

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

The Balancing of Competing Rights: The Right to Disclosure at the International Criminal Court

Research paper submitted in partial fulfilment of the requirements for the award of the LLM

degree



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2015

DECLARATION

I, Brenda Mwale, declare that *“The Balancing of Competing Rights: The Right to Disclosure at the International Criminal Court”* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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ACKNOWLEDGEMENT

I would like to express my sincere gratitude to my supervisor Professor Gerhard Werle for his guidance, insight and support during the writing of this thesis. A word of utmost appreciation also extends to Dr. Moritz Vormbaum who read through the drafts and provided me with insightful commentary. I am equally grateful to the German Academic Exchange Service (DAAD) for funding my LL.M study. Special thanks to my friends Darleen Seda, Thato Toebe and Victoria Ojo for the moral and intellectual support. My sincere gratitude also goes to my family for their enduring love, support and motivation through the entire academic journey.



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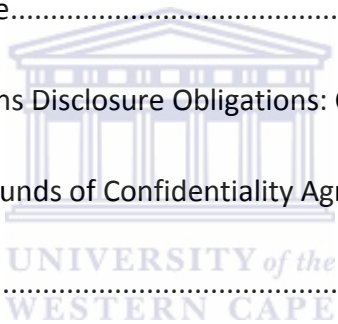
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KEY WORDS

Ad hoc tribunals

Competing interests

Confidentiality

Disclosure

Exculpatory evidence

Fair trial

ICC Statute

International Criminal Court

National Security

Non-disclosure



LIST OF ABBREVIATIONS

ECCC	Extraordinary Court of Cambodia (ECCC)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Ad hoc Criminal Tribunal for Rwanda
ICTY	International Ad hoc Criminal Tribunal for the Former Yugoslavia
IMTN	International Military Tribunal at Nuremberg
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
UN	United Nations
UDHR	Universal Declaration of Human Rights



Chapter 1

Background of the Study

1. Background

It is trite law that an accused person has the right to have adequate time and facilities to prepare his defence. This is one of the fundamental ingredients for a fair trial well-established in both domestic and international law. One specific requirement that emanates from fair trial guarantees is the right to disclosure of evidence. In this regard, the Rome Statute places an obligation on the prosecution to disclose material within its possession to facilitate the effective and timely preparation of the defence case. However, disclosure has been one of the most contentious procedural issues in the International Criminal Court (ICC).

There are constant tensions caused by the prosecutions disclosure obligations. On the one hand, the defence has a right to disclosure and on the other the prosecution has a duty to disclose. This duality often brings about competing interest. Further, the restrictions on disclosure exacerbate the problem. For instance, article 67(2) of the ICC-Statute and Rule 77 of the Rules of Procedure and Evidence require the prosecution to disclose potentially exculpatory evidence to the accused subject to restrictions on *inter alia* confidential information, witness protection and national security interests. In one given instance therefore, there may be tensions between confidentiality of information¹ as well as the conflicts arising between the rights to disclosure on the one hand and the protection of witnesses and safeguarding of state

1 Typically, informants give information to the prosecution on the assurance of confidentiality, and some of this information may be potentially exculpatory.

national security interests on the other hand.² The interest in safeguarding an on-going investigation may also clash with that of defence in disclosure. Such scenarios are often complicated and this is what makes disclosure of evidence complicated.

In the *Prosecutor v Lubanga*,³ the Single Judge emphasized that disclosure must fully respect the accused right to a fair trial enshrined under the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Individual Freedoms and the American Convention on Human Rights.⁴ But that the uniqueness of the ICC should address any possible tensions among the provisions of these conventions. In addition, the Judge opined that an effective disclosure regime should take into account the protection of victims, preservation of evidence, confidentiality of certain information and guarantee that victims are able to adequately exercise their procedural rights.⁵ The ruling however did not address the problem of how to solve the possible tensions that could result from conflicting rights of the accused and third parties such as witnesses, victims and information providers.

Asides from the restrictions to full disclosure listed above, there are other conflicting interests presented by the regime. For instance, the Rome Statute obliges the prosecution to comply with the reasonable time standard in disclosing evidence. Where deadlines on disclosure are set by the Pre-Trial Chamber the interests of crime control and truth finding on the one hand conflict with those of efficient trial management and the rights of the accused on the other

2 The disclosure of witnesses for example may be important in the one hand and may interfere with witness protection on the other. The same holds true for confidential materials and information are likely to compromise confidentiality of agreements.

3 The *Prosecutor v Thomas Lubanga Dyilo*, ICC (PTC) Annex of 15 May 2006.

4 Paragraph 4 of the Annex.

5 Paragraph 6 of the Annex

hand.⁶ In some of the cases, there is a bulk of evidence obtained which may not allow the prosecution to put it in order and adhere to the reasonable time standard. Consequently, a substantial body of exculpatory evidence is either left undisclosed or disclosed late such that the defence lacks ample time to prepare for the trial. In such instance isn't the accused person prejudiced? Also, there are some practical circumstances such as the number of suspects and witnesses involved as well as the nature of the crime that may further complicate the efficacy of disclosure. How therefore can both interests of the accused and of the prosecutorial authorities be sufficiently met?

The main focus of this research paper is not on the general duty of disclosure by the Prosecutor, but on the conflicting interests presented by the right and duty to disclose. This research paper centres on the interests in confidentiality agreements, witness protection and national interests, as they have caused particular controversy in the *ad hoc* tribunals and still continue to be the cause significant challenges in the ICC proceedings. This paper will review a number of judicial decisions in order to assess the consistency and efficacy by the ICC in deciding disputes where there are conflicting interests. Proposals are also made in an attempt to provide a harmonised disclosure regime which will act as a guide for the ICC and other international tribunals. This research recommends the balancing of competing interests to redress the constant conflicts in disclosure obligations.

2. Problem Statement

It is apparent that disclosure is an area of procedural conflicts and that there is an inherent challenge in harmonizing competing fairness concerns of all parties. While the ICC

6 Klamberg M (2013) 283.

jurisprudence concludes that all the above-mentioned interest are fundamental, practice is still indicative of the uncertainty as to whether the right to disclosure prevails over other interests or vice versa. In addition, the courts jurisprudence does not provide a clear cut indication on how the rights will be balanced in future cases. The current system which relies on the prosecutor to make a decision on what material to disclose, and only turns to the court in case of any doubt, does not facilitate fair disclosure either. As a result, the prosecution may be skewed to favour one right over another. For that reason, this research paper seeks to analyse the courts jurisprudence and look at their strengths and potential weaknesses as well as attempts to balance the said rights and interests.

3. Significance of the Study

The significance of this research is demonstrated by the fact that pre-trial disclosure is one of the most complex procedural rights in the ICC system which needs an effective remedy. In *Prosecutor V Thomas Dyilo Lubanga*, the first ICC trial judgement, the Trial Chamber ordered two stays of proceedings resulting from non-disclosure by the Prosecution. It noted that the omission or any refusal of the Prosecution to disclose potentially exculpatory evidence sufficiently compromised the accused's person's right to a fair trial. As a result, the *Lubanga* trial almost collapsed. Rules of disclosure are therefore an important element in the criminal procedure and their importance in guaranteeing the right of a fair trial cannot be gainsaid. This research paper will contribute to a growing body of literature that aims to streamline the right to disclosure in the ICC system.

4. Research Questions

The study seeks to answer the following questions:

- What is the scope of the OTPs disclosure obligations?
- Does non-disclosure amount to the violation of the right to a fair trial?
- How can one strike a balance between competing interests presented by the right to disclosure?
- To what extent can conflicts be resolved by the Pre-Trial Chamber?
- Are there alternatives to the ICC disclosure regime?

5. Argument to the Problem

It is assumed that non-disclosure and the one sided balancing of competing interests in favour of the prosecution can have a negative effect on the right to a fair trial. It is further assumed that a simpler and well established disclosure system will minimize this shortcoming. The unbalanced system is supported by the fact that there are little guidelines on how all legitimate competing interests can be accommodate within the Rules of Procedure and Evidence. This research paper will address the problem presented by discussing the jurisprudence of the International Criminal Court. It is hypothesized that these conflicts are better resolved through a well-crafted disclosure system. Also it will examine how the ad hoc tribunals dealt with the issue of disclosure.

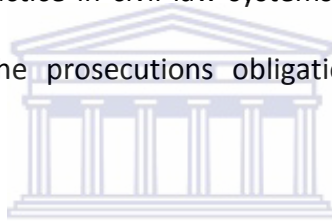
6. Structure of the Paper

Chapter 1: Proposal

This Chapter gives the general outline of the research. It focuses on the problem statement, significance of the study, research questions, hypothesis and methodology.

Chapter 2: Introduction

This Chapter gives a general introduction to the right of disclosure, the purpose of disclosure, the right to a fair trial and its nexus to disclosure, an introduction to the right to disclosure in international criminal law, the practice in civil law systems and the common law system, the principle of equality of arms, the prosecution's obligation to disclose evidence and the requirements for disclosure.



Chapter 3: Prosecution Disclosure Obligations in International Criminal Tribunals and Domestic Jurisdictions

This chapter discusses the right to disclosure in the International Military Tribunal, the International Criminal Tribunal of the Former Yugoslavia, the International Criminal Tribunal of Rwanda, the Special Court for Sierra Leone, the Special Tribunal of Lebanon and the Extraordinary Court of Cambodia. It will also look at how disclosure is regulated in civil law jurisdictions such as Germany and common law jurisdictions such as New Zealand.

Chapter 4: The Right to Disclosure at the International Criminal Court

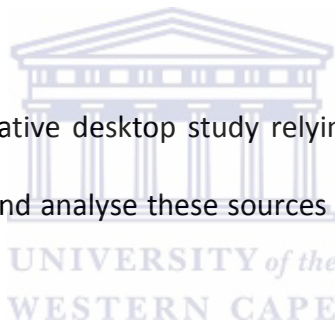
This Chapter discusses the relevant provisions of the Rome Statute and the Rules of Procedure and Evidence. It also analyses the ICC jurisprudence as well as the competing interests that arise in the cases.

Chapter 5: Conclusion and Recommendations

This Chapter includes the conclusion and recommendations of the study. It will also include a draft proposal for new regulations of disclosure for the ICC Statute.

7. Research Methodology

This research shall utilize a qualitative desktop study relying on both primary and secondary sources. It will critically examine and analyse these sources in order to develop answers to the research questions.



Chapter 2

Introduction

1. The Right to Disclosure

Although it is true that courts must act firmly against persons who commit crimes, it is equally important that the fundamental rights of such persons are guaranteed. Therefore, the entire criminal justice system must provide an accused person with several rights to ensure a fair trial. Among these is the right to disclosure.

In a broad sense disclosure means the act of revealing that which was previously unknown. In the context of criminal proceedings, the term refers to ‘the uncovering of evidence and other information between the parties of legal proceedings before and during these proceedings’.⁷ As a general rule the prosecution is required to disclose to the defence all the material that may either weaken or strengthen the defence case. And this rule has been accepted by several countries. The Law Commission of Ireland for example defines disclosure as

‘[the] duty on the prosecution to disclose and to make available to the defence any material in the possession or procurement of the prosecution which may be relevant to the case which could either help the defence or damage the prosecution’.⁸

Traditionally, disclosure was not explicitly included in many legal texts. Courts found this right to be part of more wide-ranging rights enshrined in many constitutions and human rights instruments (such as the right to make a defence, the right to have adequate time and facilities

7 Büngeener L *Disclosure of Evidence in International Criminal Trials - A Historical Overview* (PhD Thesis, University of Marburg, 2012) 5.

8 Law Reform Commission of Ireland ‘Issues Paper on Disclosure and Discovery in Criminal Cases’ available at <http://www.lawreform.ie/fileupload/Issues%20Papers/ip5Disc.pdf> (accessed 15/09/2015).

to prepare for a defence, and the right to a fair hearing). It is therefore '[an] example of the proliferation of implied rights that are the product of interpretation of basic and general norms'.⁹ In including disclosure in the ambit of other rights accorded to the accused, courts now see it as an integral part of the accused right to a fair trial. The underlying reason behind the inclusion of disclosure rights alongside other fundamental rights is that it is a critical tool for the accused to mount a meaningful defence.¹⁰

When both the prosecution and the defence are cognizant of the arguments and evidence that the opposing sides intend to rely on, trials will run smoothly.¹¹ For instance, the accused needs to know the identity of prosecution witnesses before the trial commences; only through such disclosure can the accused challenge the credibility of witnesses.¹² From that view point, it is obvious that disclosure promotes efficient and fair trial. Additionally, where non-disclosure has a direct effect on the accused's case, it may amount to a miscarriage of justice, depending on the overall circumstances of the case and the significance of the evidence concerned. Consequently, it is a ground for appeal in many criminal cases.¹³

Nonetheless, the complexity in disclosure arises in two instances. First, when the prosecutor is obligated to disclose both inculpatory and exculpatory evidence. The prosecution is then forced to wear two hats - disclosing both evidence that may strengthen or weaken the defence's case. Furthermore, whereas the prosecution is obliged to fully disclose evidence it is difficult to gauge

9 Langer M & Roach K ' Rights in the criminal process: a case study of convergence and disclosure rights' in Tushnet M, Fleiner T & Saunders C (ed) *Routledge Handbook of Constitutional Law* (2013)275. .

10 Langer M & Roach K (2015)275.

11 Ashworth A & Redmayne M *The Criminal Process* (2010)259.

12 Klamberg M (2013)269.

13 Ashworth A & Redmayne M (2010)259.

whether material that ought to be disclosed was in fact disclosed. This is because at the first stage of collection of evidence, it is the prosecution which makes a decision on the exculpatory value of the evidence in its possession.¹⁴ Second is the fact that disclosure of evidence is not absolute. Limitations on the right to disclosure include *inter alia* confidentiality, witness protection and protection of national interests and the prosecution is allowed to withhold disclosure on such grounds. Disclosure then requires finding a balance between the limitations of the duty to disclose evidence and the rights of the accused person. Achieving this equilibrium becomes even more relevant when the prosecution withholds certain material subject to the limitations.

Taking into account non-absolute and discretionary elements of the right and duty to disclosure, it is necessary to analyse whether there are appropriate safeguards to ensure the rights of the accused to a fair trial are upheld. Such safeguards may involve the harmonization of competing rights. This is because during trials the interest of the defendant to be informed about potentially exonerating evidence, the interest in protecting a witness who gave such evidence and the interest of safeguarding an ongoing investigation may all compete at a given instance.¹⁵ Such situations call for careful balancing of interests so as not to prejudice one party.

14 See Laucci C *The Annotated Digest of the International Criminal Court* (2014) 236.

15 Fiori BM *Disclosure of Information in Criminal Proceedings: A comparative analysis of national and international criminal procedural systems and human rights law* (PhD Thesis, University of Groningen, 2015) 2.

2. The Purpose of Disclosure

The right to disclosure of evidence is predominantly based on the concept of fair trial rights. This is because disclosure primarily seeks to protect the accused's rights in criminal trials granting the accused adequate facilities for the preparation of the defence. Firstly, it aims to assist in the timely preparation of the accused's case. Secondly, it ensures that non-contentious issues are resolved at the preliminary stages of the proceedings. In effect, disclosure facilitates the right to an expeditious trial. Thirdly, disclosure guarantees that there is equality of arms between the prosecution and the defence. Fourthly, it prevents trial by ambush where one party to the proceedings only learns of the other party's evidence at the trial and it becomes practically impossible to rebut the evidence. Fifth, it encourages resolution of cases including in appropriate circumstances entering a guilty plea in the early stages of the proceedings.¹⁶ Lastly, it enables the court to make an informed determination on the innocence or guilt of the accused person and prevent wrongful convictions.

3. Disclosure of Evidence as a Precondition to a Fair Trial

3.1 The Right to a Fair Trial

The concept of a fair trial is an 'umbrella notion' as it includes minimum guarantees that ensure the equitable dispensation of justice.¹⁷ It is also included in article 10 of the Universal Declaration of Human Rights (UDHR) which provides that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his

16 ROFE Q.C 'Disclosure by both sides' available at http://www.aic.gov.au/media_library/conferences/prosecuting/rofe.pdf (accessed 15/09/2015).

17 Acquaviva G, Combs N, Heikikila M et al 'Trial Process' in Sluiter G, Friman H, Linton S et al (ed) *International Criminal Procedure: Principles and Rules* (2013) 773.

rights and obligations and of any criminal charge against him'.¹⁸ Most human rights instruments and statutes of international criminal courts and tribunals, as will be seen later in this research paper, also provide for the right to a fair trial.

In addition to the UDHR, the standards of fairness have been clearly set out in the International Covenant on Civil and Political Rights (ICCPR) and have been adopted in international tribunals and courts.¹⁹ Article 14(3) (b) of the ICCPR provides for certain 'minimum guarantees' that should be afforded to accused. It states: '[in] the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To have adequate time and facilities for the preparation of his defence'. Such guarantees are purely procedural in nature and create a benchmark of fairness in any criminal trial.

The notion 'adequate facilities' presupposes that the accused or his defence is granted access to information and documents for the preparation of his defence.²⁰ Such access ensures prior knowledge of the prosecution's case which is the right to disclosure of evidence. The ICCPR requires in mandatory terms that such guarantees are available to the defence.²¹ While it is clear that the fair trial guarantees are non-derogatory what is in issue here is whether non-disclosure amounts to a breach of a fair trial.

18 Article 10 of the Universal Declaration of Human Rights.

19 The minimum guarantees of a fair trial in Article 14 of the ICCPR have been fair trial guarantees of Article 14 of the ICCPR have been codified almost verbatim by International Tribunals. See Article 21 of the ICTY Statute and Article 20 of the ICTR Statute

20 *Tochilovsky V Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (2007)95.

²¹ Despite the fact that neither the UDHR nor the ICCPR are directly applicable to the ICC, one could argue that at least the ICCPR can be viewed as an applicable treaty under Article 21(1) (b) of the Rome Statute.

It is undisputed that non-disclosure can generate significant delays in a trial; through the late commencement of trials, adjournments or stays of proceedings. It may also deny the accused access to important information and evidence. Such conduct has a direct impact on the accused persons' defence, thus infringing on his fundamental rights to fair and expeditious trial.²² In the *Lubanga* trial, the Trial Chamber concluded that a fair trial could not be achieved due to the non-disclosure by the prosecutor. But, it is also agreed that when singly looked at the right of fairness of the accused must be balanced with other rights.²³

3.2 The Principle of Equality of Arms as an Important Element of a Fair Trial

Although Article 14 of the ICCPR does not expressly refer to the principle of 'Equality of Arms' it is agreed that the concept is an essential element of a fair trial.²⁴ The notion of equality is a 'scale through which the requisite procedural fairness in any criminal proceeding can be measured'.²⁵ The principle requires that each party to the trial must be granted the same possibility to present his case without being placed at a substantial disadvantage vis-à-vis his opponent.²⁶

In practice, the prosecution is more advantaged as opposed to the defence in terms of finance, funds, personnel as well as investigative techniques. And it is impossible for the defence to

22 Amann G 'The Disclosure Regime Before The ICC: The Right to a Fair Trial' available at http://www.heritagetpirdefense.org/papers/Gabriel_Amman_Disclosure_Regime_Before_ICC.pdf (accessed 28/04/2015)

23 Fair trial recognizes other interests that need to be protected such as the victims and witnesses, confidential information amongst others.

24 Cited in Amann G 'The Disclosure Regime Before The ICC: The Right to a Fair Trial' http://www.heritagetpirdefense.org/papers/Gabriel_Amman_Disclosure_Regime_Before_ICC.pdf (accessed 28/04/2015)

25 Osasona T "Equality of Arms" and its effect on the quality of justice at the ICC' available at <http://acontrarioicl.com/2014/04/10/equality-of-arms-and-its-effect-on-the-quality-of-justice-at-the-icc/> (accessed on 28/04/2015)

26 Fiori BM (2015)118.

match this because of its limited resources.²⁷ The mismatch is even broader in international trials. While the prosecution in most instances commences investigations and collects evidence years before the trial begins, the defence starts its investigation at a much later stage. As a result, the defence heavily relies on the evidence gathered by the prosecution.

Disclosure therefore becomes an essential tool through which the defence acquires its information. It is in fact a 'practical expression of the principal of equality of arms'²⁸ as it aims to cure the imbalance between the prosecution and the defence. The concept of equality of arms guarantees equal opportunities for both the defendant and the prosecution to present their cases regardless of their advantaged or disadvantaged positions. Moreover, there can be no sincere equality if the prosecution is allowed to withhold information from the defence. Thus, the right to fair trial and equality of arms are inseparable.

4. Different Legal Traditions: Disclosure in the Adversarial and Inquisitorial Systems

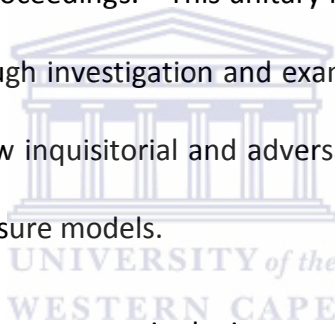
While fair trial guarantees are universally accepted, the rules and dynamics of disclosure are largely dependent on the legal tradition governing it. In principle, there are distinctive criminal procedures in two major legal traditions: the common law/adversarial system and the civil law /inquisitorial system. And one way to capture the differences is by highlighting their contrasting features i.e. the role of the judges and parties to the proceedings.

In a typical adversarial system, there are two adversaries, the prosecution and the defence, who present their cases before an impartial judge. In this system, the judge is an umpire and

27 Fiori BM (2015) 230.

28 Fiori BM (2015)231.

acts as a referee between the two adversaries.²⁹ More importantly, the prosecution and defence have equal powers and rights to investigate and present their cases. In an inquisitorial system however, the main trial is dominated by the judge who decides the order in which evidence is taken and who evaluates the collected evidence. The system entails 'unitary investigation'³⁰ where the judge assumes the role of the chief interrogator of the witnesses and the defendant. The prosecution is in charge of the investigation of evidence but the defence has little or no power to conduct its investigations and therefore solely relies on the prosecution for evidence. Contrary to the adversarial model, the prosecution is an independent agent rather than a party to the proceedings.³¹ This unitary model is seen as a system that aims to get to the truth through thorough investigation and examination of evidence. But I will not dwell on the entire debate on how inquisitorial and adversarial systems work; I will only limit my research to the different disclosure models.



Both systems have adopted different terminologies to refer to the process of unveiling evidence in the two systems. The Common law system, for example, refers to it as the right to disclosure and the notion entails the exchange of evidence by both parties to the proceedings. The general idea is that disclosure takes place inter-parties during the trial while judges 'watch from the sidelines'.³² The inquisitorial system on the other hand refers to the process as discovery or the right to access the file, *Akteneinsichtsrecht* in German, *droit de consulter le*

29 Cryer R, Friman H, Robinson D et al *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 426.

30 Langer M 'The Long Shadow of the Adversarial and Inquisitorial Categories' in Dubber MD & Hörnle T (ed) *The Oxford Handbook of Criminal Law* (2014) 895.

31 Ambos K 'International criminal procedure: "adversarial", "inquisitorial" or mixed?' *3 International Criminal Law Review* (2003)9.

32 Heinsch R, 'How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?' in Stahn C & Sluiter G *The Emerging Practice of the International Criminal Court* (2009)488.

dossier in French, and *derecho a examinar el expediente* in Spanish.³³ Here, a compilation of documentary record of evidence, referred to as the dossier, is given to the accused. The evidence gathered by the police and the prosecution no longer belongs solely to the prosecution it becomes open to the defence. Those who argue in favour of the inquisitorial system suggest that it avoids problems of disclosure that are characteristic in an adversarial system.

Whichever way one looks at the two systems, it is agreed that disclosure/ discovery is paramount to the accused's case. Besides this agreement, both systems grapple with the limitations of disclosure. How they deal with the limitations is heavily dependent on their different formal structures already described. Civil law countries, for example, focus on how to accommodate competing rights within the dossier system. Conversely, common law countries adopt an approach of expressly restricting disclosure in certain instances.³⁴ This discussion is central to this research paper as it will lay a background for discussion on the type of the disclosure regimes employed by the ICC and international criminal tribunals as well as a comparative study of different models of disclosure.

5. The Right to Disclosure in International Criminal Proceedings

International criminal law aims to ensure that perpetrators of international crimes are prosecuted. Just as in domestic criminal proceedings, it is essential that the process is legitimate. Thus international tribunals are obliged to develop laws and procedures that guarantee fairness throughout the trial. The benchmark was laid down by a UN Secretary

33 Langer M & Roach K (2013) 275.

34 Langer M & Roach K (2013) 276-279.

General report in 1993 stating that it is paramount that the International Criminal Tribunal for the Former Yugoslavia (ICTY) adheres fully to human rights standards such as the ones set out in Article 14 of the ICCPR.³⁵ Besides, the tribunals have adopted procedures to meet these standards. It is noteworthy that that procedure before them has immensely developed. For instance, the Nuremberg IMT Rules of Procedure for instance comprised only 11 rules, the Tokyo International Military Tribunal for the Far East (IMTFE) comprised only nine rules, the ad hoc tribunals contained, in contrast, more than 150 rules and the Rules of Procedure and Evidence of the ICC comprises 225 Rules.³⁶

Regrettably, prosecuting perpetrators of international crimes gives rise to unique evidentiary challenges.³⁷ The primary challenge that arises in all international criminal tribunals concerns the disclosure of evidence. This is due to the fact that international proceedings are much more complicated than domestic trials. Most of the courts investigations take place in countries rife with conflict.³⁸ Thus witnesses and victims are often fragile and security interests are also at stake.³⁹ This poses a special challenge to prosecuting international crimes and to disclosure in particular where there is an eminent risk in disclosing evidence.

Antonio Cassese also notes that the international context is faced with obstinate challenges such as the sheer volume of evidence, measures that permit delayed disclosure, non-cooperation by state authorities as well as the limitations on disclosure.⁴⁰ Thus avoiding these

35 Report of the UN Secretary General, S/25704, 3 May 1993.

36 Büngener L (2012) 2.

37 Combs N A 'Evidence' (2011) in Shabas W & Bernaz N Routledge Handbook of International Criminal Law (2011) 323.

38 Whitting A (2015) 1008.

39 Whitting A (2015) 1008.

40 Cassese A, Gaeta P, Baig L et al *Cassese's International Criminal Law* 3 ed (2013) 372.

problems also requires an effective information management system that permits disclosure of large volumes of information and leaving out irrelevant ones.⁴¹

Another challenge is that the defence heavily relies on the evidence collected by the prosecution. In fact, most of the potentially favourable evidence is obtained by the prosecution. As compared to the defence, the prosecution has vast power to conduct investigations. Typically the bulk of evidence is gathered by the prosecutor from information givers such as the United Nations are much keener to cooperate with the OTP rather than with a private person—such as the defendant.⁴² Cooperating with the former signifies the international support for the crime while helping the accused is abhorred for obvious reasons. Hence, the heavy reliance on evidence obtained by the prosecution.

In turn, the defence often complains that the Prosecution failed to comply with its disclosure obligations. The Prosecution responds by either disputing the claim or acknowledging the omission. The judges, on the other hand, assess whether there was inadvertence on the part of the prosecution and whether the materials should have been disclosed.⁴³ Where in fact there was malfeasance, the judges, in limited circumstances, give sanctions. More likely, the prosecution is only urged to comply with its obligations. Different accounts of this kind of litigation have played out again and again at the international tribunals.⁴⁴

41 Cassese A, Gaeta P, Baig L et al *Cassese's International Criminal Law* 3 ed (2013) 372.

42 Caianiello M 'Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?' (2010) *10 International Criminal Law Review* 34.

43 Whitting A 'Disclosure Challenges at the ICC' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (2015) 1007.

44 Whitting A (2015) 1007.

Given the uniqueness and conceivable challenges posed by international prosecutions, it does not come as a surprise that there are crucial shortcomings with regard to disclosure. This is supported by case law. In the *Krstić* case before the ICTY, the Prosecution failed to disclose to the defence the fact that two of the witnesses were a subject of separate prosecution investigations.⁴⁵ The fact that the witnesses apparently were of questionable character should have been disclosed to the accused. In the *Bagosora* case at the ICTR, the Trial Chamber neglected the accused's right to disclosure in favour of witness protection without giving any convincing justification.⁴⁶

The ICC has also had its fair share of problems on the subject of disclosure. The first proceedings before the ICC proved difficult where the trial almost came to a halt because of numerous failures by the prosecution to disclose potentially exculpatory evidence. The Trial Chamber in the *Lubanga* trial asserted that the non-disclosure had reached such an intolerable level that it was 'now impossible to piece together the constituent elements of a fair trial'. The Chamber therefore ordered two instances a stay of proceedings that almost terminated the proceedings. Until recently, the prosecution in the *Bemba* case⁴⁷ has failed to disclose all relevant material to the defence. In the *Gbagbo* case, the prosecution failed to disclose witness statements with no valid reasons.⁴⁸

The problem is intensified by the lack of concise and clear disclosure rules which gives the judges a wide discretion to define appropriate standards.

45 *Prosecutor v Krstić*, ICTY (AC), Judgement of 19 April 2004, para. 204.

46 Pozen J 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials' (2006) 38 N.Y.U. J. Int'l L. & Pol. 298-322.

47 *Prosecutor v Jean-Pierre Bemba Gombo*, ICC (PTC) decision of 15 June 2009 ICC-01/05-01/08.

48 *Prosecutor v Laurent Gbagbo and Charles Goude* ICC (TC) decision 21 August 2015, Para 13.

6. Conclusion

This chapter has established that the right to disclosure is an essential tool in criminal trials. It plays an essential role in ensuring that the rights of the accused are guaranteed and that there is equality of arms between the prosecution and the defence. But as a procedural issue, the right to disclosure cannot be looked at singly; it must be assessed against the background the whole procedural system. Thus to assess the complexity of the subject, disclosure must be looked at through the perspective of the prosecutor, defense/accused, as well as all other actors in the entire criminal justice system whose interests are affected by the right. International trials however are more complex and the need to have an effective disclosure system is apparent.



Chapter 3

Prosecution Disclosure Obligations in International Criminal Tribunals and Domestic Jurisdictions

1. International Tribunals

1.1 International Military Tribunal

The Nuremberg trial marks the first time in history that major war criminals who committed gross human rights violations were brought before an international tribunal. The trial was based on the Charter of the International Military Tribunal at Nuremberg which is considered as the 'birth certificate' of international criminal law.⁴⁹ Compared to the Statutes on other international tribunals, the charter was rudimentary and fragmentary with only 30 articles.

The drafting of the procedural rules was left to the discretion of the judges of the tribunal.⁵⁰ Similar to the IMT Statute, the procedural rules were rudimentary and only contained 11 provisions. Article 16 of the IMT Charter is the principle disclosure provision, at least on the face value. It provides that:

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants [and a copy] shall be furnished to the Defendant at reasonable time before the Trial.

49 Werle G & Jessberger F *Principles of International Criminal Law* 3 ed (2014)5.

50 Article 13 of the *Charter* of the International Military Tribunal.

This provision is complemented by Rule 2 of the RPE which provides for the timeline for such disclosure. There were no specific rules relating to the manner and restrictions of disclosure. Regrettably, the defence counsels were not permitted to access the prosecution's files of evidence⁵¹ and the prosecution was under no obligation to disclose evidence in favour of the accused.

Much of the evidence relied on during the Nuremberg Trials was documentary thus disclosure disputes rarely came into play. For instance, questions of confidentiality agreements were seldom addressed. However with regard to the identity of witnesses, the prosecution called its witnesses, on the ninth day of the trial, without disclosing their identity of the witness prior to the trial. Among other reasons for the non-disclosure were security policy reasons.

The fact that the untenable political situation during the Nazi era was difficult, it is easy to understand the importance of witness security and protection. Despite this, most of the disclosure obligations were not obeyed by the prosecution. Such a weak procedural framework could not allow the prosecution to adhere to the present disclosure obligations set by international tribunals.

51 May R & Wierda M 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha' 37 *Columbia Journal of Transnational Law* 756.

2. The *Ad hoc* Tribunals: Disclosure Rules in Proceedings Before the International Criminal Tribunal of the Former Yugoslavia and International Criminal Tribunal of Rwanda

2.1 Overview and Legal Framework

The system of disclosure in the *ad hoc* tribunals is more developed than that of the IMT. Procedurally, the ICTY and ICTR have developed a significant body of rules relating to the disclosure of evidence drawing on aspects of both adversarial and inquisitorial systems in an effort to balance the rights of the accused, to protect the ends of justice and to enhance the efficiency of proceedings. The judges have also given special attention to the right of a fair trial. More importantly, the two tribunals have gone far beyond the legacy of Nuremberg IMT by establishing watertight procedures that guarantee fairness in the proceedings. The rules on disclosure in both tribunals are incidental, thus this research paper will discuss them in tandem. Generally, the prosecution has extensive disclosure obligations which also cover exculpatory evidence. Rule 68 (A) of the ICTR and ICTY RPE, oblige the prosecutor to disclose to the defence, as soon as practicable, 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.⁵² In the *Kupreškić* case the court opined that:

‘...the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution,

52 Based on the broad concept of disclosure the defence and prosecution conceive what amounts to exculpatory evidence differently. This problem arose in *Prosecutor v Cermak* in the ICTR. The prosecution alleged that there was a Joint Criminal Enterprise to forcibly move Serbians to Croatia but failed to disclose evidence of hatred for the Serbs by the local Croatian forces. The prosecution contended that this evidence was not exculpatory, but the Chamber disagreed.

which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting'.⁵³

Yet, the ICTY Trial Chamber in *Blagojević et al.*, concluded that the obligation to disclose exculpatory evidence does not replace the defence's investigations.⁵⁴ In essence the prosecution is not required to identify the material being disclosed as exculpatory. But practice may demand so. As for the defence, it must only disclose information when it intends to raise an alibi defence or any special defences. In the event that the parties do not comply with their disclosure obligations, the court may provide a sanction or apply other appropriate measures.

55

Certain materials, however, are exempted from the disclosure, such as the prosecutions internal documents. There is also provision in the Rules to protect informants and information which may prejudice ongoing investigations, or may affect the security interests of any State.⁵⁶ To complicate the matter, the prosecution is under a number of specific obligations to disclose evidence of an exculpatory nature to the defence 'as soon as practicable.' In such circumstances, the prosecution may apply to the Court *in camera* to be relieved from its disclosure obligations.

Each ground of restricting disclosure gives rise to competing interests either between the accused and the prosecution or between other third parties and the defence. In ensuring that the proceedings before the tribunals are fair, due regard must be taken for the protection of all

53 *Prosecutor v. Kupreškić et al.*, ICTY (TC) Decision of 21 September 1998, para. (ii).

54 *Blagojević et al.*, ICTY (TC) Decision of 12 December 2002, para. 26.

55 Schun C *International criminal Procedure: A Clash of Legal Cultures* (2010) 111.

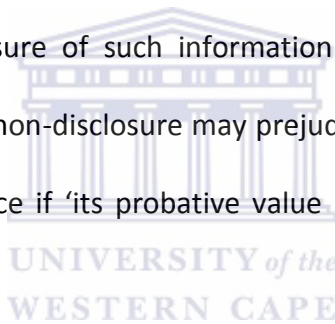
56 See rules 66(C) and 68 (C) (D).

interest. It then becomes clear that the *ad hoc* tribunals have to determine the most appropriate response to any application by either party of the proceedings to either introduce or withhold evidence.⁵⁷

2.2 Restrictions on Disclosure

2.2.1 Confidential Information

Both the *ad hoc* tribunals and the ICC share analogous provisions with regard to confidential information. Rule 70(B) of the ICTY and ICTR provides that persons or entities can provide the prosecutor with information on the basis of confidentiality, to be used solely for the purpose of generating new evidence. Disclosure of such information is subject to the consent of the information provider. While such non-disclosure may prejudice the accused, the Trial Chamber has the power to exclude evidence if 'its probative value is substantially outweighed by the need to ensure a fair trial'⁵⁸



2.2.2 The Disclosure of Witness Identities

The basic right of the accused person to examine witnesses, read together with the right to have adequate time and facilities to prepare the defence envisages more than a 'blind confrontation in the courtroom'.⁵⁹ The defence basically has a right to know the identity of the prosecution witness. Analogous to this is the argument that the use of anonymous witnesses infringes upon the accused's right to cross-examination of the witnesses.

57 Klip A & Sluiter G *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999* (2001)282.

58 Rule 89(D)

59 Tochilovsky V *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (2008)106.

2.2.2.1 Delayed Disclosure

During the pre-trial stage, the prosecution may request the chamber not to disclose the identity of a witness.⁶⁰ But, there must be exceptional circumstances in which a witness would be at risk or in danger to allow for delayed disclosure. Thus the fears of danger by potential witnesses do not establish any real likelihood of danger. There must be some 'objective foundation for those fears'.⁶¹ Any delay in disclosure therefore is permitted only to the extent that the defences right to adequately prepare for the trial is not prejudiced.⁶² Pursuant to Rule 75(A), the Trial Chamber may order protective measures which do not prejudice the rights of the accused.

Unlike the ICTR, the ICTY Rules however do not prescribe a time limit for disclosure of witness identities where delay is permitted. Rule 66(A) (ii) provides that the identity of witnesses should be disclosed 'in sufficient time' to allow the defence adequate time to prepare its defence. The notion of 'sufficient time' is determined on a case to case basis depending on the particular circumstances of the case.⁶³

However, it is noted that the degree of risk on witness is directly dependent on the time between when the identity of the witness has been disclosed and when he has to give evidence⁶⁴ -the longer the time the greater the risk. Thus the Trial Chamber has balance

60 Rule 69

61 *Prosecution v Brdanin and Talic* ICTY(TC) Decision of 8 November 2000, para 13

62 See Rule 69 of the ICTY and ICTR Rules.

63 *Prosecutor v Seselji*, ICTY (TC) Decision of 22 November 2006, para 17.

64 *Prosecution v Brdanin and Talic* ICTY (TC) para 13.

between the length of time necessary to disclose the identity of the witness, the safety of the witness as well as adequate time needed for the defence to investigate the witnesses.

2.2.2.2 Witness Anonymity

The impact of witness anonymity on disclosure is clear. The accused does not get a chance to know the identity of his accuser; he cannot investigate the witness and cannot challenge the credibility of witnesses.⁶⁵ In addition, the defence cannot verify witness statements where it cannot understand the contents. But at the same time, disclosing such witness identity may pose a risk to the witnesses as a result of their potential testimonies.⁶⁶ In this regard, Rule 69 allows the prosecution to either delay its Rule 66 obligations to the extent that the witness may be in danger.

The issue of witness protection and witness anonymity arose in the ICTY's first trial, namely *Prosecutor v Tadic*, where the prosecution made an application to the court to withhold the identity of its witnesses from not only the media but also the defence. At the time of the trial, the ICTY Statute was silent on what exact limitations could be allowed when it concerns curtailing defences rights so as to protect the rights of witnesses, and under what circumstances such limitations would apply.⁶⁷ Hence up to now, there is no clear guidance regarding this issue; the ICC will have to establish whether the use of anonymous witnesses is permitted. Nonetheless, the ICTY allowed witness identities to be withheld from the defence.

65 Točilovsky V (2008)111.

66 Einarsdóttir KÓ (2010) 36.

67 Knoops G *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* 2 ed (2014) 260.

The first attempt to balancing interests was also in the *Tadic* decision. But the balance would only operate in exceptional circumstances. The Trial Chamber therefore laid out five criteria to determine anonymity:

'[f]irst and foremost, there must be real fear for the safety of the witness or her or his family [...]. Secondly, the testimony of the particular witness must be important to the Prosecutor's case [...]. Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy [...]. Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case [...]. Finally, any measures taken should be strictly necessary'.⁶⁸

However the court opined that the rights of the accused can be sacrificed for witness safety.

The *Tadic* decision was mechanically transposed to the ICTR jurisprudence. Joanna Pozen however notes the ICTR's decision to shield the identity of the victims makes little sense.⁶⁹ It relied on the decision justifying the shielding of witnesses by the on-going war in Yugoslavia, while testifying in Rwanda presented lesser risk to the witnesses. Thus to refuse disclosure of evidence on the basis of witness protection is not practical.

Notably, the Trial Chamber in the *Kupreškić* ordered disclosure of the identity of witnesses and requested the Bosnia and Herzegovina authorities and the International Police Task Force to investigate and prosecute any incidents of witness intimidation.⁷⁰ In another instance, the Trial Chamber in *Milutinović et al.* refused to hear the witnesses based on the fact that it would

68 *Tadic*, para 62-66.

69 Joanna Pozen (2006) 283.

70 *Prosecution v Kupreškić et al* ICTY (TC) decision of 21 May 1998.

adversely affect the fairness of the trial.⁷¹ The decisions contrasts with the Trial Chambers approach in the *Milošević* case where conditions requested by the US pursuant to Rule 70 which allowed the witnesses to *inter alia* give evidence in a private session in order to protect the national security interests of the United States were granted.⁷² As a result, cross examination was solely within the statements disclosed by the prosecution. The effect of the Trial Chambers ruling is that the accused person could not cross examine the witness on potentially exculpatory evidence-which was in fact disclosed to the court in a private session.⁷³

None of these cases provide a defined framework on how to balance both interest. In each case, there are different ways in which the court decided to strike a balance. What is clear however is that the court acknowledges the significance of witness protection but is more inclined to favour the accused right to the identity of witnesses whom the prosecution intends to rely on to prove the guilt of the accused.⁷⁴ In the *Milosevic* decision where the court noted that the rights of the accused should be given primary consideration and that the need to protect witnesses is a secondary one.⁷⁵ The ICC does not take a similar approach.

2.2.3 National Security Interests

Both the ICTY and ICTR Statutes endorse specific requirements to advance the protection of national security interests. In particular, Rule 66(C) of the ICTY RPE limits the general obligation of disclosure by the Prosecutor with concerns of national security. The *Blaškić* Judgement noted

71 *Milutinović et al* ICTY (TC) decision of 16 February 2007.

72 *Milošević* ICTY (TC) Decision on Prosecution's Application For a Witness Pursuant to Rule 70(B) 30 October 2003;

73 O'Sullivan E & Montgomery D 'The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY 8 (2) *Journal of International Criminal Justice* (2010) 534.

74 *Prosecutor v Haradinaj et al*, ICTY (TC) decision of 22 November 2006 para 3.

75 *Milosevic*, ICTY (TC) 19 February 2002, para 23.

that this blanket provision on national security would undermine the functioning of the ICTY because in most occasions it's the states which have information relating to armed conflicts that triggered the jurisdiction of tribunals. Thus the tribunal asserted that claims based on national security interests could defeat the purpose of the tribunal as such documents or information (in possession of the state) could be vital in determining the guilt or innocence of the accused.⁷⁶ On the other hand, the United States claimed in the *Milutinovic* case that the disclosure obligation concerning national security concerns puts the ICTY 'into conflict with States over the protection of their national security interest and makes it significantly more difficult for States to cooperate in providing such information to the parties in Tribunal proceedings'⁷⁷. A similar conflict exists for Article 29 of the ICTY Statute which provides that 'States shall comply without undue delay with any request for assistance or order issued by a Trial Chamber'.



The matter of national security interests is however a complex. Illustrative of this is the *Blaškić* case where Croatia proclaimed that once a state withholds information on grounds of its national security interests, this assertion must be accepted by the international tribunal.⁷⁸ In addition, it challenged the coercive powers of international tribunals noting that states only have an obligation to cooperate with international tribunals, and this does not give them any coercive authority over state.⁷⁹ Any attempts therefore to exercise such an authority would fail and may also threaten cooperation between the international tribunals and states. This is also true for the ICC.

76 *Prosecutor v Milutinovic*, ICTY (TC) Judgment of 12 May 2006 Para 65

77 *Blaškić* (AC).

78 *Blaškić* (AC) 135.

79 *Blaškić* (AC) 71.

The real danger in withholding disclosure from the accused was evident in the *Blaškić* case. The defendant Thomir Blaškić was indicted and convicted of crimes against humanity and war crimes.⁸⁰ After the conviction of the defendant, the Croatian authorities announced that they had discovered potentially exculpatory evidence. This was after the death of the president who had opposed disclosure of documents requested during the trial. On appeal, the Appeals Chamber, relying on the new evidence disclosed by Croatia, reversed 16 out of 19 convictions and reduced Blaškić sentence to nine years imprisonment.⁸¹ This scenario shows that the fair trial rights to a defendant may be jeopardised by a state's objection of disclosing evidence on the grounds of national security interests. Thus the Appeals Chamber opined that states cannot unilaterally refuse to disclose evidence on the grounds of national security.

Importantly, the *Blaškić* decision held that it had the powers to 'scrutinise the validity of States' security interests. In contrast, the ICC does not exercise this option. To mitigate any problems arising from restricting disclosure, the court also found it acceptable for the State itself to remove parts in the documents that contain the sensitive information.⁸²

3. Special Court for Sierra Leone

The Special Court for Sierra Leone's disclosure system is highly influenced by that of the ICC and the *ad hoc* tribunals. Rule 68 of the RPE obliges the Prosecution to disclose exculpatory evidence to the defence. The Trial Chamber in *Prosecutor v Charles Taylor*, placed the onus on

80 Blaškić ICTY (TC) Judgment, 3 March 2000.

81 Blaškić ICTY (AC) Judgement, 29 July 2004.

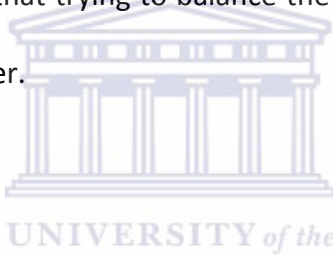
82 *Blaškić* ICTY(AC) para 67

the defence to establish that the prosecution has breached its disclosure obligations. The defence must:

- a. identify the evidence sought with requisite specificity;
- b. show the exculpatory or potentially exculpatory nature of the evidence requested;
- c. show that the prosecution is in custody or control of the requested evidence;
- d. show that the prosecution has failed to disclose the exculpatory evidence.⁸³

This is a very high threshold for the defence since most of the evidence is primarily obtained and is in possession of the prosecution. The position of the court on competing rights in *Prosecution v Allieu Kondewa*⁸⁴ is that trying to balance the two rights would violate the rights of one party in one way or the other.

4. Special Tribunal of Lebanon



There is no direct mention of disclosure in the Special tribunal of Lebanon Statute -the concept is extensively dealt with in the Rules of Procedure and evidence. The tribunal majorly follows a common law approach to disclosure where the judges do not actively participate in the disclosure process. It is important to note that the Rules of the Special Tribunal is contains rules that specifically deal with counter balancing of conflicting interests. Where the prosecution makes an application not to disclose information, it shall provide reasons for such an application sought to be kept confidential, together with a statement relating to the proposed counterbalancing measures. Such include inter alia; identification of new, similar information,

83 *Prosecutor v Charles Taylor* SLCL (TC) decision of 23 September 2010 para 15.

84 *Prosecutor v Allieu Kondewa*, SCSL (TC) 10 October, 2003.

provision of the information in summarized or redacted form, or stipulation of the relevant facts.⁸⁵

Also, the Tribunal may play a role in the counter balancing efforts by ordering appropriate counterbalancing efforts.⁸⁶ And if no such measures are available to sufficiently protect the accused's right to a fair trial, the Prosecutor shall be given the option of either amending or withdrawing the charges to which the material relates or disclosing the material. There is still no jurisprudence indicating how the counter balancing works.

5. Extraordinary Court of Cambodia (ECCC)

The rules of disclosure at the Extra Ordinary Courts of Cambodia are civil law oriented as the pre-trial judge has extensive powers to gather evidence.⁸⁷ Disclosure here is done by the co-investigating judges using a "case file".⁸⁸ When an investigation has been opened by the co-prosecutors, they shall refer the case to the co-investigating judges and hand over case file to the judges-containing both inculpatory and exculpatory evidence.⁸⁹ All parties are allowed to access the file. This appears to be immensely advantageous to the defence as opposed to the ICC and *ad hoc* tribunals. While disclosure at the ECCC is a continuing obligation, late disclosure may lead to exclusion of the evidence.⁹⁰ This is also a significant remedy as compared to other tribunals.

85 Rule 116 B

86 Rule 116 C of the Rules of Procedure and Evidence.

87 Rule of the ECC Rules.

88 Article 35 of the ECCC Statute.

89 ECCC Internal Rules, rule 53(1) and (2).

90 See *Prosecutor v Kaing Guek Eav alias Duch*, ECCC (TC) 2 July 2009 paras. 3-11.

6. Domestic Jurisdictions

6.1 Germany

The German disclosure regime is useful to study for several reasons. The rules on the access of the dossier provide a good example of the inquisitorial approach to disclosure. At the same time, the German model aligns with arguments for early and extensive discovery of evidence as a central feature of a fair criminal process.⁹¹ In addition, the system provides measures which may accommodate both the right to disclosure (referred to as discovery in civil law jurisdictions) and witness protection.

The German criminal code uses the term *Akteneinsichtsrecht* to refer to discovery of evidence. The process of discovery is regulated under section 147 of the German Criminal Procedure Code. As a practical matter, the defence is allowed to access the entire prosecution file or dossier. However, it is only the defence counsel who is allowed to access the prosecution dossier.⁹² Where the accused person has no defence, copies of information and files shall be made available to him or her provided that such information is necessary for an adequate defence. In such instances, such provision should not endanger the purpose of the investigation.⁹³

The dossier contains evidence gathered by the prosecution and police or any state investigating agency and may contain both inculpatory and exculpatory evidence. Full access to the dossier is allowed with some exception made to witness safety, work product and the integrity of

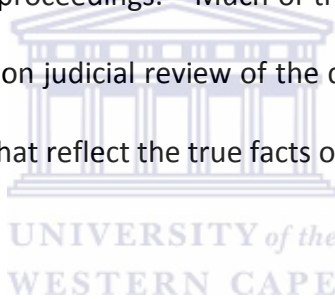
91 Turner JI 'Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons' available at SSRN: <http://ssrn.com/abstract=2659372> (accessed 1/10/2015) 7.

92 Bohlander M *Principles of German Criminal Procedure* (2012) 62.

93 Section 147 (7) of the German Criminal Procedure Code.

ongoing investigations. These restrictions must be based on concrete evidence that show potential danger in disclosing such evidence.⁹⁴ However the non-disclosure based on the risk posed to the investigation is justified only on a temporary basis. Once the danger elapses, the prosecution must inform the defence that the dossier can now be accessed.

There is very little literature on the problem of conflicting interest when disclosure is restricted. With regard to witness protection however, Turner notes that the German model suggests that witness protection measures can be imposed on a case-by-case basis, while retaining open-file disclosure as a general rule.⁹⁵ The judge can independently investigate the facts of the case and also safeguard the fairness of the proceedings.⁹⁶ Much of the success of the German discovery system depends on a large extent on judicial review of the dossier. This provides them with an opportunity to make judgements that reflect the true facts of the case.⁹⁷



6.2 New Zealand

New Zealand follows a common law approach in its criminal proceedings where the trial is a contest between two parties. Disclosure rules in New Zealand are statutorily grounded in the Criminal Disclosure Act, 2008⁹⁸, the Evidence Act, the Criminal Disclosure Act, 2011 and the New Zealand Bill of Rights Act 1990. All relevant material in possession of the prosecution,

94 Turner (2105) 7.

95 Turner (2015)14.

96 Turner (2015)14.

97 Turner (2015)14.

98 The Criminal Disclosure Act provides a comprehensive regime for disclosure by the prosecutors.

including exculpatory evidence, must be disclosed to the defence at all stages of the trial.⁹⁹

Unlike the German system, there is little emphasis on early discovery.

The law have adopted various positions where interests may appear to be conflicting. With regard to the disclosure of identity of informers, for instance, their identities may not be disclosed unless the Judge is of the opinion that such disclosure is necessary to establish the innocence of the defendant. Thus information under these grounds may be withheld by the prosecution or disclosed in a modified manner. Limitations on national security on the other hand, are contained in several statutes. Importantly, section 30(1) (b) of the Criminal Disclosure Act provides that the court can order the disclosure of information where the interests in favour of disclosure prevail over the reasons for withholding it.

Another important provision in the Criminal Disclosure Act is that the defence can seek orders for disclosure of information from a person other than the prosecutor if such information is likely to assist the defence. At any such hearing, the Prosecutor may make submissions on the relevance or admissibility of the evidence sought by the defence. Such provisions seek to cure the imbalance in investigatory powers between the prosecution and the defence.

7. Conclusion

In conducting the investigation and prosecution the prosecution is obliged to protect on-going investigations, interest of witnesses, victims and other third parties as well as the integrity of the prosecution itself. So far however, the ad hoc tribunals seem to be unable to establish a suitable remedy for serious violations of the prosecutions duty to disclose, this may, in part

⁹⁹ Criminal Disclosure Act 2008, s 13.

explain why such violations continue to be rampant. We can conclude from the abovementioned cases that the tension between the two rights is one that is yet to be resolved and that there is still no single appropriate remedy to this lacuna.





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Chapter 4

The Right to Disclosure at the International Criminal Court

1. The Prosecution's Duty to Disclose Evidence: A Legal Dilemma

The prosecution's duty to disclose evidence to the defence is founded on Article 54(1) (a) which sets forth the requirement that the prosecution investigate both incriminating and exonerating evidence. In addition Article 67(2) and Rule 77 of the RPE obligate the prosecution to disclose potentially exculpatory evidence to the accused. The defence's right to disclosure, on the other hand is founded on Article 67 of the ICC Statute which provides for the accused person to have adequate time and facilities to prepare its defence. Thus in principle, the prosecution is mandated to disclose both incriminating and exonerating or exculpatory evidence pursuant to its own obligations and to the rights of the accused. The obligation is proactive and does not depend on the accused person's request to receive such information.¹⁰⁰

The basic rule under the ICC Statute is that the prosecutor discloses two clusters of evidence to the accused. Firstly, the evidence he intends to use to support the charges. Secondly, evidence which may be favourable for both the prosecutors' case and that of the accused.¹⁰¹ This is where the prosecution is often in a dilemma. It is an 'advocate of the people' tasked with seeking convictions on behalf of the victims, at the same time it also has the duty to investigate and establish the truth. Thus, the prosecutors' duty to disclose both incriminating and exonerating evidence creates a competing duty. The conflicting dualism 'coupled with the

100 Amann G 'The Disclosure Regime Before The ICC: The Right to a Fair Trial' http://www.heritagetpirdefense.org/papers/Gabriel_Amman_Disclosure_Regime_Before_ICC.pdf (accessed on 28/04/2015).

101 Hanna Kuczyńska *The Accusation Model Before the International Criminal Court: Study of Convergence of Criminal Justice Systems* (2015) 198.

political and public pressures for convictions...provides the impetus for ...prosecutors to opt for dishonest conduct and downplay or fail to disclose evidence that is potentially favourable to the defence.¹⁰² It may be argued that this is one of the reasons why the prosecution at the ICC may fail to disclose potentially exonerating evidence. It may be skewed towards building its own case. It seem unrealistic for the prosecutor to actively look for exculpatory evidence and at the same time search for evidence with an aim to building a

The internal conflict doesn't end here. The Prosecution also grapples with divided allegiances. The interests of fair justice demands that full disclosure be meted out, but this is often complicated by sensitivity of some information.¹⁰³ Furthermore, there is the need to generate new evidence and not to prejudice ongoing investigations.¹⁰⁴ This may provide a good incentive for partiality. The Prosecution may abuse its powers and choose to go with their gut feeling by asking which interest makes more sense -disclosing evidence to an accused person, protecting a witness or securing an ongoing investigation? Tempting as it might be, the prosecution is still required to fully disclose material in its possession to the accused.

The central role that the prosecution plays in investigation and disclosure of evidence means that any omission can adversely affect the entire trial. Thus where there are competing interests that may force the prosecution to choose to protect the one interest over another,

102 Klinkosum M 'Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files' available at <http://www.nacdl.org/Champion.aspx?id=28476> (accessed 20/6/2015)

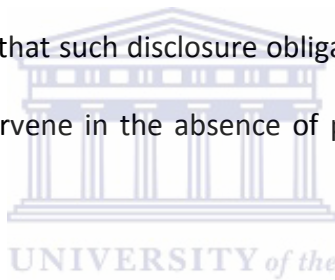
103 Such information includes victim protection concerns, confidentiality needs and the security interests of a state.

104 See Fedorova M, Verhoen S & Wouters J *Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings* (2009) 17.

one party may be prejudiced. Where does the prosecution draw the line? And how can these tensions be reconciled?

2. Ruling on Exculpatory Evidence

In case of doubt as to the exculpatory nature of the evidence, the prosecution is allowed to make an *ex parte* application to the judges who will make a decision on whether the material is exculpatory and whether it should be disclosed.¹⁰⁵ In *Prosecutor v Bemba*, the Trial Chamber stated that it will not routinely review decisions taken by the OTP in fulfilment of its disclosure obligations unless there are reasons to doubt that the duty has been correctly fulfilled.¹⁰⁶ The onus lies on the defence to prove that such disclosure obligations were not complied with. The trial Chamber is less likely to intervene in the absence of proof that the prosecution did not comply with its obligations.



3. Restrictions on the Prosecutions Disclosure Obligations: Competing Rights and Interests

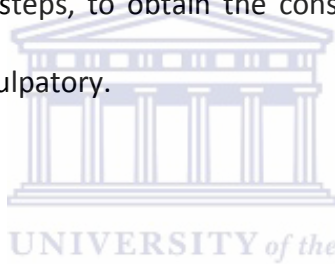
As noted previously, disclosure is not an absolute right and there are various competing interests that may arise when deciding whether or not to disclose information. This chapter therefore aims to analyse the competing interests that appear to be the most persistent in the ICC and those that will continue to be problematic in future, if the court does not find an adequate solution. For that reason, this chapter focuses on the issue of confidentiality agreements, witness protection and national security.

105 See Rule 83 of the ICC RPE.

106 *Prosecutor v Bemba*, paras.20-22

3.1 Restricting Disclosure on Grounds of Confidentiality Agreements (Article 54 (3) (e))

Confidentiality agreements between the prosecution and information providers serve as an incentive for cooperation between the court and information providers. Thus, there is dire need to maintain confidentiality in order for the prosecution to continue investigations and to receive delicate information.¹⁰⁷ As a result, Article 54(3)(e) of the Rome Statute 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.’ The Prosecutor shall take reasonable steps, to obtain the consent of the information provider if such information is potentially exculpatory.



3.1.1 The Legal Ambiguity

A plain reading of article 54(3) of the ICC Statute shows that there are many unresolved issues. First, there is a clear mismatch between article 54(3) and 67(2). The use of confidential information by the prosecution may conflict with the prosecutions obligation to disclose potentially exculpatory evidence provided under article 67(2). Secondly, the rules fail to answer whether confidentiality rules prevail over disclosure.

In addition, agreements such as those entered with the United Nations do not fall within the scope of disclosure. Article 18(3) of the ICC-UN Agreement¹⁰⁸ provides as follows;

107 Einarsdóttir KÓ *Comparing the Rules of Evidence Applicable Before the ICTY, ICTR and the ICC* (LLM thesis, University of Iceland, 2010) 39.

108 Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

the United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents shall not be disclosed to other organs of the Court or third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations

In addition to withholding information to the defence, this provision goes on to withhold information to the other organs of the court. Similarly, the U.N peacekeeping mission, MONUC in the Democratic Republic of Congo provides has an analogous relationship with the ICC. Article 10 (6) of the Memorandum of Understanding entered between them provides for confidentiality between the two bodies with regard to 'documents held by MONUC that are provided by the United Nations to the Prosecutor'. Further, the Memorandum provides that such information shall be for the purpose of generating new evidence in connection with the investigations.¹⁰⁹

Asides from the UN, other information providers can also give information to the prosecution and this is also falls under Article 54(3) (e). For such information to be disclosed, their consent must be sought, otherwise such information becomes inadmissible.

The use of such confidential evidence may compromise the fairness of the criminal proceedings. In addition, they put the prosecutor in a difficult position *vis a vis* both the defence and Chamber. In the *Lubanga* case, the prosecution admitted that more than 50% of

109 Article 10(7) of the Memorandum.

the evidence it collected was on the basis of confidentiality agreements, including potentially exculpatory evidence. However, the information providers including the U.N refused to waive the confidentiality. In the intervening time the OTP disclosed alternative materials such as excerpts or summaries of potentially exculpatory evidence. But the Trial Chamber ordered a stay of proceedings. Unfortunately, the restraint used by the prosecutors in the *ad hoc* in the use of confidentiality agreements appears to have been absent in the *Lubanga* trial, as the prosecution relied too heavily on such information.

The Trial Chamber in *Lubanga* concluded that the prosecution abused its obligations by routinely entering “into confidentiality agreements routinely and for the purpose of gathering springboard and lead evidence alike.” In such situations therefore fairness to the accused demands a stay of proceedings. Similarly in the *Katanga* case, the court noted that the prosecution extensively gathered documents covered by the confidentiality exception. In doing so, it resorted to using article 54(3) not only in exceptional or limited circumstance, but in collecting lead evidence.¹¹⁰ The single judge stated that one core factor that the prosecution should consider when deciding whether to accept material pursuant to article 54(3) is the risk it poses to the defence.

Subject to such confidentiality agreements, the relevant documents could not be revealed to the trial, let alone the defence. Thus it was impossible for the judges to ensure that the alternative materials are equivalent to the information contained in the confidential

110 *Prosecutor v Germain Katanga and Ngudjolo*, ICC (PTC) Decision of 20 June 2008 Para 10.

documents.¹¹¹ The question of confidentiality therefore goes deeper than the conflicts between the prosecution and the defence. It is also embedded on the question of who controls the Prosecutor, is it the ICC Chambers or in the end the UN? Specifically on the confidentiality restriction, there is little if no room for the judges to resolve confidentiality issues. This is because the OTP needs the consent of the UN to disclose the evidence, even to the Chamber itself. Thus, the judges are dependent on the acquiescence of the UN. The lack of the involvement of the Chambers in assessing materials covered under article 54(3) (e) therefore looms large. Amendments should be geared towards their increased involvement such that non-disclosure does not extend to the Chambers.

To effectively deal with the issue of confidentiality, Kai Ambos recommends that the prosecution should only conclude confidentiality agreements under three conditions: firstly, if there is no other 'normal' way to obtain the respective information; secondly, if the information is absolutely necessary to continue the investigation; and thirdly, the information is requested solely for the purpose of generating new evidence.¹¹² In addition, this research paper suggests that that disclosure of exculpatory evidence should not be made subject to the consent of third parties. Instead where the evidence tends to show the innocence of guilt of the accused, it should be disclosed.

111 War Crimes Research Office *The Relationship between the International Criminal Court and the United Nations* (2009)47.

112 Ambos K (2009) 556.

3.2 Witness Protection

3.2.1 The Impact of Witness Protection on the Rights of the Accused

Witness protection is the second ground for withholding disclosure from the defence. Investigations during on-going conflicts-as in most of the ICC cases-may put witnesses and victims at risk. Whereas the ICTY provides for non-disclosure in 'exceptional circumstances' the ICC has no similar provision. Article 68 of the ICC Statute generally allows the prosecution not to disclose evidence that may put witnesses at risk. This is in conflict with Article 67(1) (e) which provides for the accused persons right to examine witnesses.¹¹³

The ICC responds to this tension by take measures to protect victims and witnesses by conducting proceedings in camera, protecting witnesses through anonymity or allowing the redaction of any information that identifies witnesses, their family members and innocent third parties.¹¹⁴ This practice can be at odds with international jurisprudence on the matter. The difficulty lies in the application of Article 68 which provides that measures allowing witness protection "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".

3.2.2 Witness Anonymity

The rules make it difficult to resolve the conflict. Neither the Rome Statute nor the Rules of Procedure and Evidence specifically allow or forbid witness anonymity. While this allows for the

113 "[The accused person has a right to] examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her..."

114 Article 68 of the ICC-Statute and Rule 81(4) of the RPE.

judges to exercise their discretion, it can also allow for inconsistent judgments. It is clear from the courts jurisprudence that the identity of witnesses may be withheld from the defense.

In *Lubanga*, about 80% of the prosecution witnesses required protection and were in fact anonymous- temporarily.¹¹⁵ The defence only learnt of the identity of the witnesses three months prior to the trial. The prosecution routinely missed its disclosure deadlines and the proceedings had to be postponed several times. This research paper concludes that the use anonymous witness does not fall under Article 68(1) of the ICC-Statute. In addition, if a conviction is primarily based on anonymous witnesses and the defence was unable to cross examine the witness, this may amount to a miscarriage of justice.

3.2.3 Witness Credibility

The prosecution in the *Muthaura* case omitted to disclose the identity of witnesses and any information pertaining to them, regardless of the fact that their evidence formed the basis of the confirmation of charges against the accused. The key witness later recanted their evidence and admitted to have accepted bribes and as a result the charges were withdrawn.¹¹⁶ If the prosecution had disclosed their identity, there were prospects that the charges would have never been confirmed. As a result a case that should have not passed the first stage, never mind confirmation, was in fact committed to trial.¹¹⁷

115 *Prosecutor v Lubanga Dyilo*, ICC (TC) Hearing Transcript 13 February 2008, p19.

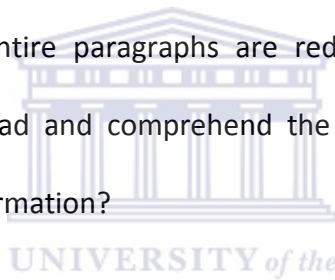
116 *Prosecutor v Francis Muthaura and Uhuru Kenyatta*, ICC (TC) Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013.

117 Khan KA & Buisman C 'Sitting on Evidence? Systemic Failings in the ICC Disclosure Regime –Time for Reform' in Stahn C(ed) *The Law and Practice of the International Criminal Court* (2015) 1030.

Non-disclosure in *Muthaura* led to a miscarriage of justice, even despite the fact that the charges were withdrawn. In sum, if the prosecution witnesses cannot be cross-examined, their veracity can hardly be tested. This undermines the fundamental principles of a fair trial to the accused enshrined both in international conventions and the ICC's own statute.

3.2.4 Redactions

On the basis of the provisions allowing redactions, much of the evidence disclosed has been heavily redacted in some cases. Even entire pages may be redacted. This negatively impacts on the defence's ability to investigate and analyse the disclosed material.¹¹⁸ Occasionally, complete sentences and even entire paragraphs are redacted making it difficult or even impossible for the defence to read and comprehend the evidence. How does the defence benefit from heavily redacted information?



The impact of highly redacted evidence was felt in the *Banda and Jerbo* case where identities of the witnesses which constituted the core charges were withheld from the defence.¹¹⁹ While the prosecution only disclosed the evidence very late into the proceedings, the redactions genuinely hampered the defence's investigations since it had no opportunity to visit the situation country. Hence, the principle of equality of arms was not adhered to. The ICC jurisprudence is skewed towards allowing redactions, even when it involves exculpatory evidence. Moreover, the decisions to allow redactions are often *ex parte*.

118 Khan K and Caroline Buisman (2015) 1049.

119 In this case, the witnesses were persons present in the AU base in Darfur prior to the attack of the base.

3.2.5. Witnesses concerns

Regardless of the foregoing arguments, witnesses also have genuine concerns that arise out of disclosure.¹²⁰ Besides from the security concerns witnesses may have interests in keeping their statements private. They may have spoken about traumatic ordeals or even embarrassing situations which they would not like to be disseminated. Whitting argues that 'If the Prosecution need not disclose information that could jeopardize the security of a witness, then it should not'.¹²¹

3.2.6 The Balance

In the "Decision on disclosure issues, responsibilities for protective measures and other procedural matters," the Trial Chamber in the *Lubanga* discussed whether interest of protective measures for the witnesses and victims overrides the right for the accused person to disclosure. On this point, Judge René Blattman opined that both the right to protecting witnesses and the right to a fair trial cannot be diminished, but noted that it is difficult to 'balance the two rights and find an acceptable equilibrium that satisfies both parties'.¹²² He noted that revealing the identities of the witnesses may put them at risk and at the same time a fair trial should be upheld, in so doing the identities of witnesses should be revealed. The difficulty lies in the fact that upholding one right over the other will have negative consequences over the adversary. She however concluded that it is debatable whether there is a direct link between the identities of witnesses and non-disclosure. However this point is not entirely convincing.

120 Whitting A (2015)1018.

121 Whitting A (2015) 1018.

122 Dissenting opinion of Judge Rene Blattman in *Prosecutor v Lubanga*.

This research paper argues that that link can be in fact inferred based on the fact that non-disclosure undermines effective cross examination and therefore the trustworthiness of witness testimony. The *Muthaura* case is a good example.

3.3 National security interests and the rights of the accused

The third possible justification for non-disclosure is when evidence touches on the national security interests. To date, there is no indication that this provision has ever been invoked by a state, thus this research paper will only give a statutory interpretation of the provisions. Article 72 provides that ‘the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.’ In accordance with article 72, a State Party may deny a request for assistance if the request concerns ‘the production of any documents or disclosure of evidence which relates to its national security.’¹²³ This exemption clause in the ICC Statute falls short of the standards set by the ICTY. Article 29(2) of the ICTY Statute requires states to ‘comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to...the production of evidence’.

There are four possible ways in which information may be withheld. First, the State may be in possession of relevant evidence but refuses to produce it on grounds of national security. Second, a person may refuse to give information or evidence or has referred the matter to the State on the ground that disclosure would prejudice its national security interests and the state confirms that that such disclosure would prejudice its interests.¹²⁴ Third, the Defence or the Prosecutor is in possession of information. What is different about Article 72, as opposed to

123 Article 93(4) of the ICC Statute.

124 Article 72(2) of the ICC Statute.

other situations discussed in this paper, is that the Prosecution itself may or may not be in possession of the evidence. The application of Article 72 therefore raises several important issues relating not only to the rights of the accused but also to a number of organs of the ICC.

3.3.6 Non-disclosure by the State

Where a State learns of the likelihood of disclosure at any stage of the proceedings and it feels like such information would prejudice its national security interests it has the right to intervene.¹²⁵ It may take all reasonable steps to resolve the matter by cooperative means including a modification of the request, determination by the Court on the relevance of information sought, obtaining information from a different source or using other protective measures.¹²⁶ And the Court must determine whether such evidence is potentially exculpatory. But the last word as regarding whether or not to disclose rests on the state. When one compares the *Blaškić* case with the relevant provisions of the ICC Statute the *Blaškić* arguments on are not applicable to the ICC.

The problem with applying Article 72 is two-fold: the State may refuse to give evidence when it is trying to shield someone. A typical instance is where the Head of State being prosecuted. Furthermore, the state might invoke the provision in order to try to conceal that the state agencies committed the crime. On the other hand, the state may want to silence political opponents or 'scores to settle with an accused, and use the national security card to manipulate the evidence before the Court.'¹²⁷

125 Article 72(4) of the ICC Statute.

126 Article 72(5) of the ICC Statute.

127 Schabas W (2002) 109.

All the above instances will have an adverse impact on the effective investigation and prosecution of cases. Firstly, it may prejudice the defence's interest in adequately preparing for the trial. Secondly, it may lead to a wrong confirmation of charges and conviction hence conflicting with the interest of justice. Lastly, it could adversely affect the prosecutions investigation and prosecution capacity when the evidence is crucial to the proceedings. The interest of the ICC in putting an end to impunity for perpetrators of international crimes may be jeopardized by putting exaggerated emphasis on the national security. As noted earlier most international crimes such as genocide are linked to national security issue. Disclosing such evidence should therefore be the rule rather than the exception.¹²⁸

3.3.7 Non –disclosure by an individual

An individual may also withhold disclosure on the basis of national security interests when compelled to testify. This will have similar consequences to the defence and the prosecution. The fundamental difference between evidence in the possession of an individual and that in possession of a state is that in the former, the court may order that that evidence be produced. There is no room for negotiations and agreements.

3.3.4 Evidence in possession of the prosecution or defence

The third scenario is where the evidence may be in the possession of either the defence or the prosecution and a state is entitled to object to its disclosure. It goes without saying that if the evidence is exculpatory, the defence will produce it in court. However, if the State objects to

¹²⁸ Zemach A 'National Security Evidence: Enhancing Fairness in View of the Non-Disclosure Regime of the Rome Statute' (2014) 4 *Israeli Law Review* 333.

such disclosure, the court will determine whether such information can be disclosed. Regrettably, an order to disclose such evidence would breach on the defences right to not be compelled to testify or to confess guilt and to remain silence under Article 67(1) (g).¹²⁹The situation is somewhat different when the evidence is in the possession of the prosecution. The overriding principle is that it must disclose exculpatory information as soon as practicable. But such disclosure is restricted under Article 72.

It is also not clear how the rules on national security interests will relate to other provisions on non-disclosure. For instance, the content of the evidence produced by an informant may touch on national security and is at the same time based on confidentiality agreements. What if a state becomes aware of this information and seeks to prevent disclosure? Which provision will the ICC use, Article 54(3) (e) or Article 72? On the one hand, confidentiality agreements are allowed for the sole purpose of generating new evidence, and on the other hand a state can object to disclosure on grounds of protecting its national security interests. It would seem more appealing for states to withhold information under article 54 than 72 as it allows states to withhold information.

4. How Can the Court Intervene?

The ICC Statute provides a weak framework under which the Trial Chamber can participate in the disclosure. Article 67(2) only provides that ‘in case of doubt as to the application [of disclosure], the Court shall decide.’ This is why in *Lubanga* the Trial Chamber opined that the primary duty lies on the parties to identify relevant material, the Chambers only have powers to

129 Schabas W (2002) 111.

intervene. Similarly, in *Prosecutor v Bemba*, the Trial Chamber stated that it will not routinely review decisions taken by the OTP in fulfilment of its disclosure obligations unless there are reasons to doubt that the duty has been correctly fulfilled.¹³⁰ Rule 84 also empowers the Chamber to order disclosure of information not previously disclosed before the trial commences. The onus lies on the defence to prove that such disclosure obligations were not complied with. However, full access of the prosecution file would allow the judges to make an informed decision where tensions exist.

5. Conclusion

If we look at the emerging jurisprudence of the ICC we may conclude that some weaknesses emerge. In fact, on one side, we have judges who are watching from the side-lines and we have two adversaries. The judges are passive and only come into play when there is a contest between the defence and the prosecution. The system is only based on the parties' initiatives. Unlike in the inquisitorial systems there is no dossier or checklist for both parties which act as a standard for preparing the evidence. In addition, the duty to disclose is based purely on the evidence selected by the Prosecutor. Even in cases where the ICC Statute provides that exculpatory evidence is disclosed, the choice still is on the party on which the duty is imposed.¹³¹ The practice of ICC Chambers, however, implies that it is difficult to balance the competing rights.

130 *Prosecutor v Bemba* ICC (TC), decision of 2 December, 2009 paras.20-22.

131 M. Caianiello (2010) 39.

In essence, it is the interpretation of the dual role of the prosecutor to disclose potentially exculpatory evidence that has proven difficult. At the end of the day, there is no doubt that the degree of flexibility has led to an unsettled practice with regard to disclosure as well as an unbalanced disclosure regime. But given the challenges posed by various interests, it must be understood that the entire disclosure process requires the active participation of the parties and judges.



CHAPTER 5:

Conclusion and Recommendations

By analysing the prosecutions disclosure obligations and the competing rights this research paper has examined contentious disclosure issues that face the ICC. Also the issues which the ad hoc tribunals face in this regard were addressed. The research illustrates the importance of disclosure obligations within the broader goals of achieving a fair trial. All the mentioned judicial organs in the preceding chapters reveal that the prosecutor must disclose to the defence both inculpatory and exculpatory evidence in his/her possession.

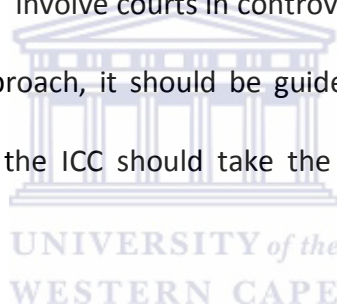
It appears from the ICC jurisprudence that there is need of improvement in the current disclosure regime. The case of *Muthaura* is a clear example of the direct consequence of non-disclosure or faulty disclosure. If the charges against the accused here were confirmed based on non-disclosure, it means that in future an accused person can be wrongly convicted. If 'trials are unfair, or perceived to be unfair, international criminal courts ... might quickly lose their legitimacy. Worse still, the entire enterprise of justice for these types of heinous crime—whether in international courts, domestic courts, or otherwise—might be dealt a serious blow'.¹³²

This research paper also established that the right of the accused to a fair trial, witnesses' right to protection, and informant's interests in confidentiality and the states interests in protecting national security may be in conflict. And this has led the ICC Chambers to adopt several

132 Jacob Katz Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 122.

remedies which represent an attempt to balance the competing interests. In order to ensure that the rights of third parties are not detrimental to the rights of the accused, the Chambers have introduced the use of summaries and redactions. In addition, the Trial Chamber in *Lubanga* concluded that the appropriate remedy for the prosecutions omission would be to stay the proceedings and an interim release of the accused.

Even though some of the rules of the *ad hoc* tribunals were taken into account in the drafting of the ICC Statute, several important issues are left to the discretion of the court, such as how to resolve the tension between competing interests. The absence of clear rules and standards can lead to inconsistent outcomes and ‘involve courts in controversial policymaking’.¹³³ Even if the court opts for a case-by-case approach, it should be guided by specific rules as a reference point. Perhaps, still in this area, the ICC should take the *ad hoc* Tribunals as possible role models.



The advantage offered by balancing the rights is that it gives judges an opportunity to critically analyse the interests when they are considering a suitable remedy. In addition, balancing practices show that all the needs of the various actors are taken into consideration.¹³⁴ Where the court is actively involved, it could easily detect the failure to disclose evidence early in the proceedings. In those circumstances, any harm suffered by the defendant as a result of non-disclosure will be less significant than when the violation is addressed later into the trial.

133 Turner J ‘Policing International Prosecutors’ (2015) 45 *International Law and Politics* 182.

134 Turner J (2015) 147.

The court must therefore find a way to accommodate the competing rights and interests without overly restricting any of them. Undoubtedly, the accused has a right to fair trial under human rights law. At the same time, other legitimate concerns should be considered. For the consistent application of this balance, the court must spell out the factors that it relies on when coming up with the balancing test. This would include the various interests at stake. This will make the ICC more predictable. By establishing coherent rules, the ICC can achieve an approach that is both effective and able to accommodate the competing interests. Like the Special Tribunal of Lebanon, the ICC should make specific mention of counter-balancing measures when there are competing rights in its Rules of Procedure and Evidence.

In sum, to bring clarity to the issue of competing rights and interests; there should be fair trial rules that provide prosecutors and courts with clear guidance on how to balance these rights. It is undeniable that the Rules of Procedure and Evidence cannot account for all situations that arise before the ICC. For that reason it is essential to weigh the available options where conflicts arise and the court must find an adequate solution. The ICC should serve as a global model of criminal procedure.¹³⁵

1. Recommendations

1.1 The competing interests

1.1.1 Confidential agreements

When the prosecution obtains confidential evidence, he should not solely rely on it as a basis of his case. It should use it as a stepping stone to get more evidence. Had the OTP used the evidence from the UN as a stepping stone in the *Lubanga* case, it would have relied less on

135 Turner J (2015)257.

confidential evidence. The issue of disclosure of exculpatory evidence might have not arisen.¹³⁶

There are two recommendations here. First, that the prosecution should restrict the use of confidential agreements in its investigations. Second, information based on confidentiality agreements is accepted by the prosecution, when and if disclosure comes into issue, disclosing such information should not be primarily subject to consent of the third parties. The court should have a say in such instances.

1.1.2 Witness identity

The current dilemma facing the ICC, as well as other international tribunals to either protect witnesses to the detriment of the accused or vice versa may be resolved by specifically providing whether testimonies of anonymous witnesses are allowed, this should not be left to the Courts interpretation but rather specifically provided in the Rules of Procedure and evidence.¹³⁷ In addition, ICC could consider using the *Tadic* decision providing a test on permitting anonymous witness testimony. The test is as follows:

1. There must be real fear of witness safety of the identity is disclosed
2. The testimony must be relevant to the prosecution's case such that it will hinder its case if allowed to proceed without it.
3. The Chamber must be satisfied of the credibility of the witness.

136 Katzman R 'The Non-disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial' (2009) 8 *Northwestern Journal of International Human* 99.

137 Anna M. Haughton The balancing of the rights of the accused against the rights of a witness in regard to anonymous testimony. <http://www.nesl.edu/userfiles/file/wcmemos/2001/haughton.pdf> (accessed on 6/10/2015).

4. The ability or inability to provide protection for witnesses should have a considerable weight when evaluating whether or not to grant anonymity.
5. The accused must not suffer additional prejudice as a result of granting anonymity.

Withholding information from the defence on the basis of witness protection should be only justified when there are serious security threats. Like at the ICTY, non-disclosure should only be permitted in 'exceptional circumstances' such that mere fears of witness do not suffice; it must be demonstrated that there is a real likelihood of danger. Another option for the ICC is to limit the use of redactions. Alternatively, testimonies of anonymous witnesses should be totally excluded if it will not be disclosed to the defence. In sum, full disclosure should be the rule and witness protection the exception.

1.1.3 National security interests

The general rule should be that information on violations on international criminal law should be subject to disclosure. In addition, guidance can be sought from the 'Global Principles on National Security and the Right to Information' which elaborates on the issue of disclosure and national security. According to the principles, an application to withhold information based on security interests should only be justified if the government can demonstrate that the restriction (1) is prescribed by domestic law (2) is necessary in a democratic society (3) and required to protect legitimate security interests.¹³⁸ In addition to the four grounds, the ICC should consider the adding prescription by international law as a ground for justification. Such ground will filter our frivolous national security claims.

138 Principle 3 of the Global Principles on National Security and the Right to Information.

1.2 The prosecution

1.2.1 Sanctions for prosecutions wilful non-disclosure

Unfortunately, there is still no appropriate remedy at the ICC, for breach of the prosecution duty to disclose in situations where the fairness of a trial has been compromised. It is suggested that a permanent stay of proceedings is too drastic a measure.¹³⁹ But this assertion is anchored on the reasoning that those who committed crime under international law must not go unpunished. The ICC should therefore adopt a remedy that is in proportion to the breach and at the same time safeguard the rights of the accused. The basic presumption is that such a rule will have a deterrent effect on deliberate non-disclosures.

1.2.2 Transparency in reasons for non-disclosure

At the onset of the trial, the prosecution should provide reasons as to why it should withhold evidence. This will reduce the number of disputes, where the defence alleges that the prosecution failed to disclose information because reasons for non-disclosure or applications for non-disclosure will be known to both the court and the defence at the onset of the trial.

1.3 The ICC Chambers

1.3.1 Judicial control over the disclosure process

While acknowledging the crucial role that the prosecution plays in the disclosure process, the development of the *ad hoc* tribunals and ICC rules has shown that there is great need for the judge to be actively involved in the disclosure phase. The judge would be more cognisant of the facts and evidence in the case as all the documents pertaining to the case are placed in a

139 International Bar Association *Fairness at the International Criminal Court* (2011) 9.

dossier. In this regard, the judges should not only participate in the disclosure process when disputes arise. It will be extremely important that the judges actively participate in disclosure.

1.3.2 Open-file system

The Court should consider adopting an open-file system which allows the defence access to all the relevant materials relating to the investigation. The advantages in this approach are that exculpatory material will be more accessible to the defence as the investigation develops. In addition, judges should also be given the collection of evidentiary documents prepared by the prosecution prior to the trial. The role that the dossier can play in the ICC'S proceedings should not be underestimated.

1.3.3 Early disclosure

All disclosure issues should be dealt with before the trial commences. Any disclosure after commencement of the proceedings should only be permitted in limited circumstances such as when witnesses at serious risk haven't yet been protected. Thus, rules should be enacted to ensure that the defence receives early disclosure of witness information and on the other hand offences concerning witness intimidation should be enacted. If the ICC takes this approach, it must enact penalties that deter the defence from misusing information provided through disclosure.

1.4 The office of the defence as the fifth organ of the ICC.

The office of the defence should be established as a permanent organ of the court, in addition to the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry. This will cure the imbalance between the prosecution and defence in investigations and resources. Thus

a head of defence should be appointed to protect the rights of the accused and the defence. The new law should provide guarantees that ensure 'equality of arms' with the prosecution at least at the pre-trial stage. This will allow for defence investigations.



ANNEXTURE

PROPOSED PROTOCOL ON DISCLOSURE OF EVIDENCE BY THE ICC PROSECUTION

PREAMBLE

Recognizing the centrality of disclosure in criminal proceedings, this protocol provides a clear guidance on the prosecutions duty to disclose evidence with an attempt to balance competing interests that arise as a result of that duty. The purpose of this protocol therefore is to harmonise the several provisions on disclosure. It is drafted for adoption by the ICC to supplement the Rules of Procedure and Evidence.



Article 1

Definitions

For the purposes of this proposed protocol:

- (a) "Disclosure" refers to the act of providing to the defence evidence in the possession of the prosecution which may be relevant to the case.
- (b) "Legitimate national security interests" refers to genuine interests intended to protect national security which are consistent with national and international law.
- (c) "National security" refers to genuine security interest.
- (d) "Non-party" refers to an individual or agency that is not party to the proceedings.

Article 2

Disclosure of evidence by the prosecution

1. As soon as the criminal proceedings commence the prosecutor must disclose both inculpatory evidence and evidence that shows or tends to show the innocence of the accused, or mitigates the guilt of the accused, or which may affect the credibility of prosecution evidence.
2. The prosecution must make full disclose to the defence the information described in subsection (1) prior to the confirmation of charges unless the information may be withheld subject to the consent of the Court.
3. The prosecution shall disclose to the defence any information or evidence referred to in subsection (1) if and when it comes into the possession or control of the prosecution after the initial disclosure and before the trial is completed.
4. An open file of the prosecution evidence shall be deposited at the Registry and shall be accessible to the Court and the defence.

Article 3

Disclosure of the identity of witnesses

1. Unless provided otherwise the prosecution must disclose to the defence the identity of the witness that it intends to call to give evidence at the trial.
2. Where revealing the identity of a witness may pose a risk to the witness, the prosecution may notify the defence in advance of the risk and make an *ex parte* application to the Pre Trial Chamber for an order to withhold disclosure.

3. An application under subsection (2) must be accompanied by a statement from the Victims and Witnesses Unit acknowledging that the witness is at risk and identifying appropriate protection measures.
4. For purposes of any proceedings before the court, the contact address of victims and witnesses shall be that of their respective lawyers.
5. The public shall be excluded from any proceedings in cases where the safety or non-disclosure of witness identity is in issue.

Article 4

Disclosure of evidence obtained on the basis of confidentiality

1. The prosecution shall only obtain evidence on the basis of confidentiality agreements with third parties if:
 - (a) there is no other practical way to obtain evidence;
 - (b) the information has a high probative value; and
 - (c) the information is necessary for the preparation of the prosecution's case.
2. Information obtained under this section shall not be used as lead evidence but only for the purpose of generating new evidence.
3. Any disclosure under this section shall not be made subject to the consent of third parties.

Article 5

Disclosure of evidence relating to national security

Any information regarding gross violations of human rights or humanitarian law or other violations of international law may not be withheld on grounds of national security in a manner that prevents investigations and accountability for the violations. Only legitimate national security interest which may prejudice a state if disclosed may be withheld from the defence.

Article 6

Non-disclosure orders

1. The prosecution may make an application to the Court for non-disclosure. In its application it shall satisfy that non-disclosure is necessary in the interests of justice and outweighs any prejudice to the accused.
2. The Court may make a full order or conditional order for non –disclosure.
3. Where the chamber grants an order under section (1) and (2) and the prosecutor becomes aware that the justification for such an order ceases to exist, the prosecution shall as soon as practicable disclose this fact to the chamber and the defence.

Article 7

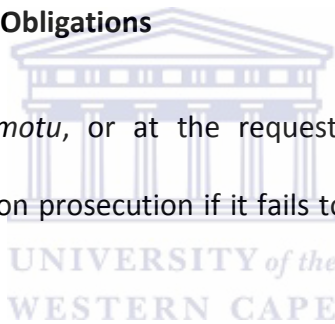
Alternative measures

1. Subject to Article 5(1) the Prosecutor shall provide reasons for withholding evidence and propose alternative measures that will not prejudice the accused right to disclosure.
2. Where the Prosecutor cannot provide alternative measures, he/she shall either:
 - (a) disclose the information; or
 - (b) proceed without the undisclosed evidence.

Article 8

Failure to Comply with Disclosure Obligations

The Court may decide *proprio motu*, or at the request of the defence, on appropriate disciplinary action to be imposed on prosecution if it fails to perform its disclosure obligations pursuant to this Protocol.



Article 9

Disclosure by non-parties

1. This section applies where non-parties may be in possession of inculpatory or exculpatory evidence.
2. The defence may make an application to the court to determine whether third party evidence should be disclosed to the defence. The application must-
 - (a) describe the information and details of the third party;
 - (b) establish the relevance of the information; and

(c) state any reasonable attempts to obtain the material from the non-party.

3. The prosecution may make written submissions to the court regarding the application.



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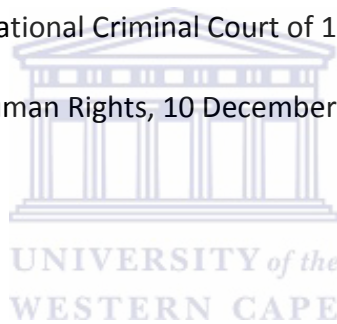
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