation to Witnesses to be Called by the Prosecution at Trial* (11 September 2009)

***Prosecutor v Juvénal Kajelijeli (ICTR-98-44A)***

**Trial Chamber**

- *Decision on Defense Motion Seeking to Interview Prosecutor's Witnesses or Alternatively to be Provided with a Bill of Particulars* (12 March 2001)
- *Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence* (5 July 2001)
- *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001)

***Prosecutor v Callixte Kalimanzira (ICTR-05-88)***

**Appeals Chamber**

- *Decision on Prosecution Motion for Protective Measures* (8 November 2007)
- *Judgement* (20 October 2010)

**Trial Chamber** *Oral Decision on Defence Motion to Exclude Evidence or Recall Witnesses Filed on 9 February 2009* (13 February 2009)

***Prosecutor v Jean de Dieu Kamuhanda (ICTR-99-54A)***

**Trial Chamber** *Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor* (29 August 2002)

***Prosecutor v Gaspard Kanyurikiga (ICTR-2002-78)***

**Appeals Chamber** *Decision on Kanyurikiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents* (19 February 2010)

***Prosecutor v Édouard Karemera, Matthieu Ndirumpatse and Joseph Nzirorera (ICTR-98-44)***

**Appeals Chamber**

- *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (7 October 2003)
- *Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations* (6 March 2006)
- *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006)
- *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006)
- *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008)
- *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008)
- *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010)
- *Judgement and Sentence* (2 February 2012)

***(Prosecutor v Ndirumpatse)*** *Decision on the Defence Motion Challenging the Lawfulness of the Arrest or Detention and Seeking Return or Inspection of Seized Items* (10 December 1999)

**Trial Chamber**

- *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003)
- *Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order* (13 October 2003)
- *Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures* (20 October 2003)
- *Decision on the Motion of the Defence of Joseph Nzirorera for Disclosure of Videotape Regarding Prosecution Witnesses* (1 December 2003)
- *Decision on Juvenal Kajelijeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits, and Pre-Trial Statements of Prosecution Witnesses GBU and GFA* (24 November 2004)
- *Decision on Severance of Andre Rwamakuba and Amendments of the Indictment* (7 December 2004)

- *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005)
- *Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses* (23 August 2005)
- *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005)
- *Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motions Under Rule 66(C) of the Rules* (15 February 2006)
- *Oral Decision on the Motion for Inspection of Non-Rule 68 Material* (9 March 2006)
- *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006)
- *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006)
- *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation of the Government of Rwanda* (27 November 2006)
- *Decision on Joseph Nzirorera's Motion to Exclude Testimony of Witness QBG* (11 July 2007)
- *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007)
- *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007)
- *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Uphendra Baghel* (30 October 2007)
- *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007)
- *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008)
- *Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation* (16 April 2008)
- *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008)
- *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008)
- *Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka* (4 December 2008)
- *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009)
- *Decision on Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009)
- *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009)
- *Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony* (15 July 2009)

***Prosecutor v Clément Kayishema and Obed Ruzindana (ICTR-95-1)***  
**Appeals Chamber Judgement** (1 June 2001)

**Trial Chamber**

- *Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute of the International Criminal Tribunal for Rwanda* (5 May 1997)
- *Judgement* (21 May 1999)

***Prosecutor v Jean Mpambara (ICTR-2001-65)***

**Appeals Chamber Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures** (28 February 2002)

***Prosecutor v Justin Mugenzi and Prosper Mugiraneza (ICTR-99-50)***

**Appeals Chamber**

- *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012)
- *Judgement* (4 February 2013)

***Prosecutor v Mikaeli Muhimana (ICTR-95-1B)***

**Trial Chamber Decision on Defence Motion for Protective Measures for Defence Witnesses** (6 July 2004)

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**Appeals Chamber**

- *Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses* (26 June 2001)
- *Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures* (14 September 2001)
- *Judgement* (28 November 2007)

**Trial Chamber Decision on an Oral Application by Defence Counsel Concerning Witness X** (19 January 2002)

***Prosecutor v Siméon Nchamihigo (ICTR-01-63)***

**Trial Chamber**

- *Decisions on Motion for Protective Measures for Prosecution Witnesses* (26 July 2006)
- *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007)

***Prosecutor v Élie Ndayambaje (ICTR-96-8)***

**Trial Chamber Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses** (15 November 2001)

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**Appeals Chamber Judgement** (16 January 2007)

***Prosecutor v Augustin Ndindliimana et al. (ICTR-2000-56)***

**Trial Chamber**

- *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3 November 2004)
- *Decision on Bizimungu's Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses* (7 April 2005)

***Prosecutor v Augustin Ndirabatware (ICTR-99-54)***

**Trial Chamber**

- *Decision on Defence... Second Motion for Inspection of Materials in the Prosecution's Custody* (27 September 2011)
- *Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others* (6 May 2009)

***Prosecutor v Eliézer Niyitegeka (ICTR-96-14)***

**Appeals Chamber**

- *Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121* (28 September 2005)
- *Decision on Request for Review* (30 June 2006)
- *Decision on Request for Review* (7 March 2007)
- *Decision on Third Request for Review* (23 January 2008)

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**Trial Chamber** *Decision on the Defence Motions for Disclosure of Copies of the Prosecutor's Exhibits* (18 September 2001)

***Prosecutor v Léonidas Nshogoza (ICTR-07-91)***

**Trial Chamber**

- *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008)
- *Order to the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations* (5 February 2009)
- *Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 December 2008 on Disclosure* (19 February 2009)

***Prosecutor v André Ntagerura et al. (ICTR-98-46)***

**Appeals Chamber** *Decision on the Defence Motion by Emmanuel Bagambiki for the Restitution of Documents and Other Personal and Family Property* (26 September 2000)

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**Appeals Chamber** *Decision on Defence Motion for Disclosure of Evidence* (1 November 2000)

**Trial Chamber**

- *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda and all Other Documents and*

*Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001)

- *Decision on the Prosecutor's Motion to Stay Disclosure Until Protection Measures are Put in Place* (27 March 2002)
- *Decision on Defence Motions by Nyiramasuhuko, Ndayambaje, and Kanyabashi on, Inter Alia, Full Disclosure of Unredacted Prosecution Witness Statements* (13 November 2001)
- *Decision on Elie Ndayambaje's and Alphonse Nteziryayo's Request for the Recall of Witness FAG Following the Disclosure of a New Confessional Statement* (18 June 2004)
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***Prosecutor v Callixte Nzabonimana et al. (ICTR-98-44D)***

**Trial Chamber**

- *Oral Decision on Disclosure Motion* (29 June 2009)
- *Decision on Nzabonimana's Motion for Stay of Proceedings ...*(13 November 2009)

***Prosecutor v Tharcisse Renzaho (ICTR-97-31)***

**Appeals Chamber**

- *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005)
- *Judgement* (1 April 2011)

***Prosecutor v Emmanuel Rukundo (ICTR-2001-70)***

**Trial Chamber**

- *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses* (24 October 2002)
- *Decision on Prosecutor's Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS, and BLJ* (28 November 2006)

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**Trial Chamber** *Decision on Defence Motion for Disclosure* (15 January 2004)

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**Appeals Chamber**

- *Decision on Defence Motions on Rule 68 Disclosure* (5 October 2007)
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***Prosecutor v Aloys Simba (ICTR-2001-76)***

**Appeals Chamber** *Decision on Prosecution Request for Protection of Witnesses* (4 March 2004)

***Prosecutor v Protais Zigiranyirazo (ICTR-01-73)***

**Trial Chamber**

- *Decision on Prosecutor Ex Parte Confidential Application et al* (10 October 2005)

- *Decision on the Prosecution Joint Motion for Reopening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza by Video-Link* (16 November 2006)
- *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007)

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##### ***Prosecutor v Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa* (SCSL-04-14)**

###### **Trial Chamber**

- *Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68* (8 July 2004)
- *Order to the First Accused to re-file summaries of witness testimonies* (2 March 2006)
- *Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure* (6 November 2006)

##### ***Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15)**

###### **Trial Chamber**

- *Decision on the Sesay Defence Team's Application for Judicial Review of the Registrar's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 16th April 2007* (12 February 2008)
- *Defence Reply to Prosecution Response to: Application for Reconsideration of and/or Leave to Appeal Regarding the Order of Judge Bankole Thompson (Protective Measures for Witnesses and Victims) Rendered on the 23rd May 2003* (June 13 2003)

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