

**Disclosure of Evidence in International Criminal Trials -
An Historical Overview**

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Preface

The present thesis is the result of several years of research. It is not so much an analytical work on international criminal law or procedure, but shall rather serve as what the title suggests: a (descriptive) overview.

Scholarship and jurisprudence have been taken into account as of autumn 2012.

Many people have contributed to this thesis. I would like to thank Professor Henning Radtke, judge at the Federal Court of Justice, as well as the Max-Planck-Institute for European Legal History in Frankfurt, for giving me the opportunity to work and conduct research at the International Research and Documentation Center for War Crimes Trials (ICWC) at the University of Marburg and providing financial funding. I thank my colleagues at the ICWC for their support, friendship and for widening my perspective on international criminal law, its history and its implications on different societies, particularly Axel Fischer, who provided me with a constant flow of information concerning the Nuremberg IMT practice. Heartfelt thanks go to Juliana Rangel and Marc Schiethart of the Library of the International Court of Justice (ICJ) in The Hague for providing access to the original Minutes of Closed Sessions of the Nuremberg IMT and for their kind additional support. I thank Eleni Chaitidou, Legal Officer at the Pre-Trial Division of the International Criminal Court (ICC) for her invaluable advice, suggestions and clarifications concerning the jurisprudence of the ICC as regards disclosure, and for her compassion. I also thank Professor Gilbert Gornig of the University of Marburg, who delivered the second revision of the thesis in no time.

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1 Introduction¹

More than 60 years have passed since, for the first time in history, some of those most responsible for gross violations of international and international humanitarian law were held responsible before an international court of justice. The International Military Tribunal of Nuremberg (IMT) marks a fundamental step in the history of international criminal law and its enforcement worldwide. In its aftermath, thousands of other trials on the national level were held against Axis war criminals of a lower rank, some until this day.

It took humanity nearly 50 years to agree on something similar to Nuremberg: the Ad-Hoc Tribunals for the former Yugoslavia and Rwanda as well as the Special Court for Sierra Leone were, as Nuremberg, installed in the face of atrocities which had just happened (or, in the case of the former Yugoslavia, were indeed still happening), in the somewhat desperate try to give a judicial answer to grave human rights abuses.

In the wake of this development, the old dream of establishing a permanent international criminal court was taken up again. Surprisingly for many, in 1998, the plenipotentiaries of a large number of states who had gathered in Rome agreed on a statute for a new permanent International Criminal Court, the ICC, which became operational in 2002 and has, as of autumn 2012, engaged in the prosecution of international crimes in seven different situations, with sixteen persons having appeared before the Court; one person has been convicted, trial proceedings against four more are ongoing.

The substantive international criminal law which is applied by the Ad-Hoc Tribunals and the ICC today can be traced back to Nuremberg. The crimes contained in the Nuremberg Charter, crimes against peace, war crimes and crimes against humanity, can, in principle, be found in the Rome Statute of the ICC today, and at least partially in the Statutes of the Ad-Hoc Tribunals. Even though many details have been and still remain under discussion, the peoples of the world have obviously more or less agreed on what should be punishable under international law. Until today, modern practitioners of international criminal law refer to and rely on jurisprudence related to crimes committed in World War II; there is no book on the matter in which one would not find reminiscence to Nuremberg.

¹ Note: Excerpts of the following thesis form part of *Bünger*, Disclosure of evidence.

The procedural law to be applied in the enforcement of this substantive law, in turn, has changed and developed dramatically since 1945. The Rules of Procedure of the Nuremberg IMT comprised as few as 11 rules; the Tokyo International Military Tribunal for the Far East (IMTFE) had only 9 rules of procedure. The modern UN-Tribunals, in turn, have more than 150 rules (counting the *bis*, *ter* and *quater* Rules), which the Rules of Procedure and Evidence of the ICC even exceed (225 Rules).

Relatively few people seem to concentrate their research on the development of international criminal procedure. On the one hand, this is undoubtedly due to the very fact that it is hard to find a ‘thread’ in the development of international criminal procedure which would be comparable to substantive international criminal law. Furthermore, one must see that the substantive criminal law relates to concrete crimes committed by ‘real people’, and thus draws much more interest, particularly by the public, than criminal procedure, which is perceived as rather technical, bureaucratic and complicated. From a legal practitioner’s point of view, on the other hand, the importance of criminal procedure cannot be underestimated. However, the way or method to proceed against a person in order to find out whether he² is guilty or not, is subjected to a fundamental dispute between the two leading legal systems of the world: the Anglo-American common law and the continental European Romano-Germanic legal system (often referred to as ‘civil law’) with their respective adversary and inquisitorial criminal procedures. Overall, one can state that all international(ized) trials for crimes under international law have always had and still have elements of both systems, initially with a strong preponderance towards adversary (Anglo-American) procedure, which however lately has shifted considerably towards a more inquisitorial (Romano-Germanic) approach.

In recent years, one aspect of international criminal procedure has proven to be of particular concern to international criminal lawyers: the disclosure of evidence. This term refers to a procedure which is rooted in the adversary system: the uncovering of collected evidence or other material by a party of the trial, usually to the other party, but occasionally also to the court or the public. In the Roman-Germanic criminal procedure, the term is unknown. Here, the prosecutor prepares a dossier containing all relevant evidence, incriminating as well as exculpatory. This dossier is handed to the defendant as well as to the Court, meaning that all participants of the trial have (ideally) the same level of information.

² To facilitate the readability of the text, references to persons will mostly be given in the masculine form.

In international justice, the procedural feature of disclosure of evidence has existed from the first day up until now. This is remarkable in at least two ways. First and foremost, in 1945, statutory rules of disclosure were, with few exceptions, inexistent in national jurisdictions. The traditional jurisprudence in the United States and Great Britain (being the two most influential countries for the development of the Rules of Procedure for the IMT) was of the view that there was, under common law, no strict legal obligation of any of the parties in criminal trials to disclose anything to the other party and could thus not be obliged by the court to do so. It thus comes as a surprise that, at least to some extent, the IMT Rules of Procedure put the prosecution, and (at least at first, as we will see) the prosecution alone, under an obligation to disclose to the defendants all documents accompanying the indictment 30 days before the trial. The second surprise may be seen in the very existence of a complex disclosure regime in the Rules of Procedure and evidence of the International Criminal Court (ICC). As mentioned, one can observe a clear shift of international criminal procedure towards the Roman-Germanic inquisitorial system. Admittedly, the procedure of the ICC still has various adversary elements. Yet with the Prosecutor being committed to the (material) truth and obliged to investigate incriminating and exonerating circumstances equally (Art. 54 (1) (a) ICCSt), it would have meant but a small step to give up the complex disclosure regime and introduce an arguably simpler dossier approach. However, this was not done.

The following thesis shall give an overview of the history of disclosure of evidence in international criminal courts. It will start with a general introduction and clarification of terms. Concerning the international criminal courts and tribunals, the thesis will follow a chronological order. Starting with Nuremberg, the statutory rules and their respective genesis will be analyzed, as well as the practice of the IMT concerning disclosure issues and the subsequent changes of the trial's disclosure regime.

The Tokyo IMTFE, being the other international tribunal related to World War 2, will not be covered. For one, the sources are not as well accessible as the ones pertaining to Nuremberg. Second, it must be observed that, probably not least due to this relative lack of documentation, Tokyo has never had the same impact on the judicial and political development of international criminal law as a whole. An analysis of the procedure of the IMTFE must therefore be left to future research.

The major part of the thesis will be dedicated to the recent history of the contemporary tribunals and the ICC. We will analyze the genesis and particularly the development of the disclosure regime of the Ad-hoc Tribunals for the former Yugoslavia and Rwanda (ICTY/ICTR), as well as the Special Court for Sierra Leone (SCSL). The development of the Rules of the Ad-hoc Tribunals is particularly interesting. Since they are drafted

by the Judges of the Tribunals themselves, they can be easily amended; and the Judges have made extensive use of their right to amend the Rules – as of spring 2012, the Rules of the ICTY have been revised 46 times. Since the amendments are made by the judges, the analysis of the development must entail the related jurisprudence of the Tribunals, too. Also, although the Rules of the ICTY, ICTR, and, to a certain extent, the SCSL started from very similar wordings, they have developed differently. We will analyze the respective differences and their consequences.

Finally, we will take a look at the Rules of Procedure and Evidence of the ICC. As already mentioned, they are even more detailed than the Rules of the Ad-Hoc Tribunals – and in contrast to those, they are crafted and promulgated by the Assembly of States Parties of the ICC, acting as a purely legislative body. These Rules are also subject to change, yet cannot be amended as easily as the Rules of the Ad-Hoc Tribunals. The Rules of the ICC as a permanent institution and, particularly its jurisprudence relating to procedural matters must therefore be considered as ‘trend-setting’ for the future of international criminal procedure, and might for their part serve as a source of experience and comparative law for national legislators.

Before we start the analysis of the history of disclosure in international courts, however, it is indispensable to take a look at the beginnings and the development of disclosure in national systems until 1945. Given the fact that the United Kingdom and the United States of America were the two common law countries involved in crafting the procedural rules at Nuremberg, it makes sense to concentrate on these.

The same holds true for the time between Nuremberg and the Ad Hoc Tribunals. On the national level, the development of disclosure made considerable progress in the course of the 20th century both in England and in the United States. The latter were partially influenced by the development in England as concerns their disclosure law; and we even find proof that the Nuremberg experience may have had an indirect influence here. The ICTY’s Rules of Procedure and Evidence, in turn, bear the clear handwriting of the United States; no other country made a larger and more significant contribution as to their drafting. The Rules of the ICTY, finally, became a role model for the Rules of the other Ad-Hoc Tribunals and the ICC.

In the course of our analysis, we will find that disclosure both on the national and international level took a development towards a considerable liberalization. This is particularly due to the fact that courts became more and more audacious with regard to obliging both prosecution and defence to a ‘cards-on-the-table’ approach, blurring the traditional adversarial/inquisitorial dichotomy. This was done not least, it is held, with a goal to enhance truth-finding in criminal trials.

The thesis will conclude with a short evaluation of what has been achieved and whether a further development of disclosure appears desirable.

1.1 Definition and clarification of terms

1.1.1 Disclosure/Discovery

The term ‘disclosure’ can generally be described as the uncovering of evidence and other information between the parties of legal proceedings before and during these proceedings. The term ‘discovery’ is primarily used in North American jurisdictions. In a sense, it is the “inversion” of disclosure, meaning that *discovery* by one party signifies *disclosure* by the other – i.e. ‘defence discovery’ would equal ‘disclosure by the prosecution’, whereas ‘prosecution discovery’ means ‘disclosure by the defence’.³ In England, the term ‘discovery’ was apparently originally used to refer primarily to civil procedures;⁴ however, according to the Civil Procedure Rules 1998⁵, the term disclosure is now also generally used for civil proceedings.⁶ Most authors, as a matter of fact, use the terms ‘disclosure’ and ‘discovery’ synonymously.⁷

In international criminal jurisdictions, as we shall see, the disclosure of evidence has developed into something which must be understood more broadly, for it includes not only the parties, but the court as well. This has to do with the purposes of disclosure, which, it is held, lie not only in the protection of human rights of the person concerned, but also imply aspects of ‘procedural economy’ or ‘trial management’ and truth finding.⁸ In order to avoid (or at any rate: reduce) ambiguities, it therefore appears sensible to at least theoretically differentiate between something we might call ‘disclosure in the procedural sense’ and ‘disclosure in the material sense’.

³ Compare *Ambos*, Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations, at 561.

⁴ *Matthews/Malek*, Disclosure, mn. 1.01.

⁵ 1998 No. 3132 (L.17).

⁶ See part 31 of the Civil Procedure Rules. It should be noted, however, that the term ‘disclosure’ has a narrower meaning in the context of these rules, in that it means only the information about the existence of a document (s. 31.2: “Meaning of disclosure: A party discloses a document by stating that the document exists or has existed.”); this would be followed by a “right to inspection” by the other party (s. 31.3).

⁷ Compare *Matthews/Malek*, Disclosure, *ibid.*; *Comment (Charles Reich)*, Pre-Trial Disclosure in Criminal Proceedings, note 2; *Lynch*, Closure and Disclosure in Pre-Trial Argument, at 291.

⁸ See as to the purposes of disclosure 1.3 below.

1.1.1.1 Disclosure in the ‘procedural sense’

By ‘disclosure in the procedural sense’, we mean the procedural ‘feature’ of disclosure. It is a phase within criminal proceedings as it exists the Anglo-American⁹ and international criminal procedure, which takes place after the indictment (or a document containing the ‘charges’¹⁰, for that matter) is issued and before the trial, but can refer also to an ongoing process when the trial has already started. When scholars and practitioners refer to ‘disclosure’, they usually utilize the term in its procedural meaning. In the following, whenever we speak of disclosure without further explanation, we will mostly refer disclosure in the procedural sense.

1.1.1.2 Disclosure in the ‘material sense’

There is, however, also a material aspect of disclosure, which implies what the word ‘disclosure’ actually says: the material or ‘physical’ uncovering of information towards other participants of the trial proceedings. In this understanding, disclosure is not the ‘procedural feature’, but the material handing over of information or evidence to another participant in the course of criminal proceedings, which does not necessarily take place between the parties (*inter partes*), but can also be done *to* or *via* the court and/or *via* the access to a dossier containing the evidence. Indeed, in this understanding, disclosure does not even require the existence of ‘parties’ in a procedural sense; and is thus not limited to the Anglo-American procedural system, but the term can also be applied to Continental European systems. As a matter of fact, especially in the context of the human rights aspect of disclosure, the procedural rights of the accused contained in the relevant human rights treaties must be respected regardless of the given procedural tradition. Thus, the accused may have a ‘right to disclosure’, even though ‘disclosure’ as a procedural feature does not exist in his procedural system. To be sure, the most relevant underlying reasons for exceptions to and limitations of disclosure, such as the protection of national security information and the protection of victims and witnesses, must also be dealt with regardless of the procedural tradition. It is thus somewhat misleading to say that ‘disclosure does not exist in the Continental European system’: It may not exist as a procedural feature or phase, but it nevertheless exists in a material sense. As mentioned, in the following, if not stated otherwise, we will utilize

⁹ As to some comparative considerations, see 1.2 below.

¹⁰ Compare Art. 61 Par. 3 (a) ICCSt.

the term in the technical or ‘procedural’ sense of the word; however, it is important to keep in mind that substantially it could be applied to any legal system.

1.1.2 The person concerned

In the following, for obvious reasons, we will oftentimes refer to the person against whom criminal proceedings have been initiated. There are quite a number of different terms to name this person, according to the jurisdiction of the proceedings as well as for the procedural phase he finds himself in. In American courts, the person will usually be called ‘suspect’ during the investigation phase, and ‘defendant’ once the indictment is filed with the court;¹¹ the German Code of Criminal Procedure uses the word ‘accused’ as a general term together with special terms according to the particular procedural phase;¹² in other contexts, the person will be referred to as the ‘accused’ or the ‘charged’¹³; in the international criminal courts and tribunals, we speak of the ‘suspect’¹⁴, ‘accused’, ‘person concerned’¹⁵ or sometimes just ‘person’.¹⁶ Hereinafter, we will mostly refer to this person as the *accused*. It appears to be the most general term available without sounding overly artificial; furthermore, in most cases, disclosure in the procedural sense normally takes place after the indictment is confirmed, which is why the term is also technically correct in most instances.¹⁷

¹¹ *Ambos/Miller*, Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective, p. 339 with further references.

¹² See German Code of Criminal Procedure: “Section 157. [Definition of the Terms "Indicted Accused" and "Defendant"]:

Within the meaning of this statute,

the indicted accused shall be an accused person against whom public charges have been preferred, the defendant shall be an accused person or indicted accused in respect of whom there has been a decision to open the main proceedings.”

¹³ *Safferling*, Towards an international criminal procedure, *passim*, e.g. pp. 136, 140.

¹⁴ See, e.g., Art. 18 ICTYSt. The ICC nomenclature, in turn, does not know the term ‘suspect’.

¹⁵ See, e.g. Art. 17 ICCSt.

¹⁶ See, e.g. Art. 55 ICCSt.

¹⁷ With the exception of the ICC, where we must distinguish between pre-confirmation and pre-trial disclosure, see 6.2.1 *infra*. See for instructive remarks on the terminology generally *Ambos/Miller*, Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective, p. 339 et seq.

1.2 Comparative Considerations

In order to address the issue of disclosure (in the procedural sense) in an international legal context properly, it is necessary to describe, very briefly, some of the main differences between the two most dominant procedural systems as regards criminal procedure, which are the ‘Anglo-American’ system on the one hand, and the ‘Romano-Germanic’¹⁸ one on the other. This is warranted because disclosure as a procedural ‘feature’, as just mentioned, is rooted and existent only in the adversary trial of the Anglo-American tradition. The following overview will focus on the protagonists of the proceedings and their respective roles within them.¹⁹

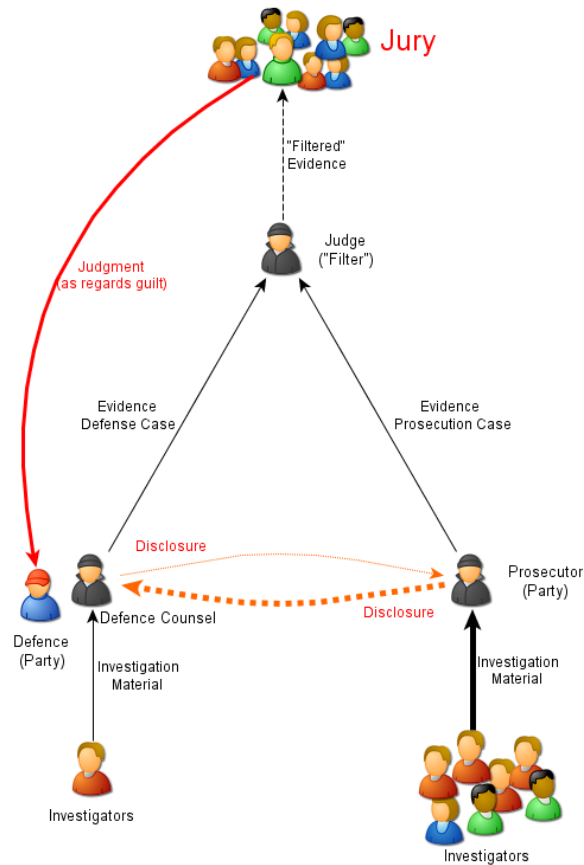
1.2.1 The Anglo-American System

The following (simplifying and ‘idealising’)²⁰ overview may help to illustrate the basic procedural functioning of the Anglo-American system:

¹⁸ Often also referred to as ‘common law’ and ‘civil law’, respectively. These terms, however, appear to be somewhat inaccurate, since ‘common law’ is a specific source of law within the Anglo-American system, whereas ‘civil law’ will often refer to civil law as opposed to criminal or public law. Hereinafter, we will stick to the terms Anglo-American and Romano-Germanic; the latter will also at times be referred to as ‘Continental European’.

¹⁹ See on the comparison of the two major legal systems generally *Damaška*, *The Faces of Justice and State Authority*, as well as *Damaška*, *Structures of Authority and Comparative Criminal Procedure*; *Zweigert/Kötz*, *Einführung in die Rechtsvergleichung*. For a concise comparative overview see *Orie*, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, as well as *Safferling*, *International Criminal Procedure*, p. 52 et subs.

²⁰ To be sure, for example, many trials in modern Anglo-American legal systems are conducted without a jury. The ‘ideal’ form of the adversarial trial, however, is fundamentally based on the existence of a jury. See, also on the present decline of the importance of the jury, *Jackson/Doran*, *Judge without jury*, p. 1 et subs.



As may be seen from the illustration, the trial in the Anglo-American system is adversarial in nature. The main protagonists are the parties, Prosecution and Defence. They are the ones who collect evidence and present it in court. The parties are supported by investigators; in the case of the Prosecutor, they are ‘official’ and public investigators, such as the police; the defence is free to employ its own investigators as it desires. The judge, in turn, plays a rather passive role and serves as a kind of ‘referee’. Indeed, legal procedures in Anglo-American systems have been compared to ‘games’ or ‘fights’, which is probably also one of the reasons why expressions such as ‘equality of arms’²¹ ever emerged. As *Pollock and Maitland* put it:

The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are

²¹ See 1.3.1.3 below.

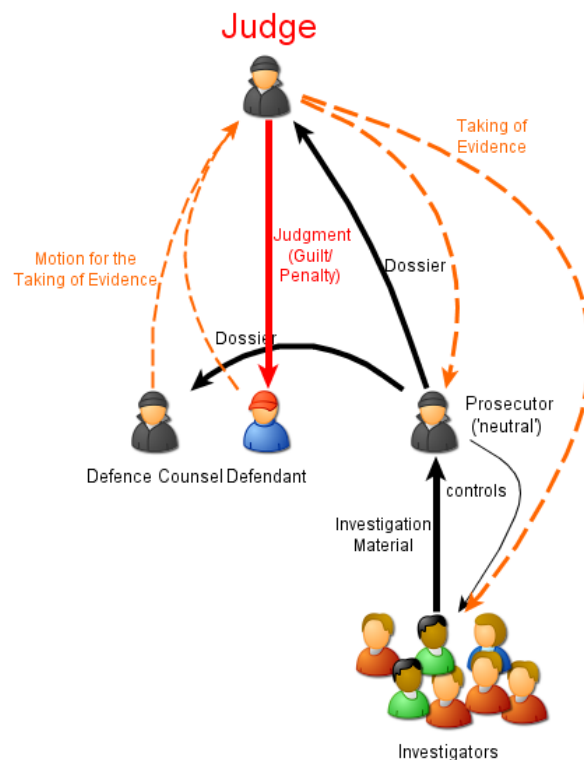
*often reminded of the cricket-match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that ?' This passive habit seems to grow upon them as time goes on and the rules of pleading are developed.*²²

One can also compare the judge to a 'filter' as concerns the evidence: the jury may only consider the evidence that was allowed by the judge and has thus bypassed him.²³ The jury finally hands down the judgment as concerns guilt or innocence. It remains for the judge to decide on the penalty imposed upon the defendant.

Disclosure, the main topic of this thesis, takes place between the parties, with disclosure obligations of the prosecution usually being more extensive than those of the defence.

1.2.2 The Romano-Germanic System

The Romano-Germanic system may be illustrated as follows:



This overview, inspired by the German system, is again somewhat oversimplifying and not applied in actual jurisdictions without at least some modifications. It aims at

²² *Pollock/Maitland*, The history of English law before the time of Edward I Vol. 2, p. 670 et seq.

²³ *Walpin*, America's Adversarial and Jury Systems: More Likely to Do Justice, at p. 176: "Evidentiary Traffic Warden".

demonstrating that the trial in the Romano-Germanic tradition revolves around the judge, who plays a very active role and, during the trial, takes the evidence himself. The Romano-Germanic system is therefore often referred to as ‘inquisitorial’. The accused/defence and the prosecutor, at least as far as the trial phase is concerned, play a much more passive role. It is important to note that, at least in the traditional understanding of the procedural system, there are no actual *parties* in the proceedings. If one were to define a party, it would be the defendant and the defendant alone.²⁴ The prosecutor is not a party, but (ideally) merely acts as a ‘neutral’, as opposed to partisan, administrator of justice and is obliged to lead the investigation in an objective manner, collecting all evidence related to a case, be it incriminatory or exculpatory.²⁵ The police, as controlled by the public prosecutor, submits the evidence it has collected to the prosecutor (or, in some jurisdictions, such as France, an investigating judge) who prepares a dossier, which, in principle, contains all the evidence. If he decides to indict the suspect, he must submit the entire dossier to the court together with the indictment, and, if the defence requests him to do so (which it usually does), to the defence. On the basis of the dossier, the court decides whether it opens the trial or not; it can also oblige the prosecutor to collect more evidence. If the defence is of the opinion that more evidence should be collected, it can make a motion to the prosecutor or, in the trial phase, the court. If the court grants the motion, it will oblige the prosecutor or the investigators directly to collect the requested evidence; in some cases the court will even collect the evidence itself, e.g. by calling a witness or an expert *ex officio*. At trial, all participants, judge, prosecutor and defence, who share knowledge of the same dossier, should have, in principle, the same level of information. In such a system, there is obviously no need for disclosure in a procedural sense between the parties. Disclosure in the material sense, however, can still be an issue, for example in cases of evidence containing intelligence information or protected/anonymous witnesses.

²⁴ See also 1.3.1.4 below.

²⁵ See, e.g., Section 160 of the German Code of Criminal Procedure:

[Investigation Proceedings]

- (1) As soon as the public prosecution office obtains knowledge of a suspected criminal offense either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.
- (2) The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that such evidence is taken the loss of which is to be feared.
- (3) The investigations of the public prosecution office should extend also to the circumstances which are important for the determination of the legal consequences. For this purpose it may avail itself of the service of the court assistance agency.

1.2.3 International Proceedings

International proceedings have always combined elements of the adversary system of the Anglo-American tradition and the inquisitorial system of the Continental-European one.²⁶ Their rules have oftentimes been described as a ‘mix’ of the two systems.²⁷ Indeed, as mentioned above, disclosure in international trials has always existed as a procedural feature, and has increasingly become an element which does not only involve the parties, but the court as well. As we shall see, it appears that the concepts of what we call disclosure in the procedural sense and disclosure in the material sense are converging, and that the separation between them is increasingly blurred, which makes it necessary to understand the concept of disclosure in international criminal proceedings more widely.

1.3 The Purpose of Disclosure

The purpose of disclosure of evidence in criminal proceedings appears to have been evaluated differently over time. We can differentiate at least three aspects concerning the purpose of disclosure: the human rights aspect, the procedural or trial management aspect, which relates to the efficiency of the proceedings, and the truth finding aspect. We shall take a brief look at these issues in the following.

1.3.1 The Human Rights Aspect – Fair Trial Rights

Today, disclosure in criminal proceedings tends to be seen primarily in relation with the protection of the accused’s rights as regards criminal trials, i.e. with his fair trial guarantees.²⁸ Most authors and human rights bodies relate disclosure to the accused’s rights of information and the facilities for the preparation of the defence. However, the

²⁶ In Nuremberg and Tokyo, the Judges were, in contrast to the usual practice in the Anglo-American systems at the time, allowed to ask questions to the witnesses, and made use of this right; there were also no technical rules of evidence. These features were kept and widened at the Ad Hoc Tribunals and still expanded at the ICC. These issues will be discussed in more detail in the respective chapters.

²⁷ See, e.g. *Ambos*, *The Structure of International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?* with further references; see also *Kreß*, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*; *Picker*, *International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction*, at p. 1087 et seq.; as well as *Safferling*, *Towards an international criminal procedure*, p. 219.

²⁸ See, e.g., *Brady*, *Disclosure of Evidence*, at 403.

disclosure of evidence is also oftentimes linked to the accused's 'right to an adversarial trial' and/or the principle of 'equality of arms'.

1.3.1.1 Rights to Information and Defence Preparation

Art. 6 (3) (a) and (b) of the European Convention on Human Rights²⁹ state:

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence.

Almost verbatim,³⁰ Art. 14 (3) (a) and (b) of the International Covenant of Political Rights and Civil Liberties³¹ provide:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence [...].

As a matter of fact, neither of the two mentioned human rights documents is directly applicable to the international criminal courts and tribunals, since none of them is party to the underlying treaties.³² In the case of the ICC, however, one could be of the opinion that at least the ICCPR could be viewed as an "applicable treaty" in the sense of Art. 21 Par. 1 (b) of the Rome Statute^{33,34} To be sure, the right to a fair trial has been recognized by the ICTY as a requirement of customary international law.³⁵

²⁹ Convention for the Protection on Human Rights and Fundamental Freedoms, hereinafter: ECHR.

³⁰ In fact, Art. 14 (3) (b) ICCPR was modelled after Art. 6 (3) and (b) ECHR; see *Nowak*, UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll, Art. 14, mn.42; see as to the genesis of Art. 14 (3) (b) ICCPR the overview at *Bossuyt*, Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights, p. 296.

³¹ Hereinafter: ICCPR.

³² See *Safferling*, Die EMRK und das Völkerstrafprozessrecht, p. 157.

³³ Rome Statute of the International Criminal Court, hereinafter: ICCSt.

³⁴ See McAuliffe de Guzman in: *Triffterer*, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Art. 21, mn.10.

³⁵ *Prosecutor v. Aleksovski*, ICTY Case No. IT-95-14/1-A, Judgment, Appeals Chamber, 24 March 2000, par. 104.

Be that as it may – all of the international criminal courts and tribunals echo the said fair trial guarantees in their basic legal documents to a larger or lesser extent. Already in the Charter of the Nuremberg IMT³⁶, which was of course passed before the named international human rights treaties, we find a related provision:

Article 16.

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. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial. [...]

Similarly, Art. 9 of the IMTFE Charter for the Tokyo Tribunal provided:

Article 9

Procedure for Fair Trial. In order to insure a fair trial for the accused the following procedure shall be followed:

(a) Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offence charged. Each accused shall be furnished, in adequate time for defence, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

The modern tribunals, for their part, have practically incorporated the said provisions of the modern human rights treaties. Article 21 (4) (a) and (b) of the Statute³⁷ of the International Tribunal for the Former Yugoslavia³⁸, Article 20 (4) (a) and (b) of the Statute³⁹ of the International Tribunal for Rwanda⁴⁰, Article 17 (4) (a) and (b) of the Statute of the Special Court for Sierra Leone⁴¹ as well as Article 16 (4) (a) and (b) of the Statute⁴² of the Special Tribunal for Lebanon⁴³ cite the above mentioned provisions of

³⁶ London Charter of the International Military Tribunal, decreed on 8 August 1945 as an annex to the London Agreement, *International Military Tribunal*, Trial of the Major War Criminals before the International Military Tribunal : Nuremberg, 14 November 1945 - 1 October 1946 (hereinafter: IMT) vol. I, p. 10-16.

³⁷ Adopted by UNSC Resolution 827 (1993), 25 May 1993, hereinafter: ICTYSt.

³⁸ Full title: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereinafter: ICTY.

³⁹ Adopted by UNSC Resolution 955 (1994), 8 November 1994, hereinafter ICTRSt.

⁴⁰ Hereinafter: ICTR.

⁴¹ Hereinafter: SCSLSt and SCSL, respectively.

⁴² Adopted by UNSC Resolution 1757 (2007), hereinafter STLSt.

the ICCPR verbatim, the only difference being that the latter includes, presumably for reasons of equal gender treatment, the respective female form. The Khmer Rouge Tribunal⁴⁴ took a different approach by simply making explicit reference to Art. 14 ICCPR in Article 13 of the Agreement between the UN and Cambodia⁴⁵:

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: [...] to have adequate time and facilities for the preparation of his or her defence; [...]

The International Criminal Court⁴⁶, in Article 67 (1)(a) and (b) of the ICC Statute also echoes Art. 14 (3)(a) and (b) Art. 14 (3)(a) and (b) ICCPR, adding a right to information of the *content* of the charge and formulating in a gender neutral manner:

In the determination of any charge, the accused shall be entitled to [...] the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence [...].

In addition to that, the ICCSt contains, as a somewhat unique⁴⁷ feature among the other international courts, an explicit right to disclosure as concerns exculpatory evidence. Art. 67 Par. 2 provides:

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

The rights to information as concerns the charges and adequate time and facilities for the preparation of the defence, are usually cited when it comes to disclosure issues. In

⁴³ Hereinafter: STL.

⁴⁴ Full title: Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, hereinafter: ECCC.

⁴⁵ Agreement between the United Nations and The Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

⁴⁶ Hereinafter: ICC.

⁴⁷ While the other courts and tribunals do have similar provisions, they are not contained in their respective statutes but only in the Rules of Procedure and Evidence.

relation with disclosure, some authors appear to stress the first provision (information of the accused),⁴⁸ while many merely cite the second one (adequate time and facilities for the preparation of the defence).⁴⁹ The two provisions are obviously closely linked to each other: a proper preparation of the defence is impossible without knowing the charges in detail; the same is true if the charges are known but the defence lacks the time and facilities for preparation.⁵⁰ However, disclosure *stricto sensu* is indeed more closely linked to the *facilities* for the preparation of the defence, whereas the information on the charges refers more to the indictment or charges, meaning a statement of the facts and circumstances the defendant is accused of – disclosure usually takes place *after* the charges are formulated and refers to pieces of evidence and factual information which go beyond the contents of an indictment.⁵¹ In fact, the right to information ‘serves’ the right to preparation.⁵² Obviously, there is also a close link with the *time* granted for the preparation of the defence, for a disclosure of evidence which does not take place sufficient time before the hearing is relatively useless.

In their jurisprudence and comments, the relevant international human rights organs have also related disclosure issues to the right to prepare one’s defence.

In its General Comment on Art. 14 ICCPR, the UN Human Rights Committee states that “facilities must include access to documents and other evidence which the accused requires to prepare his case”.⁵³ In *O.F. v. Norway*, the HRC, though declaring the case inadmissible, also indicated that it saw the right to access to material documents as falling under Art. 14 (3)(b) ICCPR. At the same time, it held that the right to access does not entail the right to actually *receive* the relevant documents, i.e. that they be sent to the accused.⁵⁴ In *Haase v. Germany*, the European Commission of Human Rights likewise related access to documents to Art. 6 (3)(b) ECHR.⁵⁵

⁴⁸ *Zappalà*, Human rights in international criminal proceedings, p. 119.

⁴⁹ See, e.g. *Stavros*, The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights, pp. 178 et subs., 182; *Rzepka*, Zur Fairness im deutschen Strafverfahren, p. 63; *Safferling*, Towards an international criminal procedure, pp. 194 et subs.; *Frowein/Peukert*, Europäische Menschenrechtskonvention, Art. 6, mn. 185.

⁵⁰ See also *Stavros*, The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights, p. 168.

⁵¹ See also ECommHR, *Ofner v. Austria*, Application No. (524/59), 3 Yearbook 322, 19 December 1960.

⁵² See also *Frowein/Peukert*, Europäische Menschenrechtskonvention, Art. 6, mn. 175.

⁵³ HRC General Comment No. 13 (Art. 14), par. 9.

⁵⁴ *O. F. v. Norway*, Communication No. 158/1983, 26 October 1984, par. 5.5.

⁵⁵ ECommHR, *Haase v. Federal Republic of Germany*, Application No. 7412/76, Report 12 July 1977, par. B (a), p. 27.

In *Jespers v. Belgium*, the ECommHR held:

*In particular, the Commission takes the view that the “facilities” which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purpose of preparing his defence, with the results of investigations carried out throughout the proceedings.*⁵⁶

Disclosure certainly serves the right of the accused to prepare himself adequately for the trial, and it appears that disclosure is best placed into the ambit of this right. However, other authors and indeed also international courts place relate disclosure to other fair trial rights.

1.3.1.2 Right to an Adversarial Trial

More often than not,⁵⁷ disclosure has also been linked to the ‘right to an adversarial trial’. This term is not to be found explicitly in the ECHR, but has been recognized by the European Courts of Human Rights. In *Brandstetter v. Austria*, the Court stated that

*The principle of equality of arms⁵⁸ is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial [...]. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.*⁵⁹

What the ECtHR calls the ‘right to an adversarial trial’ is, at least, very similar to what would be called the ‘right to be heard’⁶⁰ in the Continental European legal tradition.⁶¹

⁵⁶ *Jespers v. Belgium*, Application no. 8403/78, Report, 14 December 1981, par. 56. The case was declared inadmissible by the Commission on 15 October 1980, and thus never made it to the ECtHR.

⁵⁷ See, e.g., *Harris/O'Boyle/Bates/Buckley*, Law of the European Convention on Human Rights, pp. 254 et subs.; *Ovey/White*, European Convention on Human Rights, pp. 156 et subs.; see also *Trechsel/Summers*, Human rights in criminal proceedings, pp. 92 et subs.

⁵⁸ See as to the equality of arms 1.3.1.3 below.

⁵⁹ *Brandstetter v. Austria*, Series A no. 212, Judgment, 28 August 1991, paras. 66 & 67.

⁶⁰ As, e.g., in Art. 103 (1) of the Basic Law for the Federal Republic of Germany (*Grundgesetz*): “In the courts every person shall be entitled to a hearing in accordance with law.”; see also § 33 German Code of Criminal Procedure (*Strafprozessordnung*):

[Hearing the Participants]

(1) A decision of the court rendered in the course of the main hearing shall be given after hearing the participants.

(2) A decision of the court rendered outside a main hearing shall be given after a written or oral declaration by the public prosecution office.

Indeed, the Court has indicated to this conclusion in, e.g., *Kamasinski v. Austria*, when it equated the English term “right to be heard” with the French term “le principe du contradictoire”:

*Nevertheless, in conducting the factual inquiry the Supreme Court did not observe the principle that contending parties should be heard (le principe du contradictoire), this being one of the principal guarantees of a judicial procedure [...].*⁶²

This right also implies rights to information, in order to be able to make an informed decision as to whether one should aim to actively influence the decision of the court and how. Also, the ‘right to access to the dossier’ as known in the Continental European legal tradition, which for its part forms the ‘Continental counterpart’ to disclosure and indeed entails disclosure in the material sense, is oftentimes, at least partially, derived from this right to be heard.⁶³

Not explicitly related to the ‘right to an adversarial trial’, the Court held in *Edwards v. UK*:

*The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (art. 6-1), indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings.*⁶⁴

Later, in *Jasper v. UK* and *Rowe and Davis v. UK*, both judgments handed down on the same day and with identical wording in the respective passages, the Court, apparently combining the above cited holdings in *Brandstetter* and *Edwards*, held that

(3) If a decision has been given pursuant to subsection (2), another participant shall be heard before facts or evidentiary conclusions in respect of which he has not yet been heard are used to his detriment. [...]

⁶¹ Compare also *Trechsel/Summers*, Human rights in criminal proceedings, p. 89. See for a comparison of the right to be heard with the principle of equality of arms for Germany also *Safferling*, Audiatur et altera pars - die prozessuale Waffengleichheit als Prozessprinzip?.

⁶² *Kamasinski v. Austria*, Application no. 9783/82, Judgment, 19 December 1989, par. 102. See also *Esser*, Auf dem Weg zu einem europäischen Strafverfahrensrecht, p. 406.

⁶³ BVerfGE 18, 399 (405); 62, 338 (343); *Schäfer*, Die Grenzen des Rechts auf Akteneinsicht durch den Verteidiger, p. 204; in this sense apparently also *Trechsel/Summers*, Human rights in criminal proceedings, *ibid.*

⁶⁴ *Edwards v. UK*, Application no. 13071/87, Judgment, 16 December 1992, par. 36; *Rowe and Davis v. UK*, App. no. 28901/95, Judgment, 16 February 2000, par. 60.

It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party [...]. In addition Article 6 § 1 requires, as indeed does English law [...], that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.⁶⁵

1.3.1.3 Equality of Arms

The principle of ‘equality of arms’ which, just as the right to an adversarial trial, is not explicitly contained in the human rights treaties, has nevertheless been constantly recognized by the ECommHR and the ECtHR. It is a central element of the principle of fair trial,⁶⁶ derived from the Roman principle of *audiatur et altera pars*,⁶⁷ and seems to have first appeared in the case of *Pataki & Dunshirn v. Austria*.⁶⁸ The ECommHR based the equality of arms on the general right to a fair trial contained in Art. 6 (1) ECHR.⁶⁹ Some scholars rather ground it on the general equality of persons before courts and tribunals as expressly mentioned in Art. 14 ICCPR.⁷⁰

As stated, since the right to equality of arms is not expressly mentioned in the procedural rights catalogues of the international criminal courts and tribunals, it is not directly applicable; the ICTY Appeals Chamber, however, has stated that

The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments.

⁶⁵ *Jasper v United Kingdom* (2000) 30 EHRR 441, par. 51.

⁶⁶ *Grabenwarter*, Europäische Menschenrechtskonvention, § 24, mn. 61; the same/Pubel in *Grote/Meljnik/Allewedt*, EMRK/GG, p. 690.

⁶⁷ *Fawcett*, The application of the European Convention on Human Rights, p. 137.

⁶⁸ Applications no. 596/59 and 789/60; Report, 28 March 1963.

⁶⁹ *Ibid.*, p. 49.

⁷⁰ See, e.g., *Gollwitzer*, Menschenrechte im Strafverfahren: MRK und IPBPR, MRK Art. 6/Art. 14 IPBPR, mn. 59.

*Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.*⁷¹

As seen above in the cases of *Pataki & Dunshirn*⁷² as well as *Brandstetter*,⁷³ the ECommHR and the ECtHR see the principle of equality of arms as, like the adversarial trial, part of the broader concept of a fair trial. Some authors state that the right to an adversarial trial is, on the contrary, for its part *contained* in the principle of equality of arms, which they treat as the broader concept.⁷⁴ Others, albeit without any explanation, want to base the principle of equality of arms (in the case of an arrest) on Art. 5 (4) ECHR.⁷⁵

Be that as it may, substantially, the principle of equality of arms, meaning a ‘fair balance’ between the parties, implies that

*[...] each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.*⁷⁶

Indeed, we note that the concepts of right to an adversarial hearing and equality of arms are closely related. *Audiatur et altera pars*, meaning “the other side is to be heard also”, shows the relation between the two principles. This said, it is not particularly surprising that some authors, for their part, link the disclosure of evidence to the principle of equality of arms.⁷⁷

1.3.1.4 Adversarial Trial / Equality of Arms in favour of the Prosecution?

As was just mentioned and as we will see in more detail below, all jurisdictions which know the procedural feature of disclosure in the formal sense, i.e. all Anglo-American and all international jurisdictions, also impose disclosure duties upon the *defence*.

⁷¹ *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-A, Appeals Judgment, Appeals Chamber, 15 July 1999, par. 44; reiterated in, e.g., *Prosecutor v. Kordić & Čerkez*, ICTY Case No. IT-95-14/2-A, Appeals Judgment, Appeals Chamber, 17 November 2004, par. 176.

⁷² See fn. 68 above.

⁷³ See fn. 59 above.

⁷⁴ *Rzepka*, Zur Fairness im deutschen Strafverfahren, pp. 85 et seq.

⁷⁵ *Kempf*, Die Rechtsprechung des EGMR zum Akteneinsichtsrecht und §§ 114, 115 Abs. 3, 115a Abs. 3 StPO, at p. 217.

⁷⁶ *Dombo Beheer v. Netherlands*, Application no. 14448/88, Judgment, 27 October 1993, par. 33.

⁷⁷ *Cryer/Friman/Robinson/Wilmshurst*, An introduction to international criminal law and procedure, no. 17.9.3, p. 381.

Particularly in the jurisprudence of the Ad-Hoc Tribunals,⁷⁸ some defence disclosure obligations not explicitly foreseen in the respective legal sources, i.e. the Statutes and Rules of Procedure and Evidence, have been based on the principle of equality of arms, invoked in favour of the Prosecution.⁷⁹

At least some of the judges did see, however, that this could not just be done offhand. In an early separate opinion handed down in the proceedings against *Tadić*, citing mainly ECtHR jurisprudence, Judge Vorah stated:

*It seems to me [...] that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the De-fence case before the Court to preclude any injustice against the accused.*⁸⁰

In the most fundamental decision concerning this point, however, the Appeals Chamber of the ICTY, also citing some of the above-mentioned ECtHR jurisprudence, argued, though without a useful explanation, that the Prosecution can *also* rely on the principle of equality of arms to defer procedural rights from it:

*This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law or Statute to the accused and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.*⁸¹

Indeed, as we have seen above, the ECtHR does say that

*[B]oth prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party [...].*⁸²

⁷⁸ See as to disclosure at the Ad-Hoc Tribunals Chapter 5 below.

⁷⁹ See for a number of references *Tochilovsky*, Jurisprudence of the international criminal courts and the European Court of Human Rights, p. 278.

⁸⁰ *Prosecutor v. Tadić*, Separate Opinion of Judge Vohrah on Prosecution Motion for Production Of Defence Witness Statements, ICTY Case No. IT-94-1-T, Trial Chamber, 27 November 1996, p. 7.

⁸¹ *Prosecutor v. Aleksovski et al.*, ICTY Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on the Admissibility of Evidence, Appeals Chamber, 16 February 1999, par. 23, footnotes omitted.

⁸² *Edwards v. UK; Rowe and Davis v. UK*, see fn. 64 *supra*.

In the mentioned case of *Jespers v. Belgium*, the ECommHR also stated:

*The equality of arms would cease to exist if the defence could inspect the special file of the Public Prosecutor's Department, while the latter cannot and has no wish to inspect the personal files of the defence.*⁸³

This implies that in the view of the ECommHR the principle of equality of arms works in favour of the prosecution as well. At the same time, it is to be noted that all of the mentioned cases dealt with applications of *accused* persons to the ECommHR/ECtHR, not prosecuting authorities. Art. 34 ECHR establishes that:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.

Even though legal persons can thus, in principle, also apply to the Court, they must be somewhat 'remote' from state power.⁸⁴ As a matter of fact, to imagine, say, the English Crown Prosecution Service going to Strasbourg to claim an infringement of its right to equality of arms *vis-à-vis* the accused has a somewhat comical note to it.

Concerning the mentioned ICTY decision in *Aleksovski*, it can be noted that the ICTY Appeals Chamber, while expressly basing the right of the prosecution to disclosure on the principle of equality of arms, refers to the fact that the ICTY prosecutor acts "in the interest of the victims of the offence charged" and "on behalf of the international community", which in this context is also a little cryptical because it hints to the conclusion that indeed the Chamber does not simply refer to the thought that the Prosecution can, as it were, 'automatically' invoke its right to equality of arms for the mere fact of being a party to the proceedings.

It must be questioned generally whether the view that the Prosecution can base own procedural rights on the principle of equality of arms can be upheld from a systematic as well as functional⁸⁵ and normative viewpoint.

Systematically, the fair trial-rights are basic human rights, which are rooted in the idea that persons have certain rights *vis-à-vis* the state, a thought which goes way back to the enlightenment. They are therefore predominantly defensive rights of persons against

⁸³ *Jespers v. Belgium*, Report, fn. 56, par. 51, taking over the argument of the Belgian Government cited by the Commission in its inadmissibility decision *Jespers v. Belgium*, application no. 8403/78, Decision of 15 October 1980 on the admissibility of the application, 15 October 1980, p. 124.

⁸⁴ *Grabenwarter*, Europäische Menschenrechtskonvention, § 17, mn. 5.

⁸⁵ By functional, we mean the specific role the participant plays within a criminal justice system as a whole.

state power, which means that the procedural guarantees of the relevant human rights convention benefit the *accused*, and, *prima facie*, no one else.⁸⁶

From a normative point of view, this is also justified, since the state, i.e. in a criminal case the prosecuting authorities, are in a much stronger position as compared to the accused, enjoying massive powers with regard to investigation which the accused does not have, and this manifest disequilibrium needs to be balanced.

Functionally, one will have to differentiate according to the role which the prosecutor takes within a procedural framework *vis-à-vis* the accused. The accused is both subject and object of a criminal trial, which devolves around the question of whether he is guilty of the crime charged or not. Since, as we have seen, he is the one who must defend himself against the allegations made by the state (and thus arguably against the state as such), he must enjoy certain procedural rights and safeguards. The accused must always be considered to be a party, and not merely a participant, of the proceedings. The role of the prosecution, in turn, is not quite so clear. Can the prosecution be considered a party meaning it to be allowed to pursue partisan interests, and does that mean by implication that it can invoke own procedural rights based on general human rights?

As we have briefly seen at the beginning of this chapter, in the Anglo-American procedural tradition, the prosecution is considered a party. This is certainly due to the fact that, originally, there was no public prosecution in England, and the prosecution of criminal offences used to be a private matter, which was therefore treated more or less equally to private litigation.⁸⁷ Today, virtually all prosecutions are carried out by public prosecutors, i.e. the state.⁸⁸ Here, the prosecution is committed to the truth and therefore not entirely partisan; it is occasionally described as a ‘minister of justice’.⁸⁹ We must

⁸⁶ See, once again, e.g. Art. 6 (3) ECHR: “*Everyone charged with a criminal offence* has the following minimum rights [...]”, emphasis added. As to the question whether the basic human rights ‘as a whole’, understood as a ‘constitutional instrument of public order’, merit a different conclusion, see below.

⁸⁷ See *Safferling*, Towards an international criminal procedure, p. 9; in fact, a public prosecution service was not installed in England until the creation of the post of Director of Public Prosecutions in 1879, see *Stephen*, A History of the Criminal Law of England Vol. 1, p. 501.

⁸⁸ Since the establishment of the Crown Prosecution Service in England in 1986, the police is not a prosecuting authority anymore, see *Slapper/Kelly*, The English legal system, p. 481.

⁸⁹ *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, at 111 states that this role of the prosecutor “can be traced back at least to the early 1800s”. While in theory this may be true, looking at the history of judicial practice, it remains doubtful. See, on the other hand, the clear wording of the landmark decision of the Supreme Court of Canada in *R v Stinchcombe*, [1991] 3 S.C.R. 326, where

conclude that it is indeed allowed to pursue its own interests, in the sense that it may, in principle, actively seek the prosecution and conviction of the accused, regardless of exonerating facts – it may be obliged to disclose them, but need not actively search for them. In the Continental European tradition, this is not the case, since regularly the prosecution is considered to be a somewhat ‘neutral’, certainly not partisan instance, which is obliged to investigate both incriminating and exonerating circumstances.⁹⁰ The prosecution in these jurisdictions is therefore generally not considered to be a party of the proceedings.⁹¹ This also entails that, at least lately, it appears to be relatively undisputed that prosecution authorities cannot claim infringements of their ‘right’ to equality of arms, or, for that matter, their ‘right’ to be heard, before human rights bodies.⁹²

At the international criminal tribunals, the picture is somewhat unclear. To be sure, all of the relevant provisions of these courts and tribunals speak of “parties” referring to the defence and the prosecution. However, at the ICC, the Prosecutor is considered an (although independent and “separate”) *organ* of the Court (Art. 42 (1) ICCSt), obliged,

[i]n order to establish the truth, [to] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal

the Court held: “The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.”, as well as the 1871 decision of the Supreme Court of Michigan in *People v. Davis*, 52 Mich. 569, 18 N.W. 362, Mich. 1884, pp. 573 et subs.: “[The prosecutor] was, on the other hand, a sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected. [...] [T]he state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the state has no such interest; its interest is that accused parties shall be acquitted, unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it.” See for U.S. federal jurisprudence also *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, U.S. 1935, at p. 112: “[The due process requirement] cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.”

⁹⁰ See, e.g., once again Section 160 (2) of the German Code of Criminal Procedure, note 25 *supra*.

⁹¹ See, e.g., *Meyer-Goßner/Cierniak/Schwarz/Kleinknecht/Meyer*, Strafprozessordnung, Vor § 141 GVG, mn. 8 with further references.

⁹² See for Germany, e.g., *Rüping*, Der Grundsatz des rechtlichen Gehörs und seine Bedeutung im Strafverfahren, pp. 143 et seq.; *Sowada*, Der gesetzliche Richter im Strafverfahren, pp. 158 et subs.; Schmidt-Aßmann in: *Maunz/Dürig*, Grundgesetz, Art. 103, mn. 36.

*responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally [...].*⁹³

And also the ICTY, in a relatively early decision, yet being, once again, unclear in its reasoning, held:

*However it should be noted 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, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting [...].*⁹⁴

This reasoning, and rightly so, has been referred to as “lofty” and “not reflecting the responsibilities of the Office of the Prosecutor as delineated in the Tribunal’s Rules”.⁹⁵ In another occasion, Judge Shahabuddeen commented on the role of the ICTY Prosecutor as follows:

*The Prosecutor is a party, but it is recognised that she represents the public interest of the international community and has to act with objectivity and fairness appropriate to that circumstance. She is in a real sense a minister of justice. Her mission is not to secure a conviction at all costs; the Rules relating to disclosure of exculpatory evidence show that. This in substance applies within common law systems. It is equally visible in continental systems. It is an aspect which a criminal tribunal acting on the international plane has to bear in mind, more especially in view of the solemn declaration taken by the witness.*⁹⁶

It may be noted that this argument, even though it does not appear to be representative for the Ad Hoc Tribunals as a whole, also has the notion of the Prosecutor as a representative of “the public interest of the international community” to it.

Now, this finding must be compared with the procedural role of the accused. Admittedly and as already said, the accused is both object and subject of the trial; he is object of it in that the court judges over his guilt, and he is subject of it in that he must

⁹³ Art. 54 (1) ICCSt.

⁹⁴ *Prosecutor v. Kupreškić et al.*, ICTY Case No. IT-95-16-T, Decision on Communications Between the Parties and their Witnesses, Trial Chamber, 21 September 1998.

⁹⁵ *Fairlie*, The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit, p. 314 et seq. See also *Zappalà*, Human rights in international criminal proceedings, p. 41, fn. 39, as well as *Karnavas*, Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer, p. 81, fn. 17.

⁹⁶ *Prosecutor v. Milošević*, ICTY Case No. IT-02-54-AR.73.02, Decision on admissibility of Prosecution Investigator’s Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, 30 September 2002, par. 18 (footnotes omitted).

be put in a position as to being able to actively and effectively influence the decision of the court. He is, so to speak, the subject of the trial *because* he is the object of it. He can thus truly be said to be a party to the criminal proceedings. Systematically, normatively and functionally, all of the basic procedural rights guaranteed by the human rights documents apply to him. In comparison with the prosecution, we see that the latter lacks the position of the accused of being object of the trial. The procedural competences of the prosecution amount to nothing more than being able to influence the decision of the court, but not in relation to the prosecution's 'personal rights' – the judgment of the court cannot and will not affect the prosecution in its 'rights', because they are not at stake.⁹⁷ It therefore appears dysfunctional to grant the prosecution the same position as the accused.

In our view the prosecution, even though it may, in the Anglo-American system as well as in the framework of the international criminal courts and tribunals, be formally called a party of the proceedings, cannot claim *any* procedural rights from this position. Admittedly, the Prosecutor at the Ad Hoc Tribunals has no formal obligation to investigate exonerating evidence. However, as we will see, the then 'new feature' of the Prosecutor's obligation to disclose exculpatory evidence does show a responsibility of the Prosecutor to take a 'neutral' position to some extent. As we have seen, the Prosecutor of the ICC must actively investigate incriminating *and* exonerating evidence, and is, by law, committed to the quest for truth.⁹⁸ The systematic as well as normative arguments against the prosecution basing procedural rights on the principle of equality of arms, which is in place to protect the *accused*, and not the state, prevail. And also functionally, it is difficult to say that the accused and the prosecution could be said to be in comparable positions, so as to imply that there could possibly be equality of arms between the two. Their respective roles are so different that, in fact, it appears tenable to say that the prosecution enjoys *no* procedural 'rights' within the trial at all; only the accused has rights before the court. What the prosecution does enjoy, in turn, are 'empowerments', or 'competences' bestowed upon it by law, in the interest of, within a national system, the offended society, and, in the international system, the already repeatedly mentioned international community. These competences can, and regularly should, be explicitly contained in the relevant legal norms, yet can also be drawn from the principles underlying these norms if they are not explicitly mentioned. They cannot, however, and as we have just undertaken to show, be derived from the right to equality of arms, which must be understood to work in favour of the accused only.

⁹⁷ See also *Siebert*, Grundlinien des Völkerstrafprozessrechts, p. 44.

⁹⁸ See, once again, Art. 54 (1) ICCSt.

It is, to be sure, recognized in the jurisprudence of the relevant judicial bodies that human rights must not only be regarded as defensive rights of natural persons *vis-à-vis* the state, but also entail an ‘objective order’ which governs not only the relationship between the citizen and the state, but also influence the legal order as such.⁹⁹ As far as can be seen, this principle has not yet been discussed in the context of the international criminal courts and tribunals. It is recognized, however, that state duties to protect the human rights of its citizens emanate from the basic human rights as contained in the relevant human rights treaties, meaning that the state must protect its citizens against infringements of their human rights not only by the state itself, but also by other persons.¹⁰⁰ In *X & Y v. The Netherlands*, the ECtHR held that this may imply that the state must put a workable criminal law and procedure in place.¹⁰¹ The case evolved around the rape or sexual assault of a mentally handicapped girl, to whom the Dutch law gave no effective legal remedy, meaning in this case the initiation of criminal proceedings. It should thus go without saying that a state must also protect its citizens against infringements of their right to life.¹⁰² It appears fair to say that a state must install and keep up an ‘effective criminal justice system’ to maintain its stability and affirm its own legal order.¹⁰³ One could say that a system of criminal justice is ‘effective’ if it is normatively *accepted* by its society.¹⁰⁴ As already briefly mentioned, a system which deprives the accused of his basic procedural rights would, in this sense,

⁹⁹ In German speaking countries, the principle is mostly referred to by “objektiver Wertgehalt der Grundrechte” or “objektive Wertordnung”, as coined by the German Federal Constitutional Court in *Lüth*, BVerfGE 7, 198, 15 January 1958.

¹⁰⁰ See references as to the duty of the state to protect the property of its citizens: *Frowein/Peukert*, Europäische Menschenrechtskonvention, Art. 1 Add. Prot. 1, mn. 33 et subs.; the duty of the states to protect the human rights of their citizens has also been recognized regarding Art. 8 ECHR (right to respect for private and family life), see *Airey v. Ireland*, application no. 6289/73, Judgment, 9 October 1979.

¹⁰¹ *X & Y v. The Netherlands*, application no. 8978/80, Judgment, 26 March 1985, par. 27.

¹⁰² *Uerpman-Witzack*, Höchstpersönliche Rechte und Diskriminierungsverbot, mn. 62 et subs. with further references. See also *Oğur v. Turkey*, ECtHR application no. 21594/93, Judgment, 20 May 1999; *Grams v. Germany*, ECtHR application no. 33677/96, Decision, 5 October 1999; *Salman v. Turkey*, ECtHR application no. 21986/93, Judgment, 27 June 2000.

¹⁰³ *Effektive Strafrechtspflege*. See *Landau*, Die Pflicht des Staates zum Erhalt einer funktionstüchtigen Strafrechtspflege, as well as *Hassemer*, Die "Funktionstüchtigkeit der Strafrechtspflege" - ein neuer Rechtsbegriff?. The correct legal classification of this principle is, however, unclear, see *Landau*, *ibid.* See also *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, par. 36, speaking of the “efficacy of the judicial process”.

¹⁰⁴ *Landau*, Die Pflicht des Staates zum Erhalt einer funktionstüchtigen Strafrechtspflege, at p. 126.

be unacceptable, as it would be perceived as unjust. On the other hand, if the accused were put in a position in which he could obstruct the truth finding process on a regular basis, this would not be acceptable either. In the English case of *R v Ward*¹⁰⁵ which we will look at in more detail below,¹⁰⁶ Glidewell LJ, albeit at a point in the judgment alluding to a notion of ‘equality of arms for the prosecution’, summed up as follows:

*The law is of necessity concerned with practical affairs, and it cannot effectively guard against all the failings of those who play a part in the criminal justice system. But that sombre realism does not relieve us, as judges, from persevering in the task to ensure that the law, practice and methods of trial should be developed so as to reduce the risk of conviction of the innocent to an absolute minimum. At the same time we are very much alive to the fact that, although the avoidance of the conviction of the innocent must unquestionably be the primary consideration, the public interest would not be served by a multiplicity of rules which merely impede effective law enforcement.*¹⁰⁷

It seems from the above cited ICTY Appeals Chamber decision in *Aleksovski*¹⁰⁸ and the dissenting opinion of Judge Shahabuddeen in *Tadić*,¹⁰⁹ that Glidewell LJ and Judge Shahabuddeen had something similar in mind when they referred to the Prosecutor as acting “on behalf of and in the interests of the community, including the interests of the victims of the offence charged” and representing “the public interest of the international community”, respectively. Apparently the respective organs of the Tribunal wanted to bring forward this argument in order to invoke equality of arms in favour of the prosecution. The ‘objective order’ which is given by the overall framework of the basic human rights is, however, not directly related with the equality of arms. The question thus remains, whether the ‘objective order’ given by the basic human rights, also in the sense of a ‘functional criminal justice system’ can serve as a basis for the ‘creation’ of procedural rights for the prosecution in international criminal trials. The fact that, especially at the beginning of the judicial practice of the Ad Hoc Tribunals in the 1990s, their procedural rules were only fragmentary and there was certainly no settled judicial practice comparable to national systems in place, may be an argument for this conclusion. However, it still remains doubtful whether ‘the state’, or ‘the prosecution acting as an agent for the international community’ for that matter, can really be said to have procedural rights *vis-à-vis* the accused. It appears preferable to speak of

¹⁰⁵ [1993] 96 Cr. App. R. 1.

¹⁰⁶ See section 4.1.1.2 below.

¹⁰⁷ *R v Ward*, fn. 105, at p. 52; at p. 67, however, he also mentions the need to “ensure a trial which is fair both to the prosecution, representing the Crown, and the accused.”

¹⁰⁸ See fn. 81 above.

¹⁰⁹ See fn. 96 above.

‘competences’ which, it is held, can indeed be based on the general principle of a ‘functional criminal justice’.

In this sense, the quest for truth, being one of the principal goals of the criminal trial (or, for that matter, a sub-goal in order to reach a just result), is also one of the ‘features’ of an effective criminal justice system. However, the procedural rights of the accused for their part form an integral part of this system and must be fully respected. Yet to draw upon these rights in order to ‘create’ procedural rights for the prosecution, cannot stand.

1.3.1.5 Right to an Expeditious Trial

The right to a speedy or expeditious trial is also contained in all major human rights treaties.¹¹⁰

As we will see in more detail below,¹¹¹ disclosure of evidence has proved to be a very efficient tool in shortening trials. Therefore, disclosure by the prosecution can definitely be said to be supporting the right to an expeditious trial of the accused.

A different question arises as concerns disclosure by the defence: can an accused or the defence, in support of the right to an expeditious trial, be forced to disclose evidence? From a formalistic point of view, given the fact that the accused enjoys the privilege against self-incrimination, one may be tempted to answer this question in the negative right away. On the other hand, as we will see, all international courts and tribunals, as well as all major national jurisdictions, know disclosure duties of the defence.

The problem is indeed closely related to the one just discussed regarding the question of ‘fair trial rights for the prosecution’. The right to an expeditious trial is but one of the procedural rights of the accused, and thus forms part of the ‘objective order’ of the (‘generally accepted’) criminal trial.¹¹² The ECtHR has recognized that oftentimes the protection of the other procedural rights granted by the ECHR may for their part make the overall trial longer and thus work against the right to an expeditious trial; which means that the conflictive principles of the trial need to be balanced.¹¹³ On this general basis, disclosure duties of the defence may under certain circumstances be justified.

¹¹⁰ “Right to be tried without undue delay.” See Art 14 Par. 3 (c) ICCPR, Art. 21 Par. 4 (c) ICTYSt, Art. 20 Par. 4 (c) ICTRSt, Art. 17 Par. 4 (c) SCSLSt, Art. 67 Par. 1 (c) ICCSt. Art. 6 Par. 1 ECHR speaks of a “fair and public hearing within a reasonable time”; Art. 8 (1) ACHR provides: “Every person has the right to a hearing, with due guarantees and within a reasonable time [...]”.

¹¹¹ See section 1.3.2 *infra*.

¹¹² See section 1.3.1.4 above.

¹¹³ Compare, e.g., *König v. Germany*, application no. 6232/73, Judgment, 28 June 1978, par. 100.

However, it is certainly systematically incorrect to defer procedural obligations from procedural human rights.¹¹⁴

1.3.1.6 Conclusion

We see from the cited jurisprudence and legal scholarship that the disclosure of evidence in criminal trials is predominantly based on basic fair trial rights. As we have just attempted to show, however, the basic fair trial rights serve to protect the accused and the accused alone. The mentioned (limited) disclosure by the defence, which exists in all international courts and tribunals as well as in all national jurisdictions, can thus not be explained by fair trial aspects. There are, however, other purposes of disclosure which, within the system of the mentioned ‘objective order’ of a functional criminal justice system, may permit to oblige the defence to disclose part of their material as well. These are, it is argued, the ‘judicial economy’ aspect, as well as the truth-finding aspect, to which we will turn now.

1.3.2 The Judicial Economy or ‘Procedural Management’ Aspect

By the judicial economy or ‘procedural management’¹¹⁵ aspect, which is closely related to the aspect of ensuring an expeditious trial which we just looked at, we mean the tendency of disclosure to reduce surprises at trial and thus to also reduce the overall time required for it. As we will see below when we look at the historical development of disclosure, the consequence of shortening the legal proceedings was, at the beginning, maybe not expressly desired, but indeed warmly welcomed by legal practitioners – accused persons who are allowed to see the sheer mass of evidence the prosecution has up its sleeve are oftentimes much more likely to confess or enter a guilty plea¹¹⁶, which saves time and money for everyone involved. Lack of disclosure, in turn, often leads to

¹¹⁴ Ambiguous on this point a previous article by the author (*Bünger*, Die Entwicklung der Disclosure of Evidence in internationalen Strafverfahren - Annäherung der Traditionen?, p. 217).

¹¹⁵ Called ‘trial-management’ by, e.g., the Prosecutor of the ICC, and endorsed by Trial Chamber I, see, *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on Defence Disclosure, Trial Chamber I, 20 March 2008, par. 20.

¹¹⁶ To be sure, a guilty plea may also obstruct the truth-finding function of criminal proceedings – for this reason, many jurisdictions have safeguards against false guilty pleas; see, e.g., Rule 11 (b)(3) Federal Rules of Criminal Procedure, which requires that a ‘factual basis’ for the plea must exist. The risk of involuntarily entering false guilty pleas, however, is reduced by full disclosure, see *McMunigal*, Disclosure and Accuracy in the Guilty Plea Process, p. 969.

delays in the proceedings.¹¹⁷ Some disclosure provisions, such as the obligation of the defence to disclose evidence in relation with the defences of alibi or special defences (such as lack of mental responsibility) certainly point to the purpose of shortening the trial; however, as concerns defence disclosure, national courts have oftentimes also pointed to truth-finding considerations.¹¹⁸ The judicial economy aspect may thus also be seen as part of the general system of effective criminal justice.¹¹⁹

1.3.3 The Truth-Finding Aspect

We hold that the disclosure of evidence has a purpose in addition to safeguarding the rights of the accused and judicial economy, which is the one of facilitating the finding of truth. The statement that disclosure has something to do with truth-finding may, at first sight, be surprising. In the contemporary international literature as well as the legal practice, we find few explicit hints as to why there should be a connection between disclosure and truth-finding. After all, as long as a piece of evidence is not fabricated – why should the time at which it is introduced to the trial or, even more so, the question whether it was disclosed to the other party beforehand, have influence on its evidentiary value? It could even be said that disclosure is, systematically speaking, entirely foreign to the adversary trial of the Anglo-American tradition. As *Wigmore*, even until the 3rd edition of his treatise on evidence of 1940 concisely and poignantly put it:

Now one of the cardinal moral assumptions in a contest of skill or chance is that a player need not betray beforehand his strength of resource, and that the opponent cannot complain of being surprised. [...] It is this feature of games and sports that has influenced powerfully the policy of the common law in the present aspect. 'Nemo tenetur armare adversarium suum contra se.' To require the disclosure to an adversary of the evidence that is to be produced, would be

¹¹⁷ See also *Matthews/Malek*, Disclosure, mn. 1.02 et seq., who mark as the main rationale behind disclosure the ‘just and efficient disposal of litigation’, yet also point to the fact that disclosure itself can be an ‘expensive and burdensome process’.

¹¹⁸ See, e.g., *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, U.S.Fl. 1970. This decision will be looked at in more detail at a later stage (section 4.2.2.1 below).

¹¹⁹ See also, e.g., Sunderland in *Ragland*, Discovery before trial, at p. iii: “It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial.”; as well as Auld LJ, Review of the Criminal Courts of England and Wales (2001), hereinafter: Auld Report, ch. 10, par. 115: “Advance disclosure by the prosecution serves two main purposes. The first is its contribution to a fair trial looked at as a whole. The second is its contribution to the efficiency, including the speed, of the pre-trial and trial process and to considerate treatment of all involved in it.” (footnote omitted).

*repugnant to all sportsmanlike instincts. Rather permit you to preserve the secret of your tactics, to lock up your documents in the vault, to send your witness to board in some obscure village, and then, reserving your evidential resources until the final moment, to marshal them at the trial before your surprised and dismayed antagonist, and thus overwhelm him. Such was the spirit of the common law; and such in part it still is.*¹²⁰

However, even before the turn of the 20th century, there were voices from common law practitioners which point to the opposite direction – opposing the game-like character of the criminal trial and instead calling for a ‘neutral’ prosecutor and sounding, in fact, almost ‘inquisitorial’:

*In every criminal case, great or small, the public should provide witnesses for the defence as well as for the prosecution, at least where the accused is not able to bring his witnesses. The old theory was that a prosecution for crime was a contest between the injured person, or his relatives, and the accused. That theory has gradually yielded to the milder view that the contest is between the public and the accused. We ought now to be ready for the theory that a criminal prosecution is not a contest at all, but an investigation, conducted by the State, before a tribunal of its own appointment, with as great a desire to clear the defendant, if not guilty, as to convict him, if guilty. It is idle to say that “truth will out,” and that if a man is innocent the jury will find him innocent, even though witnesses in his behalf are not summoned. Any one who has tried cases in a criminal court, or in any court, knows how hollow this is.*¹²¹

The history and development of the disclosure of evidence in national and international systems clearly show that historically, the truth-finding aspect played a crucial role in the minds of people dealing with disclosure. Throughout the 19th and until the middle of the 20th century we find numerous explicit references to truth-finding in debates about disclosure; especially in the American discourse accompanying the liberalization of disclosure in the 1960ies.¹²² Why this aspect was later eclipsed by the fair trial discourse, is unclear.

The relation of disclosure and truth-finding is in our view also proven by the fact that one can observe parallels as to who gets physical access to the evidence before a trial, as this appears to be the participant who has the main responsibility in the taking of evidence. This, however, is the main difference between the Continental-European and Anglo-American systems of criminal procedure. It has been held that the very objective

¹²⁰ *Wigmore*, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 6, § 1845, p. 375 et seq.

¹²¹ *Chaplin*, Reform in Criminal Procedure, at pp. 199 et seq.

¹²² See section 4.2 *infra*.

of a criminal trial in the Roman-Germanic system is the finding of the (objective) truth, while the Anglo-American system aims (only) at the settlement of a conflict, and is therefore ‘willing to subordinate the truth’ to other interests.¹²³ From this viewpoint, scholars appear to define two different ‘terms’ of truth, namely, the ‘objective’ or ‘material’ truth, as underlying the Continental European system, *vis-à-vis* a ‘procedural’ truth of the Anglo-American one.¹²⁴ Phrases such as the one by *Pollock and Maitland* cited above¹²⁵, or the following by *Arnould* certainly play a role in that:

[...] English criminal procedure does not so much seek the discovery of truth, pure and simple, as the discovery of truth according to certain artificial rules, one of which is, that the prosecution must come into Court with its case absolutely and entirely complete on the day of trial, failing which it shall, as a penalty, fail to bring the charge home to the prisoner, who must be convicted according to the strict rules of the legal game, or not convicted at all – and that, too, however clear his guilt may be – however manifest it may be that his escape arises solely from maladroitness on the part of the prosecution in neglecting to have ready at the appointed place and time, the required modicum of strict technical proof.¹²⁶

While the said differentiation may be helpful as it illustrates differences in the respective methods of truth finding, it is on the other hand confusing, as it suggests that there are indeed different ‘truths’. As a matter of fact, it is not only the Roman-Germanic system which believes that the finding of the objective truth is mandatory in order to find a just judgment. No society would, in the long run, accept criminal

¹²³ See *Fairlie*, *The Marriage of Common and Continental Law at the ICTY and its Progeny*, *Due Process Deficit* p. 248; see also *Hodgson*, *Conceptions of the Trial in Inquisitorial and Adversarial Procedure*.

¹²⁴ See for numerous references *Herrmann*, *Die Reform der deutschen Hauptverhandlung nach dem Vorbild des anglo-amerikanischen Strafverfahrens*, pp. 114 et subs, 158 et seq.

¹²⁵ Fn. 22 *supra*: “[...] not in order that they may discover the truth [...]”.

¹²⁶ *Arnould*, *Life of Thomas, first Lord Denman, formerly Lord Chief Justice of England*, Vol. 2 of 2, p. 92. See also *Goldstein*, *The State and the Accused: Balance of Advantage in Criminal Procedure*, at p. 1149: “The principal objective of criminal procedure, like that of procedure generally, is to assure a just disposition of the dispute before the court. But because time, resources and the ability to determine what is just are limited, a procedural system inevitably represents a series of compromises. Justice to society is sometimes taken to require that a given case be used not only to deal with the situation immediately before the court but also to serve a larger public interest. In criminal cases, the accused may get relief, not so much out of concern for him or for the “truth,” but because he is strategically located, and motivated, to call the attention of the courts to excesses in the administration of criminal justice.”

judgments which on a regular basis do not reflect the actual course of events.¹²⁷ At the same time, the ‘truth-seeking’ Continental European system regularly *also* subjects truth-finding to fairness considerations and the protection of human rights.¹²⁸ As commonly said: “we aim to find the truth – but not at any price”.¹²⁹ On the other hand, for example, the rigidity of the prohibition of hearsay evidence in the adversarial criminal procedure has notably declined in the last century. This is so because it is admitted that hearsay evidence *can*, under certain circumstances, be reliable, i.e. helpful to prove the *true* course of events – take, e.g., the so-called ‘catch-all-exception’ to hearsay prohibition provided for in Fed.R.Evid. 807.¹³⁰ And while it is correct that the finding of the truth in the Anglo-American procedure does not play the fundamental role as it does in the Continental-European one, we find numerous proofs for its importance. In fact, one may say that *every* truth which is found to certain procedural rules could be called ‘procedural’.¹³¹

¹²⁷ See also *Weigend*, *Is the Criminal Process about Truth?*, at pp. 157 et seq.: “Knowing exactly what has happened, who the culprit is, and why he committed the offense, is a necessary prerequisite for any attempt to re-establish social peace through justice. The determination of truth is indispensable for yet another reason-- criminal sanctions are society's most severe expression of moral blame. It is therefore imperative that criminal sanctions be imposed (only) upon those who are in fact guilty.” (footnote omitted).

¹²⁸ Take, for example, the rights of refusal to testify on personal or professional grounds provided for in sections 52 and 53 of the German Code of Criminal Procedure, not to mention the strict prohibition of evidence (directly) obtained by torture or other prohibited means (section 139a).

¹²⁹ See, e.g., German Federal Court of Justice (*Bundesgerichtshof*), BGHSt 14, 358, 365.

¹³⁰ It reads:

“A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.”

¹³¹ See *Weigend*, *Is the Criminal Process about Truth?*, at p. 170 et subs., who, though still differentiating between the two systems, convincingly argues that a *visible and credible effort* of truth finding is a necessary element of an acceptable procedural truth, regardless of who is responsible for finding it.

One gets the impression that jurists of either background tend to overestimate the actual differences between the systems, believing that the respective other judicial system operates in an ideal form of adversarial or, for that matter, inquisitorial trial.¹³² This, as we have briefly pointed out, is not the case, since both systems have been influenced and altered by the emergence of human rights and other (legal) philosophical ideas, as well as considerations of practicability and efficiency.¹³³ In the end, one, if not *the* objective for holding a criminal trial in any enlightened society is to satisfy the offended social order by trying and punishing the offender as well as by reaffirming the legal norms of the society as a whole. This is where criminal law and procedure derive their acceptance from, within the society in which they operate. And this very purpose is comparable in all modern societies.

It is therefore clear that it is not the truth which is different, but the methods of finding it which considerably differ; and which therefore, in fact, may produce considerable differences in the outcomes of the trial.¹³⁴

As illustrated above, the main difference in the two systems is where the responsibility for the finding of the truth lies. In the Anglo-American system the investigation and presentation of evidence, which is the basis on which the truth is found (whether by a jury or a judge), is up to the prosecution and the defence. In the Roman-Germanic system, this is done by the judge, for he will be the one to call witnesses and experts, and conduct the proceedings actively.

This distribution of responsibilities, it is held, is important in that it influences the disclosure regime of courts within certain procedural systems. As we will see, disclosure *in the material sense* takes place among those who are responsible for the finding of the truth or, to be more precise, those who control the truth-finding process. In the ‘classical’ Anglo-American adversarial trial, this task is solely assigned to the parties. In the Continental European system, all participants are informed via the dossier, thus no disclosure in the procedural sense takes place. However, *materially*¹³⁵, what happens is that the evidence is made open (i.e. *materially disclosed*) to the judges

¹³² In fact, many scholars and practitioners appear to disregard the exceptions and inconsistencies within their *own* systems and themselves believe to be operating in ‘pure’ legal systems.

¹³³ See for a concise description of the history of criminal procedure in Germany, England and the United States *Safferling*, Towards an international criminal procedure, pp. 4-16 with further references.

¹³⁴ See on this point, and generally on the widespread misconception of the Anglo-American procedural tradition especially by German scholars *Herrmann*, Die Reform der deutschen Hauptverhandlung nach dem Vorbild des anglo-amerikanischen Strafverfahrens, pp. 115 et subs. See also *Danziger*, Die Medialisierung des Strafprozesses, fn. 611.

¹³⁵ See section 1.1.1.2 above.

as the ones responsible for conducting the truth-finding process. In the course of this thesis, we will observe that in the ‘mixed’ systems of international criminal courts that the more actively the judges, by the statutory framework or by their own practice, get involved in managing the truth-finding process, the more they also become part of the disclosure process.

1.4 Exceptions to Disclosure

As we will see below, jurisdictions pertaining both to the Anglo-American tradition or those adhering to the Continental-European one and thus following a dossier approach, as well as all international criminal jurisdictions know exceptions to disclosure. They mainly relate to the protection of victims and witnesses,¹³⁶ or confidentiality as well as national security interests.¹³⁷

The ECtHR has constantly recognized that under certain circumstances the rights of the accused to be informed of the evidence against him can be restrained in order to protect overriding individual or public interests:

*However, [...] the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.*¹³⁸

As usual, the ECtHR does not give strict guidance on this point, but points out that as long as the ‘overall’ fairness of the trial is observed, Art. 6 ECHR is not violated.¹³⁹

¹³⁶ See, e.g., Rule 69 RPE-ICTY, Art. 68 (5) ICCSt.

¹³⁷ See, e.g., Rule 70 (B) RPE-ICTY, Art. 54 (3)(e) ICCSt, Art. 72 ICCSt.

¹³⁸ *Rowe and Davis v. UK*, note 64 *supra*, par. 61; *Edwards v. UK*, note 64, par. 52. This holding has since been reiterated by the ECtHR many times, see lately *McKeown v. UK*, Application no. 6684/05, Judgment, 11 January 2011, par. 43.

¹³⁹ See e.g., *Edwards v. UK*, note 64 *supra*, par. 34; see lately *Ebanks v. UK*, (Application no. 36822/06), ECtHR Judgment, 26 January 2010: “In considering whether the trial proceedings were fair within the

1.5 Conclusion

In sum, we can state that, even though the term of disclosure is originally rooted in the adversarial trial as commonly known in the Anglo-American legal tradition, it should, particularly in the realm of international criminal courts and tribunals, not be understood narrowly, so as to just comprise the procedural feature or phase within an adversarial trial, but must be given a broader meaning, so as to cover all actions which aim at informing other participants in the trial of (not necessarily all) evidence and other material in one's position. It should also not be seen as relating exclusively to the parties of the trial, but to other participants, such as victims, and, not least, the court.

As to the purpose of disclosure, we hold that it is threefold. Disclosure obviously serves to safeguard the procedural rights of the accused. In turn, contrary to the apparent view of the majority in legal scholarship and practice, disclosure duties of the defence cannot be invoked based upon 'procedural rights of the prosecution'. Notwithstanding, disclosure rights and obligations of both the prosecution and the defence may arise and be shaped by the duty of the courts to maintain a certain 'efficacy of judicial proceedings'. This latter point is closely connected with the second function of disclosure, which is to enhance judicial economy within the proceedings (the procedural management aspect). Finally, disclosure may contribute to improved truth-finding, a fact which, as we will see, was commonplace in a phase of liberalization of disclosure, but later neglected by most courts and tribunals both on the national and international level, whereas it now appears to be revived, particularly in the jurisprudence of the ICC and the role which the ICC Chambers acquire in the ICC proceedings.

meaning of Article 6, the Court must consider the proceedings as a whole including the decision of the appellate courts.”

2 The development of disclosure in national systems until 1945

In the following, we will take a look at the development of disclosure on the national level, taking as examples the English system and, especially, the American one. The English system will be looked at because England had a more developed disclosure regime in criminal proceedings in place before the United States, and for its part influenced the development of disclosure in the United States.

The United States' disclosure regime, in essence, proved to be a role model for the modern international criminal courts and tribunals. The disclosure rules of the Ad Hoc Tribunals were strongly influenced by proposals stemming from American sources.¹⁴⁰ The rules of the Ad Hoc Tribunals, in turn, partially served as a blueprint for the disclosure regime of the ICC.¹⁴¹ And also as far as Nuremberg is concerned, the Americans had, of all nations involved, the strongest influence as to the shaping of the procedural rules.¹⁴²

We start out with the development until 1945, which is when the Nuremberg IMT was conceived and started. The development from 1945 until the 1990ies or the present day, for that matter, will be dealt with in Chapter 4.

2.1 England¹⁴³

As a general introductory remark, it must be noted that the English legal system as regards criminal procedure is, and was much more in the past, complex.¹⁴⁴ Different categories of crimes now as in the past, warranted varying competences of different legal bodies, all applying their own procedural rules, which at times differed considerably.¹⁴⁵ Concerning disclosure, the different procedural rules could, in the past,

¹⁴⁰ See Chapter 5 below.

¹⁴¹ See Chapter 6 below.

¹⁴² See Chapter 3 below.

¹⁴³ Meaning the legal system of England and Wales, see *Cownie/Bradney/Burton*, English legal system in context, p. 1.

¹⁴⁴ See also *Fisher*, The Ethical Duty to Seek Exculpatory Evidence in Police Hands, at p. 109.

¹⁴⁵ For a relatively brief overview of the (historical) court system in England and the respective procedures see, e.g., *Dewar*, Criminal procedure in England and Scotland, pp. 4 et subs.

lead to the consequence that in the proceedings for a certain crime the accused would be entitled to disclosure of some kind, in another trial for a different crime, however, not.¹⁴⁶ In the following, we will thus limit ourselves to briefly sketch the development of disclosure within the English legal system, shedding some light on just a few of the different procedures available. Where appropriate, reference will be given to further reading.

There had been no statutory law in England generally regulating the disclosure of prosecution evidence in criminal trials until the Criminal Procedures and Investigations Act¹⁴⁷ which entered into force in 1996, a fact which has been referred to as “surprising”.¹⁴⁸ It may at a first glance be even more surprising that the CPIA directly only refers to the disclosure of material which the Prosecution is *not* planning to use at the trial. As we have seen above, disclosure is nowadays generally based on fair trial rights for the accused; and no matter which specific fair trial right is invoked, it all boils down to the principle that the accused must be informed of all the evidence which is to be used against him in advance. Yet until this day, there is no (direct) general statutory provision in the English legal system which would oblige the prosecution to disclose the evidence on which it intends to rely or which would enable the competent court to order accordingly. There were and still are, however, quite a few statutory provisions which relate to disclosure of certain parts and types of evidence, as well as to certain procedural stages. The above-mentioned numerous different pre-trial institutions and procedures within the historical English legal system, however, force us restrict ourselves to mentioning only a few more impressive examples.

To be sure, in practice, it is today generally unlikely that the prosecution would ever not disclose the evidence it is planning to use beforehand. Even though nothing would legally prevent the prosecution from presenting evidence previously undisclosed to the defence at trial, the court would on application of the defence adjourn the trial in any case; wherefore the non-disclosure of prosecution evidence would result in a mere waste of time.¹⁴⁹

¹⁴⁶ See, as a very striking example, *Stephen/Stephen*, A digest of the law of criminal procedure, Article 233 (Copies of Depositions, see below), fn. 2: “22 Vict. c. 33 [Coroners’ Inquests Bail Act 1859], s. 3. This Act applies only to cases of manslaughter, the preamble stating that inconvenience has been caused by the coroner’s inability to admit to bail in cases of manslaughter. The result is, that a prisoner committed by a coroner on a charge of manslaughter has a right to a copy of the depositions, but a prisoner committed for murder has not.”

¹⁴⁷ 1996 c. 25, hereinafter: CPIA.

¹⁴⁸ *Niblett*, Disclosure in criminal proceedings, at p. 3.

¹⁴⁹ See *Niblett*, Disclosure in criminal proceedings, at p. 32.

2.1.1 Early Statutory and Case Law until the End of the 19th Century

Whereas in civil litigation the disclosure of evidence developed from a relatively early date, probably already in ecclesiastical courts and then definitely in the courts of equity,¹⁵⁰ criminal procedure did not know discovery until the late 17th century. The fact that discovery was granted in civil proceedings, but not in criminal proceedings is, from a modern point of view, surprising, since an accused in a criminal case against him is much more in need of protection, as his freedom or even his life is at stake. Originally, however, not only did disclosure not take place, but even an indictment, if any, was not transmitted to the accused, but only read out to him at the beginning of the trial.¹⁵¹ This was based on the assumption that the truth was most likely to be determined if the accused would be confronted with the evidence against him only in the courtroom;¹⁵² apparently because it was feared that the accused might tamper with the evidence if he had knowledge of it in advance;¹⁵³ and, as we have seen above, disclosure systematically does not really ‘fit’ into a ‘pure’ adversarial procedure.¹⁵⁴ It may therefore come as a surprise that the first statutory provisions with regard to disclosure apparently were, of all laws, the Treason Acts of 1695¹⁵⁵ and 1708¹⁵⁶:

[...] And be it further enacted by the authority aforesaid, that [...] when any person is indicted for high treason or misprision of treason, a list of the witnesses that shall be produced on the trial, for proving the said indictment, and of the jury, mentioning the name, professions, and place of abode of the said

¹⁵⁰ See *Matthews/Malek*, Disclosure, mn. 1.10 et subs. with further references.

¹⁵¹ In addition to that, it has only been since 1731 that indictments “shall be in the English tongue and language only”, 4 Geo. 2 c. 26, cited according to *Hawkins/Curwood*, A Treatise of the Pleas of the Crown Vol. II, p. 434; before that, indictments were regularly written in Latin or French, which, presumably, many accused persons did not understand.

¹⁵² *Taylor*, Crime, policing and punishment in England, 1750-1914, p. 112, cited according to *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, p. 117.

¹⁵³ This fear is generally uttered frequently as a counter-argument to liberal disclosure; we will run across it regularly within this thesis.

¹⁵⁴ See section 1.3 above.

¹⁵⁵ 7 & 8 Will. III c. 3. The law also brought other progresses, such as (apparently for the first time) the right of the accused to be represented by counsel; and that defence witnesses, which at that point only recently had been allowed at all, could be sworn. See also *Wigmore*, A Treatise on the System of Evidence in Trials at Common Law, Vol. 1, § 575, pp. 697 et subs.

¹⁵⁶ Act for Improving the Union of the Two Kingdoms [England and Scotland], 7 Ann. c. 21, available at <http://www.jacobite.ca/documents/1708improving.htm>.

witnesses and jurors, be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses; any law or statute to the contrary notwithstanding.¹⁵⁷

It has been stated that this relatively liberal provision was passed with the legislators themselves in mind, as they were the ones who ran the highest risk of being prosecuted for treason. As *Stephen*, indeed very critically, notes in 1893:

*This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the state trials held under the Stuarts, it did not occur to the legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of parliament that trials for political offences should not be grossly unfair, but they were comparatively indifferent as to the fate of people accused of sheep-stealing, or burglary, or murder.*¹⁵⁸

This remark of *Stephen* is underlined by the justices at the King's Bench Division, according to whom there was, at the end of the 18th century, no entitlement to disclosure as a matter of right nor as a matter of discretion; and that the Treason Act had to be considered an exception to the general rule; in fact the judges appear to have been shocked by the mere thought that it could be otherwise:

*Lord Somers and Sir J. Holt, in framing the Statute of Anne¹⁵⁹, thought it a great indulgence to furnish a person accused of high treason with the names of the witnesses to be produced against them. But it never occurred to them that the rule, even in the case of treason, should be extended as far as this application seeks to go; for here the application is made for a copy of the substance of the evidence which is to be produced against the defendant. [...]*¹⁶⁰

In other cases, a defendant has no other intimation of the particular charge intended to be brought against him than what appears upon the indictment or information. Nor was it ever conceived to be necessary or fit that he should

¹⁵⁷ *Ibid.*, note 156 *supra*, s. XI.

¹⁵⁸ *Stephen*, A History of the Criminal Law of England Vol. 1, p. 226. See also *Fletcher*, Pretrial Discovery in State Criminal Cases, at p. 294.

¹⁵⁹ That is the said Act for Improving the Union of the Two Kingdoms, see fn. 156.

¹⁶⁰ Lord Kenyon, Ch. J., in *R v Holland* (1792) 100 E.R. 1248, at p. 1250.

*receive intelligence of the particular evidence by which the charge was to be made out. And I should be sorry if such a rule were to be laid down in any case. [...]*¹⁶¹

*It is clear that neither at common law, or under any of the statutes, is the defendant entitled as a matter of right, to have his application granted. And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent.*¹⁶²

From a modern point of view and in the light of modern human rights, this reasoning certainly sounds absurd.

Concerning disclosure in civil proceedings, we find proof that in the legal scholarship of the middle of the 19th century, the possible relation between disclosure and fact-finding, as well as the aspect of procedural management were clearly seen, even though the fear that disclosure might in the end be counter-productive because of the risk of perjury, prevailed:

*If it were now, for the first time, to be determined – whether, in the investigation of disputed facts, truth would best be elicited by allowing each of the contending parties to know, before the trial, in what manner, and by what evidence, his adversary proposed to establish his own case; arguments of some weight might a priori be adduced in support of the affirmative of this important question. Experience, however, has shewn – or (at least) Courts of justice in this country, act upon the principle – that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, before a trial, to know the precise evidence against which he has to contend; and, accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged) each party in a cause has thrown upon him the onus of supporting his own case, and meeting that of his adversary, without knowing beforehand by what evidence the case of his adversary is to be established, or his own opposed.*¹⁶³

And concerning the judicial economy benefits of (civil) disclosure, the Second Report of the *Common Law Practice Commissioners* states unequivocally:

¹⁶¹ Ashhurst, J., *ibid.*

¹⁶² Grose, J., *ibid.*, at p. 1251; see also *Plater*, *The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?*, at 118. It may be noted that the explicit mentioning of the motives of the 'historical legislator' of statutory laws in a judgment is somewhat unusual for common law judgments, see *Radbruch*, *Der Geist des englischen Rechts*, p. 28.

¹⁶³ *Wigram*, *Points on the Law of Discovery*, § 148, footnotes omitted.

*As to facts within the knowledge of the adverse party, the Courts of law possess no power of compelling discovery [...]. We have no hesitation in saying that this is altogether wrong. We assert as an indisputable proposition, that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction. [...] This opportunity for examination prior to the trial will be useful, not only for the purpose of discovering facts exclusively in the knowledge of the opposite party, but as the means of sparing the trouble and expense of producing evidence of facts which he may be prepared to admit. [...]*¹⁶⁴

In criminal cases, most courts, however, expressed the view that while a generous approach to disclosure was desirable, they lacked the authority to oblige the prosecution accordingly.¹⁶⁵ Others, however, which appear to have been mostly overlooked, were more audacious. In *R v Harrie*¹⁶⁶, which evolved around a threatening letter, the court granted a motion of the defence that the letter could be inspected by defence witnesses to prove that, in their belief, the letter was not in the handwriting of the accused. And in *R v Colucci*¹⁶⁷ the court held that the prosecution could be obliged to let the defence inspect letters seized at the premises of the accused (albeit not make copies of them). However, as stated, these cases were few and appear not to have had any major impact.¹⁶⁸

Around the same time, some more statutory disclosure provisions regarding certain kinds of preliminary proceedings were introduced. The Prisoners' Counsel Act of 1836 granted the accused, in addition to the right to legal representation, access to copies of examinations of witnesses and depositions made against him.¹⁶⁹ By the Indictable Offences Act of 1848¹⁷⁰, the accused was legally entitled to be present during the taking of depositions at his committal proceedings, something which appears to have been

¹⁶⁴ *Common Law Practice Commissioners*, Second Report 1853, p. 35, quoted according to *Wigmore, A Treatise on the System of Evidence in Trials at Common Law*, Vol. 3, p. 2409 et seq.

¹⁶⁵ *R v O'Connor*(1845) I Cox CC 233, cited according to *Niblett*, Disclosure in criminal proceedings, p. 33.

¹⁶⁶ 172 E.R. 1165 (1833).

¹⁶⁷ 176 E.R. 46 (1861).

¹⁶⁸ *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, at p. 120.

¹⁶⁹ See *Bentley*, English Criminal Justice in the Nineteenth Century, p. 36 et seq., *May*, The bar and the Old Bailey, 1750-1850, p. 197; see also *Niblett*, Disclosure in criminal proceedings, p. 33.

¹⁷⁰ 11 & 12 Vict. c. 42.

common practice already before that time.¹⁷¹ Some authors, however, note that in practice this was often of little use for the accused, since many were illiterate.¹⁷²

*Stephen's Digest of the Law of Criminal Procedure in Indictable Offences of 1881*¹⁷³ reads in Article 126 for the pre-trial proceedings before justices:

DEFENDANT ENTITLED TO COPIES OF DEPOSITIONS.

At any time after all the examinations of witnesses are completed and before the first day of the assizes or sessions or other first sitting of the Court at which any person committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and is entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he was committed, or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three-halfpence for each folio of ninety words.

And for inquest proceedings¹⁷⁴, Article 233 reads:

COPIES OF DEPOSITIONS

At any time after all the depositions of the witnesses have been taken, every person against whom any coroner's jury have found a verdict of manslaughter is entitled to have from the person having custody thereof copies of the depositions on which such verdict was found, on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words.

Even though the explicit mentioning of a certain fee to be paid for the disclosure of depositions may appear a little comical nowadays, the examples clearly show that even though no general right to disclosure was introduced, disclosure was an issue considered by both the legislative as well as the judicative authorities. To be sure, however, it can also be assumed that many of the accused may have lacked sufficient means to pay for copies of the depositions.

For some preliminary procedures, there were no disclosure provisions at all. For misdemeanours, where the criminal proceedings were initiated by criminal information,

¹⁷¹ See *Bentley*, English Criminal Justice in the Nineteenth Century, p. 35.

¹⁷² See *Bentley*, English Criminal Justice in the Nineteenth Century, p. 36, referring to contemporary statistics.

¹⁷³ See fn. 146 above.

¹⁷⁴ This refers to inquest proceedings of Coroner's Courts, which, in contrast to most other types of English criminal procedure have an inquisitorial nature; see *Slapper/Kelly*, The English legal system, p. 196, as well as *Cownie/Bradney/Burton*, English legal system in context, p. 64 et seq.

there was also no preliminary examination, and thus no disclosure.¹⁷⁵ Prosecutors could also circumvent all magistrates' court committal procedures by applying to the Grand Jury. If the latter returned a True Bill, i.e. issued an indictment, there would be no committal hearing at all; the accused would thus be completely uninformed about the evidence against him at trial. This was not altered before the passing of the Vexatious Indictment Act in 1859.¹⁷⁶

Most importantly, the statutory law made no reference to evidence which was not taken at the committal hearing, but either appeared afterwards or was even held back by the prosecution during the committal procedure on purpose. It appears that judges, while at first prohibiting the disclosure of such evidence to the accused, later at least submitted the indictment, with the names of the additional witnesses written on the back of it, to him.¹⁷⁷ Overall, however, together with the increasing number of singular statutory provisions regarding disclosure, the English judges appear to have become increasingly averse towards non-disclosure, occasionally expressing their discontent with lack of pre-trial disclosure in "strong words". This later extended to evidence other than depositions.¹⁷⁸ Still later, the judges would regularly adjourn the hearing, if they found that the accused was prejudiced by the late introduction of evidence.¹⁷⁹ As Hawkins J. held in 1882:

*Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him. Hence, if any one who was not produced before the committing justice is to be called as a witness, full information should be furnished to the accused, both as his name and as to the evidence he will give. If this has not been done, his evidence should not be pressed at the trial if the accused objects.*¹⁸⁰

¹⁷⁵ This remained unaltered until informations were abolished in England in 1967; see *Bentley*, English Criminal Justice in the Nineteenth Century, p. 38.

¹⁷⁶ 22 & 23 Vict. c. 17, see *Bentley*, English Criminal Justice in the Nineteenth Century, *ibid*.

¹⁷⁷ See *Bentley*, English Criminal Justice in the Nineteenth Century, p. 37.

¹⁷⁸ *R v. Pietro Stigiani* (1867) 10 Cox CC552, *R v Greenslade* (1884) 15 Cox CC 412, cited according to *Niblett*, Disclosure in criminal proceedings, p. 34.

¹⁷⁹ *R v Flanagan and Higgins*, (1884) 15 Cox CC 403, cited according to *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, at p. 121; and *R v Wright* (1934) 25 Cr App R 35: "At most that is a grievance and cannot affect the admissibility of the evidence [...], and, if the appellant or his counsel thought that he was being prejudiced by having had no notice, [...] he could have applied for an adjournment, but he did not do so." See also *Bentley*, English Criminal Justice in the Nineteenth Century, p. 37, as well as *Niblett*, Disclosure in criminal proceedings, p. 34; both with further references.

¹⁸⁰ *R v Harris* (1882), C.C.C. Sess. Pap XCV, 525, cited according to *Orfield*, Criminal procedure from arrest to appeal, p. 333, fn. 265.

However, English courts never went as far as the Australian courts, which as early as 1869 prohibited that previously undisclosed evidence be given at trial.¹⁸¹

2.1.2 The first half of the 20th century

In the first half of the 20th century, there was little movement with regard to disclosure as far as statutory law is concerned.¹⁸² Cases on the matter, in comparison to the second half of the century, are also relatively scarce. However, with the general practice of disclosing prosecution evidence established, according to the cases available, the focus turned to the disclosure of material which would not be given into evidence by the prosecution, but nevertheless have to be made available to the defence, such as exonerating material, or such which would cast doubt on the reliability of prosecution evidence. One of the cases which are usually cited in this regard is *R v Bryant and Dickson*¹⁸³. Others, such as *R v Nicholson*¹⁸⁴, appear to have been “overlooked”.¹⁸⁵ Likewise, in *R v Clarke* the Court of Criminal Appeal as early as 1930 indicated that the non-disclosure of inconsistent prosecution witness statements would be inappropriate:

*If in the result it had appeared that there was anything in those written descriptions which was contradictory to the evidence which was given by the police officer, or the other witnesses at the Trial, or at the police court, we should have had seriously to consider whether any miscarriage of justice had been caused by this attitude which was unfortunately assumed by the learned counsel for the prosecution.*¹⁸⁶

This decision remained practically uncited until the 1990ies; it was relied upon in the above-mentioned ECtHR decision in *Edwards v. UK*.¹⁸⁷ In *R v Bryant and Dickson*, the

¹⁸¹ *R v Brown* (1869), 6 WW & A'B239, cited according to *Bentley*, English Criminal Justice in the Nineteenth Century, p. 37.

¹⁸² See *Niblett*, Disclosure in criminal proceedings, p. 35.

¹⁸³ (1946) 31 Cr. App. R. 146, see also *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, p. 123, as well as *O'Connor*, Prosecution Disclosure: Principle, Practice and Justice, p. 465; *Niblett*, Disclosure in criminal proceedings, p. 59.

¹⁸⁴ Unreported, discussed in (1936) JPN 553, cited according to *Niblett*, Disclosure in criminal proceedings, *ibid*.

¹⁸⁵ *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, *ibid*. The appellants in *R v Bryant and Dickson* (see fn. **Fehler! Textmarke nicht definiert.** above), however, do mention it.

¹⁸⁶ *R v Clarke*, (1931) 22 Cr. App. R. 58, at 66.

¹⁸⁷ See note 64 above.

Court¹⁸⁸ took a much stricter approach and held that the prosecution did not have a duty to disclose a statement of a witness they were not going to call:

It is said that it was the duty of the prosecution to have supplied the defence with a statement which Campbell had admittedly made to the prosecution. The prosecution, for reasons which one can well understand, did not call Campbell. Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been. In the first place, if they had supplied a copy of the statement of Campbell, that would not have enabled the defence to put the statement in. The statement which Campbell made could have become evidence only if he had been called as a witness. But it is said that it was the duty of the prosecution to put that statement at the disposal of the defence. In the opinion of the Court, the duty of the prosecution in such a case is to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence. That they did in this case[...].¹⁸⁹

The Court thus appears to be of the opinion that there *is* a duty of the prosecution to provide information on the fact that the witness exists, but not to provide his actual statements; a feature which we will come across again on the international level later in this thesis. It has been stated that, given the facts of the actual case, it was not surprising that the Court decided as it did, since the defence clearly had been aware of the existence of the witness and also of the fact that he would be able to give material evidence; on top of that, he had been physically present during the whole trial.¹⁹⁰

2.1.3 Conclusion

Until the end of World War II, we can notice a development of disclosure which started relatively early, but went slowly overall. It took more than 100 years until a general practice of disclosure of the prosecution case had developed; and regarding the disclosure of unused material, the courts followed a rather restrictive approach. As we will see below, the development in the second half of the 20th century went at a much greater speed. As a general remark, it appears that the courts in their judgments did not express a particularly systematic view of the matter, in contrast to the mentioned legal

¹⁸⁸ Mr Justice Humphreys sat both in *R v Clarke* and *R v Bryant and Dickson*.

¹⁸⁹ *R v Bryant and Dickson*, fn. Fehler! Textmarke nicht definiert., p. 151.

¹⁹⁰ See *Niblett*, Disclosure in criminal proceedings, p. 60; *O'Connor*, Prosecution Disclosure: Principle, Practice and Justice, p. 465. From the explanations in the appeals judgment it appears that both parties chose not to call Mr Campbell for tactical reasons and that all of the people involved knew this.

scholarship, and in contrast also to the American jurisprudence, which we will take a look at instantly.

As to the scope of evidence which had to be disclosed, we can thus state that in 1945, a rather complete disclosure of prosecution evidence had to take place. As far as unused material is concerned, we can observe a duty to disclose the names of those witnesses which in their statements have contradicted the prosecution case, but generally not their statements. Concerning time frames, we find no explicit hints.

As regards disclosure by the defence, we find no hints in the English system until 1945. The first time defence disclosure appeared in England seems to be in 1968.¹⁹¹

2.2 The United States of America – From the beginning until the Federal Rules of Criminal Procedure (1946)

The law of the United States, even though it has been influenced by other legal traditions and indeed ‘invented’ some “uniquely American features”, is fundamentally based on the English Common Law.¹⁹² It is therefore not surprising that originally the disclosure rights and duties in criminal proceedings were very limited. In the following, we will take a short look at the development of disclosure in American jurisprudence. It does not make much sense to divide this section into chronological sub-sections, since until the passing of the Federal Rules of Criminal Procedure in 1946, we cannot really discern particular phases.

2.2.1 Prosecution Disclosure

Just as in England, we can observe that discovery was in place in civil proceedings much earlier than in criminal proceedings.¹⁹³

In criminal trials, the courts at first generally followed the common law, which, as we have seen, said that there was no general duty of the prosecution to disclose the prosecution evidence. This was, however, not without exceptions. On the federal level, the United States had followed the English example of providing for obligatory

¹⁹¹ See Chapter 4.1.2. below.

¹⁹² *LaFave/Israel/King/Kerr*, Criminal procedure Part I, 1, 1.6 (a); *Pound*, Criminal Justice in America, pp. 77 et subs..

¹⁹³ *Orfield*, Criminal procedure from arrest to appeal, p. 328.

disclosure in procedures relating to treason, which provided, as in England, for the compulsory disclosure of a witness list; this was apparently extended regarding other capital offences.¹⁹⁴ We also find some jurisprudence loosely related to this exception – arguably the famous case of *United States v. Burr*, which is known for Chief Justice Marshall’s holding that the President of the United States, like every other citizen, is subject to the law, can be seen as relating to disclosure, in that the inspection of documents in the hands of the prosecution was granted by the court.¹⁹⁵ Other than that, we do occasionally find liberal decisions regarding disclosure during the 19th century, emphasizing the supposed role of the prosecutor as a minister of justice.¹⁹⁶

Generally, however, a restrictive attitude towards disclosure can be observed. As far as legal scholarship is concerned, it is notable that despite of this fact in the 1st edition of *Wigmore on evidence* of 1904 disclosure in both civil and criminal proceedings are discussed at considerable length and in remarkable depth.¹⁹⁷ *Wigmore* first mentions truth finding combined with fair trial aspects as possible purposes or reasons for disclosure; stating that surprise in itself is no threat to fairness or truth-finding, but that it may raise the risk of falsities.¹⁹⁸ According to *Wigmore*, these aspects were, however, generally seen as counterbalanced by two main considerations: the ‘sportsmanship’ tradition of the common law, which allows the parties to keep their resources concealed;¹⁹⁹ and the related risk of the opponent tampering with the evidence.²⁰⁰ The second argument for disclosure, according to *Wigmore*, and in his mind, apparently the

¹⁹⁴ St. 1790, Apr. 30, § 29, cited according to *Wigmore*, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 3, p. 939, fn. 1; “at least three entire days before the trial” in treason cases and “two entire days” in cases of capital offences. See, as for today, 18 U.S.C. § 3432.

¹⁹⁵ *United States v. Burr*, 25 F.Cas. 30, C.C.Va. 1807, p. 35: “[T]he court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence. These observations are made to show the nature of the discretion which may be exercised. If it be apparent that the papers are irrelative to the case, or that for state reasons they cannot be introduced into the defence, the subpoena *duces tecum* would be useless. But, if this be not apparent, if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them?”. This case does not appear to have been covered by *Wigmore*.

¹⁹⁶ See, once again, *People v. Davis*, fn. 89 above.

¹⁹⁷ *Wigmore*, A Treatise on the System of Evidence in Trials at Common Law, Vol. 3, §§ 1845-1862, pp. 2398-2458.

¹⁹⁸ *Ibid.*, pp. 2398 et subs.

¹⁹⁹ *Ibid.*, p. 2401 et seq., see also the quotation above (note 120).

²⁰⁰ *Ibid.*, p. 2402 et seq.

most important one in practice, is what we have called the ‘procedural management’ aspect above:

So far as concerns the interests of litigation in general, the policy of requiring discovery or notice of evidence before trial is equally urgent, though on larger grounds. Its propriety, moreover, is independent of the truth or falsity of the opponent's evidence; it is, in fact, strongest where the opponent's evidence is assumed to be true. That policy rests on the fact of experience that the parties to controversies are prone to proceed either with a blind faith in the strength of their cause and the truth of its essential propositions of fact, or with the misguided assumption that the facts forming its defects and weaknesses are unknown to the adversaries and that their concealment to the last moment will heighten the chances of success. If these two states of mind could be prevented, a large proportion of litigation would be cut short at the beginning, with advantage to justice; because parties entertaining either belief without foundation would be disabused of it at an early moment, would perceive the uselessness of further contest in court, and would act accordingly. Any requirements of preliminary discovery, designed to lead to such a saving of time and expense, would be well worth imposing in the interests of expeditious litigation and of justice at large.²⁰¹

This argument was, according to *Wigmore*, also countered with the fear of abuse, as well as the hardly flattering argument that a reduction of litigation might lessen the income of the legal professionals involved in it.²⁰²

Quite a few states, however, had statutory laws concerning disclosure of witness lists before the turn of the century.²⁰³ Some states required the names of the witnesses who had testified before the grand jury to be written on the indictment and the indictment handed over to the accused, in some cases this was extended to a copy of their statements; others demanded that the names of the witnesses which the prosecutor *knew* to be disclosed; and finally some states demanded that the names of all witnesses intended to be called to be produced.²⁰⁴

²⁰¹ *Ibid.*, p. 2403.

²⁰² *Ibid.* *Wigmore* notes: “This is not a consideration which honorable men could entertain as in the least hindering a measure otherwise desirable. But it was in fact undoubtedly a powerful though silent motive, in the resistance, active and inert, with which the efforts towards reform in this respect were met in England in the closing days of Lord Eldon’s nomination, and indeed everywhere else, whenever such a reform was needed.”

²⁰³ See references at *Wigmore*, *A Treatise on the System of Evidence in Trials at Common Law*, Vol. 3, pp. 2415 et seq., fn. 2.

²⁰⁴ See references *ibid.*, pp. 2415 et subs.

They largely differed as what the consequences of non-compliance were. Generally, however, non-compliance with the statutory disclosure rules would have no particular consequences for the prosecution. The latter could, for instance, not be forced to swear in all of the witnesses they intended to call at trial. The calling of a witness at trial who had not been sworn in before the grand jury was generally²⁰⁵ not considered inadmissible. In the poignant words of Justice Woodward of the Supreme Court of Iowa:

Another error assigned is, that the court permitted a witness to testify in chief, whose name was not indorsed on the indictment. The bill of exceptions shows, that the witness had not been before the grand jury, and was not one of those upon whose testimony the indictment was found [...]. The question presented is, whether the prosecution is confined to the witnesses upon whose testimony the charge is founded, and whose names are indorsed. We think it is not. Such a rule would greatly embarrass the administration of justice in the punishment of offences. It would make it necessary for the State to search for all possible evidence, before it presented an indictment, and thus favor the escape of the guilty; or it would deprive it of much evidence, and even of that which is the best and the most satisfactory. There is no principle of law, or of natural right, which entitles a defendant to a previous knowledge of all the witnesses to be called against him.²⁰⁶

The solution of the English courts to generally grant a postponement of the trial was occasionally also applied by American courts in the case of a “real and unfair surprise”.²⁰⁷ Apparently, however, it fell short of being considered a general rule.

Apart from the (limited) witness lists which had to be provided according to state statutes, especially thus as regards documentary evidence and tangible objects, the jurisprudence on the question whether the courts had an inherent authority to compel prosecution disclosure is somewhat unclear at the beginning of the 20th century. While some courts recognized discretion of the courts in that respect,²⁰⁸ others, in the tradition

²⁰⁵ Few exceptions cited by *Wigmore*, A Treatise on the System of Evidence in Trials at Common Law, Vol. 3, p. 2418.

²⁰⁶ *State v. Abrahams*, 6 Clarke 117, Iowa 1858; see also *Hill v. People*, 26 Mich. 496, 1873 WL 3015, Mich. 1873.

²⁰⁷ *Wigmore*, A Treatise on the System of Evidence in Trials at Common Law, Vol. 3, p.

²⁰⁸ *Commonwealth v. Jordan*, 207 Mass. 259 (1911) at p. 811: “As to those matters it is plain, we think, that it was within the discretion of the court to grant or refuse the motion.”; see also *People v. Gerold*, 265 Ill. 448 (1914) at p. 470: “Had the plaintiff in error had an opportunity of examining, under proper conditions, these various documents, it is possible that he could have obtained positive evidence as to the payment of the money to the proper persons. The whole theory of our law as to the trial of one

of the old English jurisprudence described above, held that this discretion did not exist.²⁰⁹ In any case, however, the discretion was hardly ever exercised.²¹⁰ On rare occasions, on the other hand, we find very far-reaching judgments which allowed the defendant comprehensive inspection rights, like the following decision of the Supreme Court of Missouri of 1927:

*The prosecuting attorney is both an officer of the state and of the court, and his duty extends no further than an impartial, fair, and just trial of defendant. If in any manner [the statement] tended to show that defendant was not guilty of the offense charged, he was entitled to the benefit of it. [...] The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.*²¹¹

The court clearly analyses the procedural role of the prosecutor and in consequence indeed compels the disclosure of exculpatory evidence. It not only refers to the name of a witness, but even his statement. This approach was far ahead of its time, and was in fact overruled only three years later.²¹²

The general approach, however, was much more restrictive and, as it were, ‘back to the roots’. In an often-quoted decision of the Court of Appeals of the State of New York, the court, though citing several English²¹³ and American cases in which the courts had

accused of crime is to give him an opportunity to know the charges against him, so that he can make proper investigation and preparation for the trial. We see no reason why the motion of plaintiff in error on this point should not have been granted by the trial court.”

²⁰⁹ *State v. Jeffries*, 117 Kan. 742, 232 P. 873, Kan. 1925, at p. 874: “[...]since there is no right for an inspection of the letters in question except by virtue of express authorization by the Legislature, and since none has been granted in the Criminal Code either directly or by reference to the Civil Code, there was no power in the court to make the order requiring the county attorney to turn over the letters for inspection [...]”.

²¹⁰ See, e.g. *U.S. v. Garsson*, 291 F. 646, D.C.N.Y. 1923, at p. 649: “Finally, the defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible, move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. [...] It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence [...]. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.”

²¹¹ *State v. Tippett*, 317 Mo. 319, 296 S.W. 132, Mo. 1927, pp. 326 et seq.

²¹² *State ex rel. Missouri Pac. R. Co. v. Hall*, 325 Mo. 102, 27 S.W.2d 1027, Mo. 1930.

²¹³ Among them the above-mentioned case of *R v Harrie* (fn. 166 *supra*).

held that they did have the inherent power to compel a party to disclose part of its evidence to the other party before trial in one form or the other, finally followed the old *R v Holland*²¹⁴ approach. The court held that the disclosure of material which in itself would not be admissible as evidence could definitely not be required. As to potentially admissible evidence, the court nominally left the question open, but was obviously generally not in favour of pre-trial disclosure. Comparing civil procedure to the criminal case before it, Justice Cardozo, who had been an appeals judge since 1914²¹⁵ and should later serve at the United States Supreme Court, held:

We leave the question open, for if the power exists at all, this case is not within it. The most that can be argued with any show of reason in behalf of the defendant is that the remedy of inspection in civil causes as now prescribed by statute is to be applied in consimili casu to criminal prosecutions. The power in criminal prosecutions may not improbably be less. It surely can be no greater.

[...]

If the statute governing inspection were extended in so many words to criminal prosecutions, the defendant would be unable on such a showing to make good her title to relief. We have no occasion at this time to consider to what extent inspection might be directed at the trial as an aid to cross-examination after the witnesses had testified. [...] What concerns us at the moment is the scope of the remedy available in advance. At such a stage of the contest, a remedy so drastic is within the condemnation of the rule that inspection may not be had for the sole purpose of prying into the case of one's opponent.²¹⁶

In this wording something resembling the ‘equality of arms’ for the prosecution appears to become visible, first, in that the trial is characterized as a “contest”, second, in that the court alleges that the defendant would not be “able to make good” the advantage of pre-trial discovery, which presumably has also got to do with the constitutional privilege against self-incrimination²¹⁷ – it may simply have been unconceivable for the court that anyone could ask from the accused anything like what was proposed for the prosecution. This is quite possibly also the reason why it appeared self-evident that disclosure in criminal proceedings would have to be more restricted than in civil

²¹⁴ Fn. 160 *supra*.

²¹⁵ New York Times of 3 February 1914, available on the internet at <http://query.nytimes.com/mem/archive-free/pdf?res=9B0DEED81F3BE633A25750C0A9649C946596D6CF>.

²¹⁶ *People ex rel. Lemon v. Supreme Court of State of New York*, 245 N.Y. 24, 156 N.E. 84, N.Y. 1927, pp. 86 et seq.

²¹⁷ The Fifth Amendment to the United States Constitution provides: “No person shall [...] be compelled in any criminal case to be a witness against himself [...]”

proceedings. Justice Cardozo thus (knowingly) did not take heed to the fact that the English courts had made considerable progress since *R v Holland*.²¹⁸ After *Lemon*, most courts did recognize discretion of the courts as concerns the ordering of disclosure of evidence, however, just like before, this discretion was not often exercised, including regarding evidence originally belonging to the accused.²¹⁹

The states requiring witness lists became more numerous around this time and in the following years;²²⁰ and in some states the disclosure obligations of the prosecution were extended to include not only the lists but also transcripts of their testimony before the grand jury.²²¹ In this line, the Model Code of Criminal Procedure, drafted by the American Law Institute in 1930, provided in § 194:

Names of witnesses to be endorsed on indictment or information.

*When an indictment or information is filed, the names of all the witnesses or deponents on whose evidence the indictment or information was based shall be endorsed thereon before it is presented, and the prosecuting attorney shall endorse on the indictment or information at such time as the Court may by rule or otherwise prescribe the names of such other witnesses as he purposes to call. A failure to endorse the said names shall not affect the validity or sufficiency of the indictment or information, but the Court in which the indictment or information was filed shall, upon application of the defendant, direct the names of such witnesses to be endorsed. No continuance shall be allowed because of the failure to endorse any of the said names, unless such application was made at the earliest opportunity and then only if a continuance is necessary in the interest of justice.*²²²

This model code, in contrast to its successor, the model penal code, apparently did not have a larger impact. Throughout the 1930ies, the courts followed the restrictive

²¹⁸ *Fletcher*, Pretrial Discovery in State Criminal Cases, at p. 295, calls this fact “unfortunate”. *Dession*, The New Rules of Federal Criminal Procedure: II, at p. 219, fn.165, notes that the court “found it necessary to examine the problem almost as a new question”.

²¹⁹ See for references Note: Pre-Trial Disclosure in Criminal Cases, 60 Yale Law Journal (1951), 626-646, at p. 627 (fn. 9).

²²⁰ Compare §1851 in the second and third editions of *Wigmore* (1923 and 1940, respectively).

²²¹ *Wigmore*, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 6, § 1855a.

²²² Quoted according to *Wigmore*, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 6, p. 400 et seq., fn. 1.

approach of *Lemon*.²²³ This was despite of the fact that for civil cases, the discovery had by then developed to such an extent that each side was given “pre-trial access to almost all relevant information within the knowledge of the other side.”²²⁴

There was, however, some positive jurisdiction on the question whether, during trial, previous inconsistent evidence concerning a witness statement must be disclosed for impeaching a witness at cross-examination.²²⁵ This reminds us to some extent of the English jurisprudence described above, like *R v Clarke*;²²⁶ and it appears that the tenet that this would advance truth-finding played a major role in this:

*But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution, and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth. [...] While therefore it must be admitted that the question has not been settled in federal criminal procedure, there is good authority in other jurisdictions supporting our view. [...] That there are contrary decisions is true, but justice so plainly points in one way that we cannot hesitate to choose as we have indicated.*²²⁷

This jurisprudence, however, does not cover disclosure in the formal sense, i.e. before the trial, and does not imply a positive disclosure duty of the prosecution. It is different from the situation in England, where disclosure in principle had to take place before the trial, but only the identity of the witness had to be disclosed.

In 1938, the works for what would become the Federal Rules of Criminal Procedure (FRCP) began.²²⁸ Based on the adapted Rules Enabling Act²²⁹, the United States Supreme Court was tasked with the elaboration of the FRCP. The Court for its part

²²³ See, e.g., *State ex rel. Page v. Terte*, 324 Mo. 925, 25 S.W.2d 459, Mo. 1930; *People v. Gatti*, 167 Misc. 545, 4 N.Y.S.2d 130, N.Y.Gen.Sess. 1938; see also *State v. Di Noi*, 59 R.I. 348, 195 A. 497, R.I. 1937.

²²⁴ *LaFave/Israel/King/Kerr*, Criminal procedure, at § 20.1(a).

²²⁵ See *U.S. v. Rosenfeld*, 57 F.2d 74, C.A.2 1932; *Asgill v. U.S.*, 60 F.2d 776, C.A.4 1932; *People v. Walsh*, 262 N.Y. 140, 186 N.E. 422, N.Y. 1933, at p. 149/425; *U.S. v. Krulewitch*, 145 F.2d 76, C.A.2 1944; there was an according decision as early as 1914: *State v. Bachman*, 41 Nev. 197, 168 P. 733, Nev. 1917.

²²⁶ See fn. 186 *supra*.

²²⁷ *U.S. v. Krulewitch*, fn. 225, *ibid*.

²²⁸ See on the history of the FRCP generally *Dession*, *The New Rules of Federal Criminal Procedure: I*, pp. 694 et subs.

²²⁹ 28 U.S.C. § 2072; adapted for the FRCP in 1940.

appointed an advisory committee in 1941. Two preliminary drafts were published in 1943 and 1944, respectively. Successively the draft was transmitted to the United States Attorney General in December 1944 to be reported to the United States Congress in January 1945. After that, an additional volume of notes was published. Together, these norms represent the Federal Rules of Criminal Procedure, which entered into force on 21 May 1946.²³⁰ They comprised 60 rules.

With regard to the drafting of the FRCP, it is interesting to note that Robert H. Jackson, who in 1945 became the American Chief Prosecutor at the Nuremberg IMT, was, from 1940 until 1941, United States Attorney General, and after that became Associate Justice of the U.S. Supreme Court, which he remained until his death in 1954. In his position of Attorney General he was followed by Francis Biddle, who held this position from 1941 until 1945, and in 1945 became the primary American judge in Nuremberg.

Even though the FRCP thus entered into force after the beginning of the Nuremberg trial, it is worthwhile to briefly discuss them here, since the draft was actually finished in 1944; and both Robert H. Jackson as well as Francis Biddle held key positions in the surroundings of the FRCP and later in the Nuremberg proceedings. Jackson may be said to have been *the* driving force in the trial as a whole, not least in the preparatory proceedings, like the London Conference. Biddle did not play a major role in the preliminary works for Nuremberg, however, in his capacity as Attorney General, he co-drafted a memorandum for President F.D. Roosevelt for the Yalta Conference, where the cornerstone for the later trial was laid.²³¹

The FRCP in their original version did not contain groundbreaking novelties. To a large degree, they simply constituted or consolidated already existing law, enriched with some novelties that had been ‘tested’ in more progressive states and in England.²³² Concerning disclosure, the FRCP contained one relatively short provision, Rule 16. By its wording, we may conclude that the Supreme Court wished the dispute as to whether the courts should have discretion to compel disclosure from the prosecution to be settled in favour of discretion. Rule 16 in its original form provided:

Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to inspect and copy or photograph designated books, papers, documents or tangible objects,

²³⁰ *Dession*, The New Rules of Federal Criminal Procedure: I, at p. 696 et seq.

²³¹ See *Jackson*, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945, p. 3.

²³² *Dession*, The New Rules of Federal Criminal Procedure: I, at p. 699.

obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defence and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions that are just.

This provision had apparently been included in the first draft already.²³³ In the first draft, however, the scope of the norm had been somewhat wider, in that it originally said: “any designated books, papers, documents, or tangible objects, not privileged”, and later the qualification added “obtained from or belonging to the defendant or obtained from others by seizure or by process” was inserted.²³⁴

The norm only referred to “books, papers, documents or tangible objects”. Furthermore, it only applied to such material which had been obtained by seizure or process, thus did not cover those items which had been transmitted to the prosecution voluntarily.²³⁵ In addition to that, the defence had to make a case that, first, the items “might be material”; how it should have been able to do this without the help of the prosecution, is unclear. After all, the court was given a wide margin of discretion as to the ‘if’ and ‘how’ of disclosure. We can thus conclude that Rule 16 in its original wording was very limited as to its scope of application, and particularly vague as regards the legal consequences of its applicability.

Generally, Rule 16 contained no specific reference as to the evidence which the prosecution intends to present at the trial. As we have indicated above, this is also the approach taken by the English Criminal Procedure and Investigations Act of 1996. Rule 16 only referred to objects “material” to the defence, while their materiality is, of course, generally difficult to prove without having seen them. Furthermore, Rule 16 made no mention of the names, let alone the statements of grand jury witnesses, no matter whether envisaged for trial or not; and Rule 6 (e) FRCP allowed few exceptions of the general secrecy of the grand jury proceedings. This is particularly noteworthy given the fact that, as we have just seen, this was the very disclosure provision which was present, to one extent or another, in the procedural rules of most of the states, and was indeed contained in the Model Code of Criminal Procedure. To be sure, as briefly mentioned above, in cases for treason and capital offences, witness lists (have) had to be

²³³ Under preliminary Rule 19, see *Orfield*, The Preliminary Draft of the Federal Rules of Criminal Procedure (Part I), at p. 61.

²³⁴ Quoted according to *Shores v. U.S.*, 174 F.2d 838, C.A.8 1949.

²³⁵ See also *Dession*, The New Rules of Federal Criminal Procedure: II, at p. 220.

transmitted to the defence since 1790.²³⁶ It has been noted in this regard that there was, however, an ‘indirect’ way to obtain a list of the prospective witnesses by “watching the *praecipes* filed with the clerk of court” by the prosecution.²³⁷ As a matter of fact, this indirect method appears rather unusual; it is thinkable, however, that it was used in practice.

Another possibility of ‘indirect’ discovery, in any case, proved to be of considerable practical importance: the issuing of a subpoena *duces tecum* according to Rule 17 (c) FRCP. This provision was originally worded as follows:

[Subpoena] [f]or Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

By their sheer wording, the scopes of application of Rule 17 (c) and Rule 16 in their respective original forms clearly overlap, indeed it may well be said that the scope of application of Rule 17 (c) was wider than that of Rule 16.²³⁸ The question must thus be asked whether the narrow margin of Rule 16 FRCP could be circumvented by a resort to Rule 17 (c). Before the Nuremberg IMT, we find naturally no related jurisprudence concerning this point; we will, however, come back to it below, since this problem was imminent in the United States, and indeed a similar systematic problem has also appeared in the practice of the modern international tribunals.²³⁹ It may be noted already, in any case, that the difficulty or even impossibility of accurately separating production and disclosure of evidence illustrates the close relation between disclosure and truth-finding.

²³⁶ See fn. 194 *supra*.

²³⁷ *Dession*, The New Rules of Federal Criminal Procedure: II, *ibid*.

²³⁸ *Orfield*, Discovery and Inspection in Federal Criminal Procedure, at p. 312; see also Note: Pre-Trial Disclosure in Criminal Cases, 60 *Yale Law Journal* (1951), 626-646, at p. 629.

²³⁹ See section 5.5 *infra*.

2.2.2 Defence Disclosure

As noted above, in English criminal procedure, there were originally no obligations of defence disclosure whatsoever. This is in contrast to some of the American systems, which in fact had from a relatively early stage a, though limited, disclosure obligation of the defence with regard to alibi and some affirmative defences, such as insanity. Some statutes in federal states had according statutes in place already in the 1920ies; and they became more numerous in the following years;²⁴⁰ which is why it appears somewhat inaccurate to hold, as many scholars and courts did, that the accused was generally protected from any form of disclosure due to his privilege against self-incrimination. Proposals for obligatory defence notice and even the disclosure of witness lists date back to the early 20th century.²⁴¹ It had been contemplated to incorporate an according rule in the FRCP, this was also proposed by the Criminal Division of the department of justice;²⁴² apparently a provision to this end was included in a committee note to the Second Draft of the FRCP.²⁴³ In the end, however, it was not kept.

2.2.3 Conclusion

In sum, we can state for the American system that it would be exaggerated to say that disclosure was inexistent until the middle of the 20th century – the issue was highly relevant in court practice and present in legal discussions. Its scope, however, was, with the exception of very few states, in fact very limited. Even though by the 1940ies we may state that for the most part it was held that American courts both on the state and federal level had discretion whether to compel disclosure or not, this discretion was rarely exercised.

The FRCP, which in Rule 16 in a sense sum up the common law as regards the state of development of disclosure in the mid-1940ies, show a scanty picture, as they comprise only a very limited range of material; and disclosure here is generally not a matter of right, but of discretion. Some states were somewhat more generous; overall, however, the prosecution apparently retained a significant momentum of ‘trial by surprise’.

²⁴⁰ See references at *Wigmore*, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 6, § 1855b, fn. 2, pp. 419 et seq.

²⁴¹ *Wigmore*, A pocket code of the rules of evidence in trials at law, § 1331, p. 301: “The prosecution may on motion obtain before trial a list of the accused’s witnesses. [Note: This is not law anywhere, but it ought to be.]”

²⁴² See *Barron*, Proposed Rules of Procedure in Criminal Cases: A Prosecutor's Viewpoint, at p. 215.

²⁴³ See *Dession*, The New Rules of Federal Criminal Procedure: II, at p. 216.

2.3 Conclusion

Comparing the English and the American systems so far, we see that generally, even though there were a few exceptions, disclosure developed later and slower in the United States than in England. This is, however, not the case as concerns witness lists in capital crimes cases, where the lists had to be disclosed before trial since 1790 – albeit in England this exception applied only to treason cases. The same could obviously be said with regard to defence disclosure, which was, at least in some states, in place before this was contemplated in England. From a human rights perspective, however, this fact could well be seen as a step backwards, and not as a progressive development.

With regard to the material which was to be disclosed, we find a much more restrictive approach in America than in England. Prosecution disclosure as regards practically all of the prosecution evidence had, in theory at least, been common practice in England from the beginning of the 20th century, whereas in the United States there remained a significant element of surprise. The discussion in England had already turned away from incriminating prosecution evidence to the disclosure of unused material, which in America was, with few exceptions, like the duty to disclose inconsistent evidence during trial for cross-examination, unheard of.

This was thus the ‘state of the art’ of disclosure in England and the U.S.A. at the time when the discussions leading to the establishment of the Nuremberg IMT took place. To these discussions and the later practice of the IMT we will now turn.

3 The Nuremberg IMT

3.1 Overview and Legal Framework

The Nuremberg trial against the major war criminals marks the first time in history that gross human rights abuses were brought before an international tribunal. From 20 November 1945 until 1 October 1946, 21²⁴⁴ German and Austrian defendants stood trial for their involvement in war crimes and crimes against humanity committed during World War 2. Additionally, seven organisations were indicted.²⁴⁵ The indicted persons and organisations were defended²⁴⁶ by a total of 27 chief defence counsel, assisted by 54 associate defence counsel and 67 secretaries.²⁴⁷

Legally, the trial was based on the London Agreement of 8 August 1945 and the Charter of the International Military Tribunal, which, for its part, constituted an annex to the Agreement. Compared to the statutes of modern international criminal courts and tribunals, the IMT Charter is merely fragmentary. It consists of 30 articles.

In its first part, the Charter contains provisions concerning jurisdiction and substantive law, whereas Articles 16 et seq. concern the rights of the accused as well as basic procedural rules. In Article 13, the drafting of more explicit procedural Rules was left to the Judges of the Tribunal:

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

However, these Rules were also, in comparison to the procedural rules of modern bodies of international criminal law, and, for instance, the existing German Code of

²⁴⁴ Originally, 24 natural persons had been indicted. However, Robert Ley, *Reichsleiter* of the Nazi Party and head of the German Labour Front, had committed suicide in his cell, industrialist Gustav Krupp von Bohlen und Halbach was unfit to stand trial, and Martin Bormann, Head of the Party Chancellery, was missing (in fact, as it later turned out, he was already dead); Bormann was, however, tried *in absentia*.

²⁴⁵ The *Reich* Cabinet, the Leadership Corps of the Nazi Party, the SS, SD, Gestapo, SA, and the General Staff and High Command of The German Armed Forces.

²⁴⁶ A very instructive overview over the situation of the defence counsel at the IMT and the legal as well as practical problems they encountered is provided by *Safferling/Graebke*, *Strafverteidigung im Nürnberger Hauptkriegsverbrecherprozess: Strategien und Wirkung*, p. 47-81;

²⁴⁷ *Heydecker/Leeb*, *Der Nürnberger Prozeß*, p. 118.

Criminal Procedure of that time, rudimentary, consisting of only eleven rules covering little more than four pages.²⁴⁸

In the following, we will take a look at the making of the Nuremberg Charter as well as the Rules of Procedure and will briefly analyze the legal content of the relevant finalized provisions. After that, we will analyze the practice of the IMT concerning disclosure in general and *vis-à-vis* the provisions.

3.1.1 The Making of the Legal Provisions

3.1.1.1 The IMT Charter

As just mentioned, the IMT Charter was an annex to the London Agreement of 8 August 1945. Even though the intention to punish those responsible for Nazi atrocities committed during the Second World War had been formulated as early as January 1942 in the so-called St.-James-Declaration²⁴⁹, the legal preparatory works for the creation of an international tribunal started quite late, since the Allies and the United Nations Commission for the Investigation of War Crimes (UNWCC) had initially put emphasis on the gathering of materials to be used as evidence against the alleged war criminals. The actual work on the implementation of an international tribunal and its procedure was practically left until after the capitulation of Nazi Germany in early May 1945. At the beginning it was far from clear whether the German Nazi leaders, i.e. those considered to be the most responsible for the committed atrocities, should be tried at all. The Moscow Declaration²⁵⁰, which constitutes the second major public document concerning punishment of Axis war crimes, had envisaged that the major German war criminals would “be punished by joint decision of the government of the Allies” – this wording, however, was ambiguous enough to cover everything from an international trial to a summary execution. Some of the allies had, as far as Nazi leaders were concerned, strong reservations against the holding of a trial in the proper sense. The British government, for instance, was rather in favour of summary executions of those

²⁴⁸ See *IMT* vol. 1, p. 19 et subs..

²⁴⁹ The Declaration of St. James of 13 January 1942 (reprinted in: *Punishment for War Crimes: The Inter-Allied Declaration signed at St. James’s Palace, London, on 13th January, 1942, and Relative Documents*) is often considered to mark the cornerstone for the IMT, mainly for the wording “punishment through the channel of organized justice of those guilty and responsible for these crimes“.

²⁵⁰ The full text of the declaration can be found, e.g., on the internet at <http://www.ibiblio.org/pha/policy/1943/431000a.html>.

persons considered most responsible for the committed atrocities. As late as April 1945, the British feared that the outcome of a trial with high ranking defendants represented by legal counsel was uncertain and that full defence rights might render the trial too protracted. Also, it was held that a war of aggression might not constitute a crime under international law.²⁵¹

The American government, on the other hand, was the strongest supporter of the idea of a proper trial. Since September 1944, the advocates of a proper trial in the American government, namely Secretary of War Stimson and Secretary of State Hull, had urged President Roosevelt to push for a trial of justice instead of summary executions, which had been contended by others on the American side as well, such as Secretary of the Treasury Henry Morgenthau.²⁵²

3.1.1.1.1 The Memorandum for President Roosevelt²⁵³

The first document containing specific legal information on the strategy of implementing an international criminal tribunal and thus forming the basis of the later London Agreement, is the ‘Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945’²⁵⁴. It was drafted as a guide to President Roosevelt in preparation for the Yalta Conference in February 1945²⁵⁵ and contains remarks on the crimes and criminals to be punished, the nature and composition of the prospective tribunal as well as summaries of the attitudes of the other main Allies (Great Britain and the USSR at that time) towards the plan. However, the memorandum does not entail even the most basic ideas as to how to implement the planned tribunal procedurally. The Yalta Conference as such was little fruitful as regards the treatment of the major war criminals: the only thing the ‘Big Three’ could agree on was that ‘the question of the major war criminals should be the subject of inquiry by the three Foreign Secretaries for report in due course after the close of the

²⁵¹ Aide-Mémoire from the United Kingdom [to the United States], 23 April 1945, published in: *Jackson*, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (hereinafter: *Jackson Report*), p. 18 et subs. The Aide-Mémoire was written at a time when Hitler, who committed suicide on 30 April 1945, was still alive and would thus have been the most important prospective indictee of a future tribunal.

²⁵² Compare *Harris*, Tyranny on trial, p. 7 et subs.

²⁵³ Sometimes referred to as “Yalta memorandum” or “Crimean proposal”, see *Jackson Report*, p. 4.

²⁵⁴ Published in: *Jackson Report*, p. 18 et subs.

²⁵⁵ *Ibid*, p. 18.

conference'²⁵⁶. It is obvious that, lacking a concrete agreement as to the 'if' of a proper international tribunal, the 'how', meaning the procedure to be employed, was left aside.

3.1.1.1.2 The San Francisco Draft

From 25 April to 26 June 1945 the 'United Nations Conference on International Organization' was held in San Francisco as a follow-up conference of Yalta.²⁵⁷ It was here where the UN Charter was signed on the final day of the conference.

During the San Francisco Conference, informal discussions on the topic of the prosecution of the alleged war criminals took place between 2 and 10 May. Here, an American first draft of an 'Executive Agreement', prepared by the State, War, and Justice Departments, was handed to the representatives of Great Britain, the USSR, and, for the first time, the Provisional Government of France. The draft was accompanied by an explanatory memorandum.²⁵⁸

The papers had been drafted in conference with U.S. Supreme Court Justice Robert H. Jackson,²⁵⁹ who at the time was already unofficially appointed by the new American President Truman as American Chief Prosecutor for Axis war crimes committed in Europe, his designation becoming effective on 2 May 1945.²⁶⁰ Jackson was a strong proponent of a trial in the proper sense.²⁶¹

The two papers are quite concrete as to the crimes the Allies or, for that matter, the Americans were seeking to punish, and to the structure of the prospective international tribunal. However, they also contain proposals as to the procedure to be followed in order to establish the guilt of the prospective defendants.

Some of the fundamental tenets of the later IMT Charter as regards criminal procedure are clearly based on the provisions of the San Francisco draft. The principle that the prospective tribunal would establish its own rules of procedure is contained (Art. 18 San

²⁵⁶ See Yalta Agreement VI. ('Major War Criminals').

²⁵⁷ See Yalta Agreement I. 1. ('World Organization').

²⁵⁸ The full texts of the proposal and the accompanying memorandum are published in: *Jackson Report*, p. 23 through 38.

²⁵⁹ *Jackson Report*, p. 22; see also: *Taylor*, *The Anatomy of the Nuremberg Trials*, p. 40; *Harris*, *Tyranny on trial*, p 10 et. subs.

²⁶⁰ See Executive Order by President Truman, May 2, 1945, published in *Jackson Report*, p. 21.

²⁶¹ Compare, e.g., Jackson's speech before the American Society of International Law on the topic "The Rule of Law Among Nations", published in: *American Society of International Law Proceedings*, vol. 39 (1945), p. 10 et subs.

Francisco Draft, Art. 13 IMT Charter); as is the principle of ‘non-technical’ procedure and a considerable laxity as far as the admissibility of evidence is concerned (Articles 13 and 14 San Francisco Draft, Art. 19 IMT Charter). The accompanying memorandum on its part contains interesting background information on this. Even though there is no concrete suggestion as to a set of procedural rules, it is clear that from the point of view of the Americans, a ‘mixed’ procedural model should be followed:

It should not shock anyone that a trial before an Allied military tribunal should have some aspects based upon common law traditions and some drawn from the Continental and Slavic systems. For example, the United States and the United Kingdom cannot insist on the full, rigid application of Anglo-American procedures, the rules of evidence, the privilege against self incrimination and similar matters. These are not inherent parts of other systems of criminal practice and there is no need for leaning over backward to give the Axis leaders the benefit of protective principles, not afforded by German law, even prior to Axis distortion of German justice. The Hitlerites need only have a fair trial. Similarly, those raised in the Russian and Continental systems of law cannot properly object to having the methods of trial influenced by common law principles to some extent. The trial should be an Allied venture, reflecting the influence of the systems of justice in force in all four of the principal Allied nations.²⁶²

The principal reason for this expressed point of view is clear: the Americans are obviously appealed by the flexible approach of the continental justice system as regards some procedural matters and safeguards for the defendant, such as the relatively lax law of evidence. This is understandable, particularly in the light of the above mentioned British fears as to the duration of a proper trial.²⁶³ The said motivation expressed in the American memorandum, however, also underlies a different theory as to the roots of the IMT procedural law, namely that, while effectively blending elements of Anglo-American and Continental-European procedure, it was in fact based on the practice of American *Military Commissions* such as in *ex parte Quirin*.²⁶⁴

²⁶² *Jackson Report*, p. 36.

²⁶³ See in this regard also the interim Report of Justice Jackson to the President of the U.S.A. of 5 June 1945: “These hearings, however, must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons. But the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.” *Jackson Report*, p. 46.

²⁶⁴ *Wallach*, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?* In a slightly different context, *Harris*

The San Francisco Draft does not contain any information as to the disclosure of evidence *stricto sensu*. However, Art. 12 of the draft does contain provisions as to the necessary notification of the defendants of the indictment:

DUE PROCESS FOR DEFENDANTS

12. In order to insure fair trial for defendants charged with crime pursuant to this Agreement, it is declared that the following is required in order to constitute due process in their behalf:

a. Reasonable notice shall be given to the defendants of the charges against them and of the opportunity to defend. Such notice may be actual or constructive. Any tribunal before which charges are tried pursuant to this Agreement shall have the right to determine what constitutes reasonable notice in any given instance.

b. The defendants physically present before the tribunal (a) will be furnished with copies, translated into their own language, of any indictment, statement of charges or other document of arraignment upon which they are being tried, and (b) will be given fair opportunity to be heard in their defense personally and by counsel. The tribunal shall determine to what extent proceedings against defendants may be taken without their presence.

c. (...)

This is mentioned because for one, as we shall see, the ‘due process’ requirement was later replaced by a ‘fair trial’ principle, and, as we will also see, the views of the Four Powers differed fundamentally as to what documents should be lodged (and thereby disclosed) together with the indictment.

In the months following the San Francisco Conference, a number of amendments of the draft agreement were discussed among the Allies, almost all of which, however, did not relate to the envisaged procedure.²⁶⁵ Nevertheless, it took several weeks before the San Francisco Draft was even officially accepted as a basis for further discussions, meaning that the governments of the other Allies were not immediately convinced of the American approach.²⁶⁶ On 14 June 1945, a revised version of the draft was circulated; it

also makes reference to Military Commissions serving as a role model for the IMT, see *Harris, Tyranny on trial*, at p. 500 et subs.

²⁶⁵ The only proposed amendment which refers to the procedure was to omit the possibility of constructive notice of the defendants (Art. 12 lit. a. of the San Francisco Draft), see British Memorandum of May 28, 1945, published in: *Jackson Report*, p. 39 et subs., particularly p. 40.

²⁶⁶ The British Aide-Mémoire in which the acceptance of the San Francisco Draft as a basis for discussion is officially announced is dated June 3, 1945, see *Jackson Report*, p. 41.

incorporated several changes, none of which, however, had been suggested by the other Allies.²⁶⁷

3.1.1.1.3 The Revised Draft, 14 June 1945 ('London Draft')

This draft²⁶⁸ constituted the basis for the discussions which took place within the London Conference, starting on 26 June 1945.

As far as the envisaged procedure is concerned, the new draft is clearly based on the former one. The competence of the tribunal to draw up its own rules of procedure (now contained in Art. 8) and the 'non-technical' rules of evidence (now contained in Articles 17 and 18) were sustained. The above-mentioned provisions concerning the notification of the defendants of the indictment were also kept. However, there is a slight difference in the wording of what is now Art. 16:

FAIR TRIAL FOR DEFENDANTS

16. In order to insure fair trial for defendants charged with crime pursuant to this Agreement, it is declared that the following procedure is required:

a. Reasonable notice shall be given (...)

As will be noted, the 'due process' requirement contained in the San Francisco Draft was replaced by a principle of 'fair trial'. 'Due process', or, more completely, 'due process of law' is a legal principle which is deeply rooted in the law of the USA as well as England. The term was used for the first time in a statutory rendition of the Magna Carta as early as 1354 under King Edward III,²⁶⁹ and was later incorporated into the U.S. Constitution (5th and 14th Amendment). The concept tries to encompass basic legal foundations of a state of law and has developed considerably over time. Its exact scope is widely unclear and cannot be discussed in detail here.²⁷⁰ However, it must be understood as *encompassing* the concept of fair trial, meaning that fair trial is a necessary, but not a sufficient prerequisite for a 'due process of law'. This goes together with the above quoted memorandum ('(...) the United States and the United Kingdom cannot insist on the full, rigid application of Anglo-American procedures (...) The

²⁶⁷ See *Jackson Report*, p. 55.

²⁶⁸ Published in: *Jackson Report*, p. 55 et subs., hereinafter referred to as „London Draft“

²⁶⁹ See 1354 Liberty of Subject Act (28 Edw 3 c. 3): 'No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.'

²⁷⁰ See, e.g., *Hurtado v. California*, 110 U.S. 516, 535, 1884: "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".

Hitlerites need only have a fair trial', see page 65). The substantial difference between the San Francisco and the London draft on this point is, however, little. At no time the Allied nations or, for that matter, the Americans were planning to grant the prospective defendants the full rights afforded by American constitutional law. Nevertheless, in the preface of his report to President Truman, Justice Jackson takes up the notion of 'due process of law' once more, stating:

While it obviously was indispensable to provide for an expeditious hearing of the issues, for prevention of all attempts at unreasonable delay and for elimination of every kind of irrelevancy, these necessary measures were balanced by other provisions which assured to the defendants the fundamentals of procedural "due process of law." Although this famous phrase of the American Constitution bears an occasionally unfamiliar implication abroad, the Continental countries joined us in enacting its essence-guaranties securing the defendants every reasonable opportunity to make a full and free defense.²⁷¹

3.1.1.1.4 The London Conference

The London Conference, which took place from 26 June 1945 until 8 August 1945 turned out to be the founding conference for the IMT, for it was here that the Charter of the IMT was finalized. However, a quick look into the minutes of the discussions and the memoranda shows that, at least at the beginning, the procedure which the Four Powers wanted the Court to follow was far from clear. This follows foremost from the different legal background of the actors – the Americans and British adhering to the Anglo-American system, the French and Russians sticking to Continental-European principles. It appears that the actors, which in their respective countries doubtlessly enjoyed a high reputation,²⁷² were quite clueless as regards the legal systems of their colleagues and sometimes maybe even their own systems.²⁷³ In the following few

²⁷¹ *Jackson Report*, Preface, p. X et seq.

²⁷² André Gros as one of the French delegates was professor for international law and later became a judge at the International Court of Justice, Aron Naumovich Trainin, member of the Soviet delegation, was professor for criminal law in Moscow. Many of the other delegates were high-ranking legal practitioners – first and foremost Robert H. Jackson, who was an associate justice at the U.S. Supreme Court, David Maxwell-Fyfe was Attorney General of the United Kingdom, Robert Falco had been a *conseiller* at the French *Cour de cassation*.

²⁷³ See as an illustration the remark by General Nikitchenko on the final day (!) of the London Conference (*Jackson Report*, p. 403):

“GENERAL NIKITCHENKO. There is one question. What is meant in the English by "cross-examination"?"

paragraphs we shall take a brief look at the different positions as they appear from the minutes of the meetings as well as from the memoranda prepared by the participants.

3.1.1.1.4.1 The American position

The American position, as far as the procedure is concerned, follows (unsurprisingly) the American role model of criminal procedure. This can be derived not so much from the law of evidence – the Americans, as we have seen above, from the very beginning were not willing to grant the prospective defendants the safeguards of the rigid Anglo-American evidentiary rules – but from the envisaged truth-finding process, which is clearly adversarial.

The planned procedure was the following:

1. *Reading of the indictment.*
2. *Arraignment of defendants by Tribunals, calling on each to plead “guilty” or “not guilty”.*
3. *Opening statements by the Prosecutors.*
4. *Presentation of the case by Prosecutors, defendants having the right to cross-examine.*
5. *Opening statements by defendants or their counsel.*
6. *Defendants’ evidence, with cross-examination by Prosecutors.*
7. *Defendants’ final arguments or summations.*
8. *Prosecutors’ final arguments or summations.*
9. *Judgment.*²⁷⁴

This represents the most basic form of an Anglo-American trial. The particularity starts fundamentally with the plea-principle – a plea is something a Continental European criminal lawyer could hardly reconcile himself with, since the very idea of a criminal

LORD CHANCELLOR. In an English or American trial, after a witness has given testimony for the prosecution he can be questioned by the defense in order that the defense may test his evidence, verify his evidence, to see whether it is really worthy of credit. In our trials the defendant or his counsel is always entitled to put questions in cross-examination. And I think the same situation prevails in the courts of France.

JUDGE FALCO. Yes, the same.”; see also *Safferling*, *International Criminal Procedure*, p. 53 with further remarks.

²⁷⁴ See notes by Sidney Alderman, American Representative to the drafting Subcommittee at the London Conference, of 10 July 1945, published in: *Jackson Report*, p. 191 et subs., particularly p. 192.

trial from the Roman Germanic point of view is the finding of guilt or innocence by a court, and not the settlement of a dispute between two dissenting parties. Also, opening statements by the prosecution and the defence as well as the truth-finding process based on cross-examination are somewhat unknown to Central European Courts.²⁷⁵

Naturally, the pre-trial procedure of the envisaged court proceedings was, in the view of the Americans, based on the same model. First of all, and this is what matters most in the context of our main topic of disclosure, the Americans could not reconcile themselves with the idea of lodging any evidence together with the indictment. In a Continental-European system, the dossier containing all the evidence is handed over to the court together with the indictment and, upon request, to the defence.²⁷⁶ This, however, was nothing the Americans could accept – maybe not so much as far as disclosure to the defence was concerned, but rather disclosure to the court. From an American point of view, to present evidence to a court before trial and without the previous possibility of the other party to cross-examine the evidence is not imaginable, for it might leave the judges biased. Also, and perhaps more importantly, the Americans were afraid of losing control over the evidence *vis-a-vis* the court. As Mr. Justice Jackson noted in the discussions at the London Conference:

*Our indictment is merely a charge. It merely accuses and names the crime of which it accuses, tells briefly where it was committed and when, and does not give evidence. (...) You do not set forth the evidence in the indictment. You merely start the case in motion, and then the trial is for producing the evidence.*²⁷⁷

However, in a later meeting, Justice Jackson, while emphasizing that he was not willing to let the control of the trial out of his hands, demonstrated considerable openness to find a compromise:

I notice in your article 15 that you provide that the indictment shall be accompanied by all of the evidence pertaining to the case. Now you see, we do not do that, and therefore what we have reserved is the right to act independently in the trial of the case if necessary, as well as in the investigation, while you have reserved the right to act independently only in the investigation. I do not see how we could act on the basis that all evidence pertaining to the case must accompany the indictment because that leaves nothing for the trial but to read the evidence (...). The indictment in our practice is intended to state an

²⁷⁵ See fn. 273 above.

²⁷⁶ See already Chapter 1 above.

²⁷⁷ See Minutes of Conference Session of June 26, 1945, published in: *Jackson Report*, p. 71 et subs., particularly p. 78 et subs.).

*outline of the charges rather than all the evidence. We are quite willing in this case to put in a great deal of evidence for the indictment or as supplementary to it in some form, but do not think we could deprive the trial of all functions of taking the evidence.*²⁷⁸

3.1.1.1.4.2 The Soviet Position

Next to the Americans, the Soviet delegation headed by General Nikitchenko, who later became the Judge for the Soviets, and Professor Trainin proved very active in the discussions, putting forward their point of view concerning the envisaged procedure. As usual in the Continental-European system,²⁷⁹ the Russians favoured active judges, with the other participants playing a subordinate role. Most importantly in our context, the Russians put forward the idea of handing the evidence to the judges together with the indictment, this point, as seen above, being controversial with the American position. The issue came up several times at the London Conference. The Soviet drafts provided:

Art. 15

Indictment

*At the conclusion of the investigation the Commission shall draw up an indictment which shall be lodged with the Tribunal together with all the evidence pertaining to the same. In the absence of sufficient evidence to warrant the turning of the case over to the Tribunal the Commission²⁸⁰ shall decide whether to bring the proceedings to an end. (...)*²⁸¹

At the same time, the American proposal read:

*There shall be lodged with the Court prior to commencement of the trial an indictment, supported by full particulars, specifying in detail the charges being brought to trial. No proof shall be lodged to the Court except at the trial, and copies of any matters to be introduced in writing shall be furnished the defendants prior to their introduction.*²⁸²

It is interesting to note that at this time the Soviet proposal does not contain provisions as to handing over the evidence to the defendant. Art. 17 of the Soviet draft merely

²⁷⁸ See Minutes of Conference Session of July 3, 1945, published in: *Jackson Report*, p. 143 et subs., particularly p. 153.

²⁷⁹ See Chapter 1.

²⁸⁰ Later renamed in 'Committee', meaning the group formed by the Prosecutors.

²⁸¹ See 'Draft Showing Soviet and American Proposals in Parallel', *Jackson Report*, p. 165 et subs., particularly p. 175 et subs.

²⁸² *Ibid.*

speaks of the indictment which is to be handed over to the defendant.²⁸³ However, from the context of the discussion at the conference, it is clear that the Soviets intended to hand the evidence to the defendants also.²⁸⁴ Nevertheless, the arguments which the Soviets brought forward in favour of this position were actually not so much focused on protecting the rights of the accused, but rather speeding up the trial:

*The difference apparently is on the point as to whether the material is to be submitted to the court or whether it is to be kept by the prosecuting officers. In the view of the Soviet Delegation, if the court is to be assisted, that material should be referred to it and reference should be made in the indictment as to the reasons for the charges advanced, giving the evidence that has been collected and leaving it with the court as completely presented.*²⁸⁵

As to the American critique of possible bias of the prospective judges, General Nikitchenko expressed his view that in a case of such magnitude complete judicial impartiality was merely fictitious:

*Third, with regard to the position of the judge-the Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case. The declaration of the Crimea Conference is quite clear that the objective is to bring these criminals to a just and speedy trial. Therefore, the judge, before he takes his seat in court, already knows what has been quoted in the press of all countries, and it is well known about the criminal as accused and the general outline of the case against him. The case for the prosecution is undoubtedly known to the judge before the trial starts and there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before. If such procedure is adopted that the judge is supposed to be impartial, it would only lead to unnecessary delays and offer opportunity for the accused to bring delays in the action of the trial.*²⁸⁶

This conclusion can hardly be denied, given the fact that General Nikitchenko later in fact became the Soviet Judge of the Tribunal – his statement was furthermore uttered in the very same moment as his (in-)famous quote:

We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those

²⁸³ Ibid., p. 176.

²⁸⁴ See, e.g. *Jackson Report*, p. 154.

²⁸⁵ General Nikitchenko, Conference session 26 June 1945, *Jackson Report* p. 80. Compare also p. 116.

²⁸⁶ See *Jackson Report*, p. 105.

*declarations both declare to carry out immediately just punishment for the offenses which have been committed.*²⁸⁷

3.1.1.1.4.3 The French Position

The French delegation, lead by Professor Gros and the later Alternate Judge Falco, appears to have played a rather diplomatic and balancing role in the London Conference.²⁸⁸ The delegates emphasized that a flexible approach should be taken as far as the procedure was concerned, as the envisaged tribunal was without precedent.²⁸⁹ The French were, like the Russians, in favour of lodging the evidence together with the indictment, and, most probably for streamlining the proceedings, proposed to entrust this evidence to a designated member of the Tribunal, who should then serve as a *rapporteur* and present the case to the other judges.²⁹⁰ We also find proof that at a stage when the proceedings had already started, Judge De Vabres, the French Judge, proposed to introduce some kind of dossier approach.²⁹¹ Judge De Vabres also published a major work on the proceedings in the aftermath of Nuremberg,²⁹² and, while concentrating on questions of substantive law, also elaborated on the procedure and indeed dedicated part of his work to comparative considerations.²⁹³ As to the influence of the French delegation regarding the procedure, he states that some ‘continental’ features, like the right of the defendant to make an unsworn statement (Art. 24 (j) of the IMT Charter), were based on French proposals.²⁹⁴ However, he notes nothing in particular as far as disclosure is concerned.

²⁸⁷ *Jackson Report*, p. 104 et seq.

²⁸⁸ Compare also *Ascensio*, *The French Perspective*, p. 40, who states that “[i]n writing the Statute of the Nuremberg Tribunal, French influence was probably low, as the procedure was modelled on traditions of *common law*.”

²⁸⁹ See ‘Observations of the French Delegation on American Draft, June 29, 1945’, published in: *Jackson Report*, p. 89 et subs.

²⁹⁰ *Ibid.*, p. 91. See also the interventions by Judge Falco, Minutes of Conference Session of June 26, 1945, published in: *Jackson Report*, p. 81.

²⁹¹ See section 3.3.1.2 below.

²⁹² *Donnedieu de Vabres*, *Le Procès de Nuremberg*.

²⁹³ *Ibid.*, see particularly pages 120 et subs. as well as 186 et subs.

²⁹⁴ *Ibid.* p. 154.

3.1.1.1.4.4 The British Position

The British law of criminal procedure is, and was at the time of the London Conference, close to the American system. The British were therefore in favour of the American model to lodge the evidence in open court.²⁹⁵ However, as regards the disclosure of evidence, or, for that matter, the access to the dossier, they were apparently somewhat appealed by the Soviet and French point of view. Shortly after the beginning of the conference, on 29 June 1945, the British delegate Sir David Maxwell-Fyfe, who was Attorney-General at the time and later became deputy prosecutor for the British, stated:

I wondered whether we could consider this method, which is an adaptation of Professor Gros' suggestion, as being one on which we could find a synthesis of our different views-that the prosecuting body, those of us around this table, when we have prepared the indictment and got together the evidence on which the indictment is based, might forward that indictment and the evidence or a full summary of the evidence to the court, who would then transmit it to the defendants. That is, the court would get it, and that would meet General Nikitchenko's point that the court should be fully informed of the prosecution. On the other hand, if it is passed to the defendants, it would mean the defendants had had fair notice of what they had to meet; they would then be compelled to say which part of it they accepted and which part they disputed, and these matters could come before the court. I put that forward as being a method of trying to find a synthesis between the different systems of prosecution.²⁹⁶

And, at a later stage of the conference, the British put forward a draft provision which contained a surprisingly detailed regime as to which documents should be lodged with the indictment:

The Chief Prosecutors shall act as a Committee for the following purposes:

(c) to settle the draft of the Indictment and the documents to be submitted therewith, copies of which are to be furnished to the Defendants.

The documents to be submitted with the Indictment shall include:

(i) lists of treaties, agreements or assurances, to be referred to by the Prosecution, and copies of relevant clauses and parts thereof:

(ii) official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied

²⁹⁵ See Mr. Roberts' (alternate of Sir David Maxwell Fyfe at the London Conference) reaction to American delegate General Donovan's intervention at the session of 26 June 1945, *Jackson Report*, p. 81.

²⁹⁶ See Minutes of Conference Session of June 29, 1945, published in: *Jackson Report*, p. 97 et subs., particularly p. 113 et seq.).

countries for the investigation of war crimes and records or findings of military or other tribunals of any of the United Nations:

(iii) copies of the statement, deposition or affidavit of any witness on which the Prosecution intends to rely save in cases where it is proposed that the witness shall testify before the Tribunal in person:

(iv) copies of any statements made by any Defendant.

No document of a class other than those mentioned shall be submitted with the Indictment unless the Chief Prosecutors, by a majority vote, decide otherwise: but nothing herein contained shall prejudice the right of the Chief Prosecutors to submit to the Tribunal (with the duty to serve copies thereof on the Defendants) at any time after the lodging of the Indictment or at the Trial, any other document (whether or not of the classes referred to in sub-paragraphs (i) to (iv) hereof) which was not available or convenient for lodging with the Indictment: or to call at the Trial any oral evidence.²⁹⁷

This takes up the arguments of the Soviets and French, while keeping in mind Justice Jackson's concern that the case might be taken out of the hands of the prosecution. In the conference session after the draft was circulated Sir David Maxwell Fyfe explained the compromise-based approach in further detail.²⁹⁸ The draft divides the documents to be lodged in four different categories: public documents, such as treaties, government documents, statements of witnesses which cannot be called to testify, as well as previous statements of the defendants themselves. The last paragraph makes clear that, in principle, this enumeration of documents is exhaustive, but can be handled flexibly by majority vote. The French reaction to this is telling. Judge Falco had obviously until that point not quite realized what could possibly happen, namely that documents could be withheld from the court and the defence, or at least presented surprisingly:

I accept the suggested draft for article 15, but there is one point which strikes my mind from the point of view of a French prosecutor as a little shocking: the indictment and the documents lodged with the Tribunal should contain the whole case of the prosecution so that from the time the indictment is filed both the Tribunal and defendants can know the whole case against them. It seems there is a possibility under this draft that the defense could be faced during the trial with the opening of Pandora's box of unhappy surprises, in as much as during the trial there is liberty to the prosecution to produce something new.²⁹⁹

²⁹⁷ Proposed Revision of Article 15 of Draft Agreement, Submitted by British Delegation, July 19, 1945, published in: *Jackson Report*, p. 310 et subs.

²⁹⁸ Minutes of Conference Session of July 20, 1945, published in: *Jackson Report*, p. 315 et subs., particularly p. 318.

²⁹⁹ *Ibid.*, p. 319.

Sir David Maxwell Fyfe argued against this point of view, stating from his own practice that this procedure would not necessarily produce unfairness, since the defence would be notified as soon as possible and be given time to react, if necessary.³⁰⁰ The promising discussion was unfortunately quite abruptly stopped again because other things, such as the decision-making of the committee of Chief Prosecutors were of greater importance to the participants, yet the new wording of Art. 15 (which would later become Art. 14 of the Charter) appeared to be generally acceptable to all participants. However, it was not kept. In a ‘redraft’ submitted by the British on 23 July³⁰¹, the wording of Art. 15 was the following:

(1) The Chief Prosecutors shall act as a committee for the following purposes :

(...)

(c) to approve the Indictment and the documents to be submitted therewith.

(d) to lodge the Indictment and the accompanying documents with the Tribunal.

This wording actually went back almost verbatim to the wording of a draft proposed by the drafting sub-committee on 11 July³⁰² – and it was the wording which in the end was kept. The sources do not provide any specific reason as to why the British changed their mind and why the Russians or the French did not comment on that. Perhaps the new (or old, for that matter) wording provided enough of a compromise – as will be noted, the provision that ‘all the evidence’ should be lodged with the indictment which was contained in the Soviet draft (see 3.1.1.1.4.2 above) was given up, as well as the American proposal which provided that ‘[n]o proof shall be lodged to the Court prior to the trial’. The new wording leaves open the possibility of lodging documents, while not imposing a duty on the Committee of Chief Prosecutors to lodge any documents at all, let alone specifying certain types of documents. Perhaps the flexibility of the new wording appealed to all participants.

On 8 August 1945, the London Charter was signed – literally at the last minute, with some matters disputed until the very end.³⁰³

³⁰⁰ Ibid.

³⁰¹ Redraft of Charter, Submitted by British Delegation, July 24, 1945, published in: *Jackson Report*, p. 348 et subs.

³⁰² Compare Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945.

³⁰³ About the difficulties at the London Conference, especially as regards Justice Jackson’s distrust towards the Soviets, *Taylor*, *The Anatomy of the Nuremberg Trials Chapter 4: Establishing the London Charter*, passim.

3.1.1.2 The Rules of Procedure

As we have seen, the idea that the procedural rules of the prospective court would be made by the judges themselves was already contained in the San Francisco Draft of the IMT Charter (see 3.1.1.1.2 above) and kept until the end. This approach, at least at the time, was rather usual for common law legal systems, and the other powers, though at first favouring a more detailed regulation of the proceedings, were persuaded by arguments brought forward by the Americans: flexibility and the extraordinary character of the prospective tribunal.³⁰⁴ From Art. 19 of the Charter it follows that the chief prosecutors had a decisive say on the wording of the procedure. It provides:

The Chief Prosecutors shall act as a committee for the following purposes: (...) (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have the power to accept, with or without amendments, or to reject, the rules so recommended.

So it was done. Unfortunately the available sources do not provide any guidance on how and when exactly the Rules were drafted among the Prosecutors. In any event, in their closed session on Friday, 12 October 1945, the IMT Judges, in closed session, began discussing the proposal made by the Prosecution, and proposed and agreed on several changes.³⁰⁵ In the next two days, the Rules played a minor role in the discussions; it may be interesting to note, however, that in fact the title “Rules of the International Military Tribunal” was agreed on on 14 October 1945, following a proposal by General Nikitchenko, who presided the session on that day.³⁰⁶ On 15 and 16 October 1945, the Rules were on the agenda once more. Most of them were approved, some with amendments.³⁰⁷ It appears that the last amendments were made on the 29th of October, and the Rules passed by the Judges immediately afterwards.³⁰⁸ Unfortunately, as the sources do not contain any details as to how the original draft by the Prosecutors looked

³⁰⁴ See Mr. Justice Jackson’s statement at the session of 26 June 1945, *Jackson Report*, p. 75.

³⁰⁵ *Nuremberg IMT*, Minutes of Closed Sessions No. 4, 5, 12 October 1945. The 100 minutes of closed sessions of the Nuremberg IMT are kept, together with the other original documents of the Tribunal, at the library of the International Court of Justice in the Peace Palace in The Hague, Netherlands. They are not available for public inspection in the premises of the ICJ. The author is in possession of a digital copy of the documents; they are available for inspection at the International Research and Documentation Centre for War Crimes Trials (ICWC) in Marburg, Germany. The minutes (unfortunately) do not contain the discussions of the participants, but merely the decisions taken (see *Nuremberg IMT*, Minutes of Closed Sessions No. 2, 10 October 1945).

³⁰⁶ *Nuremberg IMT*, Minutes of Closed Sessions No. 8, 14 October 1945.

³⁰⁷ *Nuremberg IMT*, Minutes of Closed Sessions No. 9, 10, 15 and 16 October 1945.

³⁰⁸ *Nuremberg IMT*, Minutes of Closed Sessions No. 16, 29 October 1945.

like, the amendments by the judges which are contained in the minutes of closed sessions are out of context and can thus hardly be evaluated.

3.2 The Content of the Provisions

In the following we will briefly name the provisions which in the final versions of the Charter and Rules had (potential) impact on the disclosure of evidence and analyze their legal content.

Art. 16 (a) of the IMT Charter is, at least on the surface, the central disclosure provision of the IMT Charter. It provides:

Article 16.

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. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial.

However, it must be read together with Art. 14 (c) through (e), which, as we have seen above, contains a flexible norm as to what documents (if any) can be lodged together with the indictment.

These provisions are complemented by the Rules of Evidence. Rule 2 (a) gives further detail as to what shall constitute ‘reasonable time before the trial’ as provided in Art. 16, fixing a term of 30 days:

Rule 2. Notice to Defendants and Right to Assistance of Counsel.

(a) Each individual defendant in custody shall receive not less than 30 days before trial a copy, translated into a language which he understands, (1) of the Indictment, (2) of the Charter, (3) of any other documents lodged with the Indictment, and (4) of a statement of his right to the assistance of counsel as set forth in sub-paragraph (d) of this Rule, together with a list of counsel. He shall also receive copies of such rules of procedure as may be adopted by the Tribunal from time to time.

Finally, Rule 3 provides that the same procedure shall apply in the case of an amended indictment, and Rule 9 (b) states that evidentiary documents must be produced also in the language of the defendants.

The disclosure regime provided by the IMT Charter and Rules is thus thin. However, as we have seen, the topic was an issue in the run-up to the IMT and, after only a few days of trial, proved to be of considerable practical relevance, which we will see in the following.

3.3 The Practice of the IMT

3.3.1 Disclosure by the Prosecution

In modern times, the disclosure duties of the prosecution compared to those of the defence are generally more ample. The reasons for this are obvious: the defendant is generally protected by the principle that the burden of proof lies on the prosecution, therefore the latter is primarily responsible for the gathering of the evidence and, accordingly, its disclosure. In the following, we will look at how the mentioned legal provisions shaped the practice of and before the IMT. In the first part, we will cover pre-trial disclosure, for this is what the Charter and Rules contain provisions about. After that, and certainly more importantly, we will take a look at how the disclosure of evidence went during the ongoing trial, citing only a few examples, however, in order to give the reader a general idea. Overall, it appears fair to say that the question of disclosure was a constant issue between the participants and led to numerous disputes, not least due to the different legal backgrounds of the actors.³⁰⁹ Also, it should be noted

³⁰⁹ See as a striking example the transcript of 14 December 1945:

“DR. FRIEDRICH BERGOLD (Counsel for the Defendant Bormann): May it please the Tribunal, I should like to bring up one other point, which appears to me important, because it was apparently the real source of this discussion. According to our legal system it is the duty of the Prosecution to produce not only the incriminating evidence but also evidence for the defense of the accused. [...] We find ourselves in difficulties because, in contrast to our own procedure, the Prosecution for the most part simply presents incriminating evidence but omits to present the exculpating evidence which may form part of any document or part of the testimony of a witness. [...]

THE PRESIDENT: Will you explain the part of the German law to which you were referring, where you say it is the duty of the Prosecution not only to produce evidence for the Prosecution but also to produce evidence for the Defense.

DR. BERGOLD: That is a general principle of German jurisprudence, established in Paragraph 160 of the Reich Code of Penal Procedure. It is one of the basic principles of law in Germany to...

[...]

MR. JUSTICE JACKSON: I think one bit of additional information should be furnished in view of the statements made here that we have information that we are withholding. [...] [U]nder the Charter our

that, whenever technical questions of disclosure actually arose, they referred only to material actually *used* by the prosecution – a general right of the defence to access to the documents in possession of the prosecution was not granted at any time, which was, in any case, criticized by the German defence counsel.³¹⁰

3.3.1.1 Pre Trial Disclosure

As we have seen, the four powers at Nuremberg implemented a system which did not follow the Continental-European approach to lodge *all* evidence together with the indictment but rather took a flexible approach by which documents *could* be lodged but did not necessarily need to be according to Article 14 (c) and (d) in connection with Article 16 (a) of the Charter and Rule 2 (b) of the Rules.

The available official documents which are contained in the official publication of the IMT state that the indictments were served to the defendants, together with a notice, a copy of the Charter of the IMT, a copy of Rule 2 (d) of the Rules of Procedure and a list of German lawyers. Most of the defendants obtained their documents on 19 October,³¹¹ two on the 18th,³¹² and the indictment of defendant Bormann, who was believed to be still alive, was published in several newspapers as well as read on the radio.³¹³ As to any additional “documents lodged together with the Indictment” (Rule 2 (a)(3)), the primary sources do not contain any details;³¹⁴ the only document to which the indictment makes

duty is to present the case for the Prosecution. I do not, in any instance, serve two masters.” *IMT*, p. 548 et subs.

³¹⁰ See *Kranzbühler*, Nuremberg Eighteen Years Afterwards, p. 336, who also makes reference to the fact that not only had the German documents been confiscated by the prosecution, but also access to foreign archives was not granted; see also *Haensel*, The Nuremberg Trial Revisited, p. 256, as well as *Safferling/Graebke*, Strafverteidigung im Nürnberger Hauptkriegsverbrecherprozess: Strategien und Wirkung, p. 75 et seq. with further references, as well as *Donnedieu de Vabres*, Le Procès de Nuremberg, p. 188. The inherent unfairness of this situation towards the defence is recognized by *Taylor*, The Anatomy of the Nuremberg Trials, p. 627. *Taylor* notes that “in normal circumstances”, the prosecution archives would have been open to the defence, while stating that, however, the “conditions were decidedly not normal”. At the same time, we have seen that an ‘open archive’ policy was the rule neither in the United States nor in England at the time.

³¹¹ Certificate of Service to Individual Defendants of 24 October 1945, *IMT*, vol. 1, p. 117; Certificate of Service on Defendant Gustav Krupp von Bohlen of 23 October 1945, *ibid.*, p. 118.

³¹² Acknowledgment of Service by the Defendants Fritzsche and Raeder, *IMT*, vol. 1, p. 123.

³¹³ Order of the Tribunal Regarding Notice to Defendant Bormann, 18 October 1945, *IMT*, vol. 1, p. 102 et seq.

³¹⁴ The author was given access to the original indictment kept in the premises of the ICJ, however, the mentioned list of evidentiary documents could not be found. Its existence, however, is proven by

reference is a secret order of the Naval Staff about the planned destruction of Leningrad/St. Petersburg, and it cites only parts of that order. However, secondary sources indicate that a list of documentary evidence was apparently transmitted together with the indictment,³¹⁵ which could be accessed by the defence lawyers via the ‘Defendants Information Center’ installed in the Nuremberg Palace of Justice. Here, the defence counsel could get access to copies of prosecution evidence. Copies could be taken, yet at that time apparently only by hand.³¹⁶ Also, during the court proceedings, mention was made that some original documents were made accessible to defence counsel in exceptional circumstances.³¹⁷ The defence lawyers were, however, overwhelmed by the mass of documents available at that time; there appears to have been no specific order.³¹⁸

3.3.1.2 Disclosure during the trial

Before the trial started on 20 November 1945 with the reading of the indictment, three preliminary hearings took place, in which the indictment against Krupp, some technical issues as well as the indictment against Bormann were treated. On 21 November, Justice Jackson held his famous opening statement; the actual presentation of evidence started

references contained in secondary sources, see *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 17. Dr. von der Lippe was assistant to Dr. Siemers, defence counsel for the defendant Raeder. See also the intervention made by Alfred Seidl, defence counsel to Hans Frank, *IMT*, vol. 2, p. 114, as well as the explanation made by Mr. Alderman, member of the American prosecution team, to the President, *IMT*, vol. 2, p. 251.

³¹⁵ *IMT*, vol. 1, p. 58.

³¹⁶ See *Von der Lippe*, Nürnberger Tagebuchnotizen, *ibid.*, see in this context also the intervention by Dr. Stahmer, defence counsel for Hermann Göring, complaining about the insufficient number of copies of certain evidentiary documents: “Yes, I have one more request. The Prosecution has just said that it will hardly be possible to make 23 photostatic copies. I believe, gentlemen, that if these documents are as important as the Prosecution said today, it is a *conditio sine qua non* that every defense counsel and every defendant should have a photostatic copy of these documents. As we all know it is easy to produce a photostat in a few hours. With the excellent apparatus here available to the Prosecution it should, in my opinion, be easy to produce 20 or 40 photostats of these 10 documents in 48 hours.”, *IMT*, vol. 2, p. 252 et seq.

³¹⁷ Affidavit by Maj. William C. Hoogan, *IMT* Vol. 2, p. 157 et seq. (159): ‘If the officers preparing the certified translation, or one of the officers working on the briefs, found it necessary to examine the original document, this was done within the Document Room in the section set aside for that purpose. The only exception to this strict rule has been where it has been occasionally necessary to present the original document to Defense Counsel for examination. In this case, the document was entrusted to a responsible officer of the Prosecution staff.’

³¹⁸ See *Von der Lippe*, Nürnberger Tagebuchnotizen, *passim*.

on 22 November. However, in a brief statement, Sir Geoffrey Lawrence made reference to the disclosure of evidence, stating:

*THE PRESIDENT: The Tribunal has heard with great satisfaction of the steps which have been taken by the Chief Prosecutors to make available to defending counsel the numerous documents upon which the Prosecution rely, with the aim of giving to the defendants every possibility for a just defense.*³¹⁹

Nonetheless, as *Telford Taylor* later noted: ‘It soon emerged that this matter had not been satisfactorily resolved.’³²⁰

The prosecution had divided its work following the different counts in the indictment. Accordingly, the Americans lead the prosecution committee on count one: crimes against peace. The fact that it was the Americans who started the trial is important in our context, for it were experienced common lawyers who shaped the first part of the proceedings.

We will cover the first few days of the trial in a little more detail, for it took a while until a mode of procedure concerning the disclosure of evidence (at least in theory) was found.

On 22 November, the prosecution explained its envisaged ‘mode of operation’ concerning the documentary evidence of the case. According to the Statement of Maj. *Storey*, the Americans selected 2500 from the ‘tons of documents’³²¹, which they translated and photocopied. For the trial, trial briefs were prepared which later should be handed to the Judges and the defence counsel. They contained, ordered by counts of the indictment, citations from the relevant documents and had the complete documentary evidence attached to them. Also, legal propositions of the United States were contained. Maj. *Storey* pointed out that while the court would get the trial briefs in English, the Defence would get them in German translation. The original evidence cited in the trial briefs would afterwards be handed to the Tribunal. However, at that point in time, the documents were not actually served to the defence lawyers, but rather kept in the already mentioned ‘Defendants Information Center’ in a limited quantity. The president of the Tribunal, Sir Geoffrey Lawrence, agreed to the proposed procedure; the defence counsel showed no reaction, which was taken as an approval.³²²

The silence of the defence counsel on the first few days concerning the transmittal of documents is quite telling. German criminal lawyers are used to the practice that the

³¹⁹ *IMT*, vol. 2, p. 29.

³²⁰ *Taylor*, *The Anatomy of the Nuremberg Trials*, p. 165.

³²¹ *IMT*, vol. 2, p. 157, 160.

³²² *IMT*, vol. 2, p. 161.

court leads the trial, and that they get all the evidence beforehand. One might have expected an outcry against any practice in which there might have been a chance of trial by surprise. However, this did not happen, at least not at the beginning. The defence lawyers were concerned with other things, such as a common motion against the jurisdiction of the Tribunal, which had been lodged on the second day of the trial.³²³ Also, the communication of the counsel with the defendants was difficult.³²⁴ And, finally, the general conditions of living and working were, little more than six months after the end of the war, in Nuremberg as well as in the rest of Germany, far from normal.³²⁵

The defence lawyers were also not used to the practice of trial briefs. *Von der Lippe* compared them to ‘doctoral theses *en miniature*’ and was dismayed by the sheer quantity of documents, which he also did not believe would come in German translation. He furthermore noted that the oral submissions of the prosecution only partially relied on the briefs.³²⁶

The president, for his part, showed a quite caring attitude towards the defence lawyers and made clear that the documents should actually be served to the defence counsel. In the afternoon session of the same day, a telling discussion took place in the courtroom, showing quite well how the participants of the trial understood their respective roles:

MAJOR WALLIS: I now offer the documents which establish the aims of the Nazi Party and their doctrinal techniques. I also have for the assistance of the Court and Defense Counsel, briefs which make the argument from these documents. (...)

THE PRESIDENT: Major Wallis, have you got copies of these for defendants' counsel?

MAJOR WALLIS: In Room 54, Sir.

THE PRESIDENT: Well, they will be wanting to follow them now.

MAJOR WALLIS: Mr. President, my remarks, which I am proceeding toward, will cover an entirely different subject than in the briefs before you. The briefs cover what I have already said, Sir.

³²³ See *IMT*, vol. 2, p. 95.

³²⁴ See the discussion in *IMT*, vol. 2 p. 95 et subs.

³²⁵ See *Von der Lippe*, Nürnberger Tagebuchnotizen, *passim*; at the same time, the defence lawyers were quite privileged as compared to the average German citizen, see *Ferencz*, Nuremberg Trial Procedure and the Rights of the Accused.

³²⁶ *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 34.

THE PRESIDENT: Are you depositing a copy of these briefs for each of the defendants' counsel?

MAJOR WALLIS: I am informed, if Your Honor pleases, that the same procedure has been followed with respect to these briefs as has been followed with respect to the documents, namely, a total of six has been made available to the defendants in Room 54. If Your Honor does not deem that number sufficient, I feel sure that I can give assurance, on behalf of the Chief Prosecutor of the United States, that before the close of the day an ample supply of copies will be there for use.

THE PRESIDENT: The Tribunal thinks that the Defense Counsel should each have a copy of these briefs.

MAJOR WALLIS: That will be done, Sir.

THE PRESIDENT: Members of the Defense Counsel: You will understand that I have directed on behalf of the Tribunal that you should each have a copy of this brief.

DR. DIX: We are very grateful for this directive, but none of us has seen any of these documents so far. I assume and hope that these documents will be given to the Defense in the German translation.

THE PRESIDENT: Yes, Major Wallis.

(...)³²⁷

In the next few days, the defence counsel were apparently a little more settled and became more audacious.³²⁸ The court, in turn, asked the prosecution for the future to hand their trial briefs to the court and the defence *before* the start of their respective speech, as well as to give a short explanation pertaining to the same. Here, again, Sir Geoffrey Lawrence acts in the interest of the defence but also clearly on his own behalf:

THE PRESIDENT: (...) And the other matter is an observation, which the Tribunal desires me to make to the Prosecution, and to suggest to them that it would be more convenient to the Tribunal and possibly also to the Defense, that their briefs and volumes of documents should be presented to the Tribunal before Counsel speaking begins that branch of the case, so that the brief and volume of documents should be before the Tribunal whilst Counsel is addressing the Tribunal upon that branch of the case; and also that it would be convenient to the Tribunal – if it is convenient to Counsel for the Prosecution – that he should give a short explanation – not a prolonged explanation – of the

³²⁷ *IMT*, vol. 2, p. 184 et seq.

³²⁸ See, e.g., the interventions made by Dr. Nelte, and Dr. Dix, defence counsel for Keitel and Schacht, the next morning, *IMT*, vol. 2, p. 203

*documents, which he is presenting. to the Court, drawing their attention to any passages in the documents, which he particularly wishes to draw attention to.*³²⁹

It becomes clear once again that disclosure to the defence and the bench are closely related.

Apparently, on a common basis, the defence counsel would obtain the documents only in English while not getting access to the original documents (which were in German).³³⁰ The prosecution agreed to make the trial briefs available to the defence, in English, with the possibility of a German translation, to give the defence the opportunity to find out possible inaccuracies in the translation.³³¹ The right of the defence to this was emphasised by the president.³³² Obviously, however, the prosecution had not prepared enough copies of the documents, so they had to be given to the defence some days later. The prosecution promised that from the following day on, all trial briefs would be made available to the Tribunal and the defence in advance.³³³ The question of translation of the document had, naturally, not only an impact on the defence, but also on the bench, since half of the Judges were not able to read English.

In the view of the defence, the situation concerning the disclosure of evidence by the prosecution was quite desperate. *Von der Lippe* in his diary uses expressions such as 'war' or 'battle' of documents. Obviously, as the above quoted statements of the President show, the Tribunal itself was also not quite satisfied with what they got from the prosecution. This had to do as well with the vast *amount* of documents which the Tribunal was confronted with. The Americans were planning to only read summaries of the trial briefs (which in themselves were summaries already) in open court, while submitting to the Tribunal the briefs together with the attached documents, expecting this to be sufficient in order to bring the whole of the evidence on the record; a technique which was, at first, even approved by the Tribunal.³³⁴ This, however, would

³²⁹ Announcement by the President, *IMT* vol. 2, p. 204 et seq.

³³⁰ See *Von der Lippe*, Nürnbergger Tagebuchnotizen, p. 35 et seq. The primary sources contain little evidence on this point, however, there are indications that occasionally documents introduced in the proceedings were re-translated, see, e.g., *IMT*, vol. 2, p. 250, as well as vol. 9, p. 610. Notwithstanding, the defence lawyers made clear that they were willing to co-operate with the Tribunal and indicated that in the view of the defence it was unnecessary to translate *all* of the documents which were to be used during the trial, see *IMT*, vol. 2, p. 191.

³³¹ *IMT*, vol. 2, p. 215 et seq.

³³² *IMT*, vol. 2, p. 241.

³³³ *IMT*, vol. 2, p. 209.

³³⁴ See *IMT*, vol. 2, p. 204. See also *Taylor*, *The Anatomy of the Nuremberg Trials*, pages 172 and 174, who cites Justice Jackson as boasting to have put in 331 documents in the first few hours of the trial, and that his lawyers had 'glutted' the court with a mass of documents.

have meant that neither the Tribunal itself, nor the defence would have been able to keep track of the evidence.

On the same day, the 23rd of November, Dr. Seidl, counsel for the defendant Frank, noted that of the twelve documents the prosecution had produced on that day, not a single one had been contained in the list supplied to the defence.³³⁵ Later Dr. Siemers, defence counsel for the defendant Raeder, complained that a new document list was handed to the defence counsel, yet almost all of the documents contained in the list were not accessible.³³⁶

Therefore, the Tribunal convened for a closed session on Saturday, 24 November, and ordered the prosecution to find an arrangement with the defence before that.³³⁷ There are no minutes of the discussions between the prosecution and the defence; however, the diary of *Von der Lippe* as well as the minutes of closed sessions of the IMT contain some information on their content. *Von der Lippe* states that the main issues of the two meetings with the prosecution that took place on that day were the prior disclosure of the trial briefs with the pertaining documents, the question whether each of the defence lawyers should have his own copy of the brief (something the prosecution had actually already agreed to), and particularly the already mentioned question whether the cited documents would entirely have to be read in open court, in order to enter the record and be considered as evidence. He describes the discussions as very controversial.³³⁸

The contentious issues were reported to the participants of the IMT closed session of that day by Judge Francis Biddle, who apparently served as some kind of intermediary between the parties and the Judges. He suggested that those portions of the documents the prosecution wished to present should be ‘read into the record’.³³⁹ This suggestion was taken up by Lord Justice Lawrence, who proposed the following procedure:

1. Only that part of documents read in court would be regarded as submitted in evidence.

2. Copies of trial briefs and documents translated into English will be furnished to defense counsel. It was eventually agreed that ten copies of each trial brief and five copies of each book of documents should be provided.

³³⁵ See *IMT*, vol. 2, p. 214 et seq.

³³⁶ See *IMT*, vol. 2, p. 252.

³³⁷ *Ibid.*, p. 253.

³³⁸ *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 37.

³³⁹ *Nuremberg IMT*, Minutes of Closed Sessions, No. 42, 24 November 1945.

3. *Counsel for defense shall have an opportunity to see the text of every document, part of which is offered in evidence, in the Defendants' Information Center.*

4. *In order to make this possible, the original or a photostatic copy and one copy in German of each document, part of which is offered in evidence, will be available in the Defendants' Information Center twenty-four hours before any portion of it is to be presented in evidence.*

5. *A copy of the transcript of each day's proceedings in German will be provided to each defense counsel on the day after the proceedings take place.*³⁴⁰

Colonel Storey for the prosecution and Dr. Dix for the defence then joined the meeting and presented their views on the issues personally to the Judges, whereupon Lord Justice Lawrence repeated his proposal. General Nikitchenko then proposed that a photocopy of the document should be handed to the defence at the time it was offered in evidence; Judge Biddle, for his part, proposed that the document should be handed to the German interpreter for a better preparation of the latter. Apparently, Colonel Storey and Dr. Dix agreed to the solution – which is interesting insofar as the amendment proposed by General Nikitchenko was actually to the disadvantage of the defence: while the President had envisaged previous notice of twenty-four hours, General Nikitchenko's proposal might have led to the effect that the disclosure of the respective documents would coincide with their presentation in the courtroom. It might be that Dr. Dix was more concerned with the question as to whether only those parts of the documents which were actually read in open court would become part of the record – and was obviously happy with the results.³⁴¹

Interestingly, apparently Judge De Vabres on that occasion suggested introducing a kind of dossier system, proposing that the prosecution should collect all evidence pertaining to the respective defendants in separate 'files'. However, the other members, while not being opposed to the idea, held that at this point in time the American prosecutors could not be asked to reorganize their documents entirely.³⁴²

The reached conclusions were summarized by the President in the morning session of the 26th of November:³⁴³

³⁴⁰ Ibid.

³⁴¹ The minutes state that Dr. Dix agreed to “ask the other defense counsel not to raise the document problem in open court but rather to deal with future difficulties in the matter by conference. He recognized the physical limitations upon the capacity of the prosecution in this matter.”, *ibid.*

³⁴² Ibid.

³⁴³ *IMT*, vol. 2, p. 255 et seq.

THE PRESIDENT: As was announced at the sitting on Friday, Counsel for the Prosecution were to try to arrange with defendants' counsel some satisfactory arrangement with reference to the production of documents in the German language. In accordance with that announcement, Counsel for the Prosecution saw Counsel for the Defense, and representatives of the Prosecution and the Defense appeared before the Tribunal and the Tribunal has provisionally made the following arrangement:

1. That in the future, only such parts of documents as are read in court by the Prosecution shall in the first instance be part of the record. In that way those parts of the documents will be conveyed to defendants' counsel through the earphones in German.

2. In order that defendants and their counsel may have an opportunity of inspecting such documents in their entirety in German, a photostatic copy of the original and one copy thereof shall be deposited in the defendants' counsel room at the same time that they are produced in court.

3. The defendants' counsel may at any time refer to any other part of such documents.

4. Prosecuting counsel will furnish defendants' counsel with 10 copies of their trial briefs in English and five copies of their books of documents in English, at the time such briefs and books are furnished to the Tribunal.

5. Defendants' counsel will be furnished with one copy of each of the transcripts of the proceedings.

That is all. (...)

The fact that only those parts of the documents actually read in open court become part of the record is a positive development for the defence. However, it is questionable whether the rest of the arrangement can be called a success. According to paragraph 1, the documents are read to the defence in German, notwithstanding, a simultaneous translation by an interpreter is not the same as a proper translation, even with the mentioned previous information of the interpreter, which, however, does not appear in the above cited summarization of the President. Paragraph 2 in connection with paragraph 4 might take the edge off this, however, the provisions do not say when exactly the documents are to be submitted to the Tribunal and the defence, they only say that it has to happen at the same time; from Paragraph 2, it may be concluded that the production of the evidence and its disclosure coincide – if a document is read in open court, and the copy of it is provided in the defendant's counsel room at the very same time, it is of very little help to the defence. Also, given the circumstances, one must conclude that 'a photostatic copy of the original and one copy thereof' literally mean that a maximum of two such copies were meant to be provided to 27 defence counsel

and 54 associate defence counsel. The same is true for the number of English documents envisaged by paragraph 4. The small number of copies provided by the prosecution was explained by technical capacities.

However, on that very same day various situations arose which put these arrangements, especially the last point, in doubt again.

Dr. Siemers, counsel of the defendant Raeder, tried to prevent the reading of a previous statement by his client which had not previously been furnished to him – albeit only after a friendly notification by the President.³⁴⁴ However, when the document was to be read after a recess, it showed that the prosecution had not complied with the procedure agreed to a few days before. As Dr. Siemers noted³⁴⁵:

DR. SIEMERS: In the meanwhile during the lunch hour I have seen the minutes. I should like to observe that I don't think it is very agreeable that the Prosecution should not depart from their point that the Defense should only receive the documents during the proceedings, or just before the proceedings, or at times, even after the proceedings. I should be grateful if the Prosecution could see to it in the future that we are informed in good time.

Yesterday a list of the documents which were to be presented today was made in our room, number 54. I find that the documents presented today are not included in yesterday's list. You will understand that the task of the Defense is thereby rendered comparatively difficult. On principle, I cannot in my statement of today, give my agreement to the reading of minutes of interrogations. In order to facilitate matters, I should like to follow the Court's suggestion, and declare that I am agreeable to the minutes presented here being read. (...)

In the afternoon session, Dr. Stahmer, defence counsel for the defendant Goering, protested against a document which had not yet been produced by the prosecution, but had nevertheless already been published in the press. The discussion which ensued between the President, who once more proved to be caring for the defence, and the prosecution counsel, has a comical note to it:

THE PRESIDENT: Mr. Alderman, the Tribunal would like to know how many of these documents are given to the press.

MR. ALDERMAN: I can't answer that.

COL. STOREY: May it please the Tribunal, it is my understanding that as and when documents are introduced in evidence, then they are made available to the press.

³⁴⁴ *IMT*, vol. 2, p. 321 et seq.

³⁴⁵ *Ibid.*, p. 323.

THE PRESIDENT: In what numbers?

COL. STOREY: I think about 250 copies of each one, about 200 or 250 mimeographed copies.

THE PRESIDENT: The Tribunal think that the defendants' counsel should have copies of these documents before any of them are handed to the press. I mean to say that in preference to gentlemen of the press the defendants' counsel should have the documents.

COL. STOREY: Your Honor, if it please the Court, I understand that these gentlemen had the 10 documents on Saturday morning or Sunday morning. They had them for 24 hours, copies of the originals of these documents that have been read today, down in the Information Center.

THE PRESIDENT: I stated, in accordance with the provisional arrangement which was made, and which was made upon your representations, that 10 copies of the trial briefs and five copies of the volumes of documents should be given to the defendants' counsel.

COL. STOREY: Sir, I had the receipts that they were deposited in the room.

THE PRESIDENT: Yes, but what I am pointing out to you, Colonel Storey, is that if 250 copies of the documents can be given to the press, then the defendants' counsel should not be limited to five copies.

COL. STOREY: If Your Honor pleases, the 250 copies are the mimeographed copies in English when they are introduced in evidence. I hold in my hands, or in my briefcase here, a receipt that the document books and the briefs were delivered 24 hours in advance.

THE PRESIDENT: You don't seem to understand what I am putting to you, which is this: That if you can afford to give 250 copies of the documents in English to the press, you can afford to give more than five copies to the defendants' counsel – one each. Well, we do not need to discuss it further. In the future that will be done.³⁴⁶

A few days later, a situation of similar embarrassment for the prosecution arose. The prosecution on 30 November called its first witness – without giving prior notice to the defence, with the argument that the agreement between the prosecution and the defence only covered documentary evidence. Justice Jackson also gave security policy reasons for not disclosing the identity of the witness before the trial. Nevertheless, again, the name of the witness had been given to the press beforehand, though apparently without Jackson's knowledge.³⁴⁷ The question of witnesses did, however, not arise very

³⁴⁶ *IMT*, vol. 2, p. 292 et seq.

³⁴⁷ *IMT*, vol. 2, p. 435 et seq.

frequently, for the prosecution relied mainly on documentary evidence and affidavits, in order to keep trial proceedings short.³⁴⁸ The practice to make use of affidavits, i.e. transcripts of witness interrogations in which the defence counsel had not been present, was however, criticized by the defence as a ‘mix’ of documentary evidence and witnesses.³⁴⁹

The disclosure practice of the prosecution, regrettably, did often not comply with the principles laid down in the agreement pronounced by the Tribunal on the 24th of November. In many more instances in the court proceedings, documents were furnished late or in an inadequate manner, such as in an untranslated form.³⁵⁰ It is also important to note that the prosecution did not disclose documents which it intended to use during cross-examination of the defence witnesses, thus retaining an element of surprise.³⁵¹

Some authors noticed an ‘ever increasing sharpness’ of the Tribunal towards the prosecution.³⁵² However, it is difficult to ascertain that, for mere ‘criticism’³⁵³ of the prosecution’s practice by the Tribunal without strict rulings on inadmissibility of undisclosed pieces of evidence is hardly enough.

3.3.2 Disclosure by the Defence

At the time of Nuremberg, defence disclosure obligations in national systems were few, if one does not take into account the limited disclosure obligations of the defence regarding special defences. As we have seen, one of the arguments brought forward by the opponents of disclosure in criminal proceedings was the idea that disclosure

³⁴⁸ See also *Schäfers*, *Freispruch in Nürnberg - der Weg zum freisprechenden Urteil des Internationalen Militärtribunals von Nürnberg im Fall Hans Fritzsche*, p. 37 et subs.

³⁴⁹ See, once again, the intervention by Dr. Siemers, *IMT*, vol. 2, p. 321, referring to previous statements of his client, defendant Raeder. In his reply to the intervention, the President stated that “[t]he Tribunal thinks that if interrogations of defendants are to be used, copies of such interrogations should be furnished to defendant’s counsel beforehand.” See also *Safferling/Graebke*, *Strafverteidigung im Nürnberger Hauptkriegsverbrecherprozess: Strategien und Wirkung*, p. 70 et subs., with further references.

³⁵⁰ See complaints by Dr. Sauter and Dr. Seidl, *IMT*, vol. 5, p. 22 et seq.

³⁵¹ See *May/Wierda*, *International Criminal Evidence*, p. 72, with further references, as well as *Schäfers*, *Freispruch in Nürnberg - der Weg zum freisprechenden Urteil des Internationalen Militärtribunals von Nürnberg im Fall Hans Fritzsche*, p. 42 et seq.

³⁵² *Appleman*, *Military Tribunals and International Crimes*, p. 104 et seq., see also *May/Wierda*, *International Criminal Evidence*, p. 71.

³⁵³ *Appleman*, *Military Tribunals and International Crimes*, p. 105.

obligations could, because the burden of proof lies on the prosecution, never be imposed upon the defence, and, for the principle of the equality of arms, therefore not on the prosecution either. Also, neither the Charter nor the Rules provide anything about disclosure obligations by the defence.

It is therefore surprising that in the practice of the IMT the defence was obliged by the court to disclose considerable part of its evidence and strategy. The first hint as to this was given by the Tribunal as early as 10 December 1945, when Sir Geoffrey Lawrence stated:

*THE PRESIDENT: (...) At the conclusion of the case for the Prosecution, the defendants' counsel will be invited to submit to the Tribunal the evidence they propose to call; but they will be strictly confined to the names of the witnesses and the matters to which their evidence will be relevant, and this submission must not be in the nature of a speech. Is that clear? In case there should be any misunderstanding, what I have just said will be posted up on the board in the defendants' Counsel Room so that you can study it there.*³⁵⁴

Even though this statement is phrased as an 'invitation', it is quite clear that anything differing from it would not have been accepted – and it provides an unequal treatment of the defence, for the counsel would not be allowed to make an opening statement.³⁵⁵

The conflict became virulent as the beginning of the defence case drew nearer. On 4 February 1946, the defence counsel, acting as a committee, provided to the Tribunal a proposal how the defence case should be conducted. The exact wording of this proposal is not available as a primary source; however, *Von der Lippe* in his diary provides a concise summary:

- 1. After the conclusion of the prosecution case, each defence counsel would name the witnesses he wished to be called.*
- 2. The counsel read their documentary evidence, examine their witnesses and make remarks. Each counsel prepares a document book.*
- 3. Opportunity of conversation between counsel and defendant.*
- 4. 14 days before presentation in trial, each counsel furnishes the General Secretary with the document books in order for the General Secretary to prepare translations into the other three languages.*
- 5. The counsel formulate a common opinion on basic legal matters*

³⁵⁴ *IMT*, vol. 3, p. 335.

³⁵⁵ Even though the latter circumstance may already be concluded *e contrario* from Art. 24 (c) of the IMT Statute, see *Safferling/Graebke*, *Strafverteidigung im Nürnberger Hauptkriegsverbrecherprozess: Strategien und Wirkung*, p. 68.

*6. Motion for recess of three weeks after the conclusion of the prosecution case, submitting that after several months of prosecution case the defence cannot be expected to answer immediately.*³⁵⁶

The proposal, though signed by Dr. Stahmer, was mainly the work of Dönitz' defence counsel, Otto Kranzbühler.³⁵⁷ On 11 February 1946, the prosecution reacted to this proposal with an own motion as to the evidence of the defendants. The exact wording of this motion is also unknown, for it is not contained in the records of the IMT proceedings or in any other primary source. However, it appears from other sources that the prosecution planned to introduce an obligation for the defence as to state which points of the accusations it challenged and which it acknowledged; the defence should make detailed statements as to their witnesses and documents and record affidavits with their witnesses, leaving the decision whether it was necessary to call those witnesses to the Tribunal.³⁵⁸ The Tribunal dealt with the motions for the first time in its closed session on the 16th of February, with numerous members of the prosecutors and defence counsel present.³⁵⁹ Once again, only the decisions, but not the discussions, which lasted more than three hours, were recorded. After a recess of about an hour, a preliminary decision was taken, the 'official' version of which was announced by the President on 18 February:

Paragraph 1: The Tribunal cannot accept Paragraph 1 of the Prosecution's motion,³⁶⁰ as to the evidence of the defendants, dated 11 February 1946, but directs that, in complying with Article 24(d) of the Charter, counsel for the defendants shall confine their evidence to what is required for meeting the charges in the Indictment.

The Tribunal will announce later their decision with regard to Paragraphs 2 to 5 of the Prosecution's motion.

Paragraph 2: With regard to the naming of witnesses, et cetera, by the Defense under Article 24(d) of the Charter, which is referred to in Paragraph 1 of Dr. Stahmer's memorandum to the Tribunal, dated 4 February 1946, the Tribunal makes the following order:

³⁵⁶ *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 115.

³⁵⁷ *Ibid.*, p. 116.

³⁵⁸ See *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 131 et seq.

³⁵⁹ *Nuremberg IMT*, Minutes of Closed Sessions, No. 56, 16 February 1946. Participants included Justice Jackson, David Maxwell-Fyfe, General Rudenko and Charles Dubost for the prosecution, as well as Dr. Stahmer, Dr. Kranzbühler, Dr. Exner and Dr. Siemers for the defence.

³⁶⁰ This probably relates to the matter of forcing the defence to state which accusations were acknowledged and which were challenged, see *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 139.

In order to avoid delay in securing the attendance of witnesses and procuring of documents, without prejudice to the defendant's right to make further application at the conclusion of the case for the Prosecution, counsel for the Defendants Goring, Hess, Ribbentrop, and Keitel shall, before 5 p.m. on Thursday, the 21st of February, file with the General Secretary written statements giving the names of the witnesses and particulars of the documents they respectively desire to call or put in evidence, with a summary of the facts to be proved thereby and an exposition of the relevance thereof.

The Tribunal hereby appoints Saturday, the 23rd of February, at 1000 hours – that is to say, 10 o'clock – for the hearing of argument upon such statements in open session.

Paragraph 3: The Tribunal will, in due course, issue directions as to the filing of similar statements on behalf of the other defendants.

Paragraph 4: The Tribunal will announce later their decision on the other matters raised in Dr. Stahmer's memorandum.³⁶¹

Obviously, in paragraph 2 the Tribunal orders the defence to disclose specifically and in writing which witness and documentary evidence they intend to rely upon, also imposing a deadline. This was not exactly what the defence counsel had proposed, and also constituted a significantly unequal treatment of the defence *vis-à-vis* the prosecution. After their first lodging of the written statements, the four defence counsel named in the Tribunal's decision (see paragraph 2) were apparently ordered by the Tribunal to rewrite their statements and specify their evidence further.³⁶² In the court session of 23 February, this, together with the Tribunal's decision on the other paragraphs of the defence's proposal (which contained ample obligations as to the statements of the defence, the calling and sequence of witnesses, the treatment of documentary evidence, preparation of document books and their lodgement with the Tribunal two weeks before presentation etc.³⁶³), lead to a dispute in the courtroom. The main concern of the defence counsel was that according to the new procedure the prosecution could claim the alleged irrelevance of every piece of evidence offered by the defence long before its presentation, something which the defence during the prosecution case had not been entitled to. The decision was based on Art. 24 (d) of the Charter, which stated:

³⁶¹ *IMT*, vol. 7, p. 516.

³⁶² See *Von der Lippe*, Nürnberger Tagebuchnotizen, p. 145.

³⁶³ See *IMT*, vol. 8, p. 159 et seq. The decision had been prepared in the closed session of 21 February 1946, see *Nuremberg IMT*, Minutes of Closed Sessions No. 59, 21 February 1946. The motion of the prosecution was finally denied entirely.

The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

However, the defence claimed that the Tribunal had never made use of this provision *vis-à-vis* the Prosecution.³⁶⁴ The counsel had the impression that the President in his answers to the submissions did not quite address the point.³⁶⁵ This conclusion is not entirely wrong, as the transcript of the session shows:

DR. OTTO STAHMER (Counsel for Defendant Göring): Mr. President, I do not wish to repeat, but I believe that the objection of Dr. Horn has not been understood quite rightly. Dr. Horn wanted only to complain about the fact that the Defense in no case has been asked previously whether an item of evidence that the Prosecution has presented was relevant or not, but we have always been surprised when a witness was brought in and we had no possible opportunity to make any material objections relative to him.

Insofar as objections against documents were concerned, that is, as to their relevance, the Defense has always been told that for such an objection the time had not yet come for the Defense.

THE PRESIDENT: I beg your pardon, Dr. Stahmer, but you have misunderstood. The Defense have never been told that objections to the admissibility of documents could be left over until later. Every objection to the admissibility of a document has been dealt with at the time. Observations upon the weight of the document are to be dealt with now, during the course of the Defense. I don't mean today, but during the course of the Defense.

There is a fundamental distinction between the admissibility of a document and the weight of a document, and all questions of admissibility have been dealt with at the time.

DR. STAHMER: Mr. President, I fully understood that distinction. Nor did I want to say that objections against admissibility were turned down, but rather objections against relevancy.

THE PRESIDENT: Objections to the relevancy of documents – that is to say, their admissibility – that is the governing consideration under this Charter as to the admissibility of documents. If they are relevant, they are admissible. That is what the Charter says. And any objection which has been made to documents or

³⁶⁴ *IMT*, vol. 8, p. 161 et seq.

³⁶⁵ *Von der Lippe*, Nürnberger Tagebuchnotizen, *ibid.*

*to evidence by defendants' counsel has been heard by the Tribunal and has been decided at the time.*³⁶⁶

The decision of the Tribunal was mainly based on the (plausible) argument that the defence was not in a position to guarantee for the appearance of the witnesses and the availability of the documents. There was, however, no possibility for the defence to keep this evidence secret from the prosecution until its presentation. The prosecution at least in one case appears to have tried to abuse its prior knowledge of the defence evidence. The Soviet prosecution obtained an affidavit of a witness long after this witness had been proposed by the defence, and without notifying the witness of an interrogatory the defence had filed with the Tribunal several weeks earlier. However, the Tribunal did not accept the Soviet affidavit in evidence.³⁶⁷

3.4 Conclusion

In this chapter we have taken a look at the provisions of the IMT relevant to disclosure and their genesis. Also, we have briefly analyzed some examples of the relevant practice of and before the IMT.

There is no doubt that, by today's human rights standards, the disclosure regime of the IMT, as well as its procedure in general, could not stand.³⁶⁸ However, we must judge the IMT by the standards of its time. The factual and political situation was extraordinarily difficult. Large parts of the world were in ruins, a cold war was developing at high speed. But the legal situation was also desperate. A legal framework of international criminal justice was non-existent. Neither were there binding international treaties concerning human or judicial rights. It is therefore difficult to find a legal standard to evaluate the proceedings in order to be able to tell what *was* a fair trial in the mid 40ies of the 20th century.

What we can state is that a compromise concerning the procedure had to be found, and it had to be found quickly. The people working on it came from different legal

³⁶⁶ *IMT*, vol. 8, p. 164 et seq.

³⁶⁷ *IMT*, vol. 14, p. 528 et subs., 533.

³⁶⁸ See also *May/Wierda*, *International Criminal Evidence*, p. 69, as well as *Eser*, *Das Internationale Militärtribunal von Nürnberg aus deutscher Perspektive*, p. 54. See recently, however, *Schäfers*, *Freispruch in Nürnberg - der Weg zum freisprechenden Urteil des Internationalen Militärtribunals von Nürnberg im Fall Hans Fritzsche*, p. 189, who ascertains that lack of availability and disclosure of exculpatory evidence may actually have helped the defendants in that the defence was able to argue that the lack of exculpatory evidence was due to its unavailability, not its inexistence.

backgrounds, and these differences had their strongest effect in the criminal procedure. As especially Justice Jackson stated several times, public interest for the Tribunal, at least in the Allied countries, was very high, and expectations of whole nations had to be met. There was no role model; all of the participants did not really know where the journey would end.³⁶⁹

As far as disclosure in particular is concerned, it may be true that, as Justice Jackson said in the proceedings, the defence got ‘more than much more than any citizen of the United States gets on trial in the courts of the United States’³⁷⁰. This is a plausible argument in the light of the history of the disclosure of evidence in criminal proceedings in the United States, which we have sketched above. However, if we look not at what evidence the defence *received*, but rather at what evidence it had to *disclose vis-à-vis* the prosecution, we must admit that a principle such as the one of equality of arms or ‘equal treatment’ was not fully recognized at Nuremberg. As also Justice Jackson, probably not too happily, given the fact that the Soviets were commonly portrayed as the ones having no real interest in the fairness of the proceedings, had to concede in the aftermath of the IMT:

*[T]he Soviet delegation envisioned a trial with the following features: First: The prosecutors would prepare an indictment or “accusation” which would include a dossier of evidence – every statement of a witness and every document – and hand it over to the court and a copy to each defendant. They considered that this reduced the scope and probability of contest and also that it is more fair to a defendant than to withhold knowledge of the evidence from him until he is in court. There is much to be said in favor of this view. [...]*³⁷¹

This is an interesting notion concerning fairness, in that Jackson says (or, for that matter, agrees with the Soviets, that ‘fair’, as an adjective, can be compared, i.e. that one can differentiate between ‘fair’, ‘fairer’, and, possibly, ‘fairest’. Generally, one would rather expect a distinction between ‘fair’ and ‘unfair’ only. However, this expression must be endorsed; because it shows that the scope of ‘fairness’, while it has a bordering line of unfairness, also entails normative judgments which make some issues more desirable than others. If we understand fairness to comprise all basic rights of a person within a judicial proceeding, it may well be desirable, for the ‘fairest’ way of conducting the proceedings, to enable the person to exercise these rights completely. Fairness rights, however, can be balanced by other legitimate interests within a judicial

³⁶⁹ See, once again, the interim Report of Justice Jackson to the President of the U.S.A. of 5 June 1945, *Jackson Report*, p. 53 et seq.

³⁷⁰ *IMT*, Vol. 2, p. 438.

³⁷¹ *Jackson*, Some Problems in Developing an International Legal System, at p. 150.

proceeding, which is acceptable, and the trial thus ‘still fair’, as long as the line of unfairness is not crossed.³⁷²

As we will see below,³⁷³ this statement of Robert H. Jackson appears to have a certain impact on the discussions on a liberalization of disclosure in the United States of America.

³⁷² See also *Haensel*, *The Nuremberg Trial Revisited*, p. 258, who states that the IMT “proceedings, the treatment of the defendants and the rights granted to the defense counsel were very fair”. See on the other hand, *Laternser*, *Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders*, who answered the question in the negative (p. 578).

³⁷³ See Chapter 4.2.1 below.

4 The Development of Disclosure in National Systems after 1945

Having examined the national systems before Nuremberg above, it appears justified, in preparation of our analysis of the modern international tribunals, to turn our view to national systems again. Both in England and the U.S.A., the second half of the 20th century saw groundbreaking changes and developments regarding criminal procedure, not least concerning the disclosure of evidence.

4.1 England

4.1.1 Prosecution Disclosure

4.1.1.1 From 1945 to the Attorney General's Guidelines 1981

As mentioned above, the movement of the law regarding disclosure in England in the first half of the 20th century was slow. The above-cited case of *R v Bryant and Dickson*, however, proved influential; the same holds true for *Dallison*.

However, we should turn to the political level first, for there was an interesting debate at the House of Commons on 6 December 1951, showing that the problem of disclosure of unused material “occasionally came to the surface”³⁷⁴ at the parliamentary level as well. It is remarkable in the sense that it shows that politically, a liberal, or ‘open books’ approach to disclosure was expressed as desirable, or even (though falsely) as actually existing, at the highest level at a relatively early stage. It is, however, all the more remarkable in the context of this thesis, since it involves, among others, two persons who had been directly involved in the Nuremberg IMT just a few years before as prosecutors for the British side: Sir David Maxwell Fyfe, member of the Conservative Party and Home Secretary in 1951, who had been Attorney General in Winston Churchill’s caretaker government in 1945, and in this position also, at first, been head of the British delegation at the London Conference in 1945, and Sir Hartley Shawcross,

³⁷⁴ (1946) 31 Cr. App. R. 146, and [1965] 1 Q.B. 348, respectively; see also *Plater*, *The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?*, p. 123, as well as *O'Connor*, *Prosecution Disclosure: Principle, Practice and Justice*, p. 465; *Niblett*, *Disclosure in criminal proceedings*, p. 59.

³⁷⁵ *O'Connor*, *Prosecution Disclosure: Principle, Practice and Justice*, *ibid*.

Labour politician and Fyfe's successor in the position of Attorney General and later head of the British prosecution team at Nuremberg. The debate evolved around a Home Office inquiry of Mr Jolly, K.C., a few years earlier, about one Walter Rowlands, who had most probably been wrongfully convicted of murder and executed.

[...]

Mr David Maxwell Fyfe (Liverpool, West Derby):

[...] The confession³⁷⁶ was the subject at the time of an exhaustive inquiry by the late Mr. Jolly, K.C., appointed by the then Home Secretary, and Mr. Jolly's report was presented to Parliament in February, 1947, by command of His Majesty. In his report, Mr. Jolly rejected the confession which he regarded as false, and said that he was satisfied that there were no grounds for thinking that there had been any miscarriage of justice in the conviction of Rowland for murder. During the course of the inquiry Ware retracted his confession and in a signed statement published in the report said that his confession was absolutely untrue. There is nothing in the recent charge brought against Ware to require any further inquiry or action on my part.

Mr Samuel Silverman (Nelson and Colne):

Would the right hon. and learned Gentleman bear in mind that this case at the time occasioned the most acute public anxiety, that the recent development showing that this man had an insane obsession to do the very thing which he confessed to doing has served to increase that anxiety infinitely, that the police have in their possession a great deal of evidence in Rowland's favour which was never made available to the defence, and that in view of the enormous public importance of satisfying the public that an execution has not been carried out on an innocent man, will the right hon. and learned Gentleman cause a new inquiry to be made?

Mr David Maxwell Fyfe (Liverpool, West Derby):

The late Mr. Jolly who conducted the inquiry was known to me for nearly 30 years as one of the most careful and conscientious men whom I have ever known at the Bar. The results of the inquiry showed that he had taken immense pains with the subject, and I do not myself see that there is any reason to throw doubt on the conclusion to which he came.

[...]

Mr Hartley Shawcross (St Helens):

³⁷⁶ Of one David Ware, probably the real perpetrator.

Does the right hon. and learned Gentleman accept the suggestion made by the hon. Member for Nelson and Colne (Mr. S. Silverman) that the police had a great deal of evidence favourable to Rowland which they failed to disclose to the defence, and does he agree that it is the paramount duty of the prosecution and the police in all criminal cases to disclose all information, whether favourable or unfavourable to the defence?

Mr David Maxwell Fyfe (Liverpool, West Derby):

*I certainly agree with the last part of the right hon. and learned Gentleman's question, that it is the practice at the Bar of England, as I understand it, that prosecuting counsel must make known to the defence any evidence which is relevant to the matter. [...]*³⁷⁷

To be sure, as we have seen, neither the “duty” as described by Sir Hartley Shawcross, nor the according “practice” as put by Home Secretary Maxwell-Fyfe, existed at the time.³⁷⁸ The two learned King’s Counsel could certainly not have inferred their opinions from the holding of the Court of Criminal Appeal in *R v Bryant and Dickson*, and there is, of course, no proof that their common Nuremberg experience had any influence on them regarding this point. The fact that this debate took place between these two persons nevertheless is worth mentioning.

In the middle of the 20th century some cases show a tendency to oblige the prosecution to disclose evidence which would cast doubt on the credibility of the prosecution evidence or the witnesses themselves. In 1958, in *Baksh v R*, the Privy Council quashed an appeal judgment of the Court of Criminal Appeal of British Guiana, which had dismissed an appeal concerning the non-disclosure of non-consistent witness statements on the grounds that they were in any case unfavourable to one of the accused. The court, however, had allowed the appeal of the other accused, for the previous statements were favourable to him. The Privy Council held that the credibility of witnesses cannot be divided and therefore quashed the judgment.³⁷⁹ The Privy Council, however, did not mention explicitly whether a duty of disclosure concerning inconsistent witness statements existed.³⁸⁰ In 1968, the then Court of Appeal quashed a conviction also on the

³⁷⁷ Available on the internet at <http://www.theyworkforyou.com/debates/?id=1951-12-06a.2552.3>; footnote added.

³⁷⁸ See also the criticism expressed by *O'Connor*, *Prosecution Disclosure: Principle, Practice and Justice*, at p. 466.

³⁷⁹ *Baksh*

³⁸⁰ Dissenting apparently *Niblett*, *Disclosure in criminal proceedings*, p. 25.

grounds that material which was likely to cast doubt on the reliability of the prosecution evidence was not disclosed.³⁸¹

Concerning a possible duty to call *credible* witnesses contradicting the prosecution case or disclosing their statements, however, the jurisprudence stayed in line with *R v Bryant and Dickson*. In *R v Collier*, the Court of Criminal Appeal also stated that the prosecution did have a duty to disclose the identity of the witness, but not his statement, let alone to call him themselves.³⁸²

The next influential³⁸³ decision after *R v Bryant and Dickson* regarding disclosure was, as mentioned, *Dallison v Caffery*, a civil case decided by the Court of Appeal 20 years later, in 1964.³⁸⁴ The plaintiff had charged the defendant with malicious prosecution; the underlying case of the civil action was thus a criminal one. The latter evolved around the question whether the prosecution should have disclosed witness statements which supported the accused's alibi defence before, or at least at the committal hearing. In line with *R v Bryant and Dickson* and *R v Collier*, the Court answered this question in the negative:

*This contention seems to me to be based on the erroneous proposition that it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or, with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence (see Rex v. Bryant and Dixon). But it is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial.*³⁸⁵

However, *obiter*, Lord Denning went beyond this holding – or arguably rather contradicted it. In his opinion, he stated:

[...] at the committal proceedings, the evidence of Mr. and Mrs. Stamp and Mrs. Lansman was not made available to the magistrates. I do not see that this should be taken against Caffery. He did not conceal these statements. He put them before his superior officers and also before the solicitor for the prosecution. It

³⁸¹ *R v Hassan and Kotaish* (1968) 52 Cr. App. R. 291; in this case, numerous previous convictions of the complainant had not been disclosed. See also *R v Collister and Warhurst* (1955) 39 Cr. App. R. 100.

³⁸² [1958] Crim. L.R. 544.

³⁸³ The case was cited very frequently in the famous 1990ies judgments which quashed many 1970ies convictions and finally lead to the passing of the CPIA in 1996. More on this below.

³⁸⁴ [1965] 1 Q.B. 348.

³⁸⁵ *Ibid.*, judgment of Diplock L.J., p. 375 et seq., footnote omitted.

was not his fault that the solicitor did not think it necessary to put them before the magistrates. Nor do I think the solicitor need have done. The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings, gave the solicitor for the defence the statement of Mr. and Mrs. Stamp; and thereby he did his duty.³⁸⁶

These two holdings, contained in the same judgment, are difficult to reconcile.³⁸⁷

Another quite far reaching holding of Lawton LJ in 1978 had apparently no impact on this problematic matter:

[The Courts] must also keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.³⁸⁸

There was no clear line in the law and practice of criminal disclosure. It can be generally remarked that throughout the 20th century prosecutors in England enjoyed a wide discretion concerning disclosure; and the question whether evidence would be

³⁸⁶ Ibid, p. 368 et seq.

³⁸⁷ See also *O'Connor*, Prosecution Disclosure: Principle, Practice and Justice, at p. 465: “confusion of policy”; *Niblett*, Disclosure in criminal proceedings, p. 61; *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?, p. 123.

³⁸⁸ *R v Hennessey*, (1979) 68 Cr. App. R. 419, at p. 426. *Plater*, The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice? on p. 122 rightly points out that in the light of the miscarriages of justice of the 1970ies Lord Lawton's confidence in the prosecution was “misplaced”. To be sure, Lord Lawton's judgment on the point of disclosure was finally cited in *Ward*, which we will look at immediately.

disclosed or not oftentimes depended of the individual prosecuting counsel and their relation with the defence counsel.³⁸⁹

In this regard, there was an interesting development in England at the Magistrates' Courts in the early 1980ies. In about a dozen of them, a practice of so-called "pre-trial reviews" was established, whereby the prosecution and the defence well before the trial convened under the auspices of the court, in order to identify disputed issues and, if possible reach agreement on them beforehand. This was done with the intention to reduce delay and costs, which, as we have seen, has generally been one of the main purposes of disclosure. The pre-trial reviews apparently worked as a kind of "open books" discovery, where the prosecution would provide full disclosure on the condition that the defence would do the same, or at least provide an outline of its case.³⁹⁰ In the light of the privilege against self-incrimination, this arguably appeared unheard of, and indeed provoked much dogmatic criticism. However, the experiences made by the practitioners were apparently quite positive; and especially the defence lawyers seemed to have "no problem" with giving at least a general outline of their case, or even more, in return for full prosecution disclosure; an attitude which, however, was also seen as critical.³⁹¹ This kind of 'reciprocal' disclosure is something we will come across again at the discussion of the international courts and tribunals below – and generally we will notice that apart from or parallel to the 'law in the books', the 'law in action'³⁹² concerning disclosure, the protagonists often found pragmatic solutions.

However, this pragmatic approach to disclosure apparently remained limited to the Magistrates' Courts, and, as mentioned, only to about a dozen of them. Generally speaking, criminal disclosure remained more or less chaotic.³⁹³ Not least due to this confusion, several more or less widely known miscarriages of justice occurred, with infamous IRA terrorism cases, such as the one against *Judith Ward* as well as the 'Guildford Four', the 'Maguire Seven' or the 'Birmingham Six' cases, the judgments of

³⁸⁹ Compare *Plater*, *The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?*, at p. 125 et subs.; see also *Epp*, *Building on the decade of disclosure in criminal procedure*, p. 49.

³⁹⁰ *Feeney/Baldwin*, *Defense Disclosure in the Magistrates' Courts*, p. 59 et subs.

³⁹¹ *Ibid.*, p. 604 et subs.

³⁹² The graphic differentiation between 'law in books' and 'law in action' apparently goes back to an article with the same name written by Roscoe Pound, 44 *American Law Journal* (1910), p. 12 et subs., see *Maxeiner*, U.S. "methods awareness" (*Methodenbewußtsein*) for German jurists, p. 130.

³⁹³ See, once again, *O'Connor, Niblett, Plater*, fn. 387 above.

all of which were quashed in the late 1980ies and early 1990ies.³⁹⁴ All of them, it has been argued, were at least partially caused by lack of disclosure.³⁹⁵

4.1.1.2 From the Attorney General's Guidelines to the CPIA

The felt need for some harmonization and standardization of disclosure led to the "Attorney General's Guidelines for the Disclosure of Information to the Defence in Cases to be Tried on Indictment"³⁹⁶. The legal status of these guidelines remained unclear most of the time. While they were intended to have an advisory status in the form of legal instructions of prosecutors only, their legal character remained disputed.³⁹⁷ The principal duty of prosecution disclosure was quite far-reaching:

*In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary exceptions mentioned in paragraph (6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.*³⁹⁸

However, this disclosure duty was limited again by a wide discretion as to non-disclosure. Paragraph 6 of the guidelines allowed non-disclosure in cases where intimidation of witnesses had to be feared; many single exceptions related to the holding-back of witness statements which could be of use in cross-examination, another range of exceptions pertained to "sensitive information".³⁹⁹ For the latter category of exceptions, Paragraph 13 foresaw possibilities to have a "limited form of disclosure", such as providing redacted documents only. To be sure, even though in cases of doubt the Guidelines provided that "disclosure should be resolved always in favour of the accused"⁴⁰⁰, the discretion as to the exercise of discretion also lay with the prosecution, and there was little room for judicial control over it.⁴⁰¹ The main problem, however, remained the unclear legal status of the guidelines and their impact on the above-

³⁹⁴ See generally *Walker/Starmer*, Miscarriages of justice: A Review of Justice in Error

³⁹⁵ *Niblett*, Disclosure in criminal proceedings, p. 16 et subs.

³⁹⁶ (1982) 74 Cr.App.R. 302.

³⁹⁷ See *Niblett*, Disclosure in criminal proceedings, p. 67 for references.

³⁹⁸ Par. 2 Attorney General's Guidelines.

³⁹⁹ See for critical remarks on the exceptions *O'Connor*, Prosecution Disclosure: Principle, Practice and Justice, at p. 471.

⁴⁰⁰ Par. 9 Attorney General's Guidelines.

⁴⁰¹ See for a detailed description of the Guidelines *Niblett*, Disclosure in criminal proceedings, p. 67 et subs.

mentioned conflict(s) between *Bryant and Dickson*, Lord Diplock in *Dallison v Caffery* and Lord Denning in *Dallison v Caffery*.⁴⁰² In *R v Saunders et al.*⁴⁰³, Justice Henry held:

*Now, it was initially suggested to me – though I think that finally there was some retreat from this position – that the Attorney-General's Guidelines do not have the force of law. I found a certain unreality in that submission because it seems to me that any defendant must be entitled to approach his trial on the basis that the prosecution will have complied with the guidelines and those accordingly are the ground rules which govern his trial.*⁴⁰⁴

He thus treated the Guidelines as legally binding; above that, he held that the guidelines not only applied to witness statements but to all in any way disclosable materials; and thirdly, and perhaps most importantly, he found that the materiality (i.e. the ‘relevance’ of the evidence) was not for the prosecution, but for the defence to decide; the discretion of the prosecution as to non-disclosure should be limited to cases of sensitive evidence. This judgment became known as the “Guinness ruling”.⁴⁰⁵ It had quite an impact on the disclosure practice in England, in that the prosecution reacted by formalising its internal procedures and, most importantly, formalising and co-ordinating those of the police, so that the latter would start preserving disclosable material from the beginning of the investigation and generally work more closely with the prosecution.⁴⁰⁶ In the early 1990ies, however, it appears that the development of jurisprudence in a way overtook the Attorney General’s Guidelines and in the end led to the passing of the CPIA.

In *R v Maguire and others*⁴⁰⁷, the infamous Maguire Seven case, O’Connor LJ stated:

The Court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed, is an “irregularity in the course of the trial.” Why there was no disclosure is an irrelevant question,

⁴⁰² See *O’Connor*, *Prosecution Disclosure: Principle, Practice and Justice*, at p. 469: “Confusion reigns”.

⁴⁰³ 1989, unreported, transcripts available at C.C.C. August 29, 1989, cited according to *O’Connor*, *Prosecution Disclosure: Principle, Practice and Justice*, note 17.

⁴⁰⁴ Cited according to *Niblett*, *Disclosure in criminal proceedings*, p. 72. A summary can also be found in the appeals judgment, [1996] 1 Cr. App. R. 463, see below.

⁴⁰⁵ See *Niblett*, *Disclosure in criminal proceedings*, p. 70 et subs.; *Fisher*, *The Ethical Duty to Seek Exculpatory Evidence in Police Hands*, at p. 114 et seq.

⁴⁰⁶ “Guinness Advice”, see *Niblett*, *Disclosure in criminal proceedings*, p. 72 et subs.; *Fisher*, *The Ethical Duty to Seek Exculpatory Evidence in Police Hands*, at p. 115 et seq. The case later went to the ECtHR (*Saunders v. UK*, Application no. 19187/91, Judgment of 17 December 1996), which did not dwell on questions of disclosure but found a violation of the accused’s right to silence (paras. 67 et subs.).

⁴⁰⁷ [1992] 94 Cr. App. R. 133.

*and if it be asked how the irregularity was “in the course of the trial” it can be answered that the duty of disclosure is a continuing one. If categorisation is necessary we are content to categorise a failure to disclose as a “procedural” irregularity, and because that which was not disclosed ought to have been disclosed, we would expect the irregularity to be one which usually satisfied the adjective “material.”*⁴⁰⁸

In our context, this judgment is particularly interesting as it states that the disclosure obligation is “continuing”. This is an indication in favour of our hypothesis that disclosure must not just be seen as a procedural ‘feature’ or phase, but in its plain material meaning. Little later, in the *Ward* appeals judgment of 1992⁴⁰⁹, Glidewell LJ took up this notion of the *Maguire* judgment and added

*The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. If the evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity.*⁴¹⁰

Later in the judgment, taking up the above-mentioned holding of Lawton LJ in *Hennessey*⁴¹¹, he stated:

*We would emphasise that “all relevant evidence of help to the accused” is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.*⁴¹²

A kind of short summary, even though nominally only referring to scientific evidence, can be seen in the following lines:

It is necessary to consider the impact of the legal rules governing the disclosure by the prosecution of material scientific evidence. An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this

⁴⁰⁸ Ibid., p. 146.

⁴⁰⁹ [1993] 96 Cr. App. R. 1.

⁴¹⁰ Ibid., at p. 22.

⁴¹¹ See fn. 388 above.

⁴¹² *R v Ward*, fn. 409 above, at p.

*duty is continuous: it applies not only in the pre-trial period but also throughout the trial.*⁴¹³

In these words of Lord Glidewell's judgment, we find several interesting thoughts. First of all, he makes clear that he ties the disclosure of evidence to the notion of the defendant's right to a fair trial. In addition to that, and arguably for the first time in this clarity, he states that "material" means everything which strengthens or weakens the prosecution case or assists the defence case. Third, he reiterates the mentioned notion from the *Maguire* judgment that the duty of disclosure is continuous. Finally, he states that, at least as far as scientific evidence is concerned, the prosecution has a duty of disclosure regardless of a specific request by the defence. This can hardly be reconciled with the concept of a purely partisan prosecutor. It is arguably in line with the latter statement that the Court also, going beyond (or contradicting) the above-mentioned Guinness Ruling, which had held that the assessment of materiality of the evidence was for the defence to decide, but had left the discretion as to what evidence was "sensitive" to the prosecution, opined that this should rather be the task of the court. The practically very important issue of "sensitive" material or, as the court, utilising a then relatively new term, said: material underlying "public interest immunity" should, according to *Ward*, lie in the responsibility of the judges.⁴¹⁴ Notice of an according motion to the court must be given to the defence. If the prosecution should refuse to let the court rule upon the issue, the charges would have to be dropped.⁴¹⁵

Finally, Glidewell LJ stated quite clearly how he characterized the importance and legal force of the Attorney General's Guidelines:

*For the avoidance of doubt we make it clear that we have not overlooked the Attorney-General's Guidelines for the disclosure of "unused" material to the defence in cases to be heard on indictment [...]. It is sufficient to say that nothing in those guidelines can derogate in any way from the legal rules which we have stated. It is therefore unnecessary for us to consider to what extent the Attorney-General's Guidelines relating to "sensitive material" (the phrase used in those guidelines) are in conformity with the law as we have expounded it in the judgment.*⁴¹⁶

⁴¹³ Ibid, at p. 50.

⁴¹⁴ Ibid., at p. 53 ("[I]f difficulties arise in a particular case, the court must be the final judge.") and 56. Public interest immunity, according to the decision, is in essence what used to be called "crown privilege", *ibid.*, p. 26.

⁴¹⁵ Ibid., at p. 57.

⁴¹⁶ Ibid., at p. 57.

It should be mentioned, however, that the actual scope of disclosure, i.e. what information would be ‘material’ for the defence, was not entirely clarified. Whereas Lawton LJ in *Hennessey*⁴¹⁷ had stated that “all relevant evidence of help to an accused” should be made available, Glidewell LJ in *Ward*⁴¹⁸ had held that all matters have to be disclosed if they “strengthen or weaken the prosecution case or assist the defence case”. The most far-reaching duty was, theoretically, probably the one contained in the Guidelines themselves: “if it has some bearing on the offence(s) charged and the surrounding circumstances of the case”.⁴¹⁹

The mentioned central role of the judges as concerns “sensitive” material, or public interest immunity, was soon rendered more precise in that a three-tier approach should apply: If the prosecution was of the opinion that material should be protected by public interest immunity, an *inter partes* hearing should take place about the issue, wherefore the defence should be provided with general information about the category of material. The second stage would just imply a notice to the defence of the motion without specifying the material; the motion of the prosecution would be *ex parte*. In the third (“highly exceptional”) category of cases, the defence would not be notified of the prosecution’s *ex parte* application at all.⁴²⁰

Soon afterwards, Lord Chief Justice Taylor in *R v Keane*⁴²¹ again saw himself forced to ‘refine’ the disclosure obligations of the prosecution, giving them back some of their discretion as to materiality which they had lost as a consequence of the Guinness Ruling and *R v Ward*. Citing the unreported case of *R v Melvin and Dingle*, he held:

As to what documents are “material” we would adopt the test suggested by Jowitt J. in Melvin and Dingle (judgment December 20, 1993). At p. 5 of the transcript, the learned judge said:

“I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution:

(1) to be relevant or possibly relevant to an issue in the case;

⁴¹⁷ See fn. 388 *supra*.

⁴¹⁸ See fn. 409 *supra*.

⁴¹⁹ See also *Niblett*, Disclosure in criminal proceedings, p. 75.

⁴²⁰ *R v Davis, Rowe and Johnson*, (1993) 97 Cr. App. R. 110, at p. 114. The case later went to the ECtHR, see note 64 above; in the ECtHR judgment, see paras. 39 et seq. As to the critique of defence counsel especially as regards the third category of cases, see also *Niblett*, Disclosure in criminal proceedings, p. 79.

⁴²¹ (1994) 99 Cr. App. R. 1.

(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;

(3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).” [...] ⁴²²

It was thus (again) the prosecution which was, in principle, to decide whether a piece of evidence was material or not.

The final death blow for the Guidelines came with the Court of Appeal’s decision in *R v Winston Brown*⁴²³, where Justice Steyn held, similarly to Glidewell LJ in *Ward*⁴²⁴:

*Judged simply as a set of instructions to prosecutors, the Guidelines would be unobjectionable if they exactly matched the contours of the common law duty of non-disclosure. If they set higher standards of disclosure than the common law, that would equally be unobjectionable. But if the Guidelines, judged by the standards of today, reduce the common law duties of the Crown and thus abridge the common law rights of a defendant, they must be pro tanto unlawful.*⁴²⁵

The case evolved around the question whether material affecting the credibility of defence witnesses had to be disclosed in the same way as for prosecution witnesses. The Court of Appeal answered this in the negative; this was upheld by the House of Lords in 1997,⁴²⁶ already after the entry into force of the CPIA.

4.1.1.3 The Criminal Procedure and Investigations Act

The law of disclosure was thus developing quite rapidly in the late 1980ies and early 1990ies.⁴²⁷ However, the courts were perceived as being too favourable to the defence; and it was feared that the workload of the prosecution as well as the courts would become unbearable. The Royal Commission on Criminal Justice⁴²⁸, established in 1991, in its 1993 report had come to the conclusion that

⁴²² Ibid., at p. 6.

⁴²³ [1995] 1 Cr. App. R. 191.

⁴²⁴ See fn. 416 *supra*.

⁴²⁵ *R v Winston Brown*, fn. 423 *supra*, at p. 197.

⁴²⁶ *R v Winston Brown*, [1998] 1 Cr. App. R. 66.

⁴²⁷ This was not only true for England; see, once again, the decision of the Supreme Court of Canada in *R v Stinchcombe*, fn. 89 *supra*.

⁴²⁸ Often named after its chairman, Viscount Runciman; hereinafter: Runciman Report.

[...] the decisions have created burdens for the prosecution that go beyond what is reasonable. At present the prosecution can be required to disclose the existence of matters whose potential relevance is speculative in the extreme. Moreover, the sheer bulk of the material involved in many cases makes it wholly impracticable for every one of what may be hundreds of thousands of individual documents to be disclosed.⁴²⁹

Referring to the conclusions of the Runciman Commission, then Lord Chief Justice Taylor in a lecture in 1994 stated:

No one now can doubt that there must be adequate rules to ensure that material which may be helpful to the defence is made available to them. However, the one-way traffic of disclosure by the prosecution with no corresponding duty on the defence, has given rise to grave difficulties both for the CPS and for the courts. There are problems both in regard to the bulk of the material to be considered for disclosure and in some cases to the sensitivity of some material. [...] Indeed, there are often more and more searching requests by the defence for material on a purely speculative basis. [...] Courts are being required to peruse large quantities of documents and judges, instead of being in court, are sitting in their rooms to decide what disclosure is to be made. This is an unacceptable state of affairs. It shows the balance in this area has become distorted.⁴³⁰

The Runciman Report also formed part of the discussions in the House of Lords in November 1995, where the bill for the CPIA was debated. Part of the opening remarks of the then Minister of State for the Home Office, Baroness Blatch, shall be quoted here, because they sum up the concerns in the light of the development of the jurisprudence very well:

One of the most important responsibilities of any government is to ensure that their criminal justice system is fair, efficient and effective. It should be fair towards all those affected by it, whether as defendants or as victims and witnesses. It should be efficient in focusing on the issues that really matter at trial, and it should be effective in ensuring that the innocent are acquitted and the guilty are convicted. [...]

⁴²⁹ Royal Commission on Criminal Justice, Report (London, HMSO, 1993) Ch 6, par. 48, quoted according to *Plater*, *The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?*, p. 134.

⁴³⁰ *Taylor*, *Consideration of Reforms in Progress - Tom Sargant Memorial Lecture*, 19 January 1994. The fact that Taylor LCJ had himself been a prosecutor in the trial against Judith Ward, as well as in *R v Kisko*, both of which are counted among the most infamous miscarriages of justice in the 1970ies, and that, however, Lord Taylor volunteered to give evidence at the appeal (see *Morton*, *Obituary: Lord Taylor of Gosforth*), may be of interest in this regard.

The current disclosure requirements, which derive from the common law, reflect the decisions of the courts in a series of cases over the past five years or so. [...] [T]he context of the current arrangements is a series of high-profile miscarriage of justice cases in which convictions were overturned because of the non-disclosure of prosecution material which pointed away from the defendants. This reduced public confidence in the criminal justice system in general, and in the police and prosecuting authorities in particular, and it is understandable that the courts saw a need to extend the duties of disclosure owed by these authorities.

What has happened, however, is that these duties have been extended much further than anyone may have intended. The result is a system which not only protects the innocent but also makes it more difficult to convict the guilty. The current law requires the prosecutor to disclose to the accused anything which might possibly be relevant to an issue at the trial, whether or not it has any bearing on the defence which the accused relies on at trial. It is open to the accused, if he so wishes, to seek the disclosure of large volumes of material in an attempt at least to delay the onset of the trial, and if possible to uncover some sensitive material which the prosecutor cannot disclose and thereby cause the abandonment of the proceedings. And this is what has happened in practice. In short, the current disclosure regime is neither fair, nor efficient, nor effective.⁴³¹

The first part of the quote strengthens our argument made above that fair trial rights indeed apply to the accused only,⁴³² but have certainly nothing to do with protection of the prosecution. Apart from that, Baroness Blatch reiterates the arguments for a reformation of the disclosure law and hints at another important aspect: disclosure by the defence, which up to that point was underdeveloped in England; and to which we will come instantly.

The CPIA was enacted on 4 July 1996 and has been amended several times since then. Section 21 (1)⁴³³ makes clear that all existing common law rules as to disclosure should

⁴³¹ Lords Hansard 27 November 1995 (151127-04), columns 462 et seq., available on the internet at <http://www.publications.parliament.uk/pa/ld199596/ldhansrd/vo951127/text/51127-04.htm>.

⁴³² The question whether and to what extent they apply to victims also is a different matter which we cannot further inquire here; see for the legal status of the victims in proceedings before the International Criminal Court *Safferling*, *Das Opfer völkerrechtlicher Verbrechen: Die Stellung der Verbrechenopfer vor dem Internationalen Strafgerichtshof*.

⁴³³ “Common law rules as to disclosure

(1)Where this Part applies as regards things falling to be done after the relevant time in relation to an alleged offence, the rules of common law which—

(a)were effective immediately before the appointed day, and

(b)relate to the disclosure of material by the prosecutor,

be superseded by the CPIA. In accordance with s. 23, a Code of Practice was issued by the Secretary of State.⁴³⁴ To put it in simple terms, until 2003, the CPIA at first implemented a three stage approach, consisting of ‘primary disclosure’ by the prosecution, followed by a ‘defence case statement’ by the defence, and a subsequent ‘secondary disclosure’ by the prosecution.⁴³⁵ Primary disclosure obligations of the prosecution basically extend to “material which [...] might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused”⁴³⁶, which is a clear limitation compared with the wording of the Guidelines (“if it has some bearing on the offence(s) charged and the surrounding circumstances of the case”). After that, it is up to the defence to provide the prosecution as well as the court with a defence case statement, where a general outline of the defence must be stated, including factual and legal issues which are disputed as well as limited information on evidence the accused intends to rely on.⁴³⁷ This is also where, apparently for the first time, the disclosure of the evidence for the prosecution case comes into play, in that s. 5 (1)(b) and s. 6 (1)(b) provide that the defence case statement need not be made before the prosecution evidence has been disclosed. One may notice that this disclosure to the court is rather untypical for the traditional adversarial trial and just once more shows that modern day disclosure cannot be seen as detached from the court anymore. According to CPIA s. 6E (4), the judge may, on application by one of the parties or on his own motion, direct that the defence case statement is given to the jury, which is also highly unusual for the typically oral proceedings before juries. Notably, however, the material which is disclosed by the prosecution is not disclosed to the court. As to the scope of the investigations, it is noteworthy that an apparently ‘neutral’, as opposed to partisan, duty is imposed on the investigation authorities by the CPIA Code of Practice: “In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.”⁴³⁸ If the accused does not submit a defence statement or submits one which is defective, or if the time limit for its submission has expired, the court may infer negative conclusions from this fact.⁴³⁹ The handing over of

do not apply as regards things falling to be done after that time in relation to the alleged offence.”

⁴³⁴ Available at http://www.xact.org.uk/information/downloads/CPIA/Disclosure_code_of_practice.pdf.

⁴³⁵ See also *Taylor*, *Advance Disclosure: Reflections on the Criminal Procedure and Investigations Act*, at p. 115 et seq.

⁴³⁶ CPIA s. 3 (1) (a).

⁴³⁷ CPIA s. 5 through 6A.

⁴³⁸ S. 3.5 CPIA Code of Practice.

⁴³⁹ CPIA s. 11 (5): “Where this section applies—

the defence case statement until 2003 triggered a secondary disclosure duty of the prosecution. By the Criminal Justice Act of 2003⁴⁴⁰ the mentioned secondary disclosure by the prosecution was replaced by a continuing duty of the prosecutor to “review at any given time” whether more unused material needs to be disclosed,⁴⁴¹ meaning a replacement of the ‘three stage approach’ by a ‘two stage’ one. At the same time, an objective standard was introduced as to what material needs to be disclosed, in that the wording “in the prosecutor’s opinion might undermine” was replaced by “might reasonably be considered capable of undermining”.⁴⁴²

4.1.2 Defence Disclosure

As was just mentioned, since the introduction of the CPIA in 1996, the defence must provide the prosecution with a defence statement, in order to support the prosecution with its disclosure obligations. Originally, the CPIA in s. 5 foresaw that the accused would have to give a general outline of his defence and the matters on which he took issue with the prosecution; if he was to invoke a defence of alibi, he would have to name the names and particulars of his witnesses.⁴⁴³ These regulations were, by the

(a) the court or any other party may make such comment as appears appropriate;

(b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.”

⁴⁴⁰ 2003 c. 44.

⁴⁴¹ S. 37 Criminal Justice Act 2003 (s. 7A CPIA).

⁴⁴² S. 32 (1) Criminal Justice Act 2003 (s. 1(3) CPIA).

⁴⁴³ S. 5(5): Compulsory disclosure by accused.

[...]

Where this section applies, the accused must give a defence statement to the court and the prosecutor.

(6) For the purposes of this section a defence statement is a written statement—

(a) setting out in general terms the nature of the accused’s defence,

(b) indicating the matters on which he takes issue with the prosecution, and

(c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

(7) If the defence statement discloses an alibi the accused must give particulars of the alibi in the statement, including—

(a) the name and address of any witness the accused believes is able to give evidence in support of the alibi, if the name and address are known to the accused when the statement is given;

(b) any information in the accused’s possession which might be of material assistance in finding any such witness, if his name or address is not known to the accused when the statement is given.

Criminal Justice Act of 2003, ‘moved’ into s. 6A, with little substantial amendments. A specific disclosure duty of the accused as regards alibi defence is also contained in s. 11 of the Criminal Justice Act 1967⁴⁴⁴, which was the first time that defence disclosure officially appeared within the English system, thus much later than in the United States.⁴⁴⁵ In the future, it is apparently planned to generally oblige the accused to disclose the details of witnesses as well as experts he intends to call in his defence.⁴⁴⁶ Obviously, a general duty of the accused to disclose the particulars of his witnesses would render the specific duty to disclose the particulars of alibi witnesses obsolete. Other than that, the accused is planned to be obliged to ‘update’ his defence statement, meaning a continuing duty of disclosure similar to that of the prosecution.⁴⁴⁷

4.1.3 Conclusion

Summing up, for England we can state that a development which started several hundred years ago took up considerable speed towards the end of the 20th century. Together with that, we notice a change of paradigm as regards the procedural roles of the participants at trial, especially the role of the prosecution. It has developed from a mostly partisan party of the proceedings to a more neutral ‘minister of justice’. Investigation authorities are obliged to investigate more neutrally; the prosecution is made more responsible for the conduct of the investigation; the clear separation between investigation and prosecution thus becomes more permeable. Together with that, the prosecution forced to disclose more and more of its material, and, since about the middle of the 20th century, also particularly of that which it is not going to use. But also the defence is, in the interests of a more efficient justice, obliged to disclose much more material than it used to; with the prospective new sections 6B, 6C and 6D of the

(8)For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

(9)The accused must give a defence statement under this section during the period which, by virtue of section 12, is the relevant period for this section.”

⁴⁴⁴ 1967 c. 80.

⁴⁴⁵ In this regard, it may be noted that in Scotland defence disclosure regarding all affirmative defences had been in place since the end of the 19th century, see Criminal Procedure (Scotland) Act, 50 & 51 Vict. c. 35, § 36 (1887).

⁴⁴⁶ See prospective sections 6C and 6D CPIA, as shown on <http://www.legislation.gov.uk/ukpga/1996/25>, retrieved on 09 October 2012.

⁴⁴⁷ See prospective section 6B CPIA, *ibid*.

CPIA⁴⁴⁸, the defence will actually undergo similar disclosure duties as the prosecution. Together with that, the courts are called upon to work as controllers of the justice process, especially regarding the prosecution; not only during the trial, but also in the pre-trial process. Over time, the courts themselves took a more and more self-confident approach towards controlling the prosecution.

Regardless of the criticism of part of the outcome, it appears justified to say that the judiciary and the legislator found that more disclosure (from both sides) leads to more fairness and more efficient proceedings.

4.2 The United States of America

As we have seen above, most federal states had disclosure provisions in place by the middle of the century, albeit disclosure was still considered a matter of discretion (of the court), and not of right (of the accused).⁴⁴⁹ On the federal level, with the limited scope of disclosure allowed by the FRCP, regulations were lagging behind.

From the beginning of the 1950ies through the 1960ies, criminal disclosure apparently was one of the most dominant issues in the legal discussion; the debate has been described as “classic”.⁴⁵⁰ This is understandable, since, as we have noted, disclosure goes to the heart of criminal procedure itself, and indeed touches upon fundamental questions regarding fairness and the purpose of criminal procedure. We can discriminate two major sources of disclosure and its development in the second half of the 20th century: the FRCP in its different versions, as well as, and at least as importantly, the jurisprudence, particularly of the U.S. Supreme Court, which based certain disclosure obligations of the prosecution directly on the due process clause of the 5th or 14th Amendment to the United States Constitution. Since this jurisprudence in part influenced the development of the FRCP, it appears reasonable to start with the jurisprudence. Also, the jurisprudence is particularly instructive as it demonstrates the underlying arguments in favour of and against disclosure much better than the statutory law, which is why the emphasis will be laid on the jurisprudence. We will first take a look, for historical reasons, on three decisions of the U.S. Supreme Court regarding disclosure in which Robert H. Jackson, back at the Court as Associate Justice after Nuremberg, took part. Furthermore, we will concentrate on the description and analysis

⁴⁴⁸ Notes 446 and 447, respectively.

⁴⁴⁹ See Chapter 2, 1.2.3 *supra*.

⁴⁵⁰ *LaFave/Israel/King/Kerr*, Criminal procedure, § 20.1(a). See also the references at *Traynor*, Ground Lost and Found in Criminal Discovery, fn. 2.

of some landmark decisions of American courts regarding disclosure, in order to illustrate the debate and find out which were the issues that concerned the judicial practice. At the same time, reference will be made to some of the legal scholarship. In contrast to the description of the English system, it does not appear reasonable to identify specific chronological phases.

4.2.1 Prosecution Disclosure

The early judicial practice after World War II remained sceptical and widely inconsistent regarding disclosure. The vast majority of the decisions evolved around the question whether the defendant must be allowed to inspect his own statements and confessions, a matter which obviously relates both to the prosecution case and the defence case.⁴⁵¹ On several occasions, federal courts found that Rule 16 FRCP did not apply to confessions or other statements of the defendant, which was based on the drafting history of Rule 16,⁴⁵² the scope of which had been narrowed instead of widened; at the same time, it was regularly reiterated that ‘fishing expeditions’ by the defence could not be allowed.⁴⁵³ There was, however, some sporadic jurisprudence which allowed the inspection of confessions on the grounds that a defendant’s statement by right must be considered a property interest belonging to him.⁴⁵⁴ As to the above-mentioned question whether Rule 16 FRCP could be circumvented by resort to a motion for subpoena *duces tecum* according to Rule 17 (c) FRCP, the U.S. Supreme Court in its 1951 decision in *Bowman Dairy Co. v. U.S.*⁴⁵⁵, a decision in which Justice Jackson took

⁴⁵¹ Compare on the pivotal role of the confession the notion of Chief Justice Weintraub in *State v. Johnson*, 28 N.J. 133, 145 A.2d 313, N.J. 1958, at p. 137: “We must be mindful of the role of a confession. It frequently becomes the core of the State’s case. It is not uncommon for the judicial proceeding to become more of a review of what transpired at headquarters than a trial of the basic criminal event itself.” See for a more thorough analysis of this issue 4.2.1.1 (*State v. Tune*) below.

⁴⁵² See, once again, section 2.2.1 above

⁴⁵³ See as to the drafting history of Rule 16 FRCP section 2.2.1. above; *Shores v. United States*, 174 F.2d 838, C.A.8 1949; endorsed by *United States v. Pete*, 111 F.Supp. 292, D.C.D.C. 1953; see also *Schaffer v. U.S.*, 221 F.2d 17, C.A.5 1955, as well as e.g. *United States v. Peltz*, 18 F.R.D. 394, S.D.N.Y., 1955; *United States v. Gogel*, 19 F.R.D. 107, S.D.N.Y., 1956; *United States v. Chandler*, 7 F.R.D. 365, D.C.Mass., 1947. To the latter case, the U.S. Supreme Court denied certiorari and a rehearing; see *Chandler v. U.S.*, 336 U.S. 918, 69 S.Ct. 640 (Mem), U.S., 1949; as well as 336 U.S. 947, 69 S.Ct. 809 (Mem), U.S., 1949, respectively.

⁴⁵⁴ See references at *Kaufman*, Criminal Discovery and Inspection of Defendant’s Own Statements in the Federal Courts, at p. 114, notes 9 and 10.

⁴⁵⁵ *Bowman Dairy Co. v. U.S.*, 341 U.S. 214, 71 S.Ct. 675, U.S. 1951.

part, held that in principle both provisions are applicable at the same time. In this case, the defendants had made discovery motions according to Rule 16 FRCP in respect to all material covered by the provision,⁴⁵⁶ as well as subpoenas *duces tecum* according to Rule 17 (c) FRCP⁴⁵⁷, concerning “certain other books, papers, documents and objects obtained by the Government by means other than seizure or process”. These motions were granted by the District Court; and the government attorney who refused to produce the documents in order to protect confidential informants was held in contempt of court. The government appealed the decision, and the Court of Appeals reversed on the mentioned grounds of the drafting history of Rule 16; holding that a circumvention by Rule 17 (c) was impossible, since it appeared from the wording that it is only directed at witnesses and not at parties.⁴⁵⁸ Chief Judge Major pointed out for the majority:

Defendants' construction of Rule 17 not only brings it in irreconcilable conflict with Rule 16 but strips the latter of all meaning. If such construction be accepted, I perceive no reason why a defendant would ever proceed under Rule 16. Why bother to go into court and obtain an order directing the government to make the limited production required under Rule 16 when much more could be obtained merely by filling in the blank space of a subpoena as provided for in Rule 17?[...] Thus, as I read Rules 16 and 17, there is no conflict. Each is designed to serve a separate and distinct purpose. Rule 16 confers a limited privilege upon a defendant and to a like extent imposes an obligation upon 'the attorney for the government'. Rule 17 enables either party to obtain the attendance of a witness for the purpose of giving testimony, which witness may 'also' be required to produce documents. In the latter event, the court may order

⁴⁵⁶ See once again Rule 16 FRCP 1946: “Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.”

⁴⁵⁷ See once again Rule 17 (c) FRCP 1946: “[Subpoena] [f]or Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.”

⁴⁵⁸ *U.S. v. Bowman Dairy Co.*, 185 F.2d 159, C.A.7 (Ill.), 1950, at p 165.

such documents produced prior to trial and may permit their inspection by ‘the parties and their attorneys.’⁴⁵⁹

Circuit Judge Lindley dissented, holding:

Rule 17(c) authorizes a subpoena duces tecum, - an age-old expedient for securing the production of documents at the trial. However, it adds an innovation, in that the documents subpoenaed may be ordered produced prior to trial, for inspection. If we ignore this plain provision, then defendants may have only the documents mentioned in Rule 16; they may not have access to the additional documents authorized by 17(c); they are thereby completely prevented from employing the means provided by 17(c). Such a conclusion, it seems to me, does violence to the plain language of the rule. [...] Why should the fact that the person who has the documents happens to be an attorney destroy the rule? [...] Could the defendants successfully object to a similar subpoena served upon one of their counsel, commanding him to produce documents in his possession for inspection, as the rule provides, simply because it is addressed to one who is counsel in the case? I think not.

I agree with Judge Major that there is no conflict between the two rules and that each is ‘designed to serve a separate and distinct purpose.’ But I must part company with him when he concludes that we must absolve the government from compliance with a rule general in terms and applicable to any person merely because the person named in the subpoena happens to be a lawyer for the government.⁴⁶⁰

The U.S. Supreme Court granted *certiorari* and basically agreed with Judge Lindley’s dissent.

It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. [...] Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. [...] Where the court

⁴⁵⁹ *Ibid.*, at p. 166.

⁴⁶⁰ *Ibid.*, at p. 167.

*concludes that such materials ought to be produced, it should, of course, be solicitous to protect against disclosures of the identity of informants, and the method, manner and circumstances of the Government's acquisition of the materials.*⁴⁶¹

The Court, however, quashed the subpoena issued by the District Court in part, holding it was too broad, thereby retaining its established jurisprudence that disclosure must never amount to a 'fishing expedition':

Clause (c), which is the last clause in the subpoena, reads as follows:

*'are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants * * *.'*

*This is a catch-all provision, not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up. The clause is therefore invalid.*⁴⁶²

It is also to be noted that this ruling has as a consequence that the material which is to be produced must in itself be admissible as evidence.⁴⁶³ This can pose difficulties with regard to confessions.⁴⁶⁴

As to this question, and in the respective application of Rule 16, the federal courts retained a restrictive approach. In the U.S. Supreme Court case of *Leland v. State of Oregon*⁴⁶⁵ the Court, though tacitly, endorsed this practice, even though, as we have seen, Justice Jackson, who participated in the case, had recognized with regard to Nuremberg that full disclosure might generally be "more fair".⁴⁶⁶ The Court stated that

⁴⁶¹ *Bowman Dairy Co. v. U.S.*, fn. 455 *supra*, at p. 679, reference omitted.

⁴⁶² *Ibid.*

⁴⁶³ "In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena.", fn. 461

⁴⁶⁴ See *Kaufman*, Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts, at p. 1115 et seq.: "[W]here the material sought to be subpoenaed is a recorded statement, the question is more complicated since it is probable that the only evidential value the material may have for defendant is for purposes of impeachment, and then only if the Government introduces testimonial evidence relating to its contents. The problem is similar where the statement is signed by defendant and admissible against him, since, if the Government should present at trial only those portions of the statement which constitute admissions, the defendant may desire to introduce other portions of the statement which are exculpatory. Consequently, in both these situations any utilization of the statement for evidentiary purposes is dependent on the prosecution first placing all or part of the statement before the court.", references omitted.

⁴⁶⁵ *Leland v. State of Oregon*, 343 U.S. 790, 72 S.Ct. 1002, U.S. 1952.

⁴⁶⁶ See section 3.4 above.

while the disclosure of the defendant's confession might be recommendable, its non-disclosure was in itself certainly no infringement of due process:

Appellant also contends that the trial court's refusal to require the district attorney to make one of appellant's confessions available to his counsel before trial was contrary to due process. We think there is no substance in this argument. [...] While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addition the trial judge offered further time for that purpose but it was refused. There is no indication in the record that appellant was prejudiced by the inability of his counsel to acquire earlier access to the confession.⁴⁶⁷

This holding is not entirely clear, since it leaves open the question whether, had the confession not been produced five days before the accused rested his case, the Court would have found that due process was in fact violated.

Apart from that, however, there is one decision on disclosure in which Justice Jackson himself delivered the opinion of the Court regarding, in the English nomenclature, 'unused' material. As already mentioned above, there had been some jurisprudence, particularly in the 1930ies and 1940ies, regarding material which contradicted witness statements given in court, the production of which could be required for impeaching the witness in cross-examination.⁴⁶⁸ Also in this case, the witness, an accomplice of the accused on the stand had admitted that he had given statements to the prosecution before his final one, which differed in that the previous ones had not involved the accused. The defence had demanded from the court production of these documents for their inspection, but the motion had been denied, for it was held that the statements in themselves might not be admissible as evidence, and it would not have amounted to reversible error, had the trial judge excluded the documents. Justice Jackson distinguished between the question of *production for inspection* on the grounds to impeach a witness in cross-examination and the question of production of evidence *in the technical sense*. He held:

Demands for production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded. [...] The demand was for production of these specific documents and did not propose any broad or

⁴⁶⁷ *Leland v. State of Or.*, fn. 465 *supra*, at p. 801 et seq.

⁴⁶⁸ See section 2.2.1 above.

blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses. The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise. [...] Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed by that of highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to the production of such documents. Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.'⁴⁶⁹ [...] It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error.⁴⁷⁰

Justice Jackson went on to say that it was not enough that the contradiction between the witness' statements was already apparent from the cross-examination, but that the documents themselves were the more accurate and reliable evidence and would have corroborated the contradiction of the statements; this surely reminds us of Jackson's practice in Nuremberg to predominantly rely on documentary evidence instead of witnesses, even though the scope of the trials is obviously not comparable.⁴⁷¹ This judgment is in line with the jurisprudence mentioned above; it once again shows the relation between disclosure and truth-finding. However, Jackson stays cautious in that he still demands, or arguably leaves open the question, that the disclosed material should generally in itself be admissible in evidence, yet that it should be enough to make a *prima facie* case, or, as it was later called, a 'preliminary foundation' that it is.

⁴⁶⁹ *People v. Davis*, see for the full citation note 89 above.

⁴⁷⁰ *Gordon v. U.S.*, 344 U.S. 414, 73 S.Ct. 369, U.S. 1953, at p. 418 et subs., references omitted.

⁴⁷¹ "The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction.", *ibid.*, at p. 421.

Generally during that time the voices demanding a more liberal approach to disclosure became louder. As early as 1951, only five years after the entry into force of the FRCP, a note in Yale Law Journal had made a relatively detailed proposal which would have introduced basically the same rules which were applied in civil cases for criminal cases as well.⁴⁷² In addition to that, in a note contained in Harvard Law Journal of 1954 which mainly deals with the question of the relation between Rules 16 and 17 (c) FRCP, we find a reference to Justice Jackson's 1948 notion that according to the Continental-European tradition the accused gets all the evidence in a dossier;⁴⁷³ this is, as a matter of fact, the same passage in which Jackson admits that this practice may be considered "more fair".⁴⁷⁴

4.2.1.1 *State v. Tune*

Also on the state level, the question of disclosure was virulent. An often cited judgment of the Supreme Court of New Jersey, like many others during that period, evolved around the problem whether defendants should generally be granted to inspect their own confessions. In the case of *State v. Tune*⁴⁷⁵, Chief Justice Vanderbilt, for the 4:3 majority, sums up the arguments against disclosure very instructively. The same holds true for the truth-finding and fairness arguments in favour of a more liberal disclosure approach brought forward by Justice Brennan for the minority opinion. For the judgment's instructiveness, it appears justified to quote part of the opinions here.

In a murder case, the accused had made a confession upon his apprehension. Two months later, he had been assigned counsel, who had made a motion to the court to compel the disclosure of the confession and some other documents. The County Court had allowed the disclosure of the defendant's confession, together with denying disclosure of the additional documents.⁴⁷⁶ Notably, the motion of the defence had been made not according to disclosure provisions in the technical sense, but rather by asking for a subpoena *duces tecum*. The New Jersey Supreme Court, however, makes no mention of this, and only speaks of "disclosure". As mentioned earlier, the distinction between subpoenas and disclosure is difficult to draw.

⁴⁷² Note: Pre-Trial Disclosure in Criminal Cases, 60 Yale Law Journal (1951), 626-646, at p. 640 et subs.

⁴⁷³ Note: The Scope of Criminal Discovery Against the Government, 67 Harvard Law Review (1954), 492-500, at p. 492, fn. 1.

⁴⁷⁴ See section 3.4 *supra*.

⁴⁷⁵ *State v. Tune*, 13 N.J. 203, 98 A.2d 881, 25 June 1953.

⁴⁷⁶ *State v. Tune*, 24 N.J. Super. 428, 94 A.2d 695, 3 February 1953.

The prosecution had moved against the decision of the County Court; the Supreme Court by majority reversed the granting part of the County Court decision and thus denied disclosure altogether. Chief Justice Vanderbilt remarked, making reference to the argument that liberal disclosure may “promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat”⁴⁷⁷:

*Defendant argues that in keeping with the modern trend toward liberal discovery in civil proceedings we should grant him the unqualified right to an inspection of all [...] documents in the possession of the State [...]. Such an argument completely ignores the fundamental difference between civil and criminal proceedings. [...] [S]uch liberal fact-finding procedures are not to be used blindly where the result would be to defeat the ends of justice. In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense [...]. Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime [...]. All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. [...] To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.*⁴⁷⁸

Chief Justice Vanderbilt thus takes up the known argument of the dangers of the accused tampering with the evidence, e.g. by threatening witnesses, or that witnesses themselves might feel intimidated anyway if they know that the defendant is informed that they will testify against him; this has been called the ‘intimidation argument’.⁴⁷⁹ In addition to that, Justice Vanderbilt brings another well known argument into play, which has been referred to as the “perjury argument”.⁴⁸⁰ This means that the accused who knows too much of the evidence against him has the chance to ‘tailor-make’ his

⁴⁷⁷ Note: Pre-Trial Disclosure in Criminal Cases, 60 Yale Law Journal (1951), 626-646.

⁴⁷⁸ *State v. Tune*, fn. 475, at p. 209 et seq.

⁴⁷⁹ *LaFave/Israel/King/Kerr*, Criminal procedure, § 20.1.(b).

⁴⁸⁰ *LaFave/Israel/King/Kerr*, Criminal procedure, *ibid*; we find this argument in 19th century literature already, see note 163 above; Justice Brennan also mentions this in the minority opinion.

own defence and thus, by making a false statement or in any other way producing perjured testimony.⁴⁸¹ Chief Justice Vanderbilt thus basically turns the truth-finding argument for liberal disclosure around, in saying that, to the contrary, liberal disclosure means a threat to the determination of the truth. Finally, he sums up the third main argument against disclosure, which has been called the “reciprocity argument”. Citing the relevant jurisprudence some of which we have pointed to above as well referring to the limitations of the FRCP, he continues:

In considering the problem it must be remembered that in view of the defendant's constitutional and statutory protections against self-incrimination, the State has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him. [...]

See also State v. Bunk, 63 A.2d 842, at page 844 (N.J.Ct.Ct.1949):

'The element of reciprocity is present in the conduct of civil causes. Each party may examine the other, force disclosure of material evidence and thus reduce to a minimum the element of surprise or chance in the trial. In criminal causes no such reciprocity is possible. The State could not examine the defendant before trial without his consent, nor could any rule of court force such examination.'

Except for its right to demand particulars from the defendant as to any alibi on which he intends to rely, Rule 2:5-7, the State is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable.⁴⁸²

This is once again taking up the argument that the defence is not in a position to ‘make good’ the disclosure by the prosecution, for he is protected by his procedural rights. This is, of course, reminiscent of the argument for ‘equality of arms for the prosecution’, the only difference being that the ‘reciprocity’ argument is used to deny

⁴⁸¹ In this regard, it appears worth mentioning that under the Anglo-American adversarial procedure, the accused has a right to testify as a witness for the defence, which means that he is sworn in just as any other witness and is also subject to cross-examination; furthermore, he can be liable of perjury. This is unknown in the Continental-European tradition, where the functional role of the witness in the trial is considered to be incompatible with the position of the accused. The accused may not be brought into the dilemma of having to tell the truth under oath on the one hand and having the right to silence on the other, see, for Germany, Court of the German Empire (*Reichsgericht*), RGSt 57, 53 (54), endorsed by Federal Court of Justice (*Bundesgerichtshof*), BGHSt 10, 8-15, par. 3. This is not to say, of course, that the accused is not allowed to speak out, however, he may not be interrogated under oath.

⁴⁸² *State v. Tune*, fn. 475, at p. 211 et seq.

disclosure to the defence, while the ‘fair trial for the prosecution’ argument is used for grounding disclosure obligations of the defence. The argument is obviously the same; just the degree of the consequence drawn is different. In the introduction, we have already stated that in our view, this line of argument cannot stand. We thus find the three main arguments against disclosure collected in one judgment: risk of intimidation of witnesses, risk of perjury, and the reciprocity argument.⁴⁸³

Chief Justice Vanderbilt appears to make a fourth argument against disclosure, which one could almost call ‘ethnic’. It reminds us of the “spirit of the common law” mentioned in the introduction.⁴⁸⁴ To be sure, it has a very comical note to it, but appears to have been meant seriously:

*The defendant also relies on the English practice of full discovery in criminal matters. The criminal law of England differs materially from that of the United States. [...] Moreover, its system of crime detection and investigation is far more advanced than anything known in this country except in the federal field, and the law-abiding instincts of the population are in marked contrast to the disrespect for law which has long characterized the American frontier and which has not yet disappeared as the criminal statistics indicate in certain segments of the American population.*⁴⁸⁵

While it is certainly true that the culture and specific history of peoples has a lot to do with their legal traditions, one would nowadays probably not find such a holding from high ranking judges anymore. It is also interesting to note that Chief Justice Vanderbilt appears to derive the social necessity to implement a non-liberal criminal procedure from a perceived moral ‘underdevelopment’ of the American society.

For the minority, Justice Brennan started right out with his belief that disclosure leads to truth-finding, and that the experience of disclosure in civil proceedings shows that the perjury argument in practice proved to be invalid:

*That old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil causes where liberal discovery has been allowed.*⁴⁸⁶

⁴⁸³ Compare, once again *LaFave/Israel/King/Kerr*, Criminal procedure, §§ 20.1(a) and 20.1(b).

⁴⁸⁴ See section 1.3.3. above.

⁴⁸⁵ *State v. Tune*, fn. 475, at p. 219.

⁴⁸⁶ *State v. Tune*, fn. 475, at p. 227.

Other than that, he mainly alludes to the general fairness of the proceedings, particularly the opportunity for defence-preparation, and is obviously embittered by the majority decision which he finds utterly unjust. However, the determination of the truth is clearly his main concern:

It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied. If we should not overlook the fact that constitutional and statutory guaranties for the protection of the criminal accused deny the State a corresponding breadth of discovery, so that it is reasonable not ordinarily to allow the accused access to the prosecutor's 'work product' in the form of the statements of others, that reason cannot be applied to the accused's own confession. [...] [H]ow possibly can we say that counsel for the accused should be denied a copy in face of the affirmative findings by Judge Speakman, certainly supported by what was before him, that neither the public interest nor the prosecution of the State's case will suffer? [...] [Counsel's] primary concern was not with the voluntary or involuntary character of the confession but with the more vital issue of its credibility if it is admitted in evidence. Their investigation so far as it has gone raises doubt in their minds as to the truth of some of the things which apparently are stated in the confession. [...]

The holding of this case gives the majority's protestation that 'In this State our courts are always mindful of the rights of the accused' a hollow ring. The assurance seems doubly hollow in light of the emphasis upon formalism in this case while it has been our boast in all other causes that we have subordinated the procedural niceties to decisions on the merits.⁴⁸⁷

In the following years, we find, despite some exceptions, a strong and rapid tendency of liberalization in the relevant state jurisprudence, regarding the disclosure of confessions, tangible objects, or expert reports.⁴⁸⁸ In fact also the New Jersey Supreme Court, with partially new personnel, five years after *Tune* now made clear with a 5:2 majority that in principle the disclosure of previous statements and confessions was desirable and should regularly be granted, again for fairness, yet predominantly fact-finding reasons.⁴⁸⁹

⁴⁸⁷ *Ibid.*, at p. 231 et subs., references omitted.

⁴⁸⁸ *Fletcher*, Pretrial Discovery in State Criminal Cases, at p. 297 with numerous references.

⁴⁸⁹ *State v. Johnson*, fn. 451, at p. 136, 139 et seq.: "We start with the premise that truth is best revealed by a decent opportunity to prepare in advance of trial. We have embraced that tenet with respect to civil litigation, and absent overriding considerations, it should be as valid in criminal matters. [...] Surely it cannot be proposed that rules of practice be geared to foster convictions without regard to fairness to the individual. Justice requires that the innocent be acquitted. And even with respect to the

Justice Brennan, who drafted the minority dissent, should in the following years significantly advance the development of disclosure. Three years after *Tune*, in 1956, Justice Brennan was appointed to the U.S. Supreme Court and stayed an Associate Justice until 1990. As we will see, particularly in the years of the Warren Court⁴⁹⁰ we can notice a liberal and progressive, at times almost radical development concerning disclosure at (see the decisions until *Napue v. Illinois* below), which appears to decline in the later years of the Burger Court, as exemplified in *Agurs* and *Bagley*.

As concerns Justice Brennan, the disclosure of evidence was apparently one of the topics he was particularly passionate about. In one often-cited lecture of 1963 entitled “The Criminal Prosecution: Sporting Event or Quest for Truth?”, he also makes reference to *Tune* and analyses the contemporary disclosure law in the United States, which he takes this as an opportunity to fundamentally criticise the, in his opinion, misunderstood concept of the criminal trial as a whole. Once more, he places the truth-finding function of the criminal process in the middle of his analysis.⁴⁹¹ Notably, especially in the context of this thesis, he makes reference to foreign jurisdictions, and indeed to the Nuremberg IMT proceedings; noting with some sarcasm that, of all, the Soviet criticism of the procedure regarding disclosure had, in his mind, some merit:

*I think it is particularly ironic that, according to Mr. Justice Jackson, Soviet prosecutors at the War Crimes Trials at Nuremberg protested against adoption of the prevailing American procedures on the ground that they're "not fair to defendants." The upshot was a compromise procedure which permitted the accused at those trials more liberal discovery than allowed under American law, although apparently narrower than Soviet or French practice sanctions.*⁴⁹²

Of course we cannot necessarily say that Justice Brennan and thereby the later jurisprudence of the U.S. Supreme Court were actually influenced by Nuremberg and the reactions to its shortcomings, however, together with the mentioned reference in the 1954 note in Harvard Law Journal⁴⁹³, it appears fair to say that Nuremberg did not go entirely unnoticed in the disclosure debate.

guilty, it is no less imperative that convictions be fairly obtained; otherwise the judicial trial may as well be discarded and the issue of guilt left to executive determination.”

⁴⁹⁰ See on the Supreme Court during the time of Chief Justice Warren (1953-1969) generally *Belknap/Warren*, *The Supreme Court under Earl Warren, 1953 - 1969*.

⁴⁹¹ *Brennan*, *The Criminal Prosecution: Sporting Event or the Quest for Truth?*.

⁴⁹² *Ibid.*, at p. 283 and seq. This was a reference to *Jackson*, *Some Problems in Developing an International Legal System*, at p. 150: “[The Soviets] considered that this reduced the scope and probability of contest and also that it is more fair to a defendant than to withhold knowledge of the evidence from him until he is in court. There is much to be said in favor of this view.”

⁴⁹³ See fn. 473 *supra*.

In the same year (1964), Justice Brennan also gave the introductory remarks to a Symposium at the Judicial Conference of the District of Columbia Circuit on the topic of disclosure in criminal cases.⁴⁹⁴ Here, Justice Brennan puts more emphasis on the fair trial aspect of disclosure, as well as on the procedural management one.⁴⁹⁵ Later in his speech, he mostly recurs to what he had said in his lecture a few months before.⁴⁹⁶ His passion concerning disclosure is, of course, not least proved by the ‘progress report’ on disclosure, which he gave 27 years after the mentioned lecture, in 1990, which was the year of his retirement.⁴⁹⁷

4.2.1.2 *Roviaro v. United States*

In 1957, the U.S. Supreme Court handed down a decision in *Roviaro v. U.S.*⁴⁹⁸ The case evolved around the identity protection of government informants. The defendant had been indicted, inter alia, for selling drugs to one ‘John Doe’, the usual name given to an unidentified person, who was an informant. He had requested a bill of particulars containing, among other things, the name and address of ‘John Doe’. The government had objected on grounds of identity protection and the court denied the motion. During trial, a government officer testified on the conversation between the defendant and ‘John Doe’ which he had overheard in the trunk of a car; the only other persons present in the car being the defendant and ‘John Doe’. It was thus highly probable that the defendant knew who ‘John Doe’ was, even though the U.S. Supreme Court in the end held otherwise.⁴⁹⁹ Nevertheless, cross-examination concerning the identity of ‘John Doe’ had not been permitted by the trial court. The Court of Appeals sustained the conviction, finding that the identity of ‘John Doe’ was “wholly immaterial” on the

⁴⁹⁴ *Junior Bar Section of the Bar Association of the District of Columbia*, Discovery in Federal Criminal Cases: A Symposium at the Judicial Conference of the District of Columbia Circuit.

⁴⁹⁵ *Ibid.*, at p. 58.

⁴⁹⁶ Fn. 491 *supra*.

⁴⁹⁷ *Brennan*, The Criminal Prosecution: Sporting Event or the Quest for Truth? A Progress Report.

⁴⁹⁸ *Roviaro v. U.S.*, 353 U.S. 53, 77 S.Ct. 623, U.S. 1957.

⁴⁹⁹ *Ibid.*, fn. 8: “The record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to the trial. [...] However, any indications that petitioner, at the time of the trial, was aware of John Doe's identity are contradicted by the testimony of Officer Bryson that John Doe at police headquarters denied knowing, or ever having seen, petitioner. The trial court made no factual finding that petitioner knew Doe's identity. On this record we cannot assume that John Doe was known to petitioner, and, if alive, available to him as a witness. Nor can we conclude that John Doe died before the trial.”

charge.⁵⁰⁰ The U.S. Supreme Court granted *certiorari*. The majority generally held that first of all, if the identity is already known to the defendant, there is no need to keep it secret at trial. However, as just mentioned, the Court did not want to conclude this fact from the case record before it. It then went on to say that for reasons of fairness it may be obligatory to disclose the identity of the informant; otherwise the case would have to be dismissed:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. [...]

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.⁵⁰¹

For the particular case, the Court held that since ‘John Doe’ was the only other person involved in the actual drug transaction, and the defendant had had to assume that during the transaction he was alone with the informant, his identity and testimony would have been highly material. In a footnote, the Court also stated that regarding another count for which the accused had been tried, the materiality of ‘John Doe’s’ identity had been obviously material from the outset, which is why it should have been disclosed before and not only during the trial.⁵⁰²

Justice Clark dissented in strong words, on the grounds that the identity protection of informants in drug trafficking prosecutions is indispensable, and particularly on the grounds that in this particular case the defendant most probably did know the true identity of ‘John Doe’. He held:

In truth, it appears that petitioner hoped that the Government would not furnish the name for, if the informant was dead as he believed, petitioner's ground was cut from under him. If the informant was living he knew that even though his

⁵⁰⁰ *U.S. v. Roviario*, 229 F.2d 812, C.A.7 1956, at p. 814.

⁵⁰¹ *Roviario v. U.S.*, fn. 498 *supra*, at p. 60 et subs.

⁵⁰² *Ibid.*, at p. 65, fn. 15.

*testimony was favorable it would not be sufficient to overcome the presumption of the statute. In fact, a casual reading of the record paints a picture of one vainly engaging in trial tactics rather than searching for real defenses—shadowboxing with the prosecution in a baseless attempt to get a name that he already had but in reality hoping to get a reversible error that was nowhere else in sight. We should not encourage such tactics.*⁵⁰³

4.2.1.3 *Jencks v. United States*

Only a few months later, and related to *Rovario*, the U.S. Supreme Court handed down a landmark decision regarding disclosure, which is also closely related to Justice Jackson's holding in *Gordon*⁵⁰⁴, and considerably advanced it. It was once more Justice Brennan, now being Associate Justice of the U.S. Supreme Court, who pushed for a liberalization of criminal disclosure. The case, which took place during McCarthyism, evolved around the conviction of one Clinton E. Jencks, who had falsely sworn that he was not a member of the American Communist Party. His conviction was mainly based on the testimonies of two F.B.I. informants. The defendant had been denied to inspect the reports which had previously been written by these informants, before the trial and also later, during trial for cross-examination; this had been upheld by the trial court and on appeal. Citing *Gordon*, the denial had been based on the fact that the defendant had not laid a preliminary foundation of inconsistency between the reports and the testimonies of the witnesses. This, however, must have been impossible without knowing the contents of the reports. The U.S. Supreme Court, having granted *certiorari*, held that the denial was in error, in that the reports were obviously the only reasonable way in which the two witnesses could be impeached. Justice Brennan pointed out that the informants had admitted that part of their testimony had also been part of the reports; and since they did not remember the contents of their reports anymore, this had to suffice to constitute a foundation for the production of the documents. In relation to *Gordon*, Justice Brennan said that *Gordon* must be interpreted more widely.

[T]o say that Gordon held a preliminary showing of inconsistency a prerequisite to an accused's right to the production for inspection of documents in the Government's possession, is to misinterpret the Court's opinion. The necessary essentials of a foundation, emphasized in that opinion, and present here, are that '(t)he demand was for production of specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. Nor was

⁵⁰³ *Ibid.*, at p. 70.

⁵⁰⁴ Fn. 470 *supra*.

*this a demand for statements taken from persons or informants not offered as witnesses.’ We reaffirm and re-emphasize these essentials. ‘For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule * * *.’[...] Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in Gordon, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. [...]’⁵⁰⁵*

However, Justice Brennan went much further than that, holding that only the defence could reasonably decide whether the evidence could be of use or not; and the court was not entitled to decide over the matter:

We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of [the witnesses] in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness and thereby furthering the accused’s defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. [...] The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. [...]’⁵⁰⁶

Yet Justice Brennan did not stop here. He goes as far as saying that if the government elected to keep its reports secret and not disclose them to the defence, then this would have a cessation of the criminal prosecution, i.e. a dismissal of the charges as a necessary consequence;

⁵⁰⁵ *Jencks v. United States*, 353 U.S. 657 (1957), at p. 666 et subs., references omitted.

⁵⁰⁶ *Ibid.*, at p. 668 et seq.

It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. [...] But this Court has noticed, in United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727, the holdings of the Court of Appeals for the Second Circuit⁵⁰⁷ that, in criminal causes ‘ * * the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense * * *.’ [...] We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.⁵⁰⁸*

This holding, especially given its time, is revolutionary and, in fact, radical; apparently it provoked harsh criticism.⁵⁰⁹ We see that while Justice Brennan in his previous decisions gave high importance to the finding of the truth, fair trial aspects appear to prevail. This is particularly relevant, of course, regarding the question whether non-disclosure can be based on reasons of security or public interest immunity; and Justice Brennan opts for the radical solution. The decision was not anonymous. Justice Burton and with him Justice Harlan, concurring, held that the decision took too much discretion away from the trial judge whether to grant disclosure or not, and that there was no need to this radicalism:

The trial judge exercises his discretion with knowledge of the issues involved in the case, the nature and importance of the Government's interest in maintaining secrecy, and the defendant's need for disclosure. By vesting this discretion in the trial judge, the conflicting interests are balanced, and a just decision is reached in the individual case without needless sacrifice of important public interests.⁵¹⁰

⁵⁰⁷ *United States v. Beekman*, 155 F.2d 580; *United States v. Andolschek*, 142 F.2d 503.

⁵⁰⁸ *Jencks v. United States*, fn. 505, at p. 670 et subs.

⁵⁰⁹ See Note: The Jencks Legislation: Problems in Prospect, 67 *Yale Law Journal* (1958), 674-699, at p. 680 et subs.

⁵¹⁰ *Ibid.*, at p. 677.

Justice Clark, as in *Rovario*, dissented poignantly, and probably not without merit, holding:

*The Court holds 'that the criminal action must be dismissed when the Government, on the grounds of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.' This fashions a new rule of evidence which is foreign to our federal jurisprudence. [...] Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.*⁵¹¹

In fact, the Congress did react immediately on this decision, by passing the 'Jencks Act'⁵¹², which provides that disclosure of the relevant documents must take place *after* the witness has testified in direct examination. If the government determines that parts of the documents relate to other matters than the subject matter of the witness' testimony, the court must, in camera, excise those parts and deliver the rest of the material to the defendant. The government, however, need not comply with the order of the court, which has as a consequence that the witness' testimony must be stricken from the record; the judge may also, in the interests of justice, declare a mistrial. This legislation obviously tries to strike a balance between the rights of the accused and national security interests of the state.⁵¹³ Some of the substance of this rule has also made its way into the Federal Rules of Criminal Procedure, and has since 1979 been included, with some amendments, in Rule 26.2 FRCP. This topic is indeed relevant for matters of disclosure, not least, as we will see below, on the international level.

However, the Supreme Court upheld its jurisprudence that the fair trial guarantees of the Constitution of the United States, i.e. the due process clause of the 5th or 14th Amendment, do not *per se* require pre-trial disclosure. While reiterating that disclosure of the defendant's confession might be the "better practice", it was maintained that it is generally in the discretion of the trial court whether to grant it or not.⁵¹⁴

⁵¹¹ *Ibid.*, at p. 681 et seq.

⁵¹² 71 Stat. 595 (1957); 18 U.S.C. § 3500.

⁵¹³ See as to the Supreme Court judgment and the Jencks Act in general Note: The Jencks Legislation: Problems in Prospect, 67 *Yale Law Journal* (1958), 674-699.

⁵¹⁴ *Cicenia v. La Gay*, 357 U.S. 504, 78 S.Ct. 1297, U.S. 1958, at p. 511: "[A]lthough it may be the 'better practice' for the prosecution to comply with a request for inspection, we cannot say that the discretionary refusal of the trial judge to permit inspection in this case offended the Fourteenth

4.2.1.4 *Pittsburgh Plate Glass Co. v. United States*

In some relation to *Jencks* we find another decision which evolves around the question of inconsistent statements of witnesses before the grand jury and later in trial. As we have seen in Chapter 2, the secrecy of grand jury proceedings according to Rule 6 (e) of the original version of the FRCP was difficult to penetrate, and in any case was at the discretion of the judge.⁵¹⁵ In *Pittsburgh Plate Glass Co. v. United States*⁵¹⁶, the defendants had been convicted on a conspiracy charge. Their motion for a discovery of grand jury testimony in order to find inconsistencies had been denied by the trial court; this was upheld by the Court of Appeals.⁵¹⁷ The U.S. Supreme Court by majority also upheld the decision:

It appears to us clear that Jencks v. United States, supra, is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise, it is equally clear that Congress intended to exclude those minutes from the operation of the so-called Jencks Act, 71 Stat. 595, 18 U.S.C. (Supp. V, 1958) s 3500, 18 U.S.C.A. s 3500. [...] Petitioners argue, however, that the trial judge's discretion under Rule 6(e) must be exercised in accordance with the rationale of Jencks; namely, upon a showing on cross-examination that a trial witness testified before the grand jury-and nothing more-the defense has a 'right' to the delivery to it of the witness' grand jury testimony. This conclusion, however, runs counter to 'a long-established policy' of secrecy older than our Nation itself. [...] It does not follow, however, that grand jury minutes should never be made available to the defense. This Court has long held that there are occasions when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial. Certainly 'disclosure is wholly proper where the ends of justice require it.' The burden, however, is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy. We have no such showing here. [...] Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge.⁵¹⁸

Amendment..” Justice Brennan took no part in the consideration or decision of that case; three Justices dissented, albeit apparently not for reasons of disclosure but infringement of the right to counsel.

⁵¹⁵ See section 2.2.1 *supra*.

⁵¹⁶ *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 79 S.Ct. 1237, U.S. 1959

⁵¹⁷ *Pittsburgh Plate Glass Co. v. U.S.*, 260 F.2d 397, C.A.4 1958

⁵¹⁸ *Pittsburgh Plate Glass Co. v. U.S.*, fn. 516, at p. 398 et subs., references omitted.

The majority thus sticks to the centuries-old tradition of secrecy of grand jury proceedings. They do, however, leave loopholes of discretion “where the ends of justice require it”, as well as leaving open the question whether the court itself can be asked to inspect the material before the defence.

Justice Brennan, and joining him justices Black and Douglas, dissented. Referring to his own holding in *Jencks*, he stated:

*The considerations which moved us to lay down this principle as to prior statements of government witnesses made to government agents obviously apply with equal force to the grand jury testimony of a government witness. For the defense will rarely be able to lay a foundation for obtaining grand jury testimony by showing it is inconsistent with trial testimony unless it can inspect the grand jury testimony, and, apparently in recognition of this fact, the Court holds today that a preliminary showing of inconsistency by the defense would not be necessary in order for it to obtain access to relevant grand jury minutes.*⁵¹⁹

Justice Brennan, goes on to reiterate his opinion in *Jencks* that the trial court should not be involved in the disclosure process, for only the defence can assess properly whether the evidence is material or not. This arguably runs counter to the *Jencks* act, which specifically provided that the court should inspect the relevant material first.

4.2.1.5 *Napue v. Illinois*

Another decision worth mentioning in this regard is the 1959 *certiorari* decision in *Napue v. Illinois*⁵²⁰. Even though it does not technically involve disclosure, it demonstrates once more the importance of truth finding and the prosecution’s commitment to it in its role as a minister of justice. The key witness and co-perpetrator in a murder trial (one Hamer) had been promised that the prosecuting attorney would recommend a reduction of his sentence. On cross-examination the witness had denied any promises, as well as in his redirect-examination; in a subsequent testimony the witness, however, had stated that somebody *had* made him a promise, but that that person had not been a state representative, but probably some public defence lawyer. The jury thus knew that the witness had lied. It was for this reason that the Illinois

⁵¹⁹ *Ibid.*, at p. 408.

⁵²⁰ *Napue v. People of State of Ill.*, 360 U.S. 264, 79 S.Ct. 1173, U.S. 1959, opinion by Chief Justice Warren.

Supreme Court denied a retrial.⁵²¹ The U.S. Supreme Court granted *certiorari*. Citing previous jurisprudence, it held that not only is the prosecution not allowed to use perjured testimony relating to the guilt of the defendant,⁵²² but it is also banned from using evidence which relates to the credibility of the evidence. This is a ‘feature’ which we will run across again when examining the disclosure of exculpatory evidence at the modern international tribunals. In this regard, one can also mention the U.S. Supreme Court Decision of *Alcorta v. Texas*⁵²³, in which the Court held that the disclosure obligation also exists regarding material which is only relevant for the sentencing, not the determination of guilt. Furthermore, and at least as importantly, the decision points out that the prosecutor must intervene if the perjured testimony appears during the trial. This duty of intervention is indeed closely related to disclosure obligations, and reminds us once again of the duty to disclose inconsistent witness statements.⁵²⁴

*First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [...] The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.*⁵²⁵

Another point worth mentioning, however, especially in the context of this thesis, is the special circumstance that the jury had in fact already known that the witness had lied. Therefore, as the Supreme Court of Illinois had argued, there was technically no need to

⁵²¹ *Napue v. People*, 13 Ill.2d 566, 150 N.E.2d 613, Ill. 1958, at p. 570: “Hamer's testimony to the effect that no promise had been given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof. We think, therefore, that under the circumstances of this case the trial court was warranted in concluding there was no constitutional infirmity by virtue of the false statement.”

⁵²² See, e.g., *Mooney v. Holohan*, fn. 89 above.

⁵²³ 355 U.S. 28 (1957).

⁵²⁴ See section 2.1.2. above.

⁵²⁵ *Napue v. Illinois*, fn. 523 *supra*, at p. 269.

reverse the judgment of the trial court, since the defendant had not been deprived of his due process rights. The U.S. Supreme Court, however, held that it did make a difference whether the jury might believe that it was actually not the prosecution who made the promise to reach a reduction of the sentence but someone who is not attributable to the State:

Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one. As Mr. Justice Schaefer, joined by Chief Justice Davis, rightly put it in his dissenting opinion below:

'What is overlooked here is that Hamer clearly testified that no one had offered to help him except an unidentified lawyer from the public defender's office.'

Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration.⁵²⁶

The U.S. Supreme Court thus arguably makes the case that there is indeed a difference regarding the 'kind', or 'level' of falsity, or, for that matter, of the scope of a trial with regard to the determination of the (whole) truth. This can only be explained with the special role that the prosecution has as a minister of justice, which makes it more than just a party of adversary judicial proceedings.⁵²⁷

At the state level, the cases of the 1950ies apparently did not have a major impact. The jurisprudence in the states, while overall moving towards more liberal disclosure, is heterogeneous during this time.⁵²⁸

⁵²⁶ Ibid., at p. 270.

⁵²⁷ See Note: The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale Law Journal (1964), 136-150, at p. 138 et seq. See also *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, N.Y. 1956, at p. 556 et seq.: "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. [...] A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict."

⁵²⁸ See *Fletcher*, Pretrial Discovery in State Criminal Cases; see also Note: Developments in the Law - Discovery, 74 Harvard Law Review (1961), 940-1072.

4.2.1.6 *Brady v. Maryland*

In close relation to *Napue v. Illinois* is another landmark decision regarding disclosure: *Brady v. Maryland*⁵²⁹. In this case, the petitioner had been indicted for murder and pleaded guilty, albeit stated that he had not committed the actual killing; he was sentenced to death. A co-perpetrator, who was tried separately, had previously confessed to the prosecution that he had done the actual killing, the petitioner being only a bystander. This confession had been suppressed by the prosecution, and only later used in the trial of the co-perpetrator. The appeals court had held that this non-disclosure was unconstitutional as an infringement of due process (5th and 14th Amendment to the U.S. Constitution), and remanded the case for a re-trial, albeit only on the question of punishment.⁵³⁰ The U.S. Supreme Court granted *certiorari* and upheld the decision of the appeals court:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The principle of Mooney v. Holohan⁵³¹ is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals.⁵³²

As was shown in previous decisions, the U.S. Supreme Court is not inclined to tamper with perjured evidence. However, this decision goes further in that it treats perjured evidence and evidence which is not perjured, but suppressed by the prosecution, equally. The decision is explicitly based on the due process rights of the accused. This is accurate in the sense the defendant is in a much weaker position than the prosecution,

⁵²⁹ 373 U.S. 83, 83 S.Ct. 1194, U.S.Md. 1963. The decision, though announced by Justice Brennan, had been drafted by Justice Douglas.

⁵³⁰ *Brady v. State*, 226 Md. 422, 174 A.2d 167, Md. 1961.

⁵³¹ See note 89 above.

⁵³² *Brady v. Maryland*, fn. 529 above, at p. 87 et seq.

and this is aggravated if the prosecution suppresses material. The adequate preparation of a defence is thereby made virtually impossible. Nevertheless, it appears justified to also mention the importance for truth-finding in this regard: without the confession it was impossible to get the ‘whole picture’, namely in this case, that the accused was not the one who physically perpetrated the killing. However, the defence did not have access to the evidence, and could not obtain it without the assistance of the prosecution. The mandatory disclosure of exculpatory evidence indeed serves the interest of justice both as regards fairness and truth.

Brady v. Maryland has retained an enormous significance until today.⁵³³ As we could already observe above in the English system, the importance of ‘unused’ evidence has been successively recognized during the 20th century. Nevertheless, as of 2010, the disclosure of exculpatory evidence still rests on *Brady* and subsequent jurisprudence, such as *Giglio*⁵³⁴; and exculpatory evidence which needs to be disclosed is generally referred to as “Brady material”. In contrast to *Jencks*,⁵³⁵ the disclosure rules related to *Brady* have not yet⁵³⁶ found their way into the FRCP; the disclosure of exculpatory material is still not regulated by statute.

4.2.1.7 *Dennis v. United States*

The 1966 case of *Dennis v. United States*⁵³⁷, like *Pittsburgh Plate Glass* some years earlier, evolved around the question of inconsistent statements of witnesses before the grand jury and later in trial. The defendants had been convicted on communism-related offences; the first judgment was reversed on the ground of admittance of prejudicial hearsay evidence.⁵³⁸ In the retrial they were convicted again. A motion (at trial) for the production of grand jury testimony of prosecution witnesses in order to find

⁵³³ See generally, also with some critical tones *Cerruti*, Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins and Due Process, as well as *Sundby*, Fallen Superheroes and Constitutional Mirages: The Tale of *Brady v. Maryland*.

⁵³⁴ See section 4.2.1.8 below.

⁵³⁵ See as to the consequences of *Jencks* for the FRCP section 4.2.2.3 below.

⁵³⁶ See as to proposals to amend Rule 16 FRCP accordingly *American College of Trial Lawyers*, Proposed Codification of Disclosure of Favorable Information under Federal Rules of Criminal Procedure 11 and 16.

⁵³⁷ *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, U.S. Colo. 1966. It may be noted that the attorney for the petitioners before the U.S. Supreme Court was Telford Taylor, who had been assistant to Robert H. Jackson in Nuremberg and later became Chief Counsel himself for the twelve Nuremberg ‘Follow-Up’ trials.

⁵³⁸ *Dennis v. U.S.*, 302 F.2d 5, C.A. Colo. 1962.

inconsistencies had been denied. In contrast to *Pittsburgh Plate Glass*, however, the defendants had made the motion to disclose the testimony either to the defence or alternatively the court; which, as we have seen above, the U.S. Supreme Court had left open in *Pittsburgh Plate Glass*. The motion had been denied by the trial court. This was upheld by the Court of Appeals, albeit expressing serious doubts and stating that an inspection by the court would have been “safer”.⁵³⁹ The U.S. Supreme Court granted *certiorari* and reversed, holding that the decision of non-disclosure by the trial court was reversible error, and stating that the general development of disclosure demanded a more liberal approach

This Court has recognized the ‘long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.’ [...] In general, however, the Court has confirmed the trial court’s power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony ‘preliminarily to or in connection with a judicial proceeding.’ In United States v. Socony-Vacuum Oil Co, the Court acknowledged that ‘after the grand jury’s functions are ended, disclosure is wholly proper where the ends of justice require it.’ And in Pittsburgh Plate Glass, where four members of the Court concluded that even on the special facts of that case the witness’ grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of ‘particularized need’ defense counsel might have access to relevant portions of the grand jury testimony of a trial witness. [...] These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is [...] also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice

⁵³⁹ *Dennis v. U.S.*, 346 F.2d 10, C.A.Colo., 1965, at p. 17 et seq.: “[W]e have left no doubt of the inherent power and the inescapable duty of the trial court to lift the lid of secrecy on grand jury proceedings in aid of the search for truth. The court should not hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment. In determining variances or inconsistencies we should remember that flat contradictions are not the only test of inconsistency. Omissions of fact or even contrast in emphasis or different order of treatment may be relevant to the process of testing credibility of a witness’ trial testimony. Our affirmance is based primarily on the proposition that inasmuch as the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency, it is safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance. While it would have been safer to have inspected the grand jury testimony, in these peculiar circumstances we remain unwilling to say the trial court committed reversible error by refusing the ‘in camera’ inspection.”

In Pittsburgh Plate Glass, supra, the Court reserved decision on the question whether in camera inspection by the trial judge is an appropriate or satisfactory measure when there is a showing of a 'particularized need' for disclosure. [...] While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony – and we do not disapprove it for that purpose – it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. [...] Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced.⁵⁴⁰

The dissent of Justices Douglas and Black did not refer to this point in the judgment. We see that this is a significant digression from *Pittsburgh Plate Glass*, and indeed Justice Brennan's dissent in *Pittsburgh Plate Glass* is cited more often than the majority opinion in that case. It also arguably incorporates some of the holdings in *Jencks*, in that it downplays, though not excludes, the role of the judge in the disclosure process. As we have stated in the introduction and as we will see especially regarding the international courts and tribunals, the judges play indeed an ever more important role in the disclosure process by inspecting the material which the prosecution is not willing to disclose to the defence.

4.2.1.8 *Giglio v. United States*

In close relation to *Brady* and *Napue* is the *certiorari* decision of *Giglio v. United States*⁵⁴¹. Once more, the case evolved around an alleged co-perpetrator, who during the investigation had been given a promise by the prosecution that he would not be prosecuted if he testified against the accused; this fact had been discovered by the defence only after the conviction of the defendant. The prosecuting attorney in the trial,

⁵⁴⁰ *Dennis v. United States*, fn. 537 *supra*, at p. 869 et subs., 874 et subs., references partially omitted.

⁵⁴¹ 405 U.S. 150, 92 S.Ct. 763, U.S. 1972.

however, had no knowledge of this promise, and in his summation stated that the witness had not received any promise of non-prosecution. The U.S. Supreme Court held, combining its holdings in *Brady* and *Napue* that the prosecution, irrespective of good or bad faith, is required to disclose matters which may cast doubt on the credibility of a witness. Therefore, it held that it is irrelevant whether the prosecuting attorney knew of the promise made by his predecessor and also whether either of the two was legally in a position to make any promises to the witness. Quite importantly, the Court stated that the actions of the prosecutors are in any case attributable to the *Government*:

[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. [...] To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it. Here the Government's case depended almost entirely on [the witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. [The witness'] credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.⁵⁴²

This, in our opinion, makes clear that it is all the more difficult to speak of the prosecution as a party in criminal proceedings which is on the same level as the accused as an individual.

4.2.1.9 *United States v. Agurs*

In 1976, the U.S. Supreme Court apparently found that the liberalization of discovery had gone a too far. In *United States v. Agurs*⁵⁴³, the Court once again decided by way of *certiorari* on a matter relating to potentially exculpatory evidence. The petitioner had been convicted for second degree murder. In the trial, she had pleaded self-defence. The victim had had a record of violent crimes, a fact which had not been disclosed by the prosecution; the defence, however, had not made any disclosure request before the trial, because the defence attorney was of the opinion that the prior record of the victim would be inadmissible if the accused had no knowledge of it, a legal opinion which, as

⁵⁴² Ibid., at p. 154 et seq.

⁵⁴³ 427 U.S. 97, 96 S.Ct. 2392, U.S. Dist. Col. 1976.

clarified by the U.S. Supreme Court little after the incident, was wrong.⁵⁴⁴ After the trial, the defence applied for a new trial, stating that the prosecution had violated its obligations under *Brady* by not disclosing the victim's record. The District Court denied the motion on the grounds of a lack of materiality since the victim's violent character had become sufficiently apparent during the trial. The Appeals Court, however, reversed, stating that the jury might have found a different verdict, had the record been disclosed and eventually presented at the trial.⁵⁴⁵

The U.S. Supreme Court first reiterated the function of the criminal trial as a means to the determination of the truth; however, it prepares a restriction as to the case before it. Justice Steven, delivering the majority opinion, stated:

[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. It is this line of cases on which the Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the Mooney line of cases is not necessarily applicable to this case.⁵⁴⁶

The Court then joined the District and Appeals Courts in that it can make no difference whether a general request for disclosure is made or not, when the defence cannot know that a specific piece of evidence exists. To oblige the defence to make a general request for "all Brady material" would, in the opinion of the majority of the Court, amount to unwarranted formalism:

In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all Brady material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor.⁵⁴⁷

⁵⁴⁴ *U.S. v. Burks*, 470 F.2d 432, C.A.D.C., 1972.

⁵⁴⁵ *U.S. v. Agurs*, 510 F.2d 1249, C.A.D.C. 1975.

⁵⁴⁶ *Ibid.*, at p. 103 et seq., references omitted.

⁵⁴⁷ *Ibid.*, at p. 106 et seq.

Preparing to define what evidence had to be considered ‘material’ in the sense that it needed to be disclosed, the Court made clear once again that while a liberal disclosure practice might be desirable, due process does not require an entirely open file:

Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. [...] For a jury's appraisal of a case “might” be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.⁵⁴⁸ [...]

The Court then goes on to state that materiality needs to be evaluated from an *ex post* perspective, meaning that the entire record of the trial must be taken into account. The Court holds that the standard in such a case, where the ‘newly discovered’ evidence had actually been in the hands of the prosecution, must lie in between the ‘normal’ standard for ordering a new trial, meaning that the accused needs to show that he would probably have been acquitted, had the new evidence been introduced in the trial, and the standard of ‘harmless error,’ meaning that if the evidence would not, or only slightly have had an effect on the finding of the jury.⁵⁴⁹ However, the Court goes on to say that only if the undisclosed material casts a reasonable doubt on the finding of guilt, the judgment must be reversed:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of

⁵⁴⁸ Ibid., at p. 108 et subs., references omitted.

⁵⁴⁹ Ibid., at p. 111 et seq.

*questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.*⁵⁵⁰

In the end, the Court apparently proposes a three-fold approach: (1) when the prosecution knowingly uses perjured evidence or leaves it uncontested, the trial must inevitably be reversed.⁵⁵¹ (2) When evidence which is not perjured is not disclosed, but had been specifically requested by the defence, the trial must also be reversed, if there is “any reasonable likelihood” that the result of the trial would have been different.⁵⁵² (3) In a case like the present one, where no request has been made, the undisclosed evidence must cast a “reasonable doubt” on the outcome of the trial, which has the effect that without a request only material which is “obviously exculpatory”⁵⁵³ needs to be disclosed. This standard, the Court held, was the one applied by the District Judge; and therefore it reversed the decision of the Court of Appeals. The U.S. Supreme Court thus in essence applied the usual standard of ‘newly discovered evidence’ to this case, in that it must be shown that the outcome of the trial would probably have been different. This arguably results in a reversal of the burden of proof. It is therefore not surprising that Justice Brennan, whom we have gotten to know as a strong supporter of liberal defence discovery, dissented, concurring with Justice Marshall, who drafted the dissenting opinion:

*The Court today holds that the prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. But once having recognized the existence of a duty to volunteer exculpatory evidence, the Court so narrowly defines the category of “material” evidence embraced by the duty as to deprive it of all meaningful content. [...]*⁵⁵⁴

Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him. [...] No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the

⁵⁵⁰ Ibid., at p. 112 et seq., references omitted.

⁵⁵¹ The prime example being *Mooney v. Holohan*, see fn. 89 above.

⁵⁵² The prime example being *Brady v. Maryland*, see above fn. 529.

⁵⁵³ See once again *United States v. Agurs* at p. 103 et seq., fn. 546

⁵⁵⁴ Ibid., at p. 114.

*prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command.*⁵⁵⁵

*Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.*⁵⁵⁶

*[The Court holds that i]n cases in which “the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury,” the judgment of conviction must be set aside “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” This lesser burden on the defendant is appropriate, the Court states, primarily because the withholding of evidence contradicting testimony offered by witnesses called by the prosecution “involve(s) a corruption of the truth-seeking function of the trial process.” But surely the truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution.*⁵⁵⁷

This critique is certainly justified. It must be admitted that, if anything that *might* have influenced the jury must be disclosed, it is difficult to argue that anything short of full access to the prosecution file should be constitutional. However, the prior record of the victim in a case where the accused pleads self-defence is almost necessarily material for the defence. In case of doubt, the decision should always be made in favour of disclosure. One gets the impression that although the majority claimed that a request to “all Brady material” would amount to formalism and thus need not be made, they had the particular case in mind, finding a sort of compensation for the non-disclosure in the fact that the ‘violent character’ of the victim had become apparent during the trial and quite possibly also in the accused’s defence counsel’s negligence.

⁵⁵⁵ Ibid., at p. 116.

⁵⁵⁶ Ibid., at p. 117.

⁵⁵⁷ Ibid., at p. 120.

4.2.1.10 *United States v. Bagley*

A further refinement (or complication) of the question of materiality came about with the U.S. Supreme Court's 1985 decision in *U.S. v. Bagley*⁵⁵⁸. In this somewhat controversial⁵⁵⁹ decision promises of financial reward which had been made to two prosecution witnesses had not been disclosed, even though specifically the discovery of any promises made to the witnesses had been requested. Instead, it appeared from the answer of the prosecution that no promises had been made. The defence, however, obtained the relevant information by other means, and requested a retrial, which was denied by the District Court (in fact, by the same judge who had sat in the summary trial) on the grounds of non-materiality; the Court found beyond reasonable doubt that, had the material been disclosed, the result would not have been different. This was reversed by the Appeals Court; the main ground for reversal being that a failure to disclose material for cross-examination amounts to an impairment of the right to confront witnesses;⁵⁶⁰ however, the Appeals Court also criticized the reasoning of the District Court with regard to the failure to produce Brady material upon the specific request.⁵⁶¹ By majority, the U.S. Supreme Court reversed this decision and remanded the case back to the Court of Appeals. Citing *Agurs*⁵⁶², Justice Blackmun stated,:

The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [Note 6: By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).] Thus, the prosecutor is not required to deliver his

⁵⁵⁸ *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, U.S.Wash., 1985.

⁵⁵⁹ "Justice Blackmun delivered the opinion of the Court with respect to Parts I and II; Justice Blackmun, joined by Justice O'Connor, delivered an opinion with respect to Part III; Justice White filed an opinion concurring in part and concurring in the judgment, in which Chief Justice Burger and Justice Rehnquist joined; Justice Marshall filed a dissenting opinion in which Justice Brennan joined; Justice Stevens filed a dissenting opinion."

⁵⁶⁰ *Ibid.*, at p. 1464.

⁵⁶¹ *Bagley v. Lumpkin*, 719 F.2d 1462 (1983).

⁵⁶² See fn. 545 above.

*entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial [...].*⁵⁶³

The Court held that the ruling of the Appeals Court that the non-disclosure of impeachment evidence amounted to an infringement of the right to witness confrontation was in error, and that impeachment evidence had to be treated like exculpatory evidence as falling under the Brady rule.⁵⁶⁴ Referring to the reasoning in *Agurs* once again, the Court stated:

“If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.”^[565] *The standard of materiality applicable in the absence of a specific Brady request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard.*⁵⁶⁶

As we have seen, *Agurs* basically resulted in the ‘newly-discovered-evidence’ standard (meaning that the accused has to prove that the trial would ‘probably’ have resulted in an acquittal), though claiming that it wasn’t; the Court in *Bagley* appears to confuse the question of request, which *Agurs* had said was irrelevant if the request could only be general anyway, with the question of materiality. Relying on the decision in *Strickland v. Washington*⁵⁶⁷, the Court held that ‘reasonable probability’ as in *Agurs* should mean a “probability sufficient to undermine confidence in the outcome”, since this standard was “sufficiently flexible”.⁵⁶⁸ Since the Court of Appeals had based its reversal mainly on the question of witness confrontation but expressed some doubts as to the “beyond reasonable doubt” reasoning of the District Court, the U.S. Supreme Court remanded the case back to the Court of Appeals to reconsider it applying the newly found standard. The fact that this standard for its part is not particularly clear is obviously intended by the majority for its “flexibility”.

Justice White formulated a concurring opinion holding that while the ‘reasonable probability’ approach was justified, the specific analysis of the kind of discovery

⁵⁶³ *U.S. v. Bagley*, fn. 558 *supra*, at p. 675.

⁵⁶⁴ *Ibid.*, at p. 676 et subs.

⁵⁶⁵ *U.S. v. Agurs*, fn. 545 *supra*, at p. 111 et seq

⁵⁶⁶ *Ibid.*, at p 678.

⁵⁶⁷ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, U.S.,1984

⁵⁶⁸ *U.S. v. Bagley*, fn. 558 *supra*, at p. 682.

request and its specificity were superfluous. Chief Justice Burger and Justice Rehnquist joined.⁵⁶⁹

As in *Agurs*, Justice Marshall and, joining him, Justice Brennan, dissented, their dissenting opinion is quite a bit longer than the majority opinion. They started out with the determination that when the undisclosed evidence is impeaching material for the state's *only* witnesses, it can logically not be harmless error not to disclose it.⁵⁷⁰ What follows is, for the most part, based on the premise that disclosure, and especially disclosure of exculpatory material, advances the discovery, or emergence, of the truth, as well as general fairness for the defendant.⁵⁷¹

Our system of criminal justice is animated by two seemingly incompatible notions: the adversary model, and the state's primary concern with justice, not convictions. Brady, of course, reflects the latter goal of justice, and is in some ways at odds with the competing model of a sporting event. Our goal, then, must be to integrate the Brady right into the harsh, daily reality of this apparently discordant criminal process.

At the trial level, the duty of the state to effectuate Brady devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing Brady. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of Brady, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case.⁵⁷²

Justice Marshall goes on to state that disclosure of favourable evidence enhances truth-finding and fairness, from which he draws the conclusion that, lacking a countervailing interest, due process requires accordingly. The bases for counter-arguments, such as possible witness intimidation or administrative difficulties, he holds, either do not exist or can be circumvented by other means. Interestingly, and in fact surprisingly, given the fact that the decision dates from 1985, he obviously does want to retain some element of surprise for the prosecution, since he is obviously not in favour of an open file discovery, which would include inculpatory evidence, too; the disclosure of prosecution evidence was, as we have seen above, in the English and also partially in the American

⁵⁶⁹ *Ibid.*, at p. 685.

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*, at p. 692 et subs.

⁵⁷² *Ibid.*

procedure was actually something that came *before* anyone even thought about disclosing unused material:

Neither of these concerns, however, counsels in favor of a rule of nondisclosure in close or ambiguous cases. To the contrary, a rule simplifying the disclosure decision by definition does not make that decision more complex. Nor does disclosure of favorable evidence inevitably lead to disclosure of inculpatory evidence, as might an open file policy, or to the anticipated wrongdoings of defendants and their lawyers, if indeed such fears are warranted. We have other mechanisms for disciplining unscrupulous defense counsel; hamstringing their clients need not be one of them. I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.⁵⁷³

In the third part of his dissenting opinion, Justice Marshall analyzes the materiality standard as defined by the majority, and quite rightly points out that it has the consequence of asking from the prosecutor to apply what is basically an *ex post* analysis prior to trial, which he sees as both impossible to properly apply and as an invitation to unscrupulous prosecutors.⁵⁷⁴ While reiterating that *Brady* requires to disclose *all* exculpatory material, Justice Marshall makes clear that this does not mean that any non-disclosure requires a new trial, however, he argues for an application of the ‘harmless error’ test, meaning that, for the review of decisions, i.e., from an *ex post* perspective it must be clear beyond a reasonable doubt that the undisclosed evidence would not have had any effect on the outcome of the trial; for the *ex ante* perspective of the prosecutor before trial, he that a presumption for disclosure should be maintained:

In so saying, I recognize that a failure to divulge favorable information should not result in reversal in all cases. It may be that a conviction should be affirmed on appeal despite the prosecutor's failure to disclose evidence that reasonably might have been deemed potentially favorable prior to trial. The state's interest in nondisclosure at trial is minimal, and should therefore yield to the readily apparent benefit that full disclosure would convey to the search for truth. After trial, however, the benefits of disclosure may at times be tempered by the state's legitimate desire to avoid retrial when error has been harmless. However, in making the determination of harmlessness, I would apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial.⁵⁷⁵

⁵⁷³ *Ibid.*, at p. 699.

⁵⁷⁴ *Ibid.*, at p. 699 et subs., references omitted.

⁵⁷⁵ *Ibid.*, at p. 696 et seq., 704.

Finally Justice Stevens also delivered a dissenting opinion, stating that he, like Justice Marshall, sees *Bagley* as clearly comparable with *Brady* since there was a specific request by the prosecution; however, he also gets to the conclusion that the case should be remanded to the Court of Appeals, albeit not on the new standard as formulated by the majority, but under the usual *Brady* standard – he holds that the Supreme Court should not itself decide on the basis of the trial record. He does, however, generally support the majority in *Agurs*, in that he holds that without a specific request *Brady* is not applicable.

4.2.1.11 *Kyles v. Whitley*

In 1995, another important and disputed decision was handed down with respect to favourable evidence. In *Kyles v. Whitley*⁵⁷⁶ the defendant had been found guilty of murder and sentenced to death. He had been incriminated by one ‘Beanie’,⁵⁷⁷ who had given several different and inconsistent statements, which in fact cast a suspicion on himself, too. Furthermore, not all of the eyewitnesses had identified the defendant in a photo line-up. These facts, however, were withheld from the defence, even though there had been a specific request. In the first trial, the jury was hung; in the second trial, with the same conditions as regards disclosure, the defendant was convicted. His appeals were not successful, though it later turned out that at least one of the eye witnesses had testified wrongly in court. The U.S. Supreme Court invoked, among other cases, *Mooney*, *Brady*, *Agurs*, and *Bagley*. It interprets *Bagley* quite widely, stating:

Bagley's touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.” The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should

⁵⁷⁶ *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, U.S.La.,1995.

⁵⁷⁷ This was apparently not his real name, but since he used several different aliases, the Court also referred to him as ‘Beanie’.

*have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.*⁵⁷⁸

The Court emphasizes again that the U.S. Constitution does not demand an open-file policy; and that the prosecution retains a level of discretion regarding exculpatory material. However, it is the task of the prosecution to make sure that the “point of materiality” is not reached.⁵⁷⁹ Of course, this does not really clarify the *Bagley* standard of materiality. The Court reiterates the *Brady* holding that whatever the police collects as evidence and consequently transmits to the prosecution, is in the sole responsibility of the prosecution, which is therefore held responsible even when it is not aware of the exculpatory evidence itself. As to the argument that the responsibility of the prosecutor to judge whether the evidence is exculpatory or not places too much of a burden on him, the Court remarks, with regard to the role of the prosecutor in the adversary trial as a truth-finding device:

*[I]t is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as “the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. The prudence of the careful prosecutor should not therefore be discouraged.*⁵⁸⁰

The Court then went on to evaluate the undisclosed material, and found that in fact taken as a whole it easily reached the threshold of materiality meaning that it did undermine confidence in the outcome of the trial.

⁵⁷⁸ *Kyles v. Whitley*, fn. 576 *supra*, at p. 434 et seq., reference omitted.

⁵⁷⁹ *Ibid.*, at p. 437.

⁵⁸⁰ *Ibid.*, at p. 439 et seq., references partially omitted.

Justice Scalia, and, joining him, Chief Justice Rehnquist and Justices Kennedy and Thomas dissented. First of all, he states that *certiorari* should not have been granted, indicating that the *habeas corpus* petition of the defendant was based merely on the wrong application of the law on the facts. Other than that, Justice Scalia restricts himself to pointing out in considerable length why the prosecution case was still strong.

4.2.1.12 The Federal Rules of Criminal Procedure

As pointed out in Chapter 2, the Federal Rules of Criminal Procedure entered into force in 1946. Since then, they have been amended many times. These changes not least had considerable impact on the rules of discovery; Rule 16 was amended nine times between 1946 and 1994;⁵⁸¹ and has also since been amended several times.⁵⁸² In the framework of this thesis, it is impossible to give a detailed overview as to the development of the Rules. What concerns us is predominantly the development between 1946 and the mid-1990ies, which is when the international Ad Hoc Tribunals took up their work. We will therefore limit our description to a brief comparison of the original FRCP and the 1994 version – an ‘optical’ comparison, as a matter of fact, speaks for itself. Due to the sheer length of Rule 16 and the difference in wording, it appears superfluous to make a synopsis as is usually done later in this thesis when analyzing the rules of the Ad Hoc tribunals and those of the ICC.

Rule 16 as of 1946:

Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defence and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions that are just.

Rule 16 as of 1994:

Discovery and Inspection

(a) Governmental Disclosure of Evidence

(1) Information Subject to Disclosure

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any

⁵⁸¹ See notes in FRCP issue U.S. Government Printing Office, Washington 1994.

⁵⁸² The current version can be accessed on the internet at <http://www.law.cornell.edu/rules/frcrmp/>.

relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct in which the person was involved.

(B) *Defendant's Prior Record.* Upon request of the defendant, the government shall furnish the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) *Documents And Tangible Objects.* Upon request of the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belonged to the defendant.

(D) *Reports Of Examinations And Tests.* Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) *Expert Witnesses.* At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefore, and the witnesses' qualifications.

(2) *Information Not Subject To Disclosure.* Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses except as provided in 18 U.S.C. § 3500.

(3) *Grand Jury Transcripts.* Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) *The Defendant's Disclosure of Evidence*

(1) *Information Subject To Disclosure*

(A) *Documents And Tangible Objects.*

If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, shall permit the government to inspect

and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports Of Examinations And Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefore, and the witnesses' qualifications.

(2) Information not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

(c) Continuing Duty To Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other's party attorney or the court of the existence of the additional evidence or material.

(d) Regulation Of Discovery.

(1) Protective and Modifying Orders. Upon sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of appeal.

(2) Failure To Comply With A Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

It is obvious that the original Rule 16 was transformed into something entirely different. In Chapter 2, we had taken a look at the limited scope of the original wording; already with the first revision of the FRCP in 1966 it was considerably widened.⁵⁸³ We find some reminiscence of the original rule in subdivision (a)(1)(C).

⁵⁸³ Printed in: United States Code Annotated, Title 18, Federal Rules of Criminal Procedure, Cumulative Annual Pocket Part For Use In 1969, St. Paul, Minn., 1968.

Generally it can be noted that the disclosure of evidence has become more of a matter of right than a matter of discretion, albeit the court still has the last word, as shown by subdivision (d)(1).

In subdivision (a)(1)(A) reference is made to the defendant's own statements, a matter which, as we have seen above, was highly disputed in the 1950ies and 1960ies. A similar provision had already been included in the first amended version of 1966, albeit giving the court much more discretion. Upon request, the prosecution must thus now disclose to the defence the defendant's prior statements, or those of the representatives of the defendant, if the latter is an organization. Other than that, the defendant's prior record, documents and tangible objects, and reports of examinations and tests must be disclosed, if they are material to the preparation of the defence or are intended to be used by the prosecution at trial (subdivisions (a)(1)(B, C). We note that this latter feature is actually new – originally Rule 16 did not contain any reference to evidence which the prosecution was actually planning to use; just like in England, the disclosure rules rather dealt with material which the prosecution was *not* necessarily going to use at trial. In contrast to England, of course, in the U.S.A. there was no common law rule which provided for the obligatory disclosure of prosecution evidence. It should also be noted that the material which is intended for use only comprises that which is to be used in the examination in chief – this means that the prosecution retains a momentum of surprise regarding material which is to be used for impeachment purposed in cross-examination.

As regards the testimony of expert witnesses, it is to be noted that the testimony itself need not be disclosed, but that a written summary suffices, this has, in principle, not changed until today.

In subdivision (a)(2) exceptions to disclosure are enumerated, such as internal memoranda and reports. Other than that, we find reference to the *Jencks* act (18 U.S.C. § 3500), which, as noted above, has also influenced Rule 26.2.

Finally, in subdivision (a)(3) we find reference to grand jury records; the rule makes clear that it generally does not apply to evidence taken before the grand jury; the parties must thus take resort to the other rules enumerated (6, 12(i) and 26.2), meaning that under certain circumstances this evidence may be disclosed for impeachment purposes, albeit generally after the witness has testified in chief.

Subdivision (c) states that the parties generally underlie a continuing duty to disclose; once again showing that disclosure may and must be understood to encompass more than just the procedural phase.

What is striking, as briefly mentioned before, is the absence of disclosure of *Brady* material in the FRCP. While *Jencks* material is explicitly mentioned, the FRCP contain no provisions related to exculpatory evidence.

An interesting feature, with which obviously the ‘reciprocity argument’ against disclosure was to be encountered, is the reciprocal duty of the defence regarding the disclosure of some of its evidence as foreseen in subdivision (b): if the defence demands disclosure according to subdivision (a)(1)(C) or (D) (tangible objects, reports etc.), it must itself let the prosecution inspect this kind of material which it has in its possession. As with the prosecution, this covers only material which is intended for use as evidence in chief – impeachment evidence need thus not be disclosed. More disclosure duties are enumerated in Rule 12, to which we will turn below.

4.2.2 Defence Disclosure

As we have seen, the original lack of defence disclosure was one of the main arguments against prosecution disclosure; and we just saw one reaction to it: the turning of the originally feared ‘one way street’ into a ‘two way street’ by imposing disclosure duties on the defence as well. As was explained in the introduction, it appears erroneous to base disclosure duties of the defence on fair trial rights, or, for that matter, the equality of arms for the prosecution. It must however be presumed that this idea was part of the motivation for the introduction of defence disclosure, or prosecution discovery.

In England, we have seen that disclosure duties of the defence did not appear until 1968, which was when the obligatory notice of alibi defence was introduced. In the United States, in turn, we find earlier examples. As noted in Chapter 2, there were some states which had notice obligations, especially regarding alibi defences, in place as early as in the 1920ies.⁵⁸⁴ As a matter of fact, the privilege against self-incrimination as enshrined in the 5th Amendment⁵⁸⁵ may, at least at first sight, conflict with a disclosure obligation of the defence.

4.2.2.1 *Williams v. Florida*

The most important decision on defence disclosure is certainly *Williams v. Florida*⁵⁸⁶.

⁵⁸⁴ See once again references at *Wigmore*, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 6, § 1855b, fn. 2, p. 419 et seq.

⁵⁸⁵ “No person [...] shall be compelled in any criminal case to be a witness against himself [...].”

⁵⁸⁶ *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, U.S.Fl. 1970.

The defendant had been indicted for robbery and had been planning to rely on a defence of alibi. Florida state law required defendants to give notice of alibi before the trial, to disclose the specifics of the alibi and to provide the prosecution with a list of witnesses in relation to the alibi defence.⁵⁸⁷ The defendant filed a motion for a protective order in order to be relieved from complying with the rule on the grounds of an alleged infringement of his privilege against self-incrimination, since he was compelled to deliver to the state evidence useful to convicting him. The motion was denied. He therefore complied, was convicted as charged and sentenced to life imprisonment. The U.S. Supreme Court granted *certiorari*, albeit by majority affirmed the conviction. The Court bases its holding both on equality arguments as well as truth-finding considerations:

We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or a 'fair trial.' Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties

⁵⁸⁷ Fla.Rule Crim.Proc. 1.200, printed in the appendix to the judgment (*ibid.*, at p. 104 et seq.): "Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule."

requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.⁵⁸⁸

The Court then goes on to say that the fact that the defendant's witnesses can be cross-examined can in itself not be an infringement of the privilege against self-incrimination. The only difference made by the Florida provision is that the defendant is forced to lay open this defence before the trial; however, if the evidence were presented only at trial, the prosecutor could definitely ask for an adjournment of the trial on the ground of surprise. The difference between the two possibilities, the Court holds, has no bearing on the accused's due process rights:

In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself. Petitioner concedes that absent the notice-of-alibi rule the Constitution would raise no bar to the court's granting the State a continuance at trial on the ground of surprise as soon as the alibi witness is called. Nor would there be self-incrimination problems if, during that continuance, the State was permitted to do precisely what it did here prior to trial: take the deposition of the witness and find rebuttal evidence. But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pretrial discovery, as it was here, avoiding the necessity of a disrupted trial. We decline to hold that the privilege against

⁵⁸⁸ *Ibid.*, at p. 81 et seq.

*compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense.*⁵⁸⁹

This ‘acceleration doctrine’⁵⁹⁰ was contested by Justice Black, and, joining him, Justice Douglas. The two Justices are of the opinion that any obligation of notice and disclosure of the defendant violate his due process rights and that there are decisive differences between the alternatives of disclosure before or only during the trial:

When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind. Before trial the defendant knows only what the State's case might be. Before trial there is no such thing as the ‘strength of the State's case’; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at the trial itself. Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a ‘poker game’ or ‘sporting contest,’ for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. A defendant, they said, is entitled to notice of the charges against him, trial by jury, the right to counsel for his defense, the right to confront and cross-examine witnesses, the right to call witnesses in his own behalf, and the right not to be a witness against himself. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the

⁵⁸⁹ Ibid., at p. 85 et seq.

⁵⁹⁰ See *LaFave/Israel/King/Kerr*, Criminal procedure, Part IV, § 20.4(d).

defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!'

A criminal trial is in part a search for truth. But it is also a system designed to protect 'freedom' by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in 'efficiency' that resulted. Their decision constitutes the final word on the subject, absent some constitutional amendment. That decision should not be set aside as the Court does today.⁵⁹¹

It must be admitted that there is certainly some merit in this dissent. Indeed the 'acceleration doctrine' caused considerable debate.⁵⁹² The discussion also partially concentrated not on the 5th Amendment, but on the 6th, in that the possible discovery of certain material may hamper the defence counsel's incentive to investigate this material, thereby undermining the defendant's right to effective assistance of counsel.⁵⁹³

However, the majority opinion in practice prevailed; the FRCP now contain according rules, as do most states.

The ruling of the Court in *Williams* was later refined by *Wardius v. Oregon*⁵⁹⁴, which held that there must be a reciprocal disclosure duty of the prosecution when there is a duty of the defence to provide alibi evidence, for otherwise the disequilibrium between the parties would be "fundamentally unfair".⁵⁹⁵

⁵⁹¹ *Williams v. Florida*, fn. 586, at p. 109, 111 et seq., 113 et seq.

⁵⁹² See, e.g., *Mosteller*, *Discovery Against the Defense: Tilting the Adversarial Balance* with references.

⁵⁹³ *LaFave/Israel/King/Kerr*, *Criminal procedure*, Part IV, § 20.4(f), with further references.

⁵⁹⁴ *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, U.S.Or. 1973.

⁵⁹⁵ *Ibid.*, at p. 474 et subs., references omitted: "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser. The *Williams* Court was therefore careful to note that 'Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant.' The same cannot be said of Oregon law. As the State conceded at oral argument, see Oregon grants no discovery rights to criminal defendants, and, indeed, does not even provide defendants with bills of particulars. More significantly, Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense. We do not suggest that the Due Process Clause of its own force requires Oregon to adopt such provisions. But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense

4.2.2.2 *United States v. Nobles*

Another important decision regarding defence disclosure was *U.S. v. Nobles*.⁵⁹⁶ Even though the decision did not specifically deal with pre-trial disclosure, it contained significant rulings concerning the ambit of the privilege against self-incrimination.

A private investigator had interviewed prosecution witnesses and prepared a report about his interviews; this report was used by the defence counsel in the cross-examination of the witnesses. When the defence counsel was going to call the investigator as a witness, the court demanded that the report be produced. When this was refused by the defence counsel, the investigator was not allowed to testify. The Court of Appeals affirmed in part, reversed in part, and remanded the case.⁵⁹⁷ The U.S. Supreme Court, in turn, reversed, holding that:

The Court of Appeals concluded that the Fifth Amendment renders criminal discovery 'basically a one-way street.' Like many generalizations in constitutional law, this one is too broad. The relationship between the accused's Fifth Amendment rights and the prosecution's ability to discover materials at trial must be identified in a more discriminating manner. [...]

In this instance disclosure of the relevant portions of the defense investigator's report would not impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements allegedly made by third parties who were available as witnesses to both the prosecution and the defense. Respondent did not prepare the report, and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator. The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.

We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. The Court of Appeals'

witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.”

⁵⁹⁶ 422 U.S. 225, 95 S.Ct. 2160, U.S. Cal. 1975.

⁵⁹⁷ *U.S. v. Brown*, 501 F.2d 146, C.A. Cal. 1974.

*reliance on this constitutional guarantee as a bar to the disclosure here ordered was misplaced.*⁵⁹⁸

Even though there were separate opinions, the Court's decision was anonymous. The Court thus held that the privilege against self-incrimination does not extend to third persons testifying for the accused. While the case at hand dealt with disclosure during the trial, the moment of disclosure has no impact on the Court's ruling as regards the 5th amendment (the privilege against self-incrimination). It thus applies to pre-trial disclosure as well.⁵⁹⁹

4.2.2.3 The Federal Rules of Criminal Procedure

As mentioned in Chapter 2, the original version of the FRCP did not contain any regulations as to defence disclosure. In fact, the inclusion of defence disclosure in both Rules 12 and 16 FRCP apparently came about in 1974, entering into force in 1975.⁶⁰⁰ It is thus quite probably a consequence of *Williams* and *Wardius*. The obligation of notices and disclosure regarding alibi and other special defenses is now contained on the federal level in Rule 12.1 through 12.3 FRCP. In 1994, they provided:

Rule 12.1 Notice of Alibi.

(a) *Notice By Defendant.* Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

(b) *Disclosure of Information and Witness.* Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) *Continuing Duty To Disclose.* If prior or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party's attorney of the existence and identity of such additional witness.

(d) *Failure To Comply.* Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by

⁵⁹⁸ *U.S. v. Nobles*, note 596 *supra*, p. 233 et seq..

⁵⁹⁹ *LaFave/Israel/King/Kerr*, Criminal procedure, Part IV, § 20 (4)(b).

⁶⁰⁰ See notes in FRCP issue U.S. Government Printing Office, Washington 1994.

such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

(f) Inadmissibility Of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defence, later withdrawn, or of statements made in connection with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert Testimony Of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental Examination Of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure To Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility Of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.3. Notice of Defense Based Upon Public Authority

(a) Notice By Defendant; Government Response; Disclosure Of Witnesses.

(1) Defendant's Notice and Government's Response. A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the

period of time the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.

(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.

(b) Continuing Duty To Disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.

(c) Failure To Comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.

(d) Protective Procedures Unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleadings be filed under seal.

(e) Inadmissibility of Withdrawn Defense Based Upon Public Authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

We thus find similar notice and disclosure provisions regarding the affirmative defences of alibi, insanity and public authority, with slight differences as to the disclosable material, which changes according to the type of defence. However, all three subdivisions enable the prosecution to require notice and disclosure, backed, in the sense of *Wardius*, with reciprocal disclosure duties of the prosecution regarding their rebuttal evidence. A problematic feature, as apparently also contained in most state rules, is a possible preclusion of evidence relating to these defences. While the testimony of the defendant himself on the affirmative defences can generally not be precluded, a possible preclusion of other evidence not previously disclosed may run counter the quest for truth.

4.2.3 Conclusion

For the United States we can state a downright amazing development of the law of disclosure both regarding statutory law and jurisprudence in the second half of the 20th century. However, it is not entirely clear where this development is going. Both sources of law have not yet merged; still a lot of disclosure obligations need to be directly derived from constitutional due process – the FRCP until now do not contain any provisions relating to exculpatory evidence. The differences between federal law and state law further complicate the matter.

We can state once again that the law concerning disclosure in America developed more slowly than in England. Given the fact that England, in contrast to the U.S.A., to this day does not have a written constitution with a bill of rights, one might have expected a different result. But apparently the development in the United States is also due to a certain rivalry between the liberal and conservative justices. Indeed, we have seen that during the days of the Warren Court the jurisprudence of the Supreme Court regarding prosecution disclosure was significantly liberalized; afterwards, however, it became more conservative again. Notwithstanding this conclusion, on the whole, comparing the law of disclosure of 1945 with the law of today, we can state a significant move towards liberalization of prosecution disclosure, together with an expansion of defence disclosure. At the same time, the involvement of the courts in the disclosure process has gotten stronger, which in part is a logical consequence of the fact that wider disclosure obligations have been imposed on both parties, which demands more guidance and control of the court.

4.3 Conclusion

In both England and the U.S.A., the 20th century brought about revolutionary changes in the law of disclosure. For both countries, we note a parallel development in a liberalization of prosecution disclosure, even though it happens earlier in England. Particularly in the U.S.A. in the 1950s and 1960s, the liberalization is based on the truth-finding function of disclosure in the trial as a whole. In England, we also find numerous truth-finding notions in the 1990s in the context of the quashing of many miscarriages of justice of the 1970s. In both countries, notions of judicial economy appear to have played a role also. We can, however, also observe certain rollback of the liberalization, the beginning of which can be dated, in the U.S.A., in the early 1970s (after the Warren Court), and in England in the 1990s, when the legislator reacted to, in the eyes of the government, all-too strict disclosure obligations imposed upon the

prosecution by the courts. In both countries, furthermore, disclosure obligations of the defence were significantly widened. Whereas English law originally did not know any disclosure obligations of the defence, they had been in place in the U.S.A. for a long time, and were significantly widened over the years. The disclosure duties of the defence in England are about to widen further significantly in the near future.

All of this, we hold, shows that the original strict adversarial role allocation, particularly of the prosecution, has shifted. The latter has constantly (been) developed into a more neutral instance, whereas the accused is, for the sake of truth finding and judicial economy, increasingly forced to ‘play ball’, once he wants to present evidence. The courts, in turn, have obtained a stronger role in controlling the disclosure process, especially as regards controlling the prosecution concerning the materiality of evidence as well as issues of public interest immunity.

This is thus the overall situation in which the first international criminal tribunal after Nuremberg, the ICTY, is established.⁶⁰¹ As we will see, particularly the American disclosure law had a strong influence on it.

⁶⁰¹ To be sure, the English CPIA was issued only after the establishment of the ICTY.

5 Disclosure of Evidence at the Ad Hoc Tribunals

5.1 Overview and Legal Framework

The system of disclosure at the ICTY and ICTR as well as the SCSL is governed by their respective Rules of Procedure and Evidence⁶⁰². While the Statutes do not contain specific rules as to disclosure, the provisions of the respective Rules of Procedure and Evidence of the Tribunals about the disclosure of evidence are quite elaborate. The section headed “Production of Evidence” (ICTY: Section 4, ICTR/SCSL: Section 3), which comprises Rules 66 through 70, sets a detailed framework of disclosure. However, provisions on disclosure can also be found in other Rules, such as Rule 94 *bis*, requiring the disclosure of expert witness statements.

In the course of Tribunals’ existence, these Rules have been subject to several changes. This is, among the substantial reasons, some of which we hope to identify in the course of this analysis, undoubtedly due to the practical fact that the Rules of Procedure and Evidence of the Ad-Hoc-Tribunals can be *easily* changed. Unlike the procedural rules of most national legal systems, namely the ones of Roman-Germanic origin, and the Rules of Procedure and Evidence of the International Criminal Court (ICC), the RPE of the Ad-Hoc-Tribunals are not crafted by a legislative authority, but by the judges of the Tribunals themselves (Art. 15 ICTYST, Art. 14 ICTRSt/SCSLSt).⁶⁰³

It is, to be sure, somewhat speculative to state reasons for the respective amendments of the Rules, since the motives of the Judges for the amendments of the Rules are, for no apparent reason and criticisable in the context of a body expressly dedicated to the protection of human rights, confidential. For the early years of the Tribunals, some of the Annual Reports contain some general remarks on the motives; however, this practice very soon disappeared.⁶⁰⁴

⁶⁰² In the following: RPE-ICTY, RPE-ICTR or RPE-SCSL.

⁶⁰³ See, e.g., the procedural codes of Germany (*Strafprozessordnung*) and France (code de procédure pénale). In turn, England and the U.S.A., for centuries, did not have any codifications of criminal procedure in place. The CPIA, as we have seen, was only passed in 1996. The American FRCP of 1946 were, as we have seen, originally elaborated by the U.S. Supreme Court.

⁶⁰⁴ As an illustration, see the remarkable statement in the Fifth Annual Report of the ICTY, A/53/219, S/1998/737, 10 August 1998, par. 105: “Due to the sheer quantity of the amendments, it suffices here merely to list the amended Rules [...]”

The first version of the Rules of Procedure and Evidence of the ICTY was formally adopted by the Judges of the ICTY on 11 February 1994. The approach to let the Judges adopt their own Rules of Procedure and evidence was not undisputed. Especially the fact that, by leaving wide parts of the Tribunal's procedural law almost completely to the judges, the UN Security Council resigned to all means of controlling it, led to controversy.⁶⁰⁵ In the end, before the adoption of the Rules, several states and non-governmental organizations had made submissions to the Secretary General, according, as far as states were concerned, to paragraph 3 of UNSC Resolution 827 (1993), submitting comments and draft procedures for consideration by the Judges. Most states and NGOs limited their submissions to general comments and remarks, whereas the United States submitted a very detailed set of draft rules, including a commentary.⁶⁰⁶ In the course of our analysis, and as far as disclosure is concerned, we will see that the ICTY adopted the American proposal to a large extent, which is not surprising, given the lack of alternatives and the short time frame for rendering the tribunal operational.⁶⁰⁷

The ICTR, installed by Security Council Resolution 955⁶⁰⁸, took over the Rules of the ICTY, as foreseen by Art. 14 of the Statute of the ICTR. The Rules of the ICTR entered into force on 29 June 1995. The changes adopted by the Judges of the ICTR *vis-à-vis* the RPE-ICTY were minor.⁶⁰⁹ In fact, in our context, meaning Rules 66 through 70, only one single word was changed.⁶¹⁰ The Rules of the ICTR were first amended on 12 January 1996; the first revision that brought changes to the disclosure regime of the ICTR came into force in June 1997.

⁶⁰⁵ See, e.g., the submission to the UN Secretariat made by Helsinki Watch, printed in: *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, vol. 2, p. 493.

⁶⁰⁶ 'Suggestions Made by the Government of the United States of America: Rules of Procedure and Evidence for the International Tribunal for the prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia', IT/14, 17 November 1993, printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia vol. 2, pp. 509 et subs.

⁶⁰⁷ Compare *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia vol. 1, p. 177, see also *Tochilovsky*, Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals, p. 345.

⁶⁰⁸ S/RES/955, 8 November 1994.

⁶⁰⁹ As compared to the 5th Revision of the RPE-ICTY which had entered into force on 15 June 1995, thus only two weeks before the original Rules of the ICTR.

⁶¹⁰ In Rule 69 (B) "testify" was replaced by "rely on". Other than that, the word "Sub-rule" in Rule 69 (C) was changed to "Rule", albeit without changing the meaning.

As to the SCSL, it was established by an agreement⁶¹¹ between the government of Sierra Leone and the United Nations. Its Statute was contained in an annex to the said agreement; it entered into force one day after a mutual notification of the Sierra Leonean government and the U.N., on 12 April 2002.⁶¹² The SCSL took over the RPE of the ICTR; as prescribed by Art. 14 SCSLSt. At the conclusion of a plenary meeting held in London from 3 to 7 March 2003, the SCSL adopted its own Rules, implying quite significant changes *vis-à-vis* the Rules of the ICTR, which, as we will see in at least one instance, were partially inspired by the English criminal procedure. All in all they appear to be a little more adversarial than those of the SCSL's two U.N. sibling Tribunals. In the course of 2003, the Rules were amended two more times.⁶¹³ Given the fact that March 2003 was also when the first suspects were put into custody, it must be estimated that disclosure at the SCSL was never conducted under original ICTR Rules, but only the SCSL Rules as of 7 March 2003.

Thus, the respective Rules of the Tribunals started from a common ground, namely the Rules of the ICTY as of its 5th Revision (15 June 1995), which formed the base for the Rules of the ICTR, which, in turn, passed its Rules, as of the revision which entered into force on 6 July 2002, on to the SCSL. However, from these respective moments on, the Rules of the respective courts developed a life of their own. Nevertheless, the basic structure of the Rules concerning disclosure was, and still is, identical at all three courts, which is why it appears proper to analyze them at the same time.

Structurally, one can divide the disclosure regime of the Tribunals into four parts.

The most important part is the *disclosure by the Prosecutor*, which is mainly governed by Rules 66 and 68. Secondly, there are also *disclosure obligations of the defence*, addressed by Rule 67. Just as in the national jurisdictions we have looked at, the duties of the prosecution as regards disclosure are more extensive than the corresponding duties of the defence. However, even though the disclosure obligations of the defence were originally very limited, they were considerably widened over time.

⁶¹¹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

⁶¹² Art. 21 of the agreement, see *Prosecutor v. Fofana and Kondewa* (CDF case), Decision on constitutionality and lack of jurisdiction, Doc. No. SCSL-04-14-PT-035, SCSL Appeals Chamber, 13 March 2004, par. 62, as well as *Schabas*, *The UN International criminal tribunals*, p. 39.

⁶¹³ See First Annual Report of the President of the SCSL for the Period 2 December 2002 – 1 December 2003, p. 7.

Thirdly, there are the *exceptions to disclosure*. Rules 53, 66 (C), 69, 70 and 97 contain exceptions as to the duty of disclosure and as to non-disclosable materials, applying for the most part, at least formally, to both prosecution and defence disclosure.

Fourthly, there is an additional category of disclosure which is not directly obvious from the Rules and which, in principle, we know from the American system already: *disclosure to, by or via the Chamber*. For one, the institution of the Pre-Trial Judge (Rule 65 *ter*) and the information obligations of the parties to file certain briefs according to Rule 65 *ter* (E, G) and the putting together of these filings in “files” (Rule 65 *ter* (L)) for their transmission, in fact has some characteristics of Roman-Germanic procedural traditions. Additionally, especially at the ICTR, a disclosure *via* the Chamber has developed under Rules 54 and 98, which systematically have nothing to do with disclosure in the procedural sense. However, as we hope to have partially identified already, disclosure and truth finding are closely related; and the “Rule 98 disclosure” is in fact a good practical example for this, showing that disclosure in the material sense and the procedural sense are converging. To be sure, formally, neither the Rules, nor the protagonists will, despite a few exceptions, speak of ‘disclosure’ to the Chamber, but rather of ‘filing’ or ‘communication’. However, materially, the Chamber gets to see what the other party gets to see, substantially resulting in ‘disclosure to the Chamber’.

In the following, we will take a closer look at the provisions of the Rules for all three courts one by one and their respective history, in a ‘vertical’ manner. This will, not least due to the mentioned flexible amendment procedure provided by Articles 14/15 of the respective Statutes, also imply reference to related relevant jurisprudence of each of the Tribunals. In some conclusive remarks, we will provide a short overall analysis in order to detect a ‘horizontal’ pattern of the development of the Rules as regards disclosure.

5.2 Disclosure by the Prosecutor

Following the Anglo-American tradition, the history of which we have looked at quite extensively above, at the Ad-Hoc Tribunals, disclosure by the Prosecutor represents the most significant category of disclosure.

The types of material which the Prosecutor has to disclose to the defence can be divided into four categories: supporting material and prior statements of the accused (Rule 66 (A)), witness statements (Rule 66 (B)), exculpatory material (Rule 68), and other material evidence, such as books and tangible objects (Rule 67 (C)).

5.2.1 Rule 66 (A) RPE

Rule 66, whose Sub-Rule (A) deals with the first two of the named categories of evidence (supporting material/prior statements of the accused and witness statements), can be regarded as the pivotal provision of the disclosure regime for the criminal procedure of all three Tribunals.

The current⁶¹⁴ wording of the provision, in a synoptic overview, is as follows:

ICTY	ICTR	SCSL
<p>Disclosure by the Prosecutor</p> <p>(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands</p> <p>(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and</p> <p>(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 <i>ter</i>, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial,</p> <p>and copies of all transcripts and written statements taken in accordance with Rule 92 <i>bis</i>, Rule 92 <i>ter</i>, and Rule 92 <i>quater</i>; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.</p>	<p>Disclosure of Material by the Prosecutor</p> <p>Subject to the provisions of Rules 53 and 69;</p> <p>(A) The Prosecutor shall disclose to the defence:</p> <p>i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and</p> <p>ii) No later than 60 days before the date set for trial,</p> <p>copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial;</p> <p>upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.</p>	<p>Disclosure of materials by the Prosecutor</p> <p>(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:</p> <p>(i) Within 30 days of the initial appearance of an accused,</p> <p>disclose to the defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify</p> <p>and all evidence to be presented pursuant to Rule 92 <i>bis</i> at trial.</p> <p>(ii) Continuously disclose to the defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good clause [sic!] being shown by the prosecution.</p> <p>Upon good cause being shown by the defence, a Judge of the Trial Chamber may order that copies</p>

⁶¹⁴ ICTY: Rev. 46, 20 October 2011; ICTR: 1 Oct. 2009; SCSL: 27 May 2008.

		of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time. [...]
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The provisions in their current basic forms were in substance introduced by the 12th amendment of the RPE-ICTY in October/November 1997, and the revision of 6 June 1997 of the RPE-ICTR, although both have been subject to minor changes since then. In its original form, the structure of Rule 66 was considerably different, in fact, it was much simpler (three paragraphs, or “Sub-rules”, without sub-paragraphs). As to the SCSL, only minor changes were implemented as compared to the original wording of 2003.

We will now analyse Rule 66 in detail, starting from its current wording. In the course of this analysis, we will examine when and how it was modified during its existence.

5.2.1.1 Supporting Material

First of all, according to Rule 66 (A)(i) ICTY/R-RPE, the Prosecutor must disclose the so called “supporting material” which was transmitted to the competent judge together with the indictment. This basic fact has not changed during the existence of the Tribunals. The original wording of Rule 66 (A) RPE-ICTY provided:

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought.

This wording overtook almost verbatim the proposal of the American Government, which said:

17.1 Disclosure by the Prosecutor. Except as otherwise provided in these Rules, the Prosecutor shall provide the following information or matters to the defense:

(A) Evidence which accompanied the indictment. As soon as practicable after the initial appearance of the accused, the Prosecutor shall provide the defense with copies of evidence which accompanied the indictment at the time confirmation was sought.⁶¹⁵

According to Rule 47 RPE, the indictment is to be transmitted to the competent judge (see Rule 28 RPE) via the Registrar, together with the supporting material. According to Rule 47 (E) ICTY/R-RPE read in conjunction with Art. 19 (1) ICTYSt and Art. 18 (1)

⁶¹⁵ Printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, vol. 2, p. 533.

ICTR-St, respectively, the competent Judge must then, based upon the indictment and the supporting material, determine whether a *prima facie* case⁶¹⁶ exists against the accused. It is this material which Rule 66 (A) (i) refers to. The supporting material, according to the Trial Chamber in *Kordić and Čerkez*, comprises only such material which actually “supports” the indictment, i. e. “the material upon which the charges are based and does not include other material that may be submitted to the confirming Judge, such as a brief of argument or statement of facts”.⁶¹⁷ This ruling of the Chamber must be criticized in the light of the above mentioned jurisprudence of the ECtHR concerning the right to an adversarial trial.⁶¹⁸ Even though the disclosure of evidence can be limited by vital interests of witness protection and national security, there is no reason why legal arguments of one party should not be disclosed to the other. The right to an adversarial trial should give every party (meaning, in a criminal trial, the accused) the opportunity to react to the actions of the other and for its part try to influence the court. If the legal arguments are not disclosed, this right thus may be hampered; this is particularly true in the case of the ICTY, which has, on at least one occasion,⁶¹⁹ though referring to the legal characterization of the charges, stated that it would not apply the principle of ‘*iura novit curia*’.⁶²⁰ Despite of the fact that the defence is not involved in the confirmation procedure and disclosure in the procedural sense takes place after the confirmation and in fact forms a procedural phase of its own, it must be noted that the disclosure obligation as regards the supporting material is necessary insofar as it relates to the very material which convinced a judge to confirm an indictment. Any legal arguments which accompanied this material should therefore be considered to be materials “supporting the charges” and be disclosed as well. In fact, under normal

⁶¹⁶ The term *prima facie* case is usually defined as a “situation where the material facts pleaded in the indictment constitute a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him of that charge”, Report of the International Law Commission, UN Document A/49/10 (1994), at 95, adopted by Judge Kirk McDonald in *Prosecutor v. Kordić and Čerkez*, Decision on the Review of the Indictment, ICTY Case No. IT-95-14-4, 10 November 1995.

⁶¹⁷ *Prosecutor v. Kordić and Čerkez*, Order on Motion to Compel Compliance by the Prosecutor with Rules 66 (A) and 68, ICTY Case No. IT-95-14/2-PT, Trial Chamber, 26 February 1999, p. 3.

⁶¹⁸ See, once again, *Jasper v UK* (2000) 30 EHRR 441, par. 51, footnote 65 above.

⁶¹⁹ *Prosecutor v. Kupreškić et al.*, ICTY Case No. IT-95-16-T, Trial Judgment, Trial Chamber, 14 January 2000, paras. 720 et subs., 740.

⁶²⁰ “The court knows the law”, meaning that the court, while usually being bound to the facts presented by the parties, is not bound by the legal characterisation of these facts as expressed by the parties, and may in fact base its decision on entirely different legal considerations. The principle is also known as ‘*da mihi facta, dabo tibi ius.*’ (“give me the facts, and I shall give you the law.”).

circumstances all material not falling under the usual exceptions (as in Rules 53, 66 (C), 70 etc.) should be disclosed, though not to the public, but to the accused.⁶²¹

In a trial against more than one accused, the prosecution should determine upon which material the charges against each accused are based.⁶²² As a consequence, only the material for the respective accused needs to be disclosed to the defence; however, when the co-accused are charged with the same events, the supporting material will, as a matter of fact, usually be widely identical for all of them.⁶²³

The provisions of the SCSL, however, differ considerably from the Rules of its two larger U.N. siblings in that they make no reference whatsoever to “supporting material”. This is due to the fact that, in the procedure of the SCSL, there is no “confirmation” of the indictment, but merely an “approval” (see Rule 47 (E) RPE-SCSL), which appears to set a lower standard than “confirmation”. It has been stated that both terms have the same meaning in practice, i.e. that the criteria which the indictments in the ICTY/ICTR and the SCSL have to meet, are “relatively identical”.⁶²⁴ This, however, must be doubted in the light of the wording of the provisions, and particularly as regards the “supporting material”. Whereas, according to Art. 19 ICTYSt and Art. 18 ICTRSt a *prima facie* case⁶²⁵ needs to be established, Rule 47 (E) RPE-SCSL merely provides that the competent judge

shall approve the indictment if he is satisfied that:

- i. the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and*
- ii. that the allegations in the prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.*

⁶²¹ See, pointing in this direction, also *Prosecutor v. Milutinović et al.*, Decision on application by Dragoljub Ojdanić for disclosure of *ex parte* submissions, ICTY Case No. IT-99-37-I, Confirming Judge, 8 November 2002. The Confirming Judge did not consider these additional materials to be “supporting materials”; however, he made clear that the Confirming Judge has a discretion as to order the disclosure of other material accompanying the indictment in the interest of justice.

⁶²² *Prosecutor v. Furundžija*, ICTY Case No. IT-95-17/1-PT, Order, Trial Chamber, 13 March 1998, p. 2: “CONSIDERING FURTHER that the Trial Chamber recommends that in future cases involving multiple accused, when seeking confirmation of the indictment, the prosecution should indicate which part of the supporting material relates to each particular accused; [...]”

⁶²³ See also *Prosecutor v. Ojdanić et al.*, ICTY Case No. IT-99-37-PT, Decision on defence Motion to Require Full Compliance with Rule 66(a)(i) and for Unsealing of *ex parte* Materials, Trial Chamber, 18 October 2002.

⁶²⁴ *Schabas*, The UN International criminal tribunals, p. 363.

⁶²⁵ See, as to the definition, note 616.

This indeed looks similar to the above mentioned definition of a *prima facie* case; however, we see that the test which the SCSL judge has to apply is only whether the case falls into the jurisdiction of the Court and whether the description of the alleged crime(s) by the prosecution would fulfil the respective prerequisites. The criteria for this test are therefore completely and strictly *formal*; for its application, the judge needs no “supporting material” whatsoever. In contrast, the Prosecutor at the ICTY and ICTR needs, according to Rule 47 (B) RPE-ICTY/R to be “satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal” and must then forward the indictment “for confirmation by a judge, together with supporting material”.⁶²⁶ In fact, in an early decision of the ICTY, Judge Sidhwa stated that the standards for the Prosecutor set out in Rule 47 (A) RPE ICTY and the one for the judge according to Rule 47 (D) in conjunction with Art. 18/19 of the respective Statutes are identical.⁶²⁷ He held that there must be “sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal“, stating at the same time that “[t]he evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime”.⁶²⁸ Judge Sidhwa himself thus points to the evidence which is brought before him at the stage of the confirmation of the indictment and it is on this evidence that the confirming judge at the ICTY and ICTR must make his decision as to whether to confirm the indictment or not. It is therefore a *substantial* decision which the judge has to make and not, as in the SCSL procedure, a purely formal one. However, at this stage of the proceedings, evidence can only be brought before the (ICTY/R) judge in terms of “supporting material”. It is therefore only logical that this supporting material be disclosed to the defence, for it contains the evidence which persuaded the competent judge to confirm the indictment.

⁶²⁶ Indeed, the SCSL’s Annual Report refers to the amendment of Rule 47 as “one of the more notable” ones, see First Annual Report of the President of the SCSL for the Period 2 December 2002 – 1 December 2003, p. 12.

⁶²⁷ *Prosecutor v. Rajić*, ICTY Case No. IT-95-12-1, Review of Indictment, Trial Chamber, 29 August 1995, p. 7 et seq. The ruling refers to Rule 47 as of the 5th revision of the Rules (15 June 1995), since, former sub-rules (A) and (D) have become sub-rules (B) and (E), respectively; the explicit reference to Art. 19 ICTYSt was not yet contained in Rule 47.

⁶²⁸ This reasoning was endorsed by the Trial Chamber in *Kovacević*, see *Prosecutor v. Kovacević*, ICTY Case No. IT-97-24-PT, Decision on defence Motion for Provisional Release, Trial Chamber, 20 January 1998, par. 20.

5.2.1.2 Prior Statements of the Accused

Furthermore, according to the Rules of the ICTY and ICTR, the prosecution has to disclose to the defence “all prior statements obtained by the Prosecutor from the accused”.

The original wording adopted in 1994⁶²⁹ did not contain any reference to statements of the accused, just as its role model, the proposal by the U.S. Government. Also the comments of the ABA Task Force Report⁶³⁰ make no reference to statements of the accused; neither does any other contribution by a state. This is remarkable, given the fact that statements of the accused are contained in the disclosable material under Rule 16 (a)(1) (A-C) of the U.S. Federal Rules of Criminal Procedure, and have, as we have seen, also played a key role in the development of disclosure in the United States. Mandatory disclosure of statements of the accused was introduced by the 3rd amendment of the Rules, entering into force on 30 January 1995. Henceforth, the wording was:

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.

The ICTY Annual Report of 1995 states that the amendments to Rule 66 (A) were to “broaden the rights of suspects and accused persons”.⁶³¹ It must be noted, however, that the 3rd amendment also brought considerable cutbacks on disclosure, mainly because of a need to protect national security interests. This development, which had already started with the 2nd revision of the Rules and went on afterwards, will be looked at in more detail below.⁶³²

The exact meaning of this wording “statements obtained by the prosecutor from the accused” is doubtful. It could be understood in such a way that only those statements of the accused that he or she has made directly to the prosecution. However, the Trial Chamber in the proceedings against *Delalić*, even though not explicitly, ruled in 1996 that Rule 66 (A) establishes a duty to disclose all statements of the accused that are in

⁶²⁹ See p. 177 above.

⁶³⁰ Report of the American Bar Association Task Force on War Crimes in the Former Yugoslavia, Commenting on the United States’ Draft Rules of Procedure and Evidence for the International Tribunal, IT/INF.6/Rev.2, 18 January 1994, printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, vol. 2, pp. 585 et subs.

⁶³¹ Second Annual Report of the ICTY, A/50/365, S/1995/728, 23 August 1995, par. 25.

⁶³² See section 5.4 below.

the possession of the Prosecutor, regardless of how they were obtained.⁶³³ Furthermore, the chamber stated that this duty of disclosure is a permanent one: even statements of the accused which the prosecution obtains after the confirmation of the indictment must be disclosed.⁶³⁴ This finding, both as regards the substantial and temporal scope of the disclosure obligation concerning prior statements of the accused, was expressly endorsed in the proceedings against *Blaškić*, where the Chamber added that, contrary to the suggestion of the prosecution, also the form of the statement does not matter.⁶³⁵ However, one and a half years later, the same Chamber, arguably contradicting itself to a certain extent, held that Rule 66 (A) only refers to statements of the accused in a formal sense, i.e. statements which the accused uttered in the context of legal proceedings.⁶³⁶ This ‘change of mind’ came about when the accused, General *Blaškić*, asked for the disclosure of intelligence interceptions of orders given by him to subordinates; arguing that these orders were, in fact, “prior statements” in the meaning of Rule 66 (A). The reasons for the change of mind of the Chamber quite obviously lie in the protection of national security interests. At the time of the Chamber’s ruling, Rule 66 (C) provided:

*Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.*⁶³⁷

Thus, there was, at the time, no legal possibility for the Chamber to withhold disclosable material for reasons of national security if this material fell under Rule 66 (A), since restrictions on disclosure for reasons of national security were only allowed for material falling under Rule 66 (B).⁶³⁸ The intercepts, however, constituted

⁶³³ *Prosecutor v. Delalić et al.*, ICTY Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Trial Chamber, 26 September 1996, par. 4.

⁶³⁴ *Ibid.*

⁶³⁵ *Prosecutor v. Blaškić*, ICTY Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, Trial Chamber, 27 January 1997, paras. 32, 37.

⁶³⁶ *Prosecutor v. Blaskić*, ICTY Case No. IT-95-14-T, Decision on the defence Motion for Sanctions for the Prosecutor’s Failure to comply with Sub-rule 66 (A) of the Rules and the Decision of 27 January 1997 compelling the Production of all Statements of the Accused, Trial Chamber, 15 July 1998, p. 3.

⁶³⁷ Rule 66 (C), Rev. 13, 10 July 1998.

⁶³⁸ See also *Moranchek*, Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY, pp. 477 et subs.

intelligence material and were considered to be security interest sensitive. The Chamber, by taking Mr. *Blaškić*'s orders out of the scope of Rule 66 (A) and instead treating it as material in the sense of Rule 66 (B), thus subjected them to the restriction of Rule 66 (C). At the same time, under the disclosure regime which was in force at the time of the decision, the defence would have had to reciprocally let the prosecution inspect its own material which it intended to use at the trial (Rule 67 (C)); in the present case, the defence was not inclined to do that.⁶³⁹

The decision of the Trial Chamber must be viewed in a differentiated way. On one hand, it is certainly not recommendable that a chamber digresses from its own previous decision, particularly when this restricts the rights of the accused. On the other hand it might not be a coincidence that the Presiding Judge of the Chamber, who came from a Roman-Germanic tradition, was willing to adopt an “open cards” approach towards disclosure, and arguably, especially in the relatively early days of the ICTY, not particularly experienced in the security demands of national states in an international trial. After all, “prior statements of the accused” can certainly be understood in the formal sense as interpreted by the Chamber in its second decision. The Trial Chamber in *Krstić* endorsed this line of argument.⁶⁴⁰

In this light it is obvious that other statements, such as press interviews, also do not fall into the category of Rule 66 (A).⁶⁴¹ Notwithstanding, this latter assertion does not apply to cases in which the charges are *based on the statements*, e.g. if the accused is charged with ordering the commitment of crimes or incitement to genocide;⁶⁴² in these cases, the statements must be considered to be “supporting material” and accordingly treated pursuant to Rule 66 (A) (i) 1st alternative RPE

Additionally, Rule 43 (iv) determines that the statement of the accused which was audio- or video-recorded must be transcribed, at the latest in the moment of

⁶³⁹ See *Prosecutor v. Blaškić*, note 636 *supra*, p. 4.

⁶⁴⁰ *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T, oral decision, Trial Chamber, 19 March 2001, mentioned in *Krstić*, Judgement, Trial Chamber, 2 August 2001 (Annex I, Procedural History), par. 36.

⁶⁴¹ See *Tochilovsky*, Indictment, disclosure, admissibility of evidence: jurisprudence of the ICTY and ICTR, p. 36.

⁶⁴² Historical and contemporary examples would be *Julius Streicher*, who published anti-semitic hate magazines such as *Der Stürmer*, and was found guilty of crimes against humanity by the Nuremberg IMT, as well as the accused in the RTML case of the ICTR, *Prosecutor v. Barayagwiza, Nahimana and Ngeze*, ICTR Case No. 99-52-T, Judgment, Trial Chamber, 3 December 2003.

arraignment.⁶⁴³ The transcripts fall under the mentioned provisions regarding prior statements of the accused and must therefore be disclosed.⁶⁴⁴

Rule 66 RPE-SCSL, in contrast, makes no reference to statements of the accused whatsoever. It is questionable why this was not mentioned, since the accused's own statements are typically of special importance for the preparation of the defence, and the Judges obviously wanted to divert from the ICTR Rules which, as we have seen, were the SCSL's first rules. The Annual Report⁶⁴⁵ is of no help in this respect.

5.2.1.3 Prior Statements of prosecution Witnesses

The Prosecutor must also disclose the statements of all witnesses whom he intends to call to testify at trial (Rule 66 (A) (ii) RPE). As seen above⁶⁴⁶, the original RPE-ICTY did not contain any reference as to witness statements. Just as the disclosure obligation concerning statements of the accused, the obligatory disclosure of (certain) witness statements was introduced with the 3rd Revision of the Rules in January 1995,⁶⁴⁷ supposedly also in an effort to strengthen the rights of the accused.⁶⁴⁸

The wording originally spoke of "prosecution witnesses". The current wording "witnesses whom the Prosecutor intends to call to testify at trial" was first introduced at the ICTR, in June 1997. Rule 66 (A) was divided into two sub-paragraphs and henceforth provided as follows:

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence:

i) within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

⁶⁴³ Rule 43 (vi) RPE-ICTY; Rule 43 (iv) RPE-ICTR provides that the content of the recording must be transcribed in any case.

⁶⁴⁴ *Prosecutor v. Čermak & Markač*, ICTY Case No. IT-03-73-PT, Decision Relating to Disclosure Obligations, Pre-Trial Judge, 26 May 2004, p. 2.

⁶⁴⁵ See note 626 *supra*.

⁶⁴⁶ Original version of the RPE-ICTY, page 177 *supra*.

⁶⁴⁷ See the wording of RPE-ICTY Rev. 3, p. 181 *supra*.

⁶⁴⁸ See Second Annual Report of the ICTY, note 631 *supra*, *ibid*.

*ii) no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.*⁶⁴⁹

It is not quite clear whether there is a difference between a “prosecution witness” and a “witness whom the Prosecutor intends to call”. It could well be that the amendment was meant to be clarifying; after all, similar to the Continental European tradition, the international criminal courts and tribunals have regularly referred to witnesses not being ‘prosecution witnesses’ or ‘defence witnesses’, but rather ‘witnesses of the court’.⁶⁵⁰ On the other hand a “prosecution witness” might also be perceived as not necessarily one which the prosecution indeed intends to call to testify; but including witnesses who only potentially might be called by the prosecution or which have played a role during the investigation, a conclusion which could be drawn especially from the wording of the Rules of the ICTR and the SCSL (see page 186 et seq. below), since the statements of witnesses which the Prosecutor does not intend to call do not need to be disclosed – even if they are referred to in the supporting material.⁶⁵¹ Then again, it must be noted that the mandatory disclosure of the statements of witnesses which will quite possibly never testify can mean that the defence waste valuable resources in investigating and finding rebuttal evidence which they will never need.⁶⁵² In practice, even with the modified Rules, it is still common that the defence will receive large amounts of evidence which eventually turns out to be useless, given the Tribunal’s (in principle accused-friendly) practice of encouraging early disclosure in trials in which literally

⁶⁴⁹ RPE-ICTR as of 6 June 1997.

⁶⁵⁰ See, e.g., *Prosecutor v. Orić*, ICTY Case No. IT-03-68, Trial Transcript of 13 January 2005, p. 3484: Judge Agius to the witness Nedeljko Radić: “Although you have been produced as a witness, brought forward as a witness by the Prosecutor, in reality, you are no longer now a witness of one side or of the other. You are a witness of the Court. You are a witness of this Tribunal. [...] In other words, you have no right to discriminate, say: I will answer fully and truthfully the questions that Ms. Sellers will ask me, but I will not be truthful and fully in my answers when Mr. Jones is putting questions. You have no right to do that. Your responsibility is to be truthful and honest in all your answers to all the questions that are put to you.”, and *Prosecutor v. Prlić et al.*, ICTY Case No. IT-04-74, Trial Transcript of 2 February 2009, p. 36152, as well as *Prosecutor v. Rukundo*, ICTR Case No. IT-04-74, Decision on defence Request to Meet the Accused During his Examination-In-Chief, Trial Chamber II, 3 October 2007, par. 3.

⁶⁵¹ *Prosecutor vs. Nahimana et al.*, Decision on an oral application by defence counsel concerning witness X, ICTR Case No. ICTR-99-52-T, Trial Chamber I, 19 January 2002, Par. 8.

⁶⁵² See *Gibson/Lusiaá-Berdou*, Disclosure, p. 318, stating as an example the ICTR case of *Théoneste Bagasora*, in which the defence received more than 800 statements of potential prosecution witnesses of which eventually only 83 testified.

years can pass between the initial appearance of the accused and the start of his trial hearing.⁶⁵³

The term “witness statement” itself is not defined in the Statute or the Rules, yet the ICTY Appeals Chamber held in the *Blaskić*-Case that

*a witness statement in trial proceedings is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime. The Appeals Chamber is of the view that when a witness testifies during the course of a trial before the Tribunal, the witness’s verbal assertions recorded by the Registry’s technical staff through contemporaneous transcription, are capable of constituting a witness statement within the meaning of sub-Rule 66 (A) (ii).*⁶⁵⁴

The same Trial Chamber also stated that the prosecution’s disclosure obligations do not extend to documents such as diaries, radio logs and maps with the personal annotations of the witness,⁶⁵⁵ which is consistent with the holding of the same Chamber regarding statements of the accused.⁶⁵⁶ Transcripts of witness statements, however, do fall into this category.⁶⁵⁷

In the above-mentioned Trial Chamber decision in *Blaskić*, the Trial Chamber had also emphasized that, just as for statements of the accused, the origin of the statement was irrelevant. Thus, not only the statements collected by the Prosecutor, but also the ones originating from any other source must be disclosed.⁶⁵⁸ This was endorsed by another ICTY Trial Chamber.⁶⁵⁹ However, as we have seen above, the *Blaskić* Trial Chamber later narrowed down its holding as regards statements of the accused. As far as witness statements are concerned, an ICTR Trial Chamber held in the year 2000 that statements made to Rwandan authorities did not qualify as witness statements in the meaning of

⁶⁵³ Compare *Gibson and Lussiaà-Berdou*, *ibid.*

⁶⁵⁴ *Prosecutor v. Blaskić*, ICTY Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and additional Filings, Appeals Chamber, 26 September 2000, par. 15.

⁶⁵⁵ *Prosecutor v. Blaskić*, ICTY Case No. IT-95-14-PT, Decision on the defence Motion to Preclude Testimony of Certain prosecution Witnesses Based Upon the prosecution’s Violation of the Tribunal’s Order Compelling the Production of Discovery Materials, Trial Chamber, 25 August 1997.

⁶⁵⁶ See *Prosecutor v. Blaskić*, note 636 *supra*.

⁶⁵⁷ *Prosecutor v. Kupreškić et al.*, ICTY Case No. IT-25-16-T, Decision on the Prosecutor’s Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session Under Rule 79 of the Rules, Trial Chamber, 29 July 1998

⁶⁵⁸ *Prosecutor v. Blaskić*, note 635 *supra*, par. 38.

⁶⁵⁹ *Prosecutor v. Delalić et. al.*, ICTY Case No. IT-96-21-T8, Decision on Motion by the Defendants on the Production of Evidence by the prosecution, Trial Chamber, 8 September 1997, par. 10.

Rule 66.⁶⁶⁰ In another decision about nine months later, however, discussing the aforementioned ICTR decision as well as the said jurisprudence in *Blaskić* and *Delalić*, a different ICTR Trial Chamber in *Nyiramasuhuko* stated that as long as the statements were uttered in legal proceedings and in the possession of the prosecution, they had to be disclosed regardless of their origin.⁶⁶¹ This development with a decision regarding the differentiation between a witness statement and internal notes in the meaning of Rule 70, which are exempt from disclosure. While the prosecution argued that handwritten notes of witness interrogations were merely “internal documents”, the Appeals Chamber of the ICTR held that they, indeed, as long as questions and answers were put down, constituted witness statements,⁶⁶² a ruling which can only be welcomed. At the same time, however, in a remarkable twist of argument, the Chamber noted that a definition for the term “statement” had yet to be found; needless to say, the Chamber did not bother trying to find one.⁶⁶³ The preliminary “final act” of the discussion appears to be a decision of Trial Chamber III of the ICTR, which held in 2009 that “[i]t considers that a reasonable interpretation of “statement”, within the meaning of Rule 66 (A) (ii), is a statement pertaining to the allegations in the Indictment, and not to any statement made by a witness to the prosecution.”⁶⁶⁴

A few months after the respective amendment of the RPE-ICTR, in the 12th revision of the RPE-ICTY (October/November 1997), the RPE-ICTY were amended in the same way (the only difference here being that the numbers were stated by words, not digits, thus saying “thirty” instead of “30”), albeit adding a provision regarding additional prosecution witnesses:

⁶⁶⁰ *Prosecutor v. Bagambiki & Imanishimwe/Prosecutor v. Ntagerura*, ICTR Case No. 99-46-T, Decision on Bagambiki’s Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda, Trial Chamber III, 1 December 2000. It must be noted, however, that the Chamber also remarked that the witnesses did not qualify as “additional prosecution witnesses”.

⁶⁶¹ *Prosecutor v. Nyiramasuhuko*, ICTR Case No. 97-21-7, Decision on the defence Motion for Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda, and all Other Documents or Information Pertaining to the Judicial Proceedings in Their Respect, Trial Chamber II, 18 September 2001.

⁶⁶² *Niyitigeka v. Prosecutor*, ICTR Case No. 96-14-A, Judgment, Appeals Chamber, 9 July 2004, par. 34. See on the development of the interpretation of “witness statements” at the ICTR in further detail *de los Reyes*, Revisiting Disclosure Obligations at the ICTR and its Implications for the Rights of the Accused, pp. 585 et subs.

⁶⁶³ *Niyitigeka v. Prosecutor*, Judgment, note 662, par. 30.

⁶⁶⁴ *Prosecutor v. Nzabonimana*, ICTR Case No. 98-44D-T, Decision on defence Motion to Recall Witness Cnal, Trial Chamber III, 17 December 2009, par. 21.

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence:

(i) (...)

(ii) no later than sixty days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

Additional prosecution witnesses were not mentioned in the original version of Rule 66 (A). In the above-mentioned decision in *Delalić*⁶⁶⁵, the Trial Chamber had, however, stated as early as September 1996 that the Prosecutor's disclosure obligation of statements of the *accused* is ongoing – it is not apparent why the disclosure of witness-statements should be treated differently, which would render this specific amendment of the Rules superfluous. As previously mentioned, it is entirely common in Continental European jurisdictions to treat the statements of witnesses and the accused differently, since the latter can never be a witness in the technical sense, due to his dilemma in between his right to silence and privilege against self-incrimination on the one side, and his oath to tell the truth on the other. However, in the present situation there is no comparable issue at hand. If thus statements of witnesses which the Prosecutor intends to call need to be disclosed, this duty must of course also apply to witnesses for which the decision to call them is made at a later stage of the trial. This amendment of the Rules must thus be just clarifying and this understanding would definitely be in the interest of the accused.

Half a year after the 12th revision of the RPE-ICTY, in June 1998, Rule 66 (A) RPE-ICTR was amended again, taking over the ICTY's provision regarding additional prosecution witnesses, yet in turn also implementing an extra provision:

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the defence:

i) (...)

*ii) no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a trial chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.*⁶⁶⁶

⁶⁶⁵ See note 633 above.

⁶⁶⁶ Rule 66 (A) RPE-ICTR as of 8 June 1998.

As the new ICTY-wording, Rule 66 (A) (ii) RPE-ICTR makes clear that those statements of witnesses the prosecution intends to call must be disclosed (in fact now ‘officially’ using the term “disclose” instead of “make available”). At the same time, the new wording of the RPE-ICTR provides for the possibility of disclosure of additional prosecution witnesses without the prerequisite of the decision of the prosecution to in fact call the respective witness, putting the decision of disclosure within the discretion of the trial chamber “upon good cause shown”. However, this fact, as considered above, also implies that a “prosecution witness” is not necessarily a witness which the prosecution intends to call at all; for otherwise the latter provision would not have any specific scope of application – the duty to disclose continuously is upon the prosecution at all times, and to demand the disclosure of the statement of a witness which actually testifies would surely not require that (additionally) good cause be shown. This assertion is corroborated by the wording of Rule 66 (A) (ii) of the Rules for the SCSL⁶⁶⁷. This Rule was obviously inspired by both the ICTY and ICTR Rules, as well as the related and mentioned jurisprudence, expressly providing that the prosecution is obliged to *continuously* disclose witness statements of additional prosecution witnesses which it intends to call to testify. Rule 66 (A) (ii) RPE-SCSL is even more elaborate than Rule 66 (A) (ii) RPE-ICTR on the disclosure of statements of “additional prosecution witnesses”, providing that “[u]pon good cause being shown by the defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.” The Rule thus clearly recognizes that a prosecution witness is not necessarily someone who the prosecution intends to call to testify. The question remains, however, in which way “good cause” in the meaning of Rule 66 (A) (ii) ICTR/RPE-SCSL could be shown, if the witness statement is neither additionally covered by Rule 66 (B) (material for the defence) or Rule 68 (exculpatory). As far as we can see, there is no jurisprudence on this point.

According to Rule 66 (A) (ii) RPE-ICTY, another category of witness statements to be disclosed by the prosecution, yet one which does not appear in the Rules of the ICTR, are those statements taken in accordance with Rule 92 *bis* through *quater*, that is to say statements and transcripts in lieu of oral testimony, other written statements and transcripts as well as written statements of unavailable persons. The reference to Rule 92 *bis* in Rule 66 (A)(ii) RPE-ICTY was introduced with the 19th revision of the RPE-ICTY in December 2000, and was quite recently (September 2006) amended once more, as to include written statements taken according to Rules 92 *ter* and *quater*. However, the first time written statements in lieu of oral testimony as such were made

⁶⁶⁷ See the synopsis in section 5.2.1 above.

subject of disclosure was in November 1999 with the 17th revision of the Rules. For one year, until the above mentioned 19th revision, the wording of Rule 66 (A)(ii) RPE-ICTY was as follows:

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) (...)

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all affidavits and formal statements referred to in Rule 94 ter; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.⁶⁶⁸

During this time, affidavits and formal statements in the meaning of Rule 94 *ter* (“Affidavit Evidence”) had to be disclosed, which provided:

To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits or formal statements signed by other witnesses in accordance with the law and procedure of the State in which such affidavits or statements are signed. These affidavits or statements are admissible provided they are filed prior to the giving of testimony by the witness to be called and the other party does not object within seven days after completion of the testimony of the witness through whom the affidavits are tendered. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.⁶⁶⁹

Rule 94 *bis* had been adopted on 4 December 1998 (Rev. 14), amended by the 17th Revision in November 1999 and then deleted by the 19th Revision in December 2000. The term “affidavit” has since almost entirely disappeared from the Rules.⁶⁷⁰ In national jurisdictions, especially Anglo-American ones, affidavits are generally not admissible as direct evidence, as this would run counter to the adversarial system of criminal justice – it is, for example and as a matter of course, impossible to cross-examine an affiant, since he is not present in court. This is attenuated in the case of a deposition, where the opposing party has the opportunity to cross-examine the witness when the deposition is

⁶⁶⁸ Rule 66 (A) (ii) RPE-ICTY as of 17 November 1999.

⁶⁶⁹ Rule 94 *ter* as of 7 December 1999 (Rev. 17) until 1 December 2000 (Rev. 19).

⁶⁷⁰ An exception being Rule 54 *bis* RPE-ICTY, which refers to affidavits of state officials in proceedings where orders directed to states for the production of documents are in dispute; this has, however, nothing to do with evidence before the Tribunal.

taken.⁶⁷¹ But also in Roman-Germanic jurisdictions, 'immediate' evidence is generally considered to be preferable to 'indirect' evidence.⁶⁷²

Given the fact that affidavits, as mentioned above, were very commonly relied on as evidence in the Nuremberg IMT and other post-World-War-II-trials, it comes as a surprise that, with the exception of depositions, written testimony in lieu of oral testimony was not included in the legal framework of the ICTY from the very beginning. The reasons for this appear to lie in the fact that international human rights standards regarding fair trial guarantees had significantly changed since Nuremberg. Generally, the first President of the ICTY Antonio Cassese stated: "One can discern in the statute and the rules a conscious effort to avoid some of the often-mentioned flaws of Nürnberg and Tokyo."⁶⁷³ In the drafting process of the RPE-ICTY, the issue of affidavits was addressed by at least two entities. *Helsinki Watch* dedicated some thoughts to the matter, proposing a very strict position:

*The Statute fails to indicate when, if ever, ex parte affidavits may be used. The ICCPR [...] simply reiterates the basic principle that in general trials should be open and that the accused shall have the right to examine witnesses against him. (See ICCPR, Article 14(3)(e).) This approach makes sense under the ICCPR, as it is a general statute, drafted to encompass all scenarios. The Statute, however, was created only to address a single and unique war crimes tribunal, a court burdened with the difficulty of investigating war crimes during an ongoing conflict and while the aggressors remain, at least in part, victorious. Given that the issue of admissibility of ex parte affidavits is of paramount concern under such circumstances (and especially because some commentators have suggested that ex parte affidavits be used when witnesses are too afraid to testify), the Statute should provide more explicit instructions. Helsinki Watch suggests that, in order to comply with the highest international standards of due process, courts never admit ex parte affidavits as substitutes for live testimony, because the admission of ex parte affidavits violates the rights of the accused to confrontation and cross-examination.*⁶⁷⁴

⁶⁷¹ See, for the Ad-Hoc Tribunals, Rule 71 (C), or, for the United States, Rule 15 (e) Federal Rules of Criminal Procedure.

⁶⁷² See, e.g., Section 250 of the German Criminal Procedure Code: "[Principle of Examination in Person] If the proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by reading out the record of a previous examination or reading out a written statement." See also *Peters*, Strafprozeß, p. 295.

⁶⁷³ ICTY Annual Report 1994, A/49/342, S/1994/1007, 29 August 1994, par. 71.

⁶⁷⁴ Procedural And Evidentiary Issues For The Yugoslav War Crimes Tribunal: Resource Allocation, Evidentiary Questions and Protection of Witnesses, Helsinki Watch, August 1993, printed in

The issue also appeared in the proposal by the American Government, which was a little laxer regarding the admission of written testimony, yet making clear that “primary evidence” should be preferable:

*The Trial Chamber shall prefer the presentation of primary evidence of a fact.
"Primary evidence" means original or first hand evidence.*⁶⁷⁵

According to the Rules adopted at the time of the creation of the ICTY, direct examination of witnesses was considered the rule, depositions the exception. Rule 90 provided:

*Witnesses shall, in principle, be heard directly by the Chambers. In cases, however, where it is not possible to secure the presence of a witness, a Chamber may order that the witness be heard by means of a deposition as provided for in Rule 71.*⁶⁷⁶

This rule was soon slightly watered down, stating:

*Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.*⁶⁷⁷

The next change came about in 1997, when, in exceptional circumstances, examination via video-link was allowed.⁶⁷⁸ The “principle” of direct examination was maintained for a few more years, however, it was, doubtfully from a normative and functional perspective, “subjected” to Rules 71 and 71 *bis* with the 17th Revision of the Rules.⁶⁷⁹ The decline of the primacy of oral testimony was, once more, orchestrated with a reference to Nuremberg:

13. [...] The Tribunal's cases involve complex legal and factual issues, as well as the application of legal principles that have not previously been interpreted or applied. Moreover, unlike the Nürnberg and Tokyo trials, a great deal of

Morris/Scharf, An insider's guide to the international criminal tribunal for the former Yugoslavia, 487, 492 et seq.

⁶⁷⁵ Rule 25.8 (A).

⁶⁷⁶ Rule 90 (A) as of 11 February 1994.

⁶⁷⁷ Rule 90 (A) as of 30 January 1995 (Rev. 3).

⁶⁷⁸ See Rule 90 (A) as of 17 November 1999: “Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71 or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link.”

⁶⁷⁹ See Rule 90 (A) as of 17 November 1999: “Subject to Rules 71 and 71 *bis*, witnesses shall, in principle, be heard directly by the Chambers.” It is indeed questionable whether one can “subject” a principle to other provisions without giving it up.

reliance is placed on the testimony of witnesses rather than on affidavits, and the Tribunal is committed to ensuring that the rights of the accused are fully respected in accordance with contemporary human rights norms. [...]

116. A new rule, 94ter was added to the Rules, providing for the taking of affidavit evidence to prove a fact in dispute. This amendment is part of the ongoing commitment of the Tribunal to speeding up the trial process while providing for the proper protection of the rights of the accused and the obligation of the Tribunal to the international community to conduct trials fairly and expeditiously.⁶⁸⁰

15 months later, with the 19th Revision of the Rules, the “principle” of direct examination of witnesses disappeared from the Rules for good, giving the Chamber a wide discretion whether to admit it or not.⁶⁸¹ Additionally, Rule 89 (F) was adopted, providing: “A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.” As one will note, the changes of the provisions about affidavits as once contained in Rules 94 *ter* partially coincide with the amendments of Rule 90 (A) – both disappear with the 19th Revision of the Rules in December 2000; and Rule 92 *bis* emerges, being, combined with Rule 89 (F), the most detailed and powerful provision for the admission of indirect evidence.

Thus, the mentioned changes in the wording of Rule 66 (A) (ii) RPE-ICTY as regards affidavits must be seen in the broader context of a number of amendments aimed at speeding up the trials.⁶⁸²

Clearly crafted reflecting the named disclosure rule of the ICTY, Rule 66 (A) (i) RPE-SCSL, also contains a duty of the Prosecutor to disclose evidence to be presented pursuant to Rule 92 *bis* RPE-SCSL, the latter referring to provisions which also resemble the respective Rules of the RPE-ICTY.

It would thus seem logical that the disclosure provisions had to move along with the general development. However, this appears not to have happened in the Rules of the ICTR – Rule 66 (A) (ii) RPE-ICTY does not contain any reference to Rule 92 *bis*, even though the RPE-ICTR does have a comparable provision in the same place, which was,

⁶⁸⁰ See ICTY Annual Report 1999, A/54/187, S/1999/846, 25 August 1999, paras. 13 and 116.

⁶⁸¹ See Rule 90 (A) since December 2000: “Every witness shall, before giving evidence, make the following solemn declaration: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth”.”

⁶⁸² See on the increasing laxity towards written as opposed to oral evidence in the history of the ICTY in general *Wald*, Establish Incredible Events By Credible Evidence; *Kay*, The Move from Oral Evidence to Written Evidence; as well as *Fairlie*, Due Process Erosion.

however, only adopted in 2002.⁶⁸³ It must also be noted that the RPE-ICTR never contained any provision as to affidavits. At the same time, the RPE-ICTR have, until this day, maintained the above mentioned principle that witnesses shall provide evidence in person.

5.2.1.4 Audio Recording, December 1996 – November 1997

In the 10th revision of the RPE-ICTY (December 1996), an additional clause was attached to Rule 66 (A), changing its wording as follows:

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses. The final version of the statement of the accused or a witness, as audio-recorded at the time of the interview, as well as a translation into one of the working languages of the Tribunal, shall be provided to the defence.

The purpose of this additional clause is not quite clear. The “final” version of a statement is most probably the last one to be recorded. Since the first clause of Rule 66 stipulates that all statements must be disclosed, it does not seem to make very much sense to introduce a new provision merely for stressing the fact that the final version of the statement must (also) be provided to the defence. The second clause can therefore not be understood as limiting the scope of the first.

A possible interpretation seems to be that only the final version of the respective statement has to be disclosed together with a translation into one of the working languages of the Tribunal, and possibly a copy of the audio-recording. However, the already mentioned provision of Rule 43 (iv) states that a copy of the statement of the suspect has to be supplied to him or her anyway. Therefore, the only possible scope of application for the second clause seems to be translations of the final statements of the accused or a witness. The Fourth Annual Report of the ICTY is silent as to the reasons of this amendment.⁶⁸⁴ The additional clause does not seem to have had any relevance as regards the jurisprudence of the ICTY. It disappeared with the 12th revision, about a year later, and apparently had no impact on the Rules of the ICTR or the SCSL.

⁶⁸³ See Rule 92 *bis* RPE-ICTR as of 6 July 2002.

⁶⁸⁴ Annual Report of the ICTY, A/52/375, S/1997/729, 18 September 1997, Par. 5.

5.2.1.5 Language Requirements

In the Rules of the ICTY, the materials which must be disclosed under Rule 66 must be “in a language which the accused understands”. This phrase was introduced by the 13th Revision of the Rules (10 July 1998). A parallel provision is missing for the ICTR and SCSL. This may be due to the fact that, in contrast to the ICTY, it is assumed that all accused of the other courts speak English or, in the case of the ICTR, English or French, which are working languages of the respective courts.⁶⁸⁵ As usual, the Annual Report is silent on this point.

5.2.1.6 Time Limits

The time limits provided for in Rule 66 (A) vary between the different tribunals.

In its current wording, Rule 66 (A)(i) RPE-ICTY, in principle, sets a strict time limit, providing that the supporting material and the statements of the accused and the witnesses have to be disclosed within thirty days of the initial appearance of the accused. The “first appearance” of the accused is governed by Rule 62, and marks the point when the accused is formally charged.

The named time limit was not included in the original version of Rule 66. From the third until the 12th Revision of the RPE-ICTY (November 1997), its wording was as follows:

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.

The new wording after the 12th revision was the following:

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence:

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

(ii) no later than sixty days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; copies of

⁶⁸⁵ See Art. 24 SCSLSt, Rule 3 (A) RPE-SCSL; Art. 31 ICTRSt, Rule 3 (A) RPE-ICTR.

the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

Here again, the Annual Report is of no help as to the motives of the modification.⁶⁸⁶ The imposition of a strict time limit after the initial appearance of the accused would probably be the interest of the latter. The wording “as soon as practicable” might of course, taken seriously, result in an even quicker disclosure process, but practically the Prosecutor might be tempted to declare that disclosure is impracticable at any given time; which is difficult to challenge before the Chamber. It must, however, be noted that, although the now introduced time limit appears to be strict, the ICTY Judges introduced, by adopting Rule 127, a general provision making flexible almost all time limits contained in the Rules, also including those pertaining to disclosure; according to Rule 127, time limits cannot only be extended, but also reduced. Nevertheless, “good cause” needs to be shown for an application of Rule 127; in principle, therefore, the time limits regarding disclosure must be adhered to.

The 12th revision, dividing Rule 66 (A) into Sub-Rules (i) and (ii), also brought a differentiation of time frames as regards the supporting material and the statements of the accused on the one hand and witness-statements on the other. As can be inferred from the above cited original wording, until the 12th revision of the Rules, all three different groups of disclosure material contained in Rule 66 (A) had to be treated equally as regards the time frames. Now there was a substantial change: supporting material and statements of the accused are to be disclosed no later than 30 days after the initial appearance of the accused, whereas the ‘disclosure deadline’ for witness statements, according to Rule 66 (A)(ii), was now no later than sixty days before the trial. Since usually the time between the initial appearance of the accused and the beginning of the trial is considerably longer than sixty days, this revision of the Rules meant a significant disadvantage for the accused.

However, this rigid time frame of sixty days was revised already little more than six months later, and replaced by a flexible one. In the 13th revision of the Rules in July 1998, the wording of Rule 66 (A) (i) was amended to what follows:

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) [...]

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; copies of the

⁶⁸⁶ See, once again, the Fifth Annual Report of the ICTY, note 604 *supra*.

statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

The time limit is no longer to be derived from the Rules, but left to the discretion of the Trial Chamber or the Pre-Trial-Judge. The latter “institution” was also introduced by the 13th revision of the Rules (Rule 65 ter); Rule 66 was modified accordingly.

The legal practice of the ICTY appears to have adapted to a regular period of thirty days prior to the trial.⁶⁸⁷

In contrast, Rule 66 (A) RPE-ICTR, starting from an identical wording as the one of the ICTY, developed a little differently. At first, the RPE-ICTR also introduced strict time limits instead of flexible ones, and equally adopted the differentiation between supporting material/prior statements of the accused on one side and witness statements on the other. The wording of Rule 66 (A) RPE-ICTR as adopted on 08 June 1998 (thus seven months after the 12th revision of the RPE-ICTY) was the following:

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the defence:

i) within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

ii) no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a trial chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.

The wording is almost identical to the one of the RPE-ICTY after the 12th revision; differences being that the limitation phrase subjecting Rule 66 (A) to Rules 53 and 69 in the RPE-ICTR not only applies to Sub-Rule (A), but to all Sub-Rules contained in Rule 66⁶⁸⁸ and the difference concerning the statements of “additional prosecution witnesses” which we have already described above. However, unlike Rule 66 (A) (ii) RPE-ICTY, which was amended again, introducing the “time-limit prescribed by the Trial Chamber or the pre-trial Judge”, Rule 66 (A) (ii) RPE-ICTR retained the strict time-limit of 60 days regarding statements of witnesses whom the prosecution intends to call to testify at trial until today. Notably, the ICTR never introduced a provision

⁶⁸⁷ *Prosecutor v. Milutinović et al.*, ICTY Case No. IT-99-37-PT, Decision on prosecution's Motions for Protective Measures, Trial Chamber, 17 July 2003, p. 4.

⁶⁸⁸ This will be dealt with in more detail below.

comparable to Rule 127 RPE-ICTY; according to Rule 107 RPE-ICTR time limits can only be extended, not reduced. As concerns additional prosecution witnesses, the setting of a time limit is left to the Trial Chamber.

Rule 66 (A) RPE-SCSL, in contrast to the ICTY and ICTR, adopted a time limit of 30 days after the initial appearance of the accused as regards the disclosure of the statements of witnesses the prosecution intends to call to testify at trial (as seen above, the RPE-SCSL contain no disclosure duty as regards prior statements of the accused). Thus, the disclosure regime of the SCSL in this respect is the friendliest towards the interests of the accused. Also, it installs a continuous duty of the prosecution to disclose the statements of additional witnesses who are intended to be called by the prosecution, setting a general time limit of sixty days before the trial; reminiscent of the corresponding provision of the ICTY. This latter limit, however, is subject to exceptions by decision of the Court upon good cause shown by the Prosecutor. As already briefly mentioned above, the Rule also states that statements of prosecution witnesses which are not intended to be called at trial may be ordered to be disclosed upon good cause shown by the defence, which is a parallel provision to Rule 66 (A) (ii) RPE-ICTR.

An evaluation of the development of Rule 66 (A) RPE-ICTY as regards the time frames must come to a critical conclusion. The original wording “as soon as practicable” certainly left a certain margin of discretion for the Prosecutor, yet it was certainly possible to at least file a motion to the competent Judge or Chamber. In this context, it must be noted again that usually a considerable amount of time passes between the first appearance of the accused and the beginning of the trial.⁶⁸⁹ While the prosecution can and will make practical use of this time, the accused and his defence are banned to remain practically inactive, at least they cannot prepare a defence which is tailored to the prosecution case. After all, the decline from “as soon as practicable” over “not less than sixty days” to “within the time-limit prescribed by the Trial Chamber or by the Pre-Trial Judge”, practically meaning a thirty days period, is strikingly contrary to the interests of the accused.

In contrast, the time limits prescribed by the Rules of the SCSL appear more balanced; which is remarkable in the context of the late creation of the SCSL. The time limits of the RPE-ICTR lie in between the other two, retaining a stricter approach than the ICTY.

⁶⁸⁹ See also *Gibson/Lusiaá-Berdou*, Disclosure, note 652 *supra*, p. 318.

5.2.1.7 Limiting Provisions

The 12th revision of the RPE-ICTY in November 1997 not only brought the division into two sub-paragraphs in Rule 66 (A), but also explicitly subjected it to two other provisions, namely Rules 53 and 69. Rule 66 of the RPE-ICTR as adopted on 08 June 1998 underwent a similar change; though going further in that the subjection to Rules 53 and 69 was included *before* Sub-Rule (A), thus subjecting the whole of Rule 66 RPE-ICTR to Rules 53 and 69. The drafters of the RPE-SCSL structurally, at a first glance, followed the example of the ICTY, yet included two more limiting provisions, Rules 50 and 53. Factually, however, the SCSL provision is “in between” the ones of the other two courts, for Rule 66 (A) (iii) RPE-SCSL is in substance close to their Sub-Rule (B). The following synopsis should illustrate the differences:

ICTY after 12th Rev., November 1997	ICTR June 1998	SCSL 2002
<p>Rule 66 Disclosure by the Prosecutor</p> <p>(A) Subject to the provisions of Rules 53 and 69,</p> <p>the Prosecutor shall make available to the defence:</p> <p>(i) within thirty days (...) and (ii) no later than sixty days (...)</p> <p>(B) The Prosecutor shall, upon request, permit the defence to inspect any books (...)</p>	<p>Rule 66 Disclosure by the Prosecutor</p> <p>Subject to the provisions of Rules 53 and 69;</p> <p>(A) The Prosecutor shall disclose to the defence:</p> <p>i) within 30 days (...) and ii) no later than 60 days (...)</p> <p>(B) At the request of the defence (...)</p>	<p>Rule 66 Disclosure of materials by the Prosecutor</p> <p>(A) Subject to the provisions of Rules 50, 53, 69 and 75,</p> <p>the Prosecutor shall:</p> <p>(i) Within 30 days (...) (ii) Continuously disclose (...) (iii) At the request of the defence, (...)</p>

5.2.1.7.1 Rule 69

Rule 69 is concerned with the protection of victims and witnesses and its impact on disclosure. As seen in the introduction, the protection of victims and witnesses is generally one crucial aspect of disclosure limitation, and was, in fact, one of the main arguments against disclosure from the very beginning.⁶⁹⁰

The wording of Rule 69 itself is quite similar in all three tribunals. Shown in a synoptic overview, it currently provides as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>Rule 69 Protection of Victims and Witnesses</p> <p>(A) In exceptional circumstances, the Prosecutor</p>	<p>Rule 69 Protection of Victims and Witnesses</p> <p>(A) In exceptional circumstances, either of the</p>	<p>Rule 69 Protection of Victims and Witnesses</p> <p>(A) In exceptional circumstances, either of the</p>

⁶⁹⁰ See Chapter 1 *supra*.

<p>may apply to a Judge or Trial Chamber</p> <p>to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.</p> <p>(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section.</p> <p>(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.</p>	<p>parties may apply to a Trial Chamber</p> <p>to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.</p> <p>(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.</p> <p>(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence.</p>	<p>parties may apply to a Judge of the Trial Chamber or the Trial Chamber</p> <p>to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.</p> <p>(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Witnesses and Victims Section.</p> <p>(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.</p>
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The provision determines that in exceptional circumstances the competent Chamber (or Judge) may order the non-disclosure of the identity of a victim or witness who may be in danger or at risk. This implies the non-disclosure of the witness-statements from that person, at least as long as the witness statement allows drawing conclusions as to the identity of the witness.

Rule 69 must be read in conjunction with Rule 75, which is the central Rule for the protection of victims and witnesses; Rule 69, according to Rule 69 (C), has to be understood as being supplementary to Rule 75. The latter, on its part, limits the range of application for Rule 69 (A). Since Rule 69 has been in existence as long as the Tribunals themselves, it must be concluded that it has always meant a restriction to the Prosecutor's duty of disclosure, rendering the later explicit reference in Rule 66 (A) clarifying, but probably superfluous.

At the ICTY, throughout the history of the Rules, the provision has remained practically unchanged. Originally consisting of sub-rule (A) and what is now sub-rule (C), with the 5th Revision in June 1995, the now sub-rule (B) was added, and the former sub-rule (B) became sub-rule (C). The only other modifications were the renaming of the term "Victims and Witnesses Unit" into "Victims and Witnesses Section" (15th revision, July 1999) and the introduction of the Judge as the judicial authority competent to order the disclosure or non-disclosure of documents aside of the Trial Chamber (22nd revision, January 2001).

At the ICTR, the Rule was substantially altered with the already mentioned amendment in mid-1998.⁶⁹¹ First of all, it is now not only the prosecution who may make an according application to the Trial Chamber, but also the defence. This must be seen as a positive development – obviously not only prosecution witnesses may be endangering themselves and their relatives by testifying, but defence witnesses also.⁶⁹² On the other hand, after the amendment, there appears to be no strict time limit anymore as to when at the latest the identity of the victim or witness must be disclosed. While before, just like in the corresponding provision at the ICTY, the identity protection had in principle (although still subject to Rule 75, which, however, does not provide for the anonymity of the witness *vis-à-vis* the accused) to be disclosed once the person was under the protection of the Tribunal, the competent Chamber now appears completely free to decide when or even whether the identity of victims or witnesses need to be disclosed at all. Even though this assumption cannot be upheld in the light of Sub-Rule (C), which obviously does not envisage the complete anonymity of a witness towards the accused either; nevertheless the introduction of such a wide margin of discretion can hardly be seen positively for the protection of the due process rights of the accused, and appears unnecessary, given the fact that Rule 75 actually provides detailed regulations as to how and by what measures the vital interests of victims and witnesses can be protected. The said amendment of Rule 69 (A) may have had to do with early jurisprudence of the ICTY, whereby the complete anonymity of witnesses had been, *contra legem*, as it is obvious from the Rules, allowed within certain limits.⁶⁹³ This jurisprudence was heavily disputed and discussed at the time,⁶⁹⁴ and fortunately, even though nominally endorsed, given up soon.⁶⁹⁵

⁶⁹¹ RPE as adopted on 08 June 1998.

⁶⁹² See only *Prosecutor v. Ruggiu*, ICTR Case No. 97-32-I, Decision on the defence's Motion for Witness Protection, Trial Chamber, 9 May 2000.

⁶⁹³ *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1995.

⁶⁹⁴ See, e.g., the minority opinion of Judge Stephen: *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1995; as well as *Leigh*, The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused; for a more flexible approach *Chinkin*, Due Process and Witness Anonymity; against her *Leigh*, Witness Anonymity is Inconsistent with Due Process.

⁶⁹⁵ *Prosecutor v. Blaškić*, ICTY Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 5 November 1996, paras. 24: "The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and

5.2.1.7.2 Rule 53

The second provision Rule 66 (A) is expressly subjected to in the Rules of all three tribunals is Rule 53. It currently provides as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>Non-disclosure</p> <p>(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.</p> <p>(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.</p> <p>(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.</p> <p>(D) Notwithstanding paragraphs (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an</p>	<p>Non-Disclosure</p> <p>(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.</p> <p>(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.</p> <p>(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.</p> <p>(D) Notwithstanding sub-rules (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to secure the possible</p>	<p>Non-disclosure</p> <p>(A) In exceptional circumstances, the Designated Judge may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.</p> <p>(B) When approving an indictment the Designated Judge may, on the application of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.</p> <p>(C) The Designated Judge or the Trial Chamber may, on the application of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.</p>

require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.”.

opportunity for securing the possible arrest of an accused from being lost.	arrest of an accused.	
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Whereas Rule 66 (A) refers to the Prosecutor’s duty to disclose documents to the *defence*, Rule 53 appears to deal with disclosure to the *public*, which, “in exceptional circumstances”, can be cut off by a Judge or a Trial Chamber, even without prior request of the prosecution. To understand the content of Rule 53, it may be of help to take a look at the wording history of the provision. Until 5 July 1996, the wording of the RPE-ICTR was the following:

Non-disclosure of Indictment

(A) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

(B) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

A year later, with the 9th revision of the RPE-ICTY, the ICTY followed in amending the provision to its current form.

As could be inferred from the heading of this version, Rule 53 originally referred to the indictment only; however, Sub-Rule (B) also included the non-disclosure of other documents – and it may be noted that Sub-Rule (B) does not explicitly refer to disclosure to the public, although systematically it must be understood in this way. In the 9th revision of the Rules (June/July 1996), Rule 53 RPE-ICTY underwent the first major change:

Non-disclosure

(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

(B) When confirming (...)

The specific link to the indictment in the heading was given up, and a new Sub-Rule (A) was inserted, giving the Judge or Trial Chamber the authority to cut off the public

disclosure of any document without request as a fundamental rule. However, this 'catch all' authority of the Chamber to prohibit the disclosure of "any documents or information until further order" "in the interests of justice" was restricted to "exceptional circumstances". Former Sub-Rules (A) and (B) obtained a new numbering, yet their wording remains unchanged until today.

It is doubtful why the scope of application for Rule 66 (A) was expressly subjected to Rules 53 and 69. The relevant Annual Reports of 1997 and 1998 do not contain any information as to the motives of this amendment.⁶⁹⁶ Systematically, Rules 66 and 69 belong together; both are contained in Part 5, Section 4 of the Rules ("Production of evidence"). As we have indicated above, it would therefore probably not have been necessary to mention Rule 69 in Rule 66 (A).

The case of Rule 53 is slightly different. Systematically, Rule 53 is still closely connected with the indictment – it is contained in Part 5, Section 1 of the Rules ("Indictments"), after Rule 52, which states that indictments, in principle, are public documents. As shown above, this fact can be explained by the historical development of the provision. Now, referring to *any* document, it is from a systematic viewpoint a little 'out of place'. The same holds true for the specific link between Rule 66 (A) and Rule 53: basically the two provisions do not have much to do with each other, since Rule 53 deals with disclosure to the public, whereas Rule 66 deals with disclosure to the defence. The identification of a witness, for instance, is a fundamental necessity for the preparation of the defence. On the other hand, the public disclosure of documents which allow the identification of a witness might put that witness into danger and does not advance the defence of the accused.⁶⁹⁷ Thus, measures according to Rule 53 may well go hand in hand with Rule 66; however, why Rule 66 should be "subject" to Rule 53, is unclear.

The stated arguments cannot explain why Rules 69 and 53 are explicitly mentioned in Rule 66 (A), instead, they corroborate the view that the according amendment of Rule 66 was superfluous, since both provisions have to be applied anyway. It may well be that their insertion in Rule 66 was merely declaratory.

As regards sub-rule (D), which deals with an exception to non-disclosure with regard to national states, it exists only at the ICTY and ICTR. This may be due to the specific

⁶⁹⁶ A/52/375, S/1997/729, 18 September 1997; and A/53/219, S/1998/737, 10 August 1998.

⁶⁹⁷ *Prosecutor v. Milošević*, ICTY Case No. IT-02-54, Decision on prosecution motion for Provisional Protective Measures, Trial Chamber, 19 February 2002, par. 32; endorsed in *Prosecutor v. Ojdanić*, ICTY Case No. IT-99-37-PT, Decision on prosecution's motion for order of non-disclosure to public of supporting materials disclosed pursuant to Rule 66 (A) (i), Trial Chamber, 7 June 2002, par. 3.

legal character of the different courts – whereas the ICTY and ICTR are sub-organs of the UN Security Council, the SCSL is, technically, a ‘hybrid’, established by an agreement between Sierra Leone and the U.N.

5.2.1.7.3 Rules 50 and 75 (SCSL)

As seen in the synopsis above, Rule 66 of the RPE-SCSL, in contrast to the former two courts, contains two other explicit subsections: Rule 50 and Rule 75.

Rule 50 deals with the amendment of indictments and, in its Sub-Rule B, contains specific disclosure provisions as to the amended indictment:

Amendment of indictment

(A) The Prosecutor may amend an indictment (...)

(B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:

(i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;

(ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;

(iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges.

Rule 50 thus contains no substantial “exceptions” as to the general provision of Rule 66, but rather a *lex specialis* as to what happens if the indictment is amended after the initial appearance of the accused. It obliges the Prosecutor to basically repeat the procedure according to Rule 66 (A)(i) with respect to the new charges, yet setting a shorter timeline (10 days from the “further” appearance instead of thirty days from the first). Rule 50 only refers to Sub-Rule (i), because Sub-Rule (ii), in the specific case of the SCSL, in any event imposes a continuous disclosure obligation on the Prosecutor as to additional prosecution witnesses, so a reference to Sub-Rule (ii) would make no sense. Rule 50 ICTY/RPE-ICTR does not contain specific regulations with regard the issue of disclosure in the event of an amendment of the indictment.

Rule 75, dealing with measures for the protection of victims and witnesses, also contains specific regulations concerning disclosure to the defence in Sub-Rule (F) (ii), which states:

(F) Once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the "first proceedings"), such protective measures:

(i) shall continue to have effect mutatis mutandis in any other proceedings before the Special Court (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but;

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

The Rules of the other two Tribunals contain according provisions.⁶⁹⁸ It is not clear why Rule 66 RPE-SCSL makes specific reference to Rule 75, since it is already included in the disclosure regime by the link contained in Rule 69 (C) of the Rules of all three tribunals.

5.2.1.7.4 Rule 66 (C)

Under the current wording of Rule 66 (C), the prosecution's disclosure obligations according to Rule 66 (A) are subject to secrecy and security reservations pursuant to Rule 66 (C). This is true for all three of the courts. Rule 66 (C) currently says:

ICTY , 20 October 2011	ICTR , 1 October 2009	SCSL , 28 May 2010
Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information.	Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-Rules (A) and (B).	Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting ex parte and in camera, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A).

⁶⁹⁸ Rule 75 (F) RPE-ICTY/R, respectively, which differ from Rule 75 (F) RPE-SCSL merely in that they say "the Tribunal" instead of "the Special Court".

When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.	When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.	When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.
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This wording, however, has also fundamentally changed in the history of the Rules. Originally, Rule 66 contained no exceptions for reasons of security interests. In fact, the original wording of the entire Rules, with one very general and vague exception,⁶⁹⁹ did not make any reference to state security matters whatsoever. This is interesting to note, because the proposal of the American government which, as we have seen several times already, served as a role model for the RPE-ICTY, did take up the matter of security concerns of states, addressing restrictions to disclosure on national security reasons mainly as regards the public, but also as regards the accused.⁷⁰⁰

Rule 66 (C) was first introduced in the 3rd Revision of the Rules (30 January 1995), thus at a very early stage. In its original wording, it provided:

Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

In contrast to the wording which is in force today, sub-rule (C) originally obviously foresaw exceptions to disclosure on grounds of ongoing investigation, public interest or state security interests only with regard to material under sub-rule (B), and not material pertaining to sub-rule (A). However, the Trial Chamber in the already mentioned decision in *Blaškić*, while interpreting the term “prior statements of the accused” widely,⁷⁰¹ stated at the same time that the Prosecutor could “apply to the Trial Chamber for relief from the obligation to disclose evidence which may prejudice further or

⁶⁹⁹ Rule 41 of the original version provided: “Retention of Information: The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of his investigations.”

⁷⁰⁰ See Rule 8 of the American proposal and the respective commentary (printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, note 605 *supra*, pp. 523 et subs. (“Protective Orders”).

⁷⁰¹ Prosecutor v. *Blaškić*, Trial Chamber, 27 January 1997, note 635 *supra*.

ongoing investigations or be contrary to the public interest or affect the security interests of any State” in the meaning of Rule 66 (C).⁷⁰² This ruling was obviously *contra legem*.⁷⁰³ The Chamber, however, did not bother to explain its ruling. In fact, it extended, also without explanation, the assumed scope of applicability of Rule 66 (C) as to cover exculpatory evidence according to Rule 68 also.⁷⁰⁴ It took almost two more years until Rule 66 (C) was adapted in such a way as to harmonize it with the Chamber’s holding in *Blaškić*, when, in the 17th Revision of the Rules (17 November 1999), it was amended to its current wording. Since then *any* disclosure obligation may be restrained if this “may be” in the “public interest” or if the disclosure “may affect of the security interest of any state”. The vagueness of this wording is quite striking and it is highly questionable if this, in the light of the right of the defendant to a fair trial, can be justified. Even though the effective exception of the disclosure obligation according to Sub-rule (C) is subjected to the control of the Trial Chamber, this wording makes sub-rule (C) a “blank-form” Rule which can be easily abused. In addition to that, the decision of the Trial Chamber according to Sub-rule (C) is issued *in camera*, thus not even the decision as such will be published entirely. Needless to say, it may be also stated that by extending the scope of application of Sub-rule (C) to *all* disclosure obligations under the Rules, the latter is now systematically in the wrong place. Since it is meant to be applied to *all* disclosure obligations, it should rather constitute a Rule of its own or be included in Rule 70.

While the Rule 66 (C) RPE-ICTY thus now covers *all* disclosure obligations of the prosecution, the scope of the corresponding Rule 66 (C) at the ICTR and the SCSL retain some limits in this regard. Rule 66 (C) RPE-ICTR, though originally also referring to disclosure according to Rule 66 (B) only, was amended in 1998 to its current wording. Thus, the term “materials” (“information *or materials*”) was included, corresponding with a change in the heading of Rule 66 (from “Disclosure by the Prosecutor” to “Disclosure of *materials* by the Prosecutor”); at the same time, the scope of Rule 66 (C) was widened as to encompass disclosure according to Rule 66 (A) as well. Interestingly enough, the judges of the SCSL chose to implement the somewhat strictest regime in this regard. Since the SCSL had originally taken over the Rules of the ICTR, the amendment of Rule 66 (C) RPE-SCSL meant a step ‘back’ to a stricter provision. Additionally, and perhaps more importantly, the procedure differs from the other Tribunals in that the application of the Prosecutor is not made to the Trial

⁷⁰² Ibid., par. 39.

⁷⁰³ See also *Moranchek*, Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY, note 638 *supra*, p. 487.

⁷⁰⁴ See Prosecutor v. *Blaškić*, *ibid.*, p. 24; and section 5.2.3 *infra*.

Chamber, but *ex parte* to an especially designated judge; thus retaining a more adversarial notion: the Trial Chamber does not even get to see the respective information, presumably in order not to be biased.

5.2.2 Rule 66 (B) RPE-ICTY/R / Rule 66 (A) (iii) RPE-SCSL

Rule 66 (B) deals with the disclosure of other material not comprised by Sub-rule (A). It currently provides as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or</p> <p>are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.</p>	<p>At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or</p> <p>are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.</p>	<p>At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused..</p>

The provision mentions three different categories of material: material “for the preparation of the defence”, material “intended for use by the Prosecutor as evidence at trial”, and material that was “obtained from or belonged to the accused”. In contrast to Rule 66 (A), all of the material mentioned in Sub-rule (B) need only be disclosed if requested by the defence.

While the second and third of the mentioned categories are self-explanatory, the Rules contain no guidance as to how the phrase “material to the preparation of the defence” can be defined. However, in the already mentioned decision in the proceedings against *Delalić et al.*⁷⁰⁵, the Trial Chamber defined this term by recurring to Rule 16(a)(1)(C)⁷⁰⁶

⁷⁰⁵ See note 633 *supra*.

of the United States' Federal Rules of Criminal Procedure and the related jurisprudence of US-American federal courts, as well as British jurisprudence. Based mainly on the latter, the chamber ruled that in order to determine the materiality of the evidence, the prosecution could recur to the following test: the evidence is material, if (1) it is relevant or possibly relevant to an issue in the case, (2) it raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use [this would fall into the second category of sub-rule (B)], or (3) it holds out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).⁷⁰⁷ The Chamber also stated that, if the materiality of the evidence is disputed among the parties, it is the obligation of the defence to identify the specific material in the possession of the Prosecutor and to make a *prima facie* showing of its materiality.⁷⁰⁸ It must be questioned, however, how the defence can reasonably be expected to fulfil these obligations, since in many cases it will hardly be able to specify material which it has not seen. At the same time, the ICTR Appeals Chamber held that materiality should in any case be considered as a wide concept, and that it does not require the material to be counter the prosecution Case.⁷⁰⁹

The original wording of Rule 66 (B) was as follows:

The Prosecutor shall on request permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

This wording, which is practically identical with the current one, in turn, goes back to the proposal of the American Government. Its Rule 17.1 (B) was drafted as follows:

Documents, tangible objects, and reports. Upon request of the defense the Prosecutor shall, within a reasonable time thereafter, permit the defense to inspect any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are in the possession, custody or control of the Prosecutor, and which are either material to the preparation of the defense, are intended for use by the Prosecutor as evidence at trial on the

⁷⁰⁶ Now Rule 16(a)(1)(E) FRCP (2010).

⁷⁰⁷ Ibid. (note 633 *supra*), par. 6-8; see also *Tochilovsky*, Jurisprudence of the International Criminal Courts: Procedure and Evidence, p. 115.

⁷⁰⁸ Ibid. (note 633), par. 9, 10.

⁷⁰⁹ Prosecutor vs. *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of The Tribunal's Rules of Procedure and Evidence, ICTR Case No. 98-41-AR73, App. Ch., 25 September 2006, par. 9.

*issue of guilt, or were obtained from or belonged to the accused. For purposes of this subsection matters filed with the Registry by the Prosecutor are considered in the control of the Prosecutor and subject to disclosure.*⁷¹⁰

This proposal, for its part, was obviously strongly inspired by the American Federal Rules of Criminal Procedure.⁷¹¹

Rule 66 (B) was amended together with the introduction of Rule 66 (C), as to include the already mentioned subsection under the latter:

*The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, [...].*⁷¹²

This amendment corroborates the above-mentioned finding that sub-rule (C) referred to sub-rule (B) only. The 17th revision of the Rules, which changed sub-rule (C) as to comprise all disclosure obligations of the Prosecutor, rendered the subsection clause in sub-rule (B) superfluous, it was accordingly stricken again. Since then, apart from one minor amendment⁷¹³, sub-rule (B) has remained unchanged.

As regards the ICTR and SCSL, both have retained the explicit subsection of sub-rule (B) to sub-rule (C) (or, in the case of the SCSL, sub-rule (B), which however is parallel to sub-rule (C) ICTY/RPE-ICTR). For those, however, sub-rule (C) and sub-rule (B), respectively, refer to all other disclosure obligations under Rule 66. The material difference between the ICTY and the other two courts thus lies only in the relationship between Rule 66 (C) (for the SCSL: Rule 66 (B)) and Rule 68 (disclosure of exculpatory materials); this will be discussed below.

Tochilovsky's conclusion that the right to inspection according to Rule 66 (B) is "subject to Sub-rule (C)"⁷¹⁴, is therefore correct, yet not going far enough. The jurisprudence⁷¹⁵ which he cites refers to the Rules of Procedure and Evidence of the ICTR, in which, until today, the explicit references of Sub-rule (B) to Sub-Rule (C) are

⁷¹⁰ Proposal by the American Government, note 606 *supra*, p. 533.

⁷¹¹ See Rule 16(a)(1)(C) FRCP 1994.

⁷¹² Wording of Rule 66 (B) after the 3rd revision of the Rules, 30 January 1995.

⁷¹³ The change in 12th revision of the RPE-ICTY in October/November 1997, by which the word "his" was amended to "the Prosecutor's", was obviously for reasons of clarification and gender neutrality only. After all, Louise Arbour had become Chief Prosecutor in 1996. It is noteworthy, though, that neither the ICTR nor the SCSL have, until this day, amended their respective Rules accordingly.

⁷¹⁴ *Tochilovsky*, Note 707, p. 114.

⁷¹⁵ *Prosecutor vs. Rutaganda*, Decision on the urgent defence motion for disclosure and admission of additional evidence and scheduling order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002.

contained, however, in this case together with Sub-rule (A), subjecting the scope of application of Sub-rule (C) to both Sub-rules (B) and (A).

5.2.3 Rule 68 RPE

Rule 68 establishes disclosure duties with regard to exculpatory evidence or material. The ICTY has defined exculpatory evidence as meaning “such material which is known to the Prosecutor and which is favourable to the accused in the sense that it tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence”⁷¹⁶. It must, of course, be questioned, whether this definition goes beyond the wording of Rule 68 and is therefore helpful in and of itself.⁷¹⁷

In light of the mentioned jurisprudence of the international human rights authorities, it appears only logical that the Ad Hoc Tribunals had to implement an obligatory disclosure of exculpatory material. In procedural regimes adhering to the Roman-Germanic tradition, the finding of exculpatory material is comprised in the investigation duties of the prosecutor⁷¹⁸ and thus treated like any other evidence (which means that it must be included in the dossier). The fact that the Rules of the Ad Hoc Tribunals contain such an obligation is, nevertheless, surprising to a certain extent: as we have seen, in the traditional adversarial system on which the Ad-hoc-Tribunals’ criminal procedure is based, it is still primarily the task of the defence to gather exculpatory evidence.⁷¹⁹

The Appeals Chamber of the ICTY, for its part, has emphasized that the disclosure of exculpatory material is “fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached”⁷²⁰ and that “[t]he prosecution’s obligation under

⁷¹⁶ Prosecutor vs. *Delalić et al.*, Decision on the request of the accused Hazim Delić pursuant to rule 68 for exculpatory information, ICTY Case No. IT-96-21-T, Trial Chamber, 24 June 1997, par. 12; affirmed in Prosecutor vs. *Krstić*, Appeals Judgment, ICTY Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, par. 178.

⁷¹⁷ See *Harmon/Karagiannakis*, The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules, p. 319.

⁷¹⁸ See, e.g., § 160 (2) StPO (German Code of Criminal Procedure).

⁷¹⁹ Prosecutor vs. *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, par. 26.

⁷²⁰ Prosecutor vs. *Krstić*, see note 716 above, par. 180.

Rule 68 is not a secondary one, to be complied with after everything else is done; it is as important as the obligation to prosecute.⁷²¹

The current wording of Rule 68 is as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>Rule 68: Disclosure of Exculpatory and Other Relevant Material</p> <p>Subject to the provisions of Rule 70,</p> <p>(i) the Prosecutor shall, as soon as practicable, disclose to the defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence;</p> <p>(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;</p> <p>(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;</p> <p>(iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure</p>	<p>Rule 68: Disclosure of Exculpatory and Other Relevant Material</p> <p>(A) The Prosecutor shall, as soon as practicable, disclose to the defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence.</p> <p>(B) Where possible, and with the agreement of the defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.</p> <p>(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.</p> <p>(D) The Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure</p>	<p>Rule 68: Disclosure of Exculpatory Evidence</p> <p>(A) The Prosecutor shall, within 14 days of receipt of the defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the defence Case Statement.</p> <p>(B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.</p>

⁷²¹ Prosecutor vs. *Kordić and Čerkez*, Decision on motions to extend time for filing appellant’s briefs, ICTY Case No. IT-95-14/2-A, Pre-Appeal Judge, 11 May 2001, par. 14.

<p>may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;</p> <p>(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.</p>	<p>may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.</p> <p>(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.</p>	
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The provision has changed fundamentally during the existence of the Tribunals. It appears therefore advisable to analyze it piece by piece in a chronological order.

The original wording of Rule 68 RPE-ICTY was the following:

Disclosure of Exculpatory Evidence

*The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused of a crime charged in the indictment.*⁷²²

This wording can be traced back to the Suggestion made by the Government of the United States in 1993. The wording contained in the suggestion was as follows:

17.2 Exculpatory evidence. The Prosecutor shall, as soon as practicable, disclose to the defense the existence of evidence known to the Prosecutor which reasonably tends to:

(A) negate the guilt of the accused of an offense charged in the indictment; or

*(B) mitigate the guilt of the accused regarding an offense charged in the indictment.*⁷²³

As already briefly mentioned, this proposal comes as a little surprise, since many other disclosure provisions resemble, more or less, in some way the Federal Rules of Criminal Procedure. In this case, however, no role model can be identified. The commentary of

⁷²² Printed in ILM 33 (1994), pp. 493-546 (523).

⁷²³ Printed in: *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia vol. 2, p. 533.

the American proposal contains no further information. It has been remarked that Rule 68 was intended to cover the so-called ‘Brady-Material’.⁷²⁴ The ABA Task Force Report⁷²⁵ mentions the Jencks Act⁷²⁶ as well as the US Supreme Court Judgment in *United States v. Giglio*⁷²⁷, recommending that these two legal sources be received by the Tribunal via a commentary. The latter legal source may be seen to be mirrored in the current wording: “may [...] affect the credibility of prosecution evidence”.

It is obvious that the content of Rule 68 and the foregoing US suggestion is almost identical – Sub-rules (A) and (B) have been merged and instead of the phrase “reasonably tends to suggest”, the ICTY Judges opted for the broader “in any way tends to suggest”. A little later, in January 1995, they decided to include an additional category of material, which relates not directly to the guilt or innocence of the accused, but to the credibility of prosecution evidence:

Disclosure of Exculpatory Evidence

*The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.*⁷²⁸

Also, the phrase “[guilt of the accused] of a crime charged in the indictment” was left out. These amendments broadened scope of application of Rule 68.⁷²⁹

The original wording of Rule 68 for the ICTR was identical to the one of the ICTY after its first amendment in 1995. However, the original wording of Rule 68 for the SCSL,

⁷²⁴ *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, p. 249. See also section 4.2.1.6 above.

⁷²⁵ See above note 630, in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, p. 594.

⁷²⁶ See section 4.2.1.3 above.

⁷²⁷ See section 4.2.1.8 above.

⁷²⁸ Rule 68 RPE-ICTY as of 30 January 1995 (Rev. 3).

⁷²⁹ “Similarly, rule 68 was amended so that the Prosecutor’s obligation to disclose to the defence exculpatory evidence which tended “to suggest the innocence or mitigate the guilt of the accused”, now extends to any evidence which “may affect the credibility of prosecution evidence”, Annual Report 1995, par. 26. Apparently the suggestion to amend Rule 68 accordingly was made by the International Law Committee of the Association of the Bar of the City of New York, see *Harmon/Karagiannakis*, The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules (p. 316, note 2).

introduced in March 2003, was considerably different and will be briefly analysed below.⁷³⁰

The difference between the original and the current version of Rule 68 ICTY/RPE-ICTR is palpable.⁷³¹ Whereas the original one is simple, short and concise, the current one establishes a sophisticated system of exceptions, checks and balances. Furthermore, the new wording included a duty to disclose exculpatory evidence in electronic form – legally not a significant difference (the material as such remains the same, for that matter), but for the practice of the discovery procedure the importance of this amendment can probably not be underestimated. It was introduced in order to limit the ‘flood’ of documents which would be disclosed to the defence under Rule 68. Particularly in conjunction with the former (wider) scope of the provision,⁷³² the defence would regularly be drowned with material which was ultimately useless; this was true especially for Rule 68 material.⁷³³

It is interesting to note that, from January 1995, which was before the ICTY had its first proceedings against *Tadić*, Rule 68 RPE-ICTY remained practically unchanged until December 2003. It underwent only one change: the expression “evidence” within the heading and the legal text was amended to “material” with the 21st revision of the Rules in July 2001. This could mean a substantial change insofar as the term “material” is wider than the term “evidence”. “Evidence” may be understood as meaning just material which can be introduced as evidence in the trial proceedings, i.e. evidence in the formal sense, whereas “material” comprises also such material that could not be introduced as evidence in the trial because of inadmissibility. It is obvious, however, that material, even though in itself it is not admissible as evidence, is still of help to the defence, as a starting point for its own investigations. In any case, the Tribunal had already ruled in 1999 that exculpatory material must be disclosed regardless of whether that material would be in itself admissible as evidence in trial proceedings or not.⁷³⁴ The ICTR retained the original wording (“evidence”) until April 2004.

⁷³⁰ 5.2.3.6 below.

⁷³¹ Indeed, it has been held that a “*new Rule 68*” was adopted, *Zappalà*, The Prosecutor’s Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE, p. 620.

⁷³² See instantly (5.2.3.1).

⁷³³ *Möller*, Das Vorverfahren im Strafprozess vor dem Internationalen Straftribunal für das ehemalige Jugoslawien (“Pre-Trial and Preliminary Proceedings”), pp. 42 et seq.

⁷³⁴ Prosecutor vs. *Krnjelac*, Decision on Motion by prosecution to Modify Order for Compliance with Rule 68, ICTY Case No. IT-97-25-PT, Pre-Trial Judge, 1 November 1999, paras. 2, 11; affirmed in Prosecutor vs. *Krstić*, Appeals Judgment, note 716, par. 178.

By the 29th Revision of the Rules (December 2003), Rule 68 RPE-ICTY was radically amended; just a little later, on 15 May 2004, the ICTR amended Rule 68 in a very similar way, with slight differences which we will take a look at.

The heading of the provision was changed, once again, to “Disclosure of Exculpatory and Other Relevant Material“, this time also in the Rules of the ICTR, which had retained the term “evidence” until then. Structurally, 5 sub-rules were introduced. It can be noted that, instead of following the usual pattern of ICTY-Rules, which is the division by capital letters, Rule 68 RPE-ICTY was divided by Roman numbers instead – Roman numbers are usually used to specify sub-paragraphs. This latter observation is particularly noticeable in the light of Rule 68 RPE-ICTR, where the usual division by capital letters was kept.

5.2.3.1 Sub-rule (i)/(A) ICTY/ICTR

The wording of Sub-rule (i)/(A) resembles the wording of Rule 68 after its first amendment in January 1995. Indeed, three material changes can be asserted.

Whereas according to the original version of the Rule only “the existence of evidence” had to be disclosed, which must probably be understood as some kind of notification, now the prosecution must disclose the material itself. However, the Appeals Chamber stated in its *Blaskić* -judgment that even under the previous wording, for reasons of fairness, it would not be sufficient to merely inform the defence of the existence of exculpatory material if this material was in the sole possession of the prosecution, but the material itself would have to be disclosed also.⁷³⁵ This decision coincides with the 30th Revision of the Rules in April 2004. The new wording appears to be favourable to the defendant because it seems to widen the disclosure duties of the Prosecutor. However, one could also understand the new wording in the way that now the prosecution must merely disclose the exculpatory material in its possession, yet without being obliged to inform the defence about the existence of exculpatory material which is not in its possession, but rather in the hands of a third person and of which the prosecution has knowledge.⁷³⁶ Understood like this, the amendment of the provision, as a matter of fact, cut down on the rights of the accused. It has, however, been held that this understanding would entail that this interpretation would “allow countless motions” with the effect as to force the Prosecutor to investigate and actively search for

⁷³⁵ Prosecutor vs. *Blaskić*, note 654, par. 41.

⁷³⁶ For this understanding apparently Prosecutor vs. *Krnojelac*, Decision on Motion by prosecution to Modify Order for Compliance with Rule 68, note 734 *supra*, paras. 8, 10, 11-2.

exculpatory evidence, and that this consequence would run contrary to Art. 15 ICTYST, which stipulates the independence of the Prosecutor as regards orders from third persons.⁷³⁷

The second change lies in what might be called “level of knowledge” of the prosecution. The wording “the existence of evidence [material] *known* to the Prosecutor” was changed into “material which in the actual knowledge of the Prosecutor”. It must be inferred from the new wording that “actual knowledge” requires a higher level of knowledge than “known”. However, “actual knowledge” of the Prosecutor may be difficult, if not impossible to prove by the defence in the case of a dispute between the parties over this issue. Yet the main difference rather appears to lie in the change of the *object* of the knowledge of the Prosecutor: originally, the knowledge of the Prosecutor referred to the evidence itself, i.e. the knowledge of the existence of the evidence, whereas its exculpatory character would be something to be assessed objectively. With the new wording, the exculpatory character is, to some extent, subjectified, in that the material must only be disclosed if not only the Prosecutor knows of its existence, but has is also aware of the fact that it is exculpatory. Nevertheless, some authors believe the amendment to be meaningless in practice, stating that the amendment only followed the interpretation of the Rule by the Tribunal.⁷³⁸

It has been stated that the main reason to amend Rule 68 in the present way, together with the introduction of electronic disclosure, was to relieve the defence from being “drowned” in irrelevant material, since the Prosecutor, under the previous wording, tended to “play safe” and hand over to the defence large quantities of material, the exculpatory relevance of was doubtful.⁷³⁹ At the same time, the new approach to the disclosure of exculpatory material also may also save resources of the Prosecutor. Other authors hold that, in fact, instead of adapting the Tribunal’s (or, for that matter, the prosecution’s) practice in accord with the Rule, the Judges did not *tackle* the underlying problems in the application of Rule 68 in its former form, but rather *avoided* them by easing down the pressure on the prosecution.⁷⁴⁰

⁷³⁷ *Khan/Dixon/Fulford*, Archbold: International Criminal Courts - Practice, Procedure and Evidence, 7-198.

⁷³⁸ *Khan/Dixon/Fulford*, Archbold: International Criminal Courts - Practice, Procedure and Evidence, 7-199, albeit without citing relevant jurisprudence.

⁷³⁹ *Möller*, Das Vorverfahren im Strafprozess vor dem Internationalen Straftribunal für das ehemalige Jugoslawien (“Pre-Trial and Preliminary Proceedings”), p. 43.

⁷⁴⁰ *Zappalà*, The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE, p. 624.

Thirdly, the passage “which *in any way tends to* suggest the innocence or mitigate the guilt of the accused or *may* affect the credibility of prosecution evidence” was converted into “[which] *may* suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence”. It is doubtful what the substantial difference between the two wordings is. It must be kept in mind, however, that it is the responsibility of the Prosecutor to determine whether certain pieces of evidence in fact are exculpatory.⁷⁴¹ The new wording must be read in conjunction with what has been said concerning the second change: overall, the new wording appears to aim to reduce the quantity of material which must be disclosed by the prosecutor, striving to rule out the ‘doubtful’ documents.

5.2.3.2 Sub-rule (ii)/(B) RPE-ICTY/RPE-ICTR

Sub rule (ii)/B contains the duty to disclose “collections of relevant material” in electronic form, the so-called “Electronic Disclosure System” (EDS). As has been stated concerning Sub-rule (i)/A above, the introduction of the EDS appears to be part of the effort to make disclosure more efficient for both parties. Since Sub-rule (ii)/B is “independent” from sub-rule (i) (“without prejudice to sub-rule (i)/A), it could be concluded that “relevant material” is not the exculpatory material itself but rather material in which exculpatory material may be contained.⁷⁴² It could, however, just aim to clarify that the disclosure performed pursuant to Sub-rule (ii)/B does not exempt the Prosecutor from discharging his duties pursuant to Sub-rule (i)/A.⁷⁴³

As concerns the RPE-ICTR, Rule 68 (B) was amended soon after the amendment of the RPE-ICTY. It slightly differs from the new ICTY wording. First, it appears to incorporate a ‘restriction’ in that the prosecution is only obliged to disclose “where possible”. The meaning of this phrase is unclear, since an ‘impossible’ disclosure obligation can obviously not be imposed (*impossibilium nulla est obligatio*). The second difference lies in the phrase “with the agreement of the defence”, meaning that the defence can insist on a submission of the material in an ‘analogous’ form.

⁷⁴¹ See, e. g., Prosecutor vs. *Blaskic*, note 654, par. 39; Prosecutor vs. *Kvočka et al.*, Decision, 22 March 2004, p. 3; Prosecutor vs. *Musema*, arrêt (“defence motion under rule 68 requesting the appeals chamber to order the disclosure of exculpatory material and for leave to file supplementary grounds of appeal”), 18 May 2001.

⁷⁴² In this sense apparently Prosecutor vs. *Halilović*, Decision on motion for enforcement of court order re electronic disclosure suite, 27 July 2005, p. 4; Prosecutor vs. *Karemera et al.*, Decision on Joseph Nzirorera’s motion to compel inspection and disclosure, 5 July 2005, p. 15.

⁷⁴³ *Möller*, Das Vorverfahren im Strafprozess vor dem Internationalen Straftribunal für das ehemalige Jugoslawien (“Pre-Trial and Preliminary Proceedings”), p. 43.

5.2.3.3 Subjection to Rule 70; Sub-rule (iii)/(C)

With the introduction of sub-rule (iii)/C in the 29th revision of the ICTY Rules, Rule 68 was implicitly subjected to Rule 70. Presumably for clarification purposes, with the 32nd revision of the Rules, the subjection of Rule 68 was made explicit.⁷⁴⁴ The latter did not happen at the ICTR, where the subjection thus remains implicit only. The SCSL does not feature a similar provision.

We will below come to some more detailed observations concerning Rule 70.⁷⁴⁵ However, the inclusion of Rule 70 within the framework of Rule 68 warrants a few remarks. It is arguably connected with a decision in the proceedings against *Brđanin* in 2002.⁷⁴⁶ Even though also before its amendment Rule 68 could have been interpreted as being subject to Rule 70, the competent Chamber clearly stated that Rule 70 did not apply to disclosure of exculpatory material according to Rule 68:

*[...] the public interest immunity discussed above is excluded where its application would deny to the accused the opportunity to establish his or her innocence. This is of paramount importance because it must be emphasised that the exception to disclose found in paragraphs 70 (B) to (E) applies **only** to information provided on a confidential basis which has been used **solely** for the purpose of generating new evidence and, in any event, **does not** relieve the prosecution of the obligation, pursuant to Rule 68 [...].*⁷⁴⁷

The relevant Annual Report, in turn, does not even count this amendment of the Rule 68 under the “most significant” ones.⁷⁴⁸

Sub-rule (iii)/(C) obliges the Prosecutor to take “reasonable steps” to obtain the consent of the provider of confidential material to disclosure of that material. What these reasonable steps may be remains unclear; and the Chamber has not really got any say as to the procedure and the production of the evidence. As to the general critique of

⁷⁴⁴ 28 July/12 August 2004. According to the versions of the Rules available on the ICTY website. *O'Sullivan/Montgomery*, The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY, who note that the explicit subjection to Rule 70 came about with the above mentioned 29th revision (at p. 529), appear to be mistaken.

⁷⁴⁵ 5.4.3 below.

⁷⁴⁶ See also *O'Sullivan/Montgomery*, The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY, note 744 *supra*, at pp. 528 et subs.

⁷⁴⁷ Prosecutor v. *Brđanin*, ICTY Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, Trial Chamber, 23 May 2002, par. 19. Footnote omitted, emphasis in the original.

⁷⁴⁸ ICTY Annual Report, A/58/297–S/2003/829, par. 33.

Rule 70 and the intrusion of (political) third party interests into the trial proceedings, these will be discussed generally below.⁷⁴⁹

5.2.3.4 Sub-rule (iv)/D

The wording of Sub-rule (iv)/D resembles almost literally the wording of Rule 66 (C), which we have discussed already (see 5.2.1.7.4 supra). The substantial meaning must be concluded to be identical. However, the existence of Rule 68 (iv) might actually be an argument against our point that Rule 66 (C) refers to all disclosure obligations contained in the Rules – if this were the case, the introduction of Sub-rule (iv) would have been superfluous, given the fact that the amendment of Rule 68⁷⁵⁰ was put into effect three years after the amendment of Rule 66 (C)⁷⁵¹. Nevertheless, we do not see how the wording of Rule 66 (C) could be interpreted in any other way than we have done above. Therefore, Sub-rule (iv)/D must *in fact* be concluded to be superfluous and certainly not clarifying.

5.2.3.5 Sub-rule (v)/E

Sub-rule (v)/E establishes a continuing obligation of the Prosecutor to disclose exculpatory material, even in and after the appeals phase. However, whether the conclusions of the Trial Chamber in *Blagojević*, that “the prosecution must, on a continuo[u]s basis, search ‘all material known to the Prosecutor’, in whatever form and in relation to the accused, for the existence of material which in any way tends to mitigate the guilt of the accused or may affect the credibility of prosecution evidence, and disclose the existence of such material completely to the defence”, is highly questionable in the light of the amendments to Rule 68.

5.2.3.6 SCSL

The wording of Rule 68 RPE-SCSL diverts from the wording of the other Tribunals in that it speaks of a Defence Case Statement according to Rule 67 RPE-SCSL, which we

⁷⁴⁹ 5.4.3 below. See also once more *O'Sullivan/Montgomery*, The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY, *ibid*.

⁷⁵⁰ 29th and 30th Revision of the Rules, December 2003, July 2004.

⁷⁵¹ 16th Revision of the Rules, July 1999.

will take a look at below.⁷⁵² Sub Rule (A) refers to this defence Case Statement which is unknown at the other Tribunals. Sub-Rule (B) says substantially the same as Rule 68 in the RPE of the other two Tribunals, setting a disclosure obligation regarding exculpatory material in a strict time-frame of 30 days of the initial appearance and also stating a continuing disclosure obligation.

5.2.4 Rule 94 bis

Rule 94 bis, which deals with the testimony of expert witnesses and its disclosure, is contained in the Rules of all three Ad Hoc Tribunals. Currently, it provides as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>Testimony of Expert Witnesses (A)</p> <p>The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.</p> <p>(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:</p> <p>(i) it accepts the expert witness statement and/or report; or</p> <p>(ii) it wishes to cross-examine the expert witness; and</p> <p>(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.</p> <p>(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial</p>	<p>Testimony of Expert Witnesses (A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 bis (B)(iv)(b) and Rule 73 ter (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.</p> <p>(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:</p> <p>(i) It accepts or does not accept the witness's qualification as an expert;</p> <p>(ii) It accepts the expert witness statement; or</p> <p>(iii) It wishes to cross-examine the expert witness.</p> <p>(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling</p>	<p>Testimony of Expert Witnesses (A) Notwithstanding the provisions of Rule 66(A), Rule 73 bis (B)(iv)(b) and Rule 73 ter (B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.</p> <p>(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:</p> <p>(i) It accepts the expert witness statement; or</p> <p>(ii) It wishes to cross-examine the expert witness.</p> <p>(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling</p>

⁷⁵² Section 5.3.1 below.

Chamber without calling the witness to testify in person.	the witness to testify in person.	the witness to testify in person.
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The Rule was first introduced at the ICTR with the amendment of 8 June 1998. The ICTY soon followed with the 13th revision on 10 July 1998. The original ICTR rule was worded as follows:

Rule 94 bis: Testimony of Expert Witnesses

(A) Notwithstanding the provisions of Rule 66(A)(ii), Rule 73 bis (B)(iv)(b) and Rule 73 ter (B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:

(i) it accepts the expert witness statement; or

(ii) it wishes to cross-examine the expert witness.

(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

The original ICTY rule only differed from the one of the ICTR in that the notions of Rule 66 (A)(ii), the words “of the present Rules” in par. (A), and the words “Trial Chamber” in par. (B) were left out, presumably because they were thought to be obsolete.

The introduction of the Rule came with a general restructuring of the pre-trial procedure at the Ad Hoc Tribunals, which will be described in a little more detail below.⁷⁵³

The general purpose of Rule 94 bis, as of other provisions adopted around this time, is obviously to streamline the proceedings and enhance judicial economy, in that the opposing party gets the chance to “accept” the statement of the expert witness and thus waive its right to cross-examination, so that the expert need not be examined at all, and his statement can be taken into evidence without much further ado; at the same time, it provides that the Chamber gets the evidence as well. Rule 94 bis applies to both parties.

The wording of the ICTR Rule has remained almost unaltered, the sole exception being the inclusion of sub-rule (B)(i), which relates to the qualification of the expert

⁷⁵³ See Excursus, instantly.

witness;⁷⁵⁴ the same holds true for the SCSL, albeit the other way round; i.e. that the wording was changed back to the wording of the original ICTR Rule.⁷⁵⁵

At the ICTY, Rule 94 *bis* was amended a few more times. With the 18th revision of the Rules, the references to Rules 73 *bis* (B)(iv)(b) and 73 *ter* (B)(iii)(b) (pre-trial and pre-defence conference) were replaced by references to Rule 65 *ter* (E)(iv)(b) and 65 *ter* (G)(i)(b). Indeed, this was necessary, because already with the 17th revision of the Rules, Rules 73 *bis* (B)(iv)(b) and 73 *ter* (B)(iii)(b) as contained in sub-rule (A) of Rule 94 *bis* RPE-ICTY had been stricken, meaning that the reference still contained in Rule 94 *bis* as of the 17th revision went into the void. At this point, for a better understanding, it appears justified to very briefly⁷⁵⁶ describe a few general changes in the Rules put in place in order to enhance judicial economy within the trials; these changes related to the pre-trial proceedings.

⁷⁵⁴ As of 27 May 2003. There appears to have been a little confusion in the revision of the ICTR Rules as of 1 July 1999, where apparently the (B) of Rule 73 *ter* (B) as contained in sub-rule (A) was misinterpreted as belonging to Rule 94 *bis* itself:

“Rule 94 *bis*: Testimony of Expert Witnesses

(A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 *bis* (B) (iv) (b) and Rule 73 *ter*

(B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

(C) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:

- (i) It accepts the expert witness statement; or
- (ii) It wishes to cross-examine the expert witness.

(D) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.”

The mistake was corrected with the next revision (21 February 2000).

⁷⁵⁵ As of 1 August 2003.

⁷⁵⁶ See generally on some of the changes of the Rules in order to expedite the proceedings *Boas*, Creating Laws of Evidence for International Criminal Law - The ICTY and the Principle of Flexibility, *Meron*, Procedural Evolution in the ICTY, *Mundis*, Improving the Operation and Functioning of the International Criminal Tribunals, as well as *Harmon*, The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials.

Excursus: Pre-Trial Regulations (Rules 65 *ter*, 73 *bis*, *ter* RPE)

The Judges of the Tribunals recognized that disclosure, not only between the parties but also the communication of evidence to the court itself, had clear advantages as regards trial management and judicial economy. Some important reforms to this end came, like Rule 94 *bis*, in the summer of 1998.⁷⁵⁷ The most significant reforms were the introduction of the Pre-Trial Judge (Rule 65 *ter* RPE-ICTY) as well as the Pre-Trial and Pre-Defence Conferences (Rules 73 *bis* and *ter*) RPE-ICTY/R. The Pre-Trial Judge is a designated member of the Trial Chamber dealing with the matter (Rule 65 *ter* (A) RPE-ICTY). Even though the ICTR and SCSL do not have Pre-Trial Judges *stricto sensu*, Rule 73 *bis* (A) RPE-ICTR/SCSL does foresee that a single Judge may be designated by the Chamber in order to supervise the Pre-Trial Conference, making the ICTR system similar to the one of the ICTY. Rules 65 *ter* and 73 *bis* and *ter* RPE-ICTY are closely connected, indeed, at the ICTY, some of the provisions originally contained in Rule 73 *bis* RPE-ICTY have ‘wandered’ to Rule 65 *ter* (which is why the above-mentioned original reference in Rule 94 *bis* RPE-ICTY to Rules 73 *bis* and *ter* had to be changed). The construction between the two is quite complicated and has been described elsewhere.⁷⁵⁸ Suffice it here that the Pre-Trial Judge as a judicial organ obviously serves the interest of judicial economy; decisions taken by a bench sitting with three judges at the same time is logically more time consuming.⁷⁵⁹ The Pre-Trial Judge is in charge of most of the issues that arise between the parties during the pre-trial phase, among them with disclosure according to Rules 66 and 67.⁷⁶⁰ Other than that, Rules 65 *ter* and 73 *bis* and *ter* are quite closely related to disclosure to the Chamber, or, for that matter, communication of information to the Chamber before the trial.

⁷⁵⁷ ICTR: 8 June 1998, ICTY: 10 July 1998 (13th revision). See regarding the efforts to enhance the judicial economy of the Tribunals also Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/541634, 22 November 1999, as well as the critical remarks of *Mundis*, Improving the Operation and Functioning of the International Criminal Tribunals.

⁷⁵⁸ See once again the references cited in note 756, particularly *Boas*, Creating Laws of Evidence for International Criminal Law - The ICTY and the Principle of Flexibility, pp. 61, 86 et subs.

⁷⁵⁹ In fact, some of the tasks of the Pre-Trial Judge can, according to Rule 65 *ter* (D)(i) RPE-ICTY even be delegated to a Senior Legal Officer, which is frequently done, but also has its downsides, see *Harmon*, The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials, p. 387.

⁷⁶⁰ Rule 65 *ter* (C) RPE-ICTY as of rev. 44: “The pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, 67, Rule 73 *bis* and Rule 73 *ter*, and with all or part of the functions set forth in Rule 73.”

Rule 73 *bis* RPE-ICTR⁷⁶¹ as well as Rule 65 *ter* (E)⁷⁶² in conjunction with Rule 73 *bis* RPE-ICTY basically require the Prosecutor to lay out his case in considerable detail,

⁷⁶¹ Rule 73 *bis* RPE-ICTR

(A) The Trial Chamber shall hold a Pre-Trial Conference prior to the commencement of the trial.

(B) At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following:

- (i) A pre-trial brief addressing the factual and legal issues;
- (ii) Admissions by the parties and a statement of other matters not in dispute;
- (iii) A statement of contested matters of fact and law;
- (iv) A list of witnesses the Prosecutor intends to call with:
 - (a) The name or pseudonym of each witness;
 - (b) A summary of the facts on which each witness will testify;
 - (c) The points in the indictment on which each witness will testify; and
 - (d) The estimated length of time required for each witness;
- (v) A list of exhibits the Prosecutor intends to offer stating, where possible, whether or not the Defence has any objection as to authenticity.

The Trial Chamber or the Judge may order the Prosecutor to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call to testify.

(C) The Trial Chamber or the designated Judge may order the Prosecutor to shorten the examination-in-chief of some witnesses.

(D) The Trial Chamber or the designated Judge may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

(E) After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

(F) At the Pre-Trial Conference, the Trial Chamber or the designated Judge may order the Defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial.”

⁷⁶² “(E) Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 *bis*, to file the following:

(i) the final version of the Prosecutor’s pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law;

(ii) the list of witnesses the Prosecutor intends to call with :

including witness lists, and summaries of the facts on which they will testify. The material must also be supplied to the defence. The latter, in turn, according to Rule 65 *ter* (F),⁷⁶³ must answer, laying out the nature of the defence, and regarding which matters it takes issue with the Prosecutor and in what way. It is, according to Rule 63 *ter* (L)⁷⁶⁴ RPE-ICTY, collected by the Pre-Trial Judge in a file, which is then transmitted to the Trial Chamber. The same, according to Rule 73 *ter* RPE-ICTR, and Rule 63 *ter* (G)⁷⁶⁵ in conjunction with Rule 73 *ter* RPE-ICTY, happens after the

- (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;
 - (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment;
 - (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count;
 - (e) an indication of whether the witness will testify in person or pursuant to Rule 92 bis or Rule 92 quater by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and
 - (f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case.
- (iii) the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed.

⁷⁶³ (F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

- (i) in general terms, the nature of the accused's defence;
- (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and
- (iii) in the case of each such matter, the reason why the accused takes issue with it.

⁷⁶⁴ "(L) (i) After the filings by the Prosecutor pursuant to paragraph (E), the pre-trial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule.

(ii) The pre-trial Judge shall submit a second file to the Trial Chamber after the defence filings pursuant to paragraph (G)."

⁷⁶⁵ "(G) After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following:

- (i) a list of witnesses the defence intends to call with:
 - (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;
 - (c) the points in the indictment as to which each witness will testify;

prosecution case, when the defence, in the so-called defence conference, must provide an outline of its case, again including a list of witnesses and summaries of the facts on which they will testify.

We will instantly take a look at the regime of disclosure by the defence ad the Ad Hoc Tribunals; however, we can see at this point already, that the judges of the Tribunals have adopted a relatively firm position as regards their own role, in the interest of trial management and judicial economy. Even though the named pre-trial provisions do not concern disclosure in the technical sense, since the evidence itself is not submitted to the Chamber, the development nevertheless shows the intertwinement between disclosure between the parties and trial management, as well as the growing relevance of the chamber in the process.

Rule 94 *bis* (continued)

Coming back to the amendments of Rule 94 *bis* RPE-ICTY, we can state that by the 19th revision of the Rules (1/13 December 2000), the mentioning of the Trial Chamber was removed; with the 22nd revision (13 December 2001), it came back in, albeit together with the notion of the Pre-Trial Judge (see current wording above). Other than that, the time-limit of sub-rule (A) was replaced by a flexible “time-limit prescribed by the Trial Chamber or by the pretrial Judge”; at the same time, the time-limit contained in sub-rule (B) was doubled to 30 days, albeit also including the possibility of the Chamber or Judge imposing a flexible time limit. With the 26th revision (30 December 2002), the already mentioned possibility for the opposing party to challenge the qualification of the expert was included (albeit in sub-rule (B)(iii), and not, as at the ICTR, as a new sub-rule (B)(i)). Finally, with the 39th revision (22 September 2006), the provision was amended so as to also refer to *reports* of the expert witnesses. Since then, the wording of Rule 94 *bis* has remained unchanged.

(d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count;

(e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 quater by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and

(f) the estimated length of time required for each witness and the total time estimated for presentation of the defence case; and

(ii) a list of exhibits the defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The defence shall serve on the Prosecutor copies of the exhibits so listed.”

The Rule is, once again, a good example of the intertwinement between disclosure between the parties and ‘disclosure to’, or information of the Chamber; it serves the preparation of both the parties and the Court.

5.3 Disclosure by the Defence

As noted above, the main burden of disclosure lies on the prosecution. However, there are situations in which the defence for its part is obliged to disclose certain material to the prosecution. Defence disclosure mainly relates to special defences, such as alibi or mental incapacity. It is (though wrongly, as we have seen in the introduction⁷⁶⁶) partly grounded in the principle of the equality of arms; however, its main purpose appears to be to secure an expeditious trial, by enabling the prosecution to adequately prepare its case, as well as the mentioned truth finding functionality. Indeed, while at the beginning of the Ad Hoc Tribunals the disclosure duties of the defence were very limited, they have been broadened considerably, especially as far as the ICTY is concerned.

5.3.1 Rule 67

The most prominent of the Rules regarding disclosure by the defence is Rule 67. It currently reads as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>Rule 67 Additional Disclosure</p> <p>(A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 bis, but not less than one week prior to the commencement of the defence case, the defence shall:</p> <p>(i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the defence’s custody or control, which are intended for use by the defence as evidence at trial; and</p> <p>(ii) provide to the Prosecutor</p>	<p>Rule 67: Reciprocal Disclosure of Evidence</p> <p>Subject to the provisions of Rules 53 and 69:</p> <p>(A) As early as reasonably practicable and in any event prior to the commencement of the trial:</p> <p>(i) The Prosecutor shall notify</p>	<p>Rule 67: Reciprocal Disclosure of Evidence</p> <p>Subject to the provisions of Rules 53 and 69:</p> <p>(A) As early as reasonably practicable and in any event prior to the commencement of the trial:</p> <p>(i) The Prosecutor shall notify</p>

⁷⁶⁶ See section 1.3.1.4 above.

<p>copies of statements, if any, of all witnesses whom the defence intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 bis, Rule 92 ter, or Rule 92 quater, which the defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.</p> <p>(B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter:</p> <p>(i) the defence shall notify the Prosecutor of its intent to offer:</p> <p>(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;</p> <p>(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and</p> <p>(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.</p> <p>(C) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.</p>	<p>the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;</p> <p>(ii) The defence shall notify the Prosecutor of its intent to enter:</p> <p>(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;</p> <p>(b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.</p> <p>(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.</p> <p>(C) If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are</p>	<p>the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below, or any defence pleaded in the defence Case Statement served under Sub-Rule (C);</p> <p>(ii) The defence shall notify the Prosecutor of its intent to enter:</p> <p>(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;</p> <p>(b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.</p> <p>(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.</p> <p>(C) To assist the Prosecutor with its disclosure obligations pursuant to Rule 68, the defence may prior to trial provide the Prosecutor with a defence Case Statement. The defence Case</p>
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<p>(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.</p>	<p>within the custody or control of the defence and which it intends to use as evidence at the trial.</p> <p>(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.</p>	<p>Statement shall:</p> <p>(i) set out in general terms the nature of the accused's defence;</p> <p>(ii) indicate the matters on which he takes issue with the prosecution; and Rules of Procedure and Evidence of the Special Court for Sierra Leone</p> <p>(iii) set out, in the case of each such matter, the reason why he takes issue with the prosecution.</p> <p>(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.</p>
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Just as most other provisions on disclosure, Rule 67 has changed considerably during the existence of the Tribunals. Originally, its wording in the RPE-ICTY was as follows:

Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received

notice in accordance with Sub-rule (ii) below;

(ii) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

(C) If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

(D) If either party discovers additional evidence or material which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or material.

Part of this provision can be traced back to the suggestion made by the United States Government:

17.4 Disclosure by the defense. Except as otherwise provided in these Rules, the defense is required to provide disclosure only in the following situations:

(A) Notice of defenses. No later than the date set by the Trial Chamber for the completion of production of evidence, the defense shall notify the Prosecutor its intent to offer:

(1) the defense of alibi, including the specific place or places at which the accused claims to have been present at the time of the alleged offense and the names and addresses of witnesses upon which the defense intends to rely to establish the alibi;

(2) the defense of diminished or lack of mental responsibility, including the names and addresses of witnesses upon which the defense intends to rely to establish the diminished, or lack of, mental responsibility;

(3) a special defense, including the names and addresses of witnesses and documentary evidence upon which the defense intends to rely to establish the special defense; however, failure of the defense to provide notice under this Rule shall not limit the right of the accused to testify.

(B) Inadmissibility of withdrawn notice. Evidence of the fact that the defense previously provided and then withdrew notice of a defense is not admissible at trial.

(C) Reciprocal production of evidence. If the defense requests disclosure under Rule 17.1 (B), the Prosecutor, upon compliance with the defense request, is entitled to inspect any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the accused and which the defense intends to introduce at trial on the issue of guilt.⁷⁶⁷

⁷⁶⁷ *Morris/Scharf, An insider's guide to the international criminal tribunal for the former Yugoslavia, vol. 2, p. 534.*

This proposal, in turn, resembles, in part, the American disclosure regulations. As to the reciprocal disclosure obligations, we find similar provisions in Rule 16 (b)(1)(A) FRCP⁷⁶⁸; concerning the disclosure in cases of special defences, in Rules 12.1. and 12.2. FRCP.

One notices that, indeed, the disclosure obligations of the defence were limited. As far as disclosure relating to special defences is concerned, the defence is apparently only obliged to “notify” the prosecution of its evidence, and not necessarily disclose it *stricto sensu*. It is then up to the prosecution to investigate the defences further. However, the “notification” must indeed imply the names and addresses of the witnesses upon which the defence intended to rely. It is noticeable that the defence would have to disclose to the Prosecutor the names *and addresses* of these witnesses, whereas the Prosecutor would only need to disclose their names. This fact is quite obviously contrary to the equality of arms of the parties. In *Delalić*, the Trial Chamber had previously stated that the defence could adequately conduct its own investigations in preparation for trial without knowing the addresses of the witnesses.⁷⁶⁹ The explanation for the fact that the defence must disclose the addresses of the witnesses also given by the same Chamber, namely that this is due to the very fact that it is only in the case of special defences that names and addresses of the witnesses need to be disclosed,⁷⁷⁰ is not satisfactory.

Other than that, however, the defence was originally not obliged to disclose any of its evidence, if it opted against requesting disclosure according to Rule 66 (B), which was frequently done.⁷⁷¹ The original wording of the Rule is a little ‘odd’ in that it starts out with a notification obligation of the Prosecutor which itself is only triggered if the defence raises a special defence according to sub-rule (A) (ii). The wording thus resembles a provision relating to prosecution disclosure; however, it is actually the defence who triggers the application of the provision. Sub-rule (A) (i) could only be applied if sub-rule (A) (ii) had been applied first. The structure of the norm was therefore somewhat ‘upside down’. Since this was not contained in the American

⁷⁶⁸ 1994. Despite of this, *Findlay*, Internationalised Criminal Trial and the Access to Justice, p. 255, calls the reciprocal disclosure obligations as concerns tangible objects etc. “unusual”.

⁷⁶⁹ *Prosecutor v. Delalić et al.*, ICTY Case No. IT-96-21-T, Decision on the defence Motion to Compel the Discovery of the Identity and Location of Witnesses, Trial Chamber, 18 March 1997, par. 20.

⁷⁷⁰ See *Prosecutor v. Delalić et al.*, ICTY Case No. IT-96-21-T, Decision On The Motion To Compel The Disclosure Of The Addresses Of The Witnesses, Trial Chamber, 13 June 1997, par. 10. See also *Kamardi*, Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial-Prinzips, p. 314.

⁷⁷¹ See, e.g., *Prosecutor v. Blaskić*, footnote 636 above, p. 4.

proposal, it appears that it was introduced in order to stress that in any case the prosecution carries the main burden of disclosure obligations.

At the SCSL, even though the provision is named “Reciprocal Disclosure of Evidence”, there is in fact no reciprocal disclosure regime comparable to the other Tribunals in place. The SCSL does have the usual notification requirements of the defence in the case of special defences; there is, however, no disclosure obligation as regards books, reports, tangible objects etc. Nevertheless, the SCSL features a “Defence Case Statement” by which the defence “may” give the prosecution a ‘general outline’ of its case, in order to “assist the Prosecutor with its [sic!] disclosure obligations”. The defence is thus not technically obliged provide this statement; however, if it does, it triggers an obligation of the prosecution to disclose “the existence of evidence [...] which may be relevant to issues raised in the defence Case Statement.” Because the statement of the prosecution according to Rule 68 (A) RPE-SCSL need only be provided if the defence has made an according defence Case Statement, one can indeed speak of a reciprocal system as in the heading of the provision. The concept of a defence Case Statement cannot be found in the statutory law of Sierra Leone.⁷⁷² However, it is known to English criminal procedure. As a matter of fact, Rule 67 (C) RPE-SCSL bears a strong resemblance with Sections 6 and 6 A of the Criminal Procedure and Investigations Act 1996, which provide:

Section 6: Voluntary disclosure by accused

(1) [...]

(2) The accused—

(a) may give a defence statement to the prosecutor, and

(b) if he does so, must also give such a statement to the court.

Section 6 A: Contents of defence statement

(1) For the purposes of this Part a defence statement is a written statement—

(a) setting out the nature of the accused’s defence, including any particular defences on which he intends to rely,

(b) indicating the matters of fact on which he takes issue with the prosecution,

(c) setting out, in the case of each such matter, why he takes issue with the prosecution, and

⁷⁷² The Criminal Procedure Acts, 1965, to be found on the internet at <http://www.sierra-leone.org/Laws/1965-32.pdf>.

(d) indicating any point of law (Including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

From this wording, one must assume that the English law served as an inspiration for the RPE-SCSL. In contrast to the English law, according to which the defence Case Statement, if given, must also be made to the court (which, by the way, just one more time shows the connection between disclosure and case management/truth finding), the defence Case Statement at the SCSL is made only to the prosecution.

The first minor change of Rule 67 RPE-ICTY consisted in changing the word ‘he’ in sub-rule (i) to “the Prosecutor”, obviously for reasons of gender neutrality.⁷⁷³ However, this was only done at the ICTY, and to this day, not at the ICTR. The SCSL also maintains the male wording.

The first substantial change to Rule 67 took place not at the ICTY, but the ICTR. The new version as of 08 June 1998 had the following wording:

Rule 67: Reciprocal Disclosure of Evidence

Subject to the provisions of Rules 53 and 69;

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;

(ii) the defence shall notify the Prosecutor of its intent to enter:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

⁷⁷³ RPE-ICTY Rev. 12, 12 November 1997.

(C) If the defence makes a request pursuant to Rule 66(B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

The heading was changed to ‘reciprocal disclosure of evidence’. This amendment coincides with the above mentioned change of the heading of Rule 66, where the phrase ‘disclosure of evidence by the prosecutor’ was changed to ‘disclosure of materials by the prosecutor’. It must be concluded that the Judges of the ICTR intended to stress the idea that the Prosecutor must disclose all kinds of material, even if in itself it would not be admissible in evidence, whereas the disclosure obligations of the defence according to Rule 67 refer only to evidence in the formal sense.

Furthermore, together with Rule 66, the disclosure obligations according to Rule 67 were expressly subjected to Rules 53 and 69.

Thirdly, the term “offer” in sub-rule (A) (ii) was replaced by “enter”.

In sub-rules (B) and (C), the words “such” and “in turn” were introduced, presumably meant to be clarifying. Finally, sub-rule (D) was amended, adding the terms “or information” as additional to “evidence”, and ‘pluralizing’ the word “material” to become “materials”. The Annual Report states that the amendments of the Rules generally were intended to speed up the trials as well as harmonizing the RPE-ICTR with those of the ICTY.⁷⁷⁴ As far as these objectives are concerned, it is difficult to see how the mentioned amendments should work towards them. For one, the new wording does not appear to simplify the disclosure procedure; and secondly, by the new wording, the RPE-ICTR actually digress from the RPE-ICTY.

The RPE-ICTY, though having introduced the named exceptions (Rules 53 and 69) to Rule 66 quite early, did not amend Rule 67 at first. One small change that happened until 2003 was the twofold replacement of the word “sub-rule” by “paragraph” in Rule 66 (A) (i) and by “Rule” in Rule 67 (C).⁷⁷⁵ Another amendment ‘tightened’ Rule 67 (D) (ongoing duty to disclose) to state the following:

⁷⁷⁴ A/53/429 – S/1998/857, 23 September 1998, paras. 11, 13-15.

⁷⁷⁵ Rev. 19, 1/13 December 2000.

(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.⁷⁷⁶

The first fundamental change of Rule 67 RPE-ICTY came with the 29th Revision on 12 December 2003:

Rule 67

Additional Disclosure

(A) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter:

(i) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and

(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.

(B) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

(C) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

By this amendment, the Judges of the ICTY changed both the name and the structure of the provision. From “reciprocal disclosure”, Rule 67 was renamed to “additional disclosure”. The mentioned ‘odd’ structure of the provision, consisting in the fact that sub-paragraph (A) (i), the notification obligation of the prosecution, had to be triggered by the notification obligation of the defence (A) (ii), was set straight. The norm now starts out with obligations of the defence.

The change of the name is consistent with the fact that by the new Rule 67 the reciprocal disclosure obligations were given up. The former sub-rule (C) was deleted.

⁷⁷⁶ Rev. 22, 13 December 2001.

At the same time, Rule 66 (B) was not amended, so that the defence could now request the disclosure of material which was material for the defence without taking the risk of having to show its own material.

As recently as 2008, Rule 67 was substantially amended once more, obtaining the above-cited wording. A new sub-rule (A) was inserted, making the old sub-rule (A) the new sub-rule (B) and so on. What had disappeared from the defence disclosure obligations according to Rule 67 RPE-ICTY in 2003, namely the ‘other’ disclosure material, such as books, documents, tangible objects etc., was now re-introduced, and now without any reciprocal ‘trigger mechanism’, but not only that: the defence disclosure obligations now practically mirror the complete disclosure obligations of the prosecution with the exceptions of supporting and exculpatory material, which are actually logical, and would otherwise contradict the privilege against self-incrimination (Art. 21 (4)(g) ICTYSt). According to the new Rule 67 (A), the defence must now permit the prosecution to inspect and copy (the latter right actually going unwarrantedly beyond the wording of the corresponding Rule 66 (B)) any books, documents etc. which it intends to use at trial,⁷⁷⁷ as well as the statements of all witnesses which the defence intends to call and use at trial.⁷⁷⁸ This wording is thus not only a step back towards the regime of defence disclosure as it used to be, but actually an entirely new Rule, imposing disclosure obligations on the defence which were previously unheard of.

This development of the statutory provisions must be seen in conjunction with the relevant jurisprudence of the Tribunals, particularly the ICTY.

It has been noted that at the very beginning, the Judges at the ICTY had contemplated a ‘modern’ approach towards disclosure, requiring disclosure from both parties.⁷⁷⁹ Indeed, the first President of the ICTY, Judge Antonio Cassese, stated in 1994:

We have made considerable efforts to put both the prosecution and the defence on the same footing, with full disclosure of documents and witnesses by both sides, so as to safeguard the rights of the accused and ensure a fair trial. In this

⁷⁷⁷ Rule 67 (A)(i) RPE-ICTY. It is questionable what happens if this material also includes incriminating evidence. Since the accused has the privilege against self-incrimination, he may obviously not be forced to hand this material to the prosecution. The Rules appear to suppose that this will not happen, since the accused would never intend to rely on incriminating evidence.

⁷⁷⁸ Rule 67 (A)(ii) RPE-ICTY.

⁷⁷⁹ *Kamardi*, Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial-Prinzips, p. 315.

*respect we have made a conscious effort to make good the flaws of Nuremberg and Tokyo.*⁷⁸⁰

However, it is questionable whether this view can be upheld looking at the original wording of Rule 67. As we have seen, the disclosure obligations of the defence were somewhat ‘hidden’ in Rule 67 (A) (ii); and applied only either in the case of special defences or reciprocally.

In the proceedings against *Tadić*, as the first case before the ICTY, the Chamber, though at first manifestly undecided on the matter, in the end held accordingly. During the hearing of 19 September 1996, the Chamber was confronted with an oral motion raised by the prosecution seeking the production of prior statements of defence witnesses after these witnesses had testified at trial, as well as the permission to question defence witnesses about matters discussed with the defence.⁷⁸¹ It is important to note that this was not a disclosure situation in the technical or formal sense, since it did not involve pre-trial disclosure: the Rules did not provide for disclosure of defence witnesses and the witness has already testified. However, the request related to a statement which had been made *before* the trial hearing and was thus certainly narrowly intertwined with the disclosure regime of the Tribunal. At first, overruling the objection raised by the defence, the motion was granted by the Chamber. Following a request by the defence, the Chamber later reversed its oral decision and, by majority, rejected the motion.⁷⁸² Each of the three Judges handed down a separate opinion. Judges Stephen and Vohra held that the RPE-ICTY did not provide for disclosure of witness statements by the defence, and that, according to the Rules, defence disclosure had to be considered an exception.⁷⁸³ Citing the disclosure regimes of several Anglo-American procedural systems as persuasive or even as a ‘general principle of law’ according to Rule 89 (B)

⁷⁸⁰ Statement by the President Made at a Briefing to Members of Diplomatic Missions IT/29, 11 February 1994. Summary of the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia, printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, p. 649, 650.

⁷⁸¹ See the introduction of Prosecutor v. *Tadić*, Decision On prosecution Motion For Production Of defence Witness Statements, ICTY Case No. IT-94-1-T, Trial Chamber, 27 November 1996, par. I. The motion and the decision were made in closed session.

⁷⁸² *Ibid.*, note 781, II.

⁷⁸³ See *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, Separate Opinion of Judge Stephen on prosecution Motion for Production Of defence Witness Statements, Trial Chamber, 27 November 1996; *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on prosecution Motion for Production Of defence Witness Statements, Trial Chamber, 27 November 1996, *passim*.

RPE-ICTY⁷⁸⁴, they held that all communication between the defence and its witnesses must be regarded as privileged, even after the witness had testified. Presiding Judge McDonald, dissenting, stressed that under the Rules reciprocal disclosure was, in contrast to the jurisprudence cited by her fellow Judges, generally recognized, and that this jurisprudence was therefore not persuasive.⁷⁸⁵ Stating that the development on the national level had moved away from the “adversarial cat-and-mouse-approach”, she strongly argued for a ‘modern’ or ‘cards-on-the-table’ approach and held that according to Rule 54⁷⁸⁶ in connection with Rule 98, as well as by its inherent authority, the Chamber could order the production of a defence witness statement.⁷⁸⁷ In this regard, and indeed in the context of this thesis, it is remarkable that Judge McDonald explicitly refers to the truth-finding aspect of disclosure:

*The modern approach, and one embraced by the Rules of the International Tribunal, is to facilitate full disclosure of all relevant facts to enhance the truth-finding process that is at the core of all criminal justice systems. This approach does not contravene the equality of arms principle contained in the ICCPR and the ECHR.*⁷⁸⁸

*[...] By this statement, the Chief Justice of the High Court of Australia reveals his predisposition toward the production of all relevant evidence that will aid the court in arriving at the truth. This concept lies at the heart of my decision.*⁷⁸⁹

*[...] Indeed, the search for truth is so paramount that after the proceedings before a Trial Chamber or the Appeals Chamber have been concluded, Rule 119 authorises the parties to file a motion with that Chamber to review its judgement if a new fact has been discovered which was not known to the moving party at the time of the proceeding.*⁷⁹⁰

⁷⁸⁴ *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, Separate Opinion of Judge Stephen on prosecution Motion for Production Of defence Witness Statements, note 783, p. 6.

⁷⁸⁵ See *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald on prosecution Motion for Production Of defence Witness Statements, Trial Chamber, 27 November 1996, par. 11.

⁷⁸⁶ Rule 54 provides: “General Rule: At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.” Rule 98 at the time provided: “Power of Chambers to Order Production of Additional Evidence: A Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance.” (Rule 98 as of 25 June/5 July 1996).

⁷⁸⁷ *Ibid.*, note 785, paras. 6, 9, 34, 39 et subs.

⁷⁸⁸ *Ibid.*, par. 6.

⁷⁸⁹ *Ibid.*, par. 18.

⁷⁹⁰ *Ibid.*, par. 39.

Finally, almost three years later, the Appeals Chamber stated its opinion on the matter for future reference, holding that once a witness has testified, the Trial Chamber has an inherent power to order his prior statements in order to ascertain his credibility.⁷⁹¹ The Appeals Chamber opined that since the matter had not technically to do with pre-trial disclosure, the tenets of equality of arms were not applicable,⁷⁹² and that it was therefore only a matter of ascertaining the credibility of a witness.⁷⁹³ As Judge McDonald in her dissenting opinion, the Appeals Chamber invoked the truth-finding aspect of this ‘disclosure’ (in the material sense):

*Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness.*⁷⁹⁴

*[...] If [the witness] has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial.*⁷⁹⁵

This finding is in harmony with the general development within the jurisprudence of the ICTY. In the proceedings against *Dokmanović*, a Trial Chamber as early as in November 1997, thus between the Trial Chamber decision and the Appeals Chamber decision in *Tadić*, ordered:

*the defence shall, through the Registry, deliver to the Trial Chamber Witness Statements taken from witnesses whom the defence intends to call for trial and other material that they intend to rely on at trial*⁷⁹⁶

This is, mildly speaking, unheard of. In contrast to the above mentioned situation in *Tadić*, this is not about the credibility of a witness who has already testified, but about disclosing the complete defence evidence to the Trial Chamber (and not the prosecution!). Indeed, the prosecution does not even appear to have made a motion to this end. It may be noted that two of the Judges sitting in this Trial Chamber, Judges Cassese and Mumba, were later also members of the Appeals Chamber in *Tadić*. The Judges did not bother to explain their ruling very profoundly:

⁷⁹¹ *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-A, Appeals Judgment, Appeals Chamber, 15 July 1999, par. 326.

⁷⁹² *Ibid.*, par. 320.

⁷⁹³ *Ibid.*, par. 322.

⁷⁹⁴ *Ibid.*, par. 316.

⁷⁹⁵ *Ibid.*, par. 322.

⁷⁹⁶ *Prosecutor v. Dokmanović*, ICTY Case No. IT-95-13a-PT, Order, Trial Chamber, 28 November 1997, No. 5.

*PURSUANT to the provisions of Article 21(4)(c) of the Statute, which guarantees the accused's right "to be tried without undue delay"; Article 20(1) of the Statute which enshrines the right to "a fair and expeditious" trial; and the principle of equality of arms between the Prosecutor and defence*⁷⁹⁷

The cited Articles of the Statute in and of themselves certainly do not confer any specific procedural rights upon the Trial Chamber. As to the approach to derive disclosure obligations of the accused from his basic procedural rights, we have rejected it in the introduction, however, we will come to another example shortly.

The Chamber continues:

NOTING the importance of clarifying the issues that will be argued before the Trial Chamber in the course of the trial of Slavko Dokmanovic;

CONSIDERING that the Trial Chamber will benefit from having access to Witness Statements and other documentary materials which will be relied on by the parties at trial and the production of Pre-Trial Briefs setting out the positions of the Parties;

NOTING that perusal of such documents by the Trial Chamber is primarily for the purpose of promoting better comprehension of the issues and more effective management of the trial;

The Chamber thus states that the order is made in order to improve the trial management, one of the main purposes of disclosure. Other than that, the Chamber generally sees a “benefit” in having access to the material.

With the next paragraph, it singlehandedly wipes away any doubts as to a possible bias of the Judges and the fact that one might see a collision with the prohibition⁷⁹⁸ of an ICTY Judge confirming the indictment later sitting in the Trial or Appeals Chamber:

*NOTING FURTHER that the rationale behind Rule 15(C) of the Rules of Procedure and Evidence does not necessarily prevent the Trial Chamber from examining material supporting the Indictment. As was stated by the European Court of Human Rights in Hauschildt [...]*⁷⁹⁹

Then, as if to corroborate the determination of the Chamber not to be biased, the Chamber concludes:

⁷⁹⁷ Ibid., p. 2.

⁷⁹⁸ Rule 15 (C) as of 12 November 1997 provided: „The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not sit as a member of the Trial Chamber for the trial of that accused.“ This Rule has since been amended and now states the opposite.

⁷⁹⁹ Ibid.

*CONSIDERING that this material will not be regarded as evidence by the Trial Chamber unless and until submitted in the course of trial [...]*⁸⁰⁰

In and of itself, this decision appears not to have had very much of an impact, since the Parties seem to have been content with it,⁸⁰¹ and the accused passed away relatively soon afterwards, so the trial ended without a judgment. However, apparently this was the first time that the Tribunal ordered the submission of pre-trial briefs, a feature which is now contained in today's Rule 65 *ter*;⁸⁰² in this regard, the decision should not be underestimated. It has been said Rule 73 *ter* entails a 'codification' of the above-mentioned approach in *Dokmanović*;⁸⁰³ which is, in the light of the described development, true to some extent; however, Rule 73 *ter* indeed only obliges the defence to provide a witness list and a summary of their expected statements, and not, as in the *Dokmanović* decision, the previous statements themselves.

As a matter of fact, in the proceedings against *Delalić*, we find reference to this decision and also to the procedure according to Rule 54 which had been proposed by Judge McDonald in her dissenting opinion in *Tadić*.⁸⁰⁴ Faced with yet another motion of the prosecution for the disclosure of a witness list, the Chamber, in a decision granting the motion, stressed the assumed difference between the disclosure of evidence during the *pre-trial* phase and the *trial* phase. Confronted with the argument of the defence that to order the defence to disclose its witness list in application of the general provision of Rule 54 would mean a circumvention of the special rule contained in Rule 67, the Chamber held:

[T]he special provision of Subrules 67(A)(i) and (ii) which deal with pre-trial reciprocal disclosure are completely different from the exercise of a general power by the Trial Chamber to require the Defence to furnish the Prosecution with a list of witnesses at trial. There is no way Rule 54 can be exercised to affect the special provisions of Rule 67. The fact that Rule 54 is found in Part Five of the Rules, entitled "Pre - Trial Proceedings", can not alter the plain literal meaning of its terms. Such headings are only intended to be used as guidance to the content of the Rules. Accordingly, there is no doubt that the Rules are silent on the issue of reciprocal disclosure after the commencement of

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid.: „HAVING HEARD the willingness of the Prosecutor and defence Counsel to assist in the expeditious conduct and management of the trial and having consulted them as to the proposed measures to achieve this purpose.“

⁸⁰² See as to Rule 65 *ter* Excursus, p. 223 *supra*.

⁸⁰³ *May/Wierda*, International Criminal Evidence, p. 83.

⁸⁰⁴ See note 785 *supra*.

the trial and there is a lacuna in the procedure which can be filled by exercise of powers under Rule 54.⁸⁰⁵ [...]

This reminds us of what we have called disclosure in the formal sense as opposed to disclosure in the material sense.⁸⁰⁶ However, the Chamber says more than that: it treats disclosure happening after the commencement of the trial as if it were something completely different. This line of argument (if in fact it is one) is not convincing. It is probably, as it is done in this thesis, helpful to differentiate between disclosure in the formal sense and disclosure in the material sense, in order to avoid misconceptions, especially as regards comparative legal considerations. However, to say that, at the bottom line, disclosure which takes place *after* the commencement of the trial ‘is not disclosure at all,’ seems to go too far. After all, it involves exactly the same activities, just at a different time. Functionally, disclosure before and during the trial must thus be treated equally. One may especially question this reasoning in the light of the jurisprudence of the very same Trial Chamber which had held that the Prosecutor’s disclosure duties are continuing, on-going during the trial and even the appeal stage.⁸⁰⁷ At that point, the Chamber certainly did not base this obligation of the prosecution on its own power to order it according to Rule 54, but on the general disclosure rules.

However, the Chamber did not stop there:

The Trial Chamber is of the opinion that this is not a matter of reciprocity but a matter of the concept of fair trial. The rationale of Article 21 paragraph 1, of the Statute is to ensure a fair trial in accordance with the Rules. One of the minimum guarantees for the accused in Article 21 paragraph 4(e), of the Statute, is equality of arms, which is the most important criteria of a fair trial. This principle requires the maintenance of a fair balance between the parties and applies to both civil and criminal cases.⁸⁰⁸

Article 21 (4)(e), as a matter of fact and of course, does not contain the notion of equality of arms, but enshrines the *right of the accused to examine witnesses*.⁸⁰⁹ We sense that from here, it can still get worse, and it does:

⁸⁰⁵ *Prosecutor v. Delalić et al.*, ICTY Case No. IT-96-21-T, Decision On The prosecution’s Motion For An Order Requiring Advance Disclosure Of Witnesses By The defence, Trial Chamber, 4 February 1998, par. 43.

⁸⁰⁶ See section 1.1.1 *supra*.

⁸⁰⁷ *Prosecutor v. Delalić et al.*, 26 September 1996 (note 633 *supra*), *ibid*.

⁸⁰⁸ *Ibid.*, par. 45.

⁸⁰⁹ “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

*There is no doubt that procedural equality means what it says, equality between the prosecution and the defence. To suggest [...] an inclination in favour of the defence is tantamount to a procedural inequality in favour of the defence and against the prosecution, and will result in inequality of arms. This will be inconsistent with the minimum guarantee provided for in Article 21 paragraph 4(e), of the Statute. In the circumstances of the International Tribunal, the Prosecutor and the defence rely on State co-operation for their investigation, so, prima facie, the basis for the inequality argument does not arise.*⁸¹⁰

This reasoning is, to put it mildly, breathtaking, and, from a systematic, functional and normative viewpoint, can be called a catastrophe. Finally, adding the sentence that, since both defence and prosecution in international criminal proceedings are dependent on state cooperation, inequality cannot arise, is downright cynical.

As Judge Vohrah had rightly pointed out:

*It seems to me [...] that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the defence acquiring parity with the prosecution in the presentation of the defence case before the Court to preclude any injustice against the accused.*⁸¹¹

As these examples drastically show, to derive ‘fair trial rights’ for the prosecution from the fair trial rights of the accused as provided by human rights treaties, is plainly untenable.⁸¹² Nevertheless, the ICTY Chambers have held accordingly in a number of instances.⁸¹³

A bench of the Appeals Chamber, (somewhat ironically presided by Judge Vohrah) dismissed the appeal of the defence against the said decision on formal grounds; *obiter*, it approved of the reasoning of the Trial Chamber as regards the application of Rule 54.⁸¹⁴ The bench remained silent, however, as to the fairness issue.

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]”.

⁸¹⁰ *Prosecutor v. Delalić et al.*, *ibid.*, par. 49.

⁸¹¹ *Prosecutor v. Tadić*, Separate Opinion of Judge Vohrah on prosecution Motion for Production Of defence Witness Statements, note 783 above.

⁸¹² See already section 1.3.1.4. above.

⁸¹³ See references in *Tochilovsky*, Jurisprudence of the international criminal courts and the European Court of Human Rights, p. 278.

⁸¹⁴ *Prosecutor v. Delalić et al.*, ICTY Case No. IT-96-21-AR 73.3, Decision On Application Of Defendant Zejnil Delalić For Leave To Appeal Against The Oral Decision Of The Trial Chamber Of 12 January 1998 Requiring Advance Disclosure Of Witnesses By The defence, Bench of the Appeals Chamber, 3 March 1998, paras. 14 et subs.

It elucidates from this analysis that the disclosure obligations of the defence have been expanded considerably at the Ad Hoc Tribunals, especially at the ICTY. The Chambers, even without having the statutory means to do so, have forced the defence time and again to disclose part of their evidence to the prosecution, and, notably, to the Chamber also. This has been based upon truth-finding and fair trial considerations. Particularly the latter reasoning, as we have seen, is untenable. In this sense, the expansion of the Rules must be welcomed as serving as a clarification. However, the right of the accused to silence as well as his privilege against self-incrimination must not be violated. It must therefore be clear that only *if* the accused decides to defend himself actively, he can be obliged to disclose part of his evidence beforehand so as to enable a reasonable preparation of the trial.

5.3.2 Rule 94 *bis*

Rule 94 *bis* has been dealt with above; it applies to both parties.⁸¹⁵

5.4 Exceptions and limitations to Disclosure

5.4.1 Rule 66 (C)

While the disclosure restriction contained in Rule 66 (C) now covers all disclosure obligations of the Prosecutor, it originally only applied to disclosure according to Rule 66 (B). For this reason, it has been dealt with above.⁸¹⁶

5.4.2 Rule 69

As Rule 69 is specifically mentioned as an exception in Rule 66(A), it has also been dealt with above.⁸¹⁷

⁸¹⁵ See 5.2.4 *supra*.

⁸¹⁶ See 5.2.1.7.4 *supra*.

⁸¹⁷ See 5.2.1.7.1 *supra*.

5.4.3 Rule 70

Rule 70 deals with “matters not subject to disclosure”. It currently provides as follows:

ICTY, 20 October 2011	ICTR, 1 October 2009	SCSL, 28 May 2010
<p>Matters not Subject to Disclosure</p> <p>(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.</p> <p>(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.</p> <p>(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in</p>	<p>Matters Not Subject to Disclosure</p> <p>(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.</p> <p>(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.</p> <p>(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.</p>	<p>Matters not Subject to Disclosure</p> <p>(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.</p> <p>(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.</p> <p>(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. The consent shall be in writing.</p>

<p>order to compel the production of such additional evidence.</p> <p>(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.</p> <p>(E) The right of the accused to challenge the evidence presented by the prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).</p> <p>(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply mutatis mutandis to specific information in the possession of the accused.</p> <p>(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.</p>	<p>(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.</p> <p>(E) The right of the accused to challenge the evidence presented by the prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).</p> <p>(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.</p>	<p>(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.</p> <p>(E) The right of the accused to challenge the evidence presented by the prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).</p> <p>(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power to exclude evidence under Rule 95.</p>
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Rule 70 lays down exceptions to disclosure. Its aim has been described by the ICTY as to

*permit the use, as and when appropriate, of certain information which, in the absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or its origin*⁸¹⁸

and to

encourage States, organisations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by

⁸¹⁸ *Prosecutor v. Blaškić*, ICTY Case No. IT-95-14-T, Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, Trial Chamber I, 11 November 1997, par. 10. See on the question of obtaining evidence in international trials specifically using the example of the *Blaškić* Case *Katz Cogan*, *The Problem of Obtaining Evidence for International Courts and Tribunals*.

*guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected.*⁸¹⁹

Or, as drastically put by the Trial Chamber in the proceedings against *Brđanin*:

*It is indeed almost impossible to envisage this Tribunal, of which the prosecution is an integral organ, being able to fulfil its functions without having provisions like Rule 66(C) and 70 in place.*⁸²⁰

This latter statement is remarkable in the light of the history of the ICTY.

Rule 70 is one of those Rules which radically changed their content in the course of the ICTY. Its original wording was the following:

Rule 70

Matters not Subject to Disclosure

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

This wording, for its part, goes back to Rule 17.6 of the American proposal for the RPE-ICTY, copying it practically verbatim.⁸²¹ The latter is, in turn, partially based on Rule 16 (a) (2) of the US FRCP.⁸²²

As one can see, there was, at the beginning no mention whatsoever concerning state security or confidential information.

Rule 70 RPE-ICTY was, however, amended to this end already at a very early stage, in autumn 1994.⁸²³ Sub-Rule (B) was added, which provided:

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of

⁸¹⁹ *Prosecutor v. Slobodan Milošević*, ICTY Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, Appeals Chamber, 23 October 2002, par. 19.

⁸²⁰ *Prosecutor v. Brđanin*, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, note 747 above, par. 18.

⁸²¹ See *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, note 615 *supra*, p. 535.

⁸²² "Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. [...]" (16 (a) (2) US FRCP as of 1994.

⁸²³ 2nd Revision of the Rules, 4 October 1994.

generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information.

In fact, Rule 70 was the very first of the disclosure provisions to be amended. The judges of the ICTY obviously saw a specific need to protect, or enable the Prosecutor to protect, confidential information which itself would not be introduced as evidence in the trial but which under the Rules of the Tribunal would have to be disclosed. It was already in the next revision of the Rules a few months later that this fact was made clear by the addition of the second sentence of the provision: “and shall in any event not be given in evidence without prior disclosure to the accused”.⁸²⁴ Since then, apart from the already mentioned gender amendment (replacing “him” by “the Prosecutor”)⁸²⁵, Rule 70 (B) has not been amended anymore.

The amendment to Rule 70 as concerns confidential information, from an ex-post perspective, appears understandable, since at the ICC, as we shall see in the following Chapter, a similar rule (Art. 54 (3)(e) ICCSt) existed from the very beginning, and has in fact played a major, if not decisive, practical role.⁸²⁶ The 1995 Annual Report of the ICTY does mention the amendment of Rule 70 specifically, albeit without much further explanation: Rule 70 (B) was introduced in order to “improve the working of the Tribunal”.⁸²⁷ However, one sees from the general content of the Report that the need to protect the confidentiality of information gathering appears to have played a major role at the time, which obviously had not been recognized to this extent at the beginning of the Tribunal. In a number of places, the Report addresses confidentiality concerns regarding the protection of victims and witnesses as well as the interests of NGOs providing information for the investigation of crimes.⁸²⁸ However, as other authors note, the amendments to Rule 70 may also have had to do with the reluctance of state governments to share their (intelligence) information;⁸²⁹ this is in line with the above cited jurisprudence of the ICTY. This fact, however, raises the question of the relationship between Rule 70 (B) and Rule 66 (C). To be sure, both provisions were introduced with the 3rd revision of the Rules in January 1995. As we have seen above⁸³⁰,

⁸²⁴ 3rd Revision of the Rules, 30 January 1995.

⁸²⁵ See already p. 233 above.

⁸²⁶ See section 6.6.4 below.

⁸²⁷ Annual Report of the ICTY, A/50/365 S/1995/728, 23 August 1995, par. 24.

⁸²⁸ Ibid., paras. 108 et subs. and 154 et subs.

⁸²⁹ Jones, *The practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda*, p. 248.

⁸³⁰ 5.2.1.7.4 *supra*.

however, Rule 66 (C) originally only applied to material in the meaning of Rule 66 (B), which historically explains its systematically wrong position in the Rules. The general content, however, of Rule 70 (B) is highly criticisable in the sense that the Prosecutor and (possibly even more so) the Chamber are thereby dependent on the goodwill of third parties. Whereas Rule 66 (C) does allow a certain control of the Prosecutor by the Trial Chamber and in fact even supplies a specific procedure for it, Rule 70 constitutes a point for intrusion of third parties with the Chamber hardly being able to intervene, a fact that is further corroborated by sub-rules (C) and (D). These, again, were introduced at a very early stage, with the 6th revision of the ICTY Rules, in October 1995.

Sub-rule (C) at first provided:

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

It thus expressly limits the powers of the Trial Chamber as regards its authority to demand the production of additional evidence according to Rule 98, both concerning additional evidence obtained by the Prosecutor from that source or from the source (a witness etc.) itself. This was further corroborated by the later introduction of a further sentence, stating:

A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.⁸³¹

This sentence prevents any circumvention of the Rule by forbidding the Judges to get the wanted information from other sources. Apart from the fact that this restriction has a serious impact on the possibilities of the defendant to prepare his case concerning the finding of evidence, especially as regards exculpatory evidence,⁸³² one can say that the Judges divested themselves to a considerable part of a means of truth-finding. This is particularly undesirable in the sense that, in the end, a third party can decide which part(s) of evidence will be available to the accused and the Chamber, thereby causing the effect that the participants will not get to see ‘the whole picture’, but only parts of it, which is often worse than not getting any evidence at all. As to the motivation of the

⁸³¹ Added in the 11th revision, 25 July 1997.

⁸³² See as to the relationship between Rule 68 and Rule 70 5.2.3.3 above.

Judges, the Annual Report explicitly mentions the amendment of Rule 70, yet confines itself to summarizing the content of the amendment.⁸³³ The ICTR and SCSL have not introduced this sentence.

Sub-rule (D) was originally framed as follows:

(D) If the Prosecutor calls as a witness the person providing, or a representative of the entity providing, information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

This is just a further ‘elaboration’ of the restrictions introduced by the 6th revision of the Rules, and completes the picture that the Tribunal exposes itself to the mercy of the provider of the respective evidence. The respective witness can basically refuse to answer any question. As sub-rule (C), sub-rule (D) was revised again by the 11th revision of the Rules⁸³⁴, now stating:

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

This amendment goes hand in hand with the above-mentioned amendment of sub-rule (C), in that it prevents the circumvention of the Rule by compelling a witness which is not or does not pertain to the provider of the information concerned, to answer questions that relate to the origin of the information (in substance, one could also generally say: questions the witness does not wish to answer).⁸³⁵

Together with sub-rules (C) and (D) came sub-rules (E) and (F), which were originally drafted in the following way:

(E) The right of the accused to challenge the evidence presented by the prosecution shall remain unaffected subject only to limitations contained in Sub-rules (C) and (D).

⁸³³ ICTY Annual Report 1996, A/51/292 S/1996/665, 16 August 1996, par. 66.

⁸³⁴ 25th July 1997.

⁸³⁵ In the proceedings against *Milutinović et al.*, the Chamber rightly “recognize[d] the prerogative of the Rule 70 provider to invoke Rule 70 at its discretion”, *Prosecutor v. Milutinović et al.*, ICTY Case No. IT-05-87-T, Second Decision on prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark, Trial Chamber, 16 February 2007, par. 26.

(F) Nothing in Sub-rule (C) or (D) above shall effect [sic!]⁸³⁶ a Trial Chamber's power under Rule 89(D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

The wording of these provisions has since then remained unchanged, except for the 19th revision of the Rules (December 2000), by which the term “sub-rules” was replaced by “paragraphs”. This change applied to the entire Rules of the ICTY; the term “sub-rule” was stricken from the RPE-ICTY entirely.⁸³⁷ At the other Ad Hoc Tribunals, this was not done. The deeper meaning of this amendment will hopefully be revealed when the motives of the Judges will be published. With the 11th revision of the ICTY Rules in July 1997, additionally, a new sub-rule (E) was included into Rule 70, stating:

The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply mutatis mutandis to specific information in the possession of the accused.

This sub-rule shall presumably work towards the equality of arms between the two parties. At the ICTR and SCSL, it was not included. By the inclusion at the ICTY, former sub-rule (E) has now become sub-rule (F).

The two sub-rules (or paragraphs) are meant to counterbalance the manifest intrusion of third party interests contained in sub-rules (C) and (D) into the trial proceedings. Sub-rule (E), however, providing that the right of the accused to challenge the evidence is “only” subject to sub-rules (C) and (D), states the obvious and arguably has an almost cynical sound to it. Sub-rule (G) (ICTR/SCSL: sub-rule (F)), in turn, gives the Chamber a certain power to exclude this incomplete and ‘tailor-made’ evidence, if it considers the trial to become unfair if this evidence is admitted. The issue became virulent especially in two more recent cases of the ICTY, namely *Milutinović* and *Milošević*, to which we will come instantly.

In the light of the criticism just expressed, it is somewhat surprising that in the early jurisprudence of the Tribunals one quite scarcely finds decisions in which sub-rules 70 (B) et subs. would have been an issue of dispute. It could well be that since it was accepted that the Trial Chamber had no power to enforce disclosure of material covered by Rule 70 (B) anyway, any efforts to challenge such exceptions would have seemed pointless. The first decisions in which Rule 70 (B) played a role appear to have been made in the proceedings against *Blaskić*. Here, the Trial Chamber laid down the requirements for the application of Rule 70, i.e. that the concerned information must be

⁸³⁶ The spelling mistake was corrected with the 9th revision of the Rules, in July 1996.

⁸³⁷ With one exception: Rule 77 *bis* (E). It must be assumed that this was simply forgotten. However, it remains there up to the moment of this writing.

in the possession of the Prosecutor, that it indeed was supplied on a confidential basis and that it was used solely for the purpose of generating new evidence.⁸³⁸ Rule 70 (B) was also applied by the ICTR, however, also merely stating that Rule 70 (B) needs to be observed, meaning that if the Prosecutor can prove that material which regularly needs to be disclosed under the Rules was obtained on a confidential basis it is exempt from disclosure.⁸³⁹ In any case, until the above-mentioned decision in *Brđanin*⁸⁴⁰, there seemed to be no general dispute as to the scope of sub-rules (B)-(E), also regarding their relationship with Rule 68.

The most demonstrative example for the implications of Rule 70 on disclosure, however, is certainly a comparison of the just mentioned proceedings against *Milošević* on the one hand and *Milutinović* on the other. In both cases, the issue revolved around the testimony of General Wesley Clark, who had been the commander of the NATO forces in the air campaign against Yugoslavia in 1999.

In the *Milošević* proceedings, the prosecution (on behalf of the American Government) had demanded that: the witness' testimony be treated as information protected by Rule 70 (C) and (D), the hearing be partially held in closed session, the witness or US Government representatives could, at any given time, require that the testimony be moved into closed session, the testimony itself be "temporarily" held in closed session with the public gallery being closed, the delay of the broadcast of the testimony be expanded from 30 minutes to 48 hours to enable the US Government to demand redactions, the prosecution's testimony limited to the content of a document handed in beforehand, the cross-examination and questioning by the *amici curiae* to underlie the same restrictions except with prior agreement of the US Government, and two US Government representatives to be present at the trial.⁸⁴¹ The motion was granted; (then Ex-) General Clark, who had already published a book and given countless interviews about his experiences in the Yugoslav Wars, testified for two days. The accused was not allowed to ask the witness questions about the air campaign against Yugoslavia, while central elements of his defence were the allegation that the Yugoslav army had acted in self-defence against the supposed aggression by the NATO campaign and that it had

⁸³⁸ Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, note 818.

⁸³⁹ *Prosecutor v. Nyiramasuhuko et al.*, ICTR Case No. 97-21-T, Decision on defence Motion for Disclosure of Evidence, Single Judge, 1 November 2000, par. 51.

⁸⁴⁰ Note 747 above.

⁸⁴¹ *Prosecutor v. Milošević*, ICTY Case No. IT-02-54-T, Confidential Decision on prosecution's Application for a Witness Pursuant to Rule 70 (B), Trial Chamber, 30 October 2003.

actually been this campaign that had caused civilians to flee from Kosovo.⁸⁴² The course of action taken by the Trial Chamber has, and rightly so, been harshly criticised.⁸⁴³

A few years later, in the trial against *Milutinović*, the competent Chamber was faced with an almost entirely parallel situation. Here, the Chamber, in application of Rules 54, 70(G), and 89(D) and Articles 20 and 21 of the Statute denied the motion of the prosecution and declined to even hear the witness, specifically on the two grounds of the limitation of both examination in chief and cross-examination, and the requirement of prior agreement of the information provider if the defence wanted this limitation to be altered. The Chamber opined that this would entail an unwarranted disclosure by the defence of its cross-examination strategy.⁸⁴⁴ The Chamber specifically rejected the intrusion by third parties to such a degree, seizing control over the proceedings. It held:

*The result of the application of these conditions would be to wrest a measure of control of the proceedings from the Chamber and hand it to the Rule 70 provider. [...] To restrict cross-examination to the subject matter predetermined by anyone other than the Chamber with the approval, at least tacit, of the prosecution is inevitably unfair to the defence.*⁸⁴⁵

And:

*It is also essential that the trial should not only be fair but be seen to be fair. Justice must be seen to be done. The trial process under the Tribunal's Statute is seen worldwide as an essential ingredient in the efforts of the international community to restore and maintain peace in the region and to bring healing and reconciliation to the territories and peoples of the former Yugoslavia. The Tribunal's mission is to try individuals accused of committing serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991. Any neutral interested bystander would be bound to view as unfair a trial in which one of the parties to a conflict insisted upon controlling the cross-examination of its citizen who commanded one force in the trial of Accused from the other, thus depriving them of their full right to confront the witnesses against them.*⁸⁴⁶

⁸⁴² See for references and on the issue of Rule 70 in the trials against *Milošević* and *Milutinović* in detail *O'Sullivan/Montgomery*, *The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*, note 744 *supra*, at pp. 528 et subs.

⁸⁴³ *Ibid.*

⁸⁴⁴ *Prosecutor v. Milutinović et al.*, ICTY Case No. IT-05-87-T, Second Decision on prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark, note 835 above, paras. 26 et seq.

⁸⁴⁵ *Ibid.*

⁸⁴⁶ *Ibid.*, par. 30, footnotes omitted.

The Appeals Chamber upheld the decision against the appeal of the prosecution.⁸⁴⁷

5.4.4 Rule 97

Rule 97, concerning the lawyer-client privilege, currently provides as follows:

ICTY, 20 October 2011

Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

- (i) the client consents to such disclosure; or
- (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

ICTR, 1 October 2009

Lawyer-Client Privilege

(A) All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

- (i) The client consents to such disclosure; or
- (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

(B) Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.

SCSL, 28 May 2010

Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

- (i) The client consents to such disclosure; or
- (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

(iii) The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance.

The confidentiality of communication between the client and his lawyer is known in most jurisdictions to a greater or lesser extent; it is recognized as a general principle of international law.⁸⁴⁸

Rule 97 RPE-ICTY has retained its original wording. The proposal of the American Government, had been framed as follows:

25.11 Lawyer-client privilege

*An individual has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to that individual.*⁸⁴⁹

⁸⁴⁷ *Prosecutor v. Milutinović et al.*, ICTY Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the prosecution from Adding General Wesley Clark to its 65th Witness List, Appeals Chamber, 20 April 2007.

⁸⁴⁸ See *Benzing*, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, p. 426 et seq. with further references.

This wording, for its part, had obviously been based on the American Federal Rules of Evidence.⁸⁵⁰ We do not see any striking similarities here. In this somewhat rare case, however, an NGO proposal proved more successful. The Lawyers Committee for Human Rights had submitted comments on the adoption of the Rules of Procedure and Evidence,⁸⁵¹ including the following proposal:

*Privilege: All communications between a suspect or witness and his lawyer in connection with obtaining legal advice should be regarded as privileged, and hence, not subject to discovery or admission at trial, unless (1) the suspect consents to such discovery or admission or (2) one or both parties to the communication has voluntarily disclosed the content of the communication to one or more third parties.*⁸⁵²

Rule 97 RPE-ICTY is thus a simplified version of the Lawyers Committee for Human Rights' proposal: "discovery" was renamed to "disclosure", the explicit admissibility limitation was apparently seen as superfluous in the light of Rule 89 (C) which establishes an untechnical approach to the admissibility of evidence.

Rule 97 RPE-ICTY is mostly self-explanatory. Generally, the lawyer-client privilege is recognized, however, it can be waived, the voluntary disclosure to a third person considered a waiver.

Both ICTR and SCSL have amended the Rule. In June 1998, the ICTR amended sub-rule 1 to its current wording, thereby doing away with the limitation to disclosure "at trial".⁸⁵³ Another amendment came about in May 2003, when the ICTR Judges added sub-rule (B), obviously in an attempt to fight the practice of "fee-splitting"⁸⁵⁴ and apparently trying to facilitate investigations as to this matter.⁸⁵⁵

The SCSL adopted the ICTR Rule as of after the 1998 amendment with an immediate revision in that a claim of ineffective assistance of counsel shall also be considered a

⁸⁴⁹ Printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, Vol. 2, p. 546.

⁸⁵⁰ See Art. V of the former Rules of Evidence, still contained in many States' Rules of Evidence (usually under Rule 501, 502 or 503).

⁸⁵¹ Memorandum of the Lawyers Committee for Human Rights to the ICTY, IT/INF 4, 19 November 1993, printed in *Morris/Scharf*, An insider's guide to the international criminal tribunal for the former Yugoslavia, Vol. 2, pp. 565-569.

⁸⁵² *Ibid.*, at p. 566.

⁸⁵³ RPE-ICTR as amended on 8 June 1998.

⁸⁵⁴ This term describes the illegal practice that the accused and his defence counsel share the legal aid provided by the respective court or tribunal for the defence of the (supposedly indigent) accused.

⁸⁵⁵ RPE-ICTR as amended on 27 May 2003.

waiver of confidentiality. Whether there was a specific reason or occasion for this amendment is unclear.

5.5 Disclosure ‘via the Chamber’ – Rules 54/98

We have already briefly seen above that as early as in the proceedings against *Tadić* there have been attempts to circumvent the disclosure provisions of Rules 66 et subs. as regards an extension of disclosure obligations of the defence.⁸⁵⁶ There, chiefly the general provision of Rule 54 was relied upon to force the defence to disclose certain documents during the trial. While this is, as we noted, an example of the intertwinement of disclosure in the formal and disclosure in the material sense, it also shows the intertwinement of disclosure and truth-finding, in that it is the competent chamber who enforces the revelation of certain information: disclosure is to take place between those participants of the proceedings who are responsible for the finding of the truth. Rule 54 contains the general power of the competent Trial Chamber to make decisions concerning the proceedings as necessary.⁸⁵⁷ Rule 98⁸⁵⁸ provides as follows:

ICTY, Rev. 46, 20 October 2011	ICTR, 1 October 2009
Power of Chambers to Order Production of Additional Evidence	Power of Chambers to Order Production of Additional Evidence
A Trial Chamber may order either party to produce additional evidence. It may <i>proprio motu</i> summon witnesses and order their attendance.	A Trial Chamber may <i>proprio motu</i> order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

It thus implies the specific empowerment of the Trial Chamber to extend the evidence for the trial on its own accord. While this power is somewhat unusual in Anglo-American jurisdictions, it has always been a ‘feature’ of international procedural frameworks and is an indispensable right for any judge working in a Romano-Germanic procedural system, as it is a means of truth-finding.⁸⁵⁹

⁸⁵⁶ See 5.3.1 above.

⁸⁵⁷ See note 786 above.

⁸⁵⁸ Only the ICTY and ICTR provisions are cited, since the SCSL RPE do not contain a similar provision.

⁸⁵⁹ See *Prosecutor v. Blaškić*, ICTY Case No. IT-95-14, Decision of Trial Chamber I in Respect of the Appearance of General Enver Hadžihasanović, Trial Chamber, 25 March 1999: “in order to ascertain the truth in respect of the crimes of which the accused has been charged”; see also Artt. 17 (b), (c) and 24(f) IMT Charter, Artt. 11 (a) to (c) IMTFE Charter; Art. 64 (6) (b) and (c) ICC Statute, Rule 140 (2) (b) ICC RPE; §§ 244 (2), 238 (1) StPO (German Code of Criminal Procedure).

Originally, Rule 98 RPE-ICTY was framed in the following way:

*A Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance.*⁸⁶⁰

Obviously the amendment of the wording to its current form did not produce any substantial difference. The wording of Rule 98 RPE-ICTR looks like a mixture between the original and the amended version of Rule 98 RPE-ICTY. It must be concluded that there is also no substantial difference between the two.⁸⁶¹

The practice of trial chambers to make use of Rule 98 for disclosure purposes, however, appears to have developed predominantly at the ICTR. Already in the proceedings against *Akayesu*, the Chamber had ordered the prosecution to

*submit all available written witness statements to the Chamber in the case and that all such statements to which reference had been made by either the Prosecutor or the defence shall be admitted as evidence and form part of the record.*⁸⁶²

This the prosecution at first refused to do, stating that the Chamber could, under Rule 98, only order the production of *specific*, as opposed to *all*, evidence.⁸⁶³ The Chamber, however, held otherwise, however, it did make a significant step backwards in that it stated that its decision should be interpreted as comprising only witness which had already been disclosed to the defence.⁸⁶⁴ Nevertheless, a practice developed, by which the ICTR Trial Chambers regularly rely on Rule 98 – both *proprio motu* and upon request of the defence.⁸⁶⁵

This practice is, as stated, a good example of the development of truth-finding in international criminal proceedings. The Court makes use of a rule which systematically has not got anything to do with disclosure in order to, on the one hand, make information available to a party of the proceedings, while taking advantage of this

⁸⁶⁰ Wording of Rule 98 before the 11th revision of the Rules, 25 July 1997.

⁸⁶¹ As rightly stated by *Gibson/Lusiaá-Berdou*, Disclosure, at note 185.

⁸⁶² *Prosecutor v. Akayesu*, ICTR Case No. 96-4-T, Decision by the Tribunal on its Request to the Prosecutor to Submit the Written Witness Statements, Trial Chamber I, 28 January 1997.

⁸⁶³ *Prosecutor v. Akayesu*, ICTR Case No. 96-4-T, Prosecutor's Motion to Reconsider and Rescind the Order of 18 January 1997, prosecution, cited according to the *Akayesu* Judgment, 2 September 1998.

⁸⁶⁴ *Prosecutor v. Akayesu*, ICTR Case No. 96-4-T, Decision on the Prosecutor's Motion to Reconsider and Rescind the Order of 18 January 1997, Trial Chamber I, 6 March 1997.

⁸⁶⁵ See *Gibson/Lusiaá-Berdou*, Disclosure, pp. 345 et subs. with further references.

information for truth-finding purposes on the other. In fact, some of these decisions even literally refer to “disclosure according to Rule 98”.⁸⁶⁶

5.6 Violations of Disclosure Obligations

A major point of controversy at the Tribunals has been what the consequences are and should be, in the case that the disclosure obligations of the parties are not fulfilled. In national jurisdictions, failure to disclose evidence before the trial (disclosure in the procedural sense) oftentimes results in an exclusion of the evidence in court.⁸⁶⁷ In the practice of the international tribunals, this is practically never the case.⁸⁶⁸ It has been stated that the exclusion of evidence is “at the extreme end of measures available” to the respective chamber.⁸⁶⁹ The only ‘sanction’ usually imposed by the Chambers is a postponement of the examination of the witness in order to give the other party (usually the defence) the opportunity to prepare its case accordingly.⁸⁷⁰

In 2001, the ICTY adopted a provision concerning remedies for non-compliance with disclosure obligations, which is Rule 68 *bis*. It provides:

The pre-trial Judge or the Trial Chamber may decide proprio motu, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

Notably, however, Rule 68 *bis* RPE-ICTY does not contain any specifics. The Annual Report is of similar usefulness, merely stating that the adoption took place on the recommendation of the Committee.⁸⁷¹ Admittedly, in the light of Rule 89 (D) it would not have made much sense to include the fact that the Trial Chamber can indeed exclude evidence if the fairness of the proceedings is at stake; a reference to Rules 46 and 77 (misconduct of counsel, contempt of the Tribunal) would also merely have stated the obvious. Possibly for the reason of this apparent needlessness, neither the ICTR nor the SCSL have adopted a similar provision.

⁸⁶⁶ See, e.g., *Prosecutor v. Karera*, ICTR Case No. 01-74-T, Decision on the defence Motion for Additional Disclosure (Rule 98), Trial Chamber, 1.9.2006

⁸⁶⁷ *Gibson/Lusiaá-Berdou*, Disclosure, at p. 320.

⁸⁶⁸ Except for occasional decisions such as the one in *Milutinović* cited above (note 844).

⁸⁶⁹ *Prosecutor v. Karemera et al.*, ICTR Case No. 98-44-T, Decision on defence Motion to Report Government of a Certain State to the United Nations Security Council and on prosecution Motions Under Rule 66(C) of the Rules, Trial Chamber, 15 February 2006, par. 25.

⁸⁷⁰ *Gibson/Lusiaá-Berdou*, Disclosure, p. 321.

⁸⁷¹ ICTY Annual Report 2002, A/57/379-S/2002/985, 4 September 2002, par. 41.

Indeed, it is hard to think of any other ‘real’ sanctions than the ones just alluded to: exclusion of the evidence and sanctions for personal misconduct of those who do not comply with their disclosure obligations. As regards the exclusion of evidence, one will generally have to agree with the above-mentioned opinion of the Chamber in *Karemera*.⁸⁷² In the light of one of the paramount goals of international criminal justice, which is the establishment of the truth, it must generally be considered necessary that the decision maker gets to see the whole picture in order to reach their decision. Exclusion of evidence must therefore be avoided. To be sure, decisions as the one in *Milutinović* are no exception to this rule, because while it is of course *unfair* to unnecessarily restrict the scope of the interrogation of a witness, it is also counter-productive for the truth-finding process, since in that case the Chamber would actually knowingly have deprived itself of seeing the whole picture. Also, one may think of a different treatment of the prosecution and defence in this regard. As Rule 67 (C) shows, the accused is not excluded from testifying on defences of alibi and special defences, even if he had not previously disclosed that he was going to do so. It therefore appears possible to exclude prosecution evidence only.

However, from a partially *ex-post* perspective, one may also think of an even more extreme sanction, which is the stay of proceedings. In *Lubanga*, as we will see below in more detail,⁸⁷³ Trial Chamber I of the ICC even twice stayed the proceedings because of non-compliance with disclosure obligations of the prosecution. This is surely partially due to the fact that at the ICC, the judges play a more active role than at the Ad Hoc Tribunals and arguably also had *their own* (as opposed to the accused’s) information on the facts of the case in mind. However, if the prosecution not only complies late, but fails to comply with its disclosure obligations, particularly as regards exculpatory evidence, in such a way that “it is not possible anymore to piece together the elements of a fair trial”⁸⁷⁴, fair trial aspects take precedence over truth finding considerations and the Chamber must have the right to stay the proceedings, also at the Ad Hoc Tribunals.

⁸⁷² Note 869 above.

⁸⁷³ See sections 6.10 and 6.6.4 below.

⁸⁷⁴ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2008, paras. 92 et subs., paragraph numbers omitted.

As regards the sanctions for personal misconduct (i.e. Rules 46 and 77), the Chambers should not be too hesitant. It is certainly not only the most extreme cases in which personal sanctions can be imposed.⁸⁷⁵

5.7 Conclusion

The history of disclosure at the Ad Hoc Tribunals shows very well the dilemmas of disclosure and adversarial criminal proceedings as a whole. Gigantic amounts of evidence need to be gathered, which is much more difficult in an international setting than within a national system, this holds especially true for the defence. It is thus all the more difficult to conduct fair trials than on the national level, which means that the prosecution is called upon to support the defence, by supplying the defence with the relevant evidence, particularly exculpatory evidence, and making this evidence manageable. This process must be controlled by the Chambers, which, as we have seen, by the shaping of the Rules and by their judicial practice, have played an increasingly active role in the proceedings, forcing both prosecution and defence to cooperate. The latter point, however, disclosure by the defence, must be looked at cautiously. While the widening trend of defence disclosure in the international proceedings of the Ad Hoc Tribunals is in line with the development in the national systems we have looked at in previous chapters, defence disclosure is a sensitive matter. The Chambers of the Tribunals have more often than not demanded more from the defence than they should have; this is particularly irksome in the light of the fact that they regularly relied on fair trial considerations for these decisions.

⁸⁷⁵ To this end, however, *Prosecutor v. Furundžija*, ICTY Case No. IT-95-17/1-PT, The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the prosecution, Trial Chamber, 5 June 1998, par. 11.

6 Disclosure of Evidence at the ICC

6.1 Introduction

The procedural law of the ICC is in many aspects remarkably different from the one of the Ad-Hoc Tribunals. While the latter, as we have seen above, though having implemented some features of the Continental European tradition, such as the less technical rules concerning the admissibility of evidence, is strongly based on the Anglo-American model of procedure, the former is much more influenced by the Romano-Germanic tradition.⁸⁷⁶ However, the ‘legislator’ of the ICC, meaning the plenipotentiaries at the Rome Conference and the Assembly of States Parties⁸⁷⁷ still chose not to implement a dossier system, but retained the procedural feature of disclosure in the formal sense. In the following, as in the former chapters, we will take a look at the genesis of the legal framework of the ICC’s disclosure regime, and analyse the relevant provisions in some detail. Furthermore, as was to be expected, the ICC Pre-Trial and Trial Chambers have already produced quite a large amount of jurisprudence concerning disclosure, on which we will also shed some light. In contrast to the disclosure regime of the Ad Hoc Tribunals, there is no need to discuss any changes in the relevant provisions, because the Rules of Procedure and Evidence⁸⁷⁸ are, in principle, not drafted and amended by the Judges of the Court, but, according to Art. 51 ICCSt, by the Assembly of States Parties;⁸⁷⁹ and the latter has, as of this writing, amended neither the Statute nor the Rules with regard to disclosure provisions. Nevertheless, however, the relevant provisions of the Statute and the Rules were naturally amended several times within the drafting process, on which we will shed some light.

⁸⁷⁶ See generally on the procedural law of the ICC, also *vis-à-vis* the Ad Hoc Tribunals *Kreß*, The Procedural Texts of the International Criminal Court, as well as *Ambos*, The Structure of International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?. See also *Arsanjani*, The Rome Statute of the International Criminal Court.

⁸⁷⁷ Hereinafter: ASP.

⁸⁷⁸ Hereinafter: RPE-ICC.

⁸⁷⁹ Except for the possibility of the Judges of the ICC to adopt, by two-thirds majority, provisional Rules according to Art. 51 (3) ICCSt; however, these provisional Rules also need to be adopted by the ASP at its respective next meeting.

6.2 General Overview over the Legal Framework – Applicable Law

The sources of applicable law for the ICC are enumerated in Art. 21 ICCSt in a hierarchical manner.⁸⁸⁰ The primary sources of law are thus the Rome Statute and the Rules of Procedure and Evidence (par. 1 (a)). Applicable treaties as well as principles and rules of international law are only a secondary source of law (par. 1 (b)); general principles may only be applied if these sources prove to be fruitless (par. 1 (c)). In addition, the Court “may” apply principles and rules of law as interpreted in its previous decisions (par. 2).

6.2.1 The Rome Statute

As the Ad-Hoc Tribunals, the Rome Statute reaffirms the basic procedural rights of the accused to information and preparation of his defence, which, as we have seen above,⁸⁸¹ form today’s basis for the human rights aspect of the disclosure rights of the accused.⁸⁸² However, in contrast to the respective Statutes of the Ad Hoc Tribunals, the Rome Statute makes, on several occasions, explicit reference to disclosure. Though leaving most of the details of disclosure to the Rules of Procedure and Evidence, the Statute addresses at least two aspects of disclosure which we have also analyzed in the context

⁸⁸⁰ Article 21 ICCSt: Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions. [...]

⁸⁸¹ See section 1.3.1. above.

⁸⁸² Art. 67 ICCSt: In the determination of any charge, the accused shall be entitled to [...] the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence [...].

of the Ad-Hoc Tribunals: Procedural disclosure rights of the accused, and limitations to disclosure, due to witness protection as well as the protection of security interests of national states and third parties.

A particular feature of the ICC's procedural law worth mentioning at this point already is the two-stage approach of its criminal procedure. The crafters of the ICC opted for a system with two separate public and oral procedures: the *confirmation of the charges* according to Art. 61 ICCSt, held before a pre-trial chamber, and the *trial* according to Articles 62 et subs., held before a trial chamber. In contrast to the Ad Hoc Tribunals, the ICC thus has, as it were, *two* pre-trial stages (before the confirmation hearing as opposed to *after* the confirmation hearing but *before* the trial⁸⁸³). This occasionally makes it a little more complicated to determine at what time and to what extent disclosure must take place. Hereinafter, for reasons of unambiguity, we will, when appropriate, differentiate between "pre-confirmation" and "pre-trial" disclosure, respectively.

The first hint to disclosure contained in the Statute can be seen in the duty of the Prosecutor to submit to the accused, together with the document containing the charges (Regulation 52 of the Regulations of the Court), "information" on the evidence on which the Prosecutor intends to rely at the confirmation hearing, Art. 61 (3)(b) ICCSt, which is followed by an affirmation of the competent Pre-Trial Chamber to rule on any issues on the matter of disclosure at this stage.⁸⁸⁴

Another central provision is the duty of the Prosecutor to disclose exculpatory evidence, which, as we have seen, proved to be a very important aspect in the disclosure regime of the Ad Hoc Tribunals. The legislator of the ICC, however, obviously considered this disclosure duty important enough to include it in the Statute itself, in the same Article, though in a separate paragraph, as the fair trial rights of the accused (Art. 67 (2) ICCSt)⁸⁸⁵. The formulation thus not merely stipulates an obligation of the Prosecution, but indeed a positive right of the accused.⁸⁸⁶ Flanked by the duty of the Prosecutor not only to disclose but also to actively investigate exonerating circumstances (Art. 54

⁸⁸³ See, for example, article 64(3) or 64(6), "prior to trial".

⁸⁸⁴ This is further elaborated by Rule 121 RPE-ICC; see for more details on this below.

⁸⁸⁵ "In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide."

⁸⁸⁶ See also *Zappalà*, *The Rights of the Accused*, at p. 1352.

(1)(a) ICCSt), Art. 67 (2) ICCSt demonstrates a strong case of the crafters of the ICC for both fairness and truth-finding.

The same holds true for Art. 64 (3)(c) and (6)(d) ICCSt⁸⁸⁷, which reiterate the power of the Trial Chamber to rule on disclosure issues before it and is thus in parallel with Art. 61 (3). Art. 64 (6)(b) and (d)⁸⁸⁸, in turn, reaffirm the power of the Trial Chamber to order the attendance of witnesses as well as the production of evidence *ex officio*, even exceeding the material already collected and presented by the parties.⁸⁸⁹ This reminds us of the feature already contained in the American FRCP (Rule 17(c)) and the Ad Hoc Tribunals (Rule 98), and reaffirms the view that the Court has been provided with far-reaching inquisitorial powers by the ICC legislator.

Aspects limiting disclosure, however, have also found their way into the Statute. Directly after the rights of the accused as enumerated in Art. 67 follow the rights of victims and witnesses, indeed, as compared with the Ad Hoc Tribunals, where victims do not enjoy participation rights, the ICC marks a fundamentally new development in international criminal law.⁸⁹⁰ Art. 68 (5)⁸⁹¹ serves as a counter-weight to prosecution

⁸⁸⁷ “Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: [...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”

⁸⁸⁸ “In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: [...]

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; [...]

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties; [...].”

⁸⁸⁹ It is to be noted that the Appeals Chamber of the ICC has expressed the view that this wording envisions that “the right to lead evidence pertaining to the guilt or innocence of the accused [...] lies primarily with the parties”, see *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 (OA 9, OA 10), Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, 11 July 2008, par. 93.

⁸⁹⁰ See regarding victims *Safferling*, *Das Opfer völkerrechtlicher Verbrechen: Die Stellung der Verbrechenopfer vor dem Internationalen Strafgerichtshof*.

⁸⁹¹ “Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

disclosure if the safety of victims and witnesses is at stake. Art. 54 (3)(e)⁸⁹² represents a consequence of the Ad Hoc Tribunals' experience that international trials can hardly be conducted satisfactorily if states and international organizations are unwilling to share their information. This is closely related with the aspect of the protection of national security interests, as elaborated in Artt. 72, 73, 93 and 99 ICCSt. We will discuss these aspects in some more detail below.

6.2.2 The Rules of Procedure and Evidence

The particulars of the disclosure regime at the ICC are, as observed, regulated in the Rules of Procedure and Evidence of the ICC. Most of the relevant provisions are to be found in Chapter 4 (“Provisions relating to various stages of the proceedings”), Section II, i.e. Rules 76-84 of the RPE-ICC (“Disclosure”). Rules 76 to 80 cover prosecution and defence disclosure and differentiate according to different types of material (witness statements and other material), as well as between disclosure *stricto sensu* and inspection. At least at the beginning of the ICC, as we shall see, this latter differentiation has played a certain role in the ICC's jurisprudence, which it apparently did not have at the Tribunals. Rules 81 and 82 deal with restrictions on disclosure, whereas Rule 83 relates to rulings of the competent chamber regarding exculpatory evidence on request of the Prosecutor. Furthermore, Rule 84 regulates details of the disclosure between the confirmation hearing and the trial as well as during trial. Moreover, Rule 73 deals with the impact of privileged communications and information on disclosure, whereas Rule 121 (2) through (6) govern the disclosure procedure to be followed in preparation of the confirmation hearing. As regards the differentiation between pre-confirmation hearing disclosure and pre-trial disclosure, the Rules are not always entirely clear. Chapter 4 of the Rules, which contains most of the Rules relating to disclosure, comprises “provisions relating to various stages of the proceedings” – and thus not necessarily to *all* of them. This somewhat ambiguous title for the Chapter was chosen on purpose.⁸⁹³ Finally, Rules 121 (2)(c), 129 and 130 regulate important details concerning the role of the respective chambers in the disclosure process, comprising

⁸⁹² “The Prosecutor may [...] [a]gree 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 [...]”

⁸⁹³ *Brady*, Disclosure of Evidence, at p. 404. At the beginning of the negotiations, however, France had proposed the creation of a general part of the Rule, containing provisions common to all phases of the proceedings, see Proposal by France. General Outline of the Rules of Procedure and Evidence, PCNICC/1999/DP.2, 1 February 1999, A, par. 9 (p. 2).

what in previous chapters has been called “disclosure to/via the court”. These provisions are intimately related to the record of the proceedings pursuant to Rules 15 and 131, which, as we will see, was originally framed as a kind of ‘down-sized’ dossier. Related to the record of the proceedings, we also find an entirely new feature of disclosure in international criminal proceedings, as well as of the ICC as an institution, which is the participation of victims in the disclosure procedure. According to Rule 121 (10) RPE-ICC, the legal representatives of the victims enjoy, under certain conditions, a right to access the record.

6.2.3 The Regulations

On 26 May 2004, the Judges of the Court adopted, according to Art. 52 ICCSt, the Regulations of the Court⁸⁹⁴, which are to contain rules “necessary for its routine functioning”.⁸⁹⁵ They contain quite a few references to “disclosure”. Reg. 42 (2) RegCt deals with the continuing protective measures concerning previous proceedings; other provisions relate to the disclosure of records of closed proceedings (Reg. 20 (3)), the disclosure of the detention record of a detained person (Reg. 92 (3)), as well as the prohibition of contact between a detained person and other persons, when a breach of an order for non-disclosure is to be feared (Reg. 101 (2)(d)). These latter examples, however, do not relate to disclosure between the parties, but rather to the public. However, Reg 54 RegCt⁸⁹⁶, on the face of it, may have a lot do with disclosure,

⁸⁹⁴ Hereinafter RegCt.

⁸⁹⁵ ICC-BD/01-01-04.

⁸⁹⁶ Regulation 54

Status conferences before the Trial Chamber

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, inter alia, the following issues:

- (a) The length and content of legal arguments and the opening and closing statements;
- (b) A summary of the evidence the participants intend to rely on;
- (c) The length of the evidence to be relied on;
- (d) The length of questioning of the witnesses;
- (e) The number and identity (including any pseudonym) of the witnesses to be called;
- (f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;
- (g) The number of documents as referred to in article 69, paragraph 2, or exhibits to be introduced together with their length and size;

particularly regarding the role and involvement of the Trial Chamber in the disclosure process. Taken seriously, it appears to authorize the Trial Chamber to order the parties to submit to the Chamber virtually anything before the trial; indeed, the regulation is quite reminiscent of the pre-trial and pre-defence conferences at the Ad Hoc Tribunals.⁸⁹⁷ In connection with defence disclosure, Reg 54 RegCt has already appeared in the jurisprudence of the ICC.⁸⁹⁸ It should be remembered, however, that the legal status and enforceability of the Regulations of the Court are not entirely clear. According to Reg. 1 (1) RegCt, they must be read “subject to the Statute and the Rules”; the fact that they are not mentioned in the applicable law of the ICC according to Art. 21. Art. 52 (1) ICCSt additionally shows that the Regulations are lower in rank than both the Statute and the Rules, which is also underlined by relatively low threshold for their adoption.⁸⁹⁹ The drafting history of Art. 52 ICCSt is of little use for determining the true scope of the Regulations, or, for that matter, to what extent an issue can be considered to be comprised in the “routine functioning” of the Court.⁹⁰⁰ As a matter of fact, however, issues covered by the Regulations of the Court arguably go beyond what could be considered “routine functioning” of the Court, such as the authority of the Chamber to modify the legal characterization of the facts before it according to Regulation 55.⁹⁰¹ Furthermore, Art. 52 (3) ICCSt speaks of their being “in force”,⁹⁰² and

-
- (h) The issues the participants propose to raise during the trial;
 - (i) The extent to which a participant can rely on recorded evidence, including the transcripts and the audio- and video-record of evidence previously given;
 - (j) The presentation of evidence in summary form;
 - (k) The extent to which evidence is to be given by an audio- or videolink;
 - (l) The disclosure of evidence;
 - (m) The joint or separate instruction by the participants of expert witnesses;
 - (n) Evidence to be introduced under rule 69 as regards agreed facts;
 - (o) The conditions under which victims shall participate in the proceedings;
 - (p) The defences, if any, to be advanced by the accused.”

⁸⁹⁷ Compare Chapter 5 - excursus *supra*.

⁸⁹⁸ See Section 6.5 *infra*.

⁸⁹⁹ Absolute majority of the Judges vs. two thirds majority of the members of the ASP, see Articles 51 (1) and 52 (1), respectively.

⁹⁰⁰ See as to different wording proposals *Behrends/Staker*, in: *Triffiterer*, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Article 52, mn. 10.

⁹⁰¹ See *Kreß*, *The Procedural Texts of the International Criminal Court*, p. 541 et seq. This issue has already become virulent before the Court, see *The Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. ICC-01/04-01/06, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and

it must be concluded that they are binding upon the Court as well as the parties, as long as they do not contradict the Statute or the Rules.

The Office of the Prosecutor as well as the Registry have also issued Regulations for their specific scopes of responsibility.⁹⁰³ They are based on Rules 9 and 14 RPE-ICC, respectively, and can therefore be concluded to be even lower in rank than the Regulations of the Court.⁹⁰⁴ The RegOTP contain various references to disclosure, the main provision in this regard being Reg. 55 RegOTP⁹⁰⁵. As may be seen, it does not have a major substantial content, but merely states that internal procedures shall be established in order to dispose of properly with the Prosecutor's disclosure obligations; furthermore, it is reaffirmed that confidential exculpatory or incriminatory material must be identified "at the earliest possible occasion".

The Regulations of the Registry also contain numerous direct and indirect references to disclosure; most importantly, the Registry is in charge of maintaining the record of the proceedings (Rules 15, 121 (10) RPE-ICC, 131; Reg. 16, 28 RegRegistry). Another important aspect in this regard is the preparatory assessment of the possible endangerment of victims and witnesses for decisions of the competent Chamber (Art. 68 (1) ICCSt, Rule 81 RPE-ICC, Reg. 99 RegRegistry).

participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", Appeals Chamber, 8 December 2009 Doc. No. ICC-01/04-01/06-2205. See also *Stahn*, Modification of the Legal Characterization of Facts in the ICC System.

⁹⁰² See as to the nomenclature of Art. 52 ICCSt *Behrends/Staker*, *ibid.*, mn. 16.

⁹⁰³ Regulations of the Office of the Prosecutor, hereinafter RegOTP, ICC-BD/05-01-09, 23 April 2009; Regulations of the Registry, hereinafter RegRegistry, ICC-BD/03-01-06-Rev.1 (current version), 25 September 2009.

⁹⁰⁴ *Kreß*, *The Procedural Texts of the International Criminal Court*, at p. 541, speaks of a "quaternary level" of legal texts.

⁹⁰⁵ "Disclosure procedures

1. The Office shall establish standardised internal procedures to ensure prompt, reliable and efficient disclosure in accordance with technical protocols and standards as defined for the Office. Those protocols shall be compatible with applicable technical standards as promulgated by the Court.

2. Such procedures shall ensure that all relevant disclosure and inspection obligations are fulfilled on an ongoing basis until the conclusion of the proceedings, and that a full and accurate record of the disclosure process and any preparatory steps is maintained.

3. The Office shall identify at the earliest possible occasion documents or information provided under article 54, paragraph 3(e) that may have incriminatory or exculpatory value in order to enable the timely processing of requests for the lifting of restrictions on disclosure."

The basic provisions regarding disclosure are contained in the Statute and the Rules; therefore, the Regulations will in the following not be looked at in detail. Where appropriate, reference will be made when discussing the provisions of the ICC Statute as well as the Rules of Procedure and Evidence.

6.2.4 Jurisprudence of the Ad Hoc Tribunals?

It has been held that the jurisprudence of the Ad Hoc Tribunals as regards the interpretation of the ICC's procedural provisions is, due to the history of the drafting process and the general similarity of some of the ICC rules with the ones of the Ad Hoc Tribunals, "undoubtedly applicable" to the procedure of the ICC.⁹⁰⁶ While, as we will see instantly, it is certainly true that the Ad Hoc Tribunals' rules and jurisprudence played an immensely important role in the drafting process of the ICC's legal provisions, it must for methodological reasons be strongly doubted whether the above conclusion to applicability is justified. As was explained above, the sources of law which shall be applied by the ICC are enumerated in Art. 21 ICCSt. Only Art. 21 par. 2 makes explicit reference to previous decisions – however, referring only to those handed down by the ICC *itself*, and thus not the ones by the Ad Hoc Tribunals. The jurisprudence of the Ad Hoc Tribunals can also not fall under "principles and rules of international law" (Art. 21 par. 1 (b)) since customary international law⁹⁰⁷ is identified by (national) State practice carried by *opinio juris*. This would only be thinkable if the decisions of the Ad Hoc Tribunals in themselves could be regarded as an *expression* of customary international law, which, however, will hardly ever be the case, at least concerning the interpretation of a particular legal norm the wording of which is similar or even equal in the Rules of the Tribunals and the ICC. The same must be concluded as regards the general principles according to Art. 21 par. 1 (c), since this provision explicitly refers only to those derived from *national* legal systems

⁹⁰⁶ *Tochilovsky*, Prosecution Disclosure Obligations in the ICC and Relevant Jurisprudence of the Ad Hoc Tribunals, at p. 844. *Tochilovsky*, however, bases his analysis exclusively on jurisprudence of the Ad Hoc Tribunals, without making reference to ICC decisions.

⁹⁰⁷ What exactly the terms "principles and rules of international law" mean is not entirely clear; the same holds true for the relation between Art. 21 paras. 1 (b) and (c). However, all authors appear to agree that customary international law is meant to be included in par. 1 (b); the uncertainty is to what extent there is a difference between "principles of international law" and "general principles of law". See *Pellet in Cassese/Gaeta/Jones*, The Rome Statute of the International Criminal Court: A Commentary, at pp. 1070 et subs., *McAuliffe de Guzman in Trifflerer*, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Art. 21, mn. 11 et subs. As mentioned, however, these cannot be construed to include the jurisprudence of the Ad Hoc Tribunals.

It is therefore to be concluded that the jurisprudence of other international tribunals cannot be considered to be an applicable source of law for the ICC regarding procedure. This does not mean, of course, that the ICC must entirely disregard the legal argument contained in the respective jurisprudence; however, the relevant sources of law in this regard remain the Rome Statute and the Rules, nothing else.

6.3 The Making of the Legal Provisions

In contrast to the Ad-Hoc Tribunals, the legal provisions of the ICC took far more time to be drafted and were discussed much more deeply. Their level of regulation is considerably higher and more complex than that of the Tribunals, at least compared with the law of the Tribunals in its original form. This impression is corroborated by the sheer scope of the documents. The ICTY Statute has merely 34 Articles, whereas the ICC Statute has 128. The original Rules of Procedure and Evidence of the ICTY as adopted on 11 February 1994 contained 125 Rules comprising roughly 10.500 words; after the 44th revision of the Rules as of 12 December 2009, their scope has increased to 165⁹⁰⁸ Rules comprising roundabout 32.000 words, meaning that the content of the original has tripled. The latter number more or less equals the original size of the ICC Rules: approximately 32.500 words. However, these are contained in 225 Rules; and it must be kept in mind that the ICC Statute, which is far more elaborate than its Ad Hoc counterparts, contains numerous procedural provisions, too. In the following subsections, we will take an introductory and general overview of the making of the Rome Statute as well as the Rules of Procedure and Evidence. A more detailed description of the genesis of the respective norms will be left to the discussion of the provisions.

6.3.1 The Rome Statute

The Rome Statute was passed by the Plenipotentiaries at the Rome Conference on 17 July 1998. It was the result of a process of five weeks of negotiations at the Rome Conference, which, for their part, were based on the ILC Draft Statute of 1994⁹⁰⁹, as

⁹⁰⁸ Counting the *bis*, *ter*, *quater* and *quinquies* Rules separately.

⁹⁰⁹ Draft Statute for an International Criminal Court U.N. Doc. A/49/10 (1994), published in: Yearbook of the International Law Commission, Vol. II, Part Two, A/CN.4/SER.A/1994/Add.1 (Part 2), pp. 26 et subs., hereinafter: 1994 Draft. See on the genesis of the ILC Draft also *Crawford*, The ILC's Draft Statute for an International Criminal Tribunal.

further elaborated by an Ad Hoc Committee and, from 1996 onwards, by a Preparatory Committee (PrepCom).⁹¹⁰ The ILC Draft of 1994, in turn, had a predecessor in another ILC Draft of 1993⁹¹¹. All in all, we may distinguish nine different proposals or commentaries on the matter between 1993 and 1998.⁹¹² Apparently, there was a general consensus during most of the drafting process that general issues of disclosure were important enough to be covered by the Rome Statute itself.⁹¹³

In the following, we will take a look at the two ILC drafts (1993 and 1994), the Report of the Preparatory Committee for the preparation of the Rome Conference,⁹¹⁴ and the Rome Statute itself; occasionally, reference will be made to proposals contained in the PrepCom reports of 1996.⁹¹⁵ This limitation appears justified for several reasons. The 1993 Draft is of interest because it constitutes the first comprehensive draft statute for a future ICC, and was in fact issued just after the ICTY Statute had been implemented.⁹¹⁶ The 1994 Draft, for its part, is based on the 1993 Draft and was the working basis for the Preparatory Committee, which issued its draft statute in 1998.⁹¹⁷ Even though

⁹¹⁰ See on the emergence of the ICC Statute generally *Bassiouni*, *The Legislative History of the International Criminal Court* Vol. 1, pp. 61 et subs., 66 et subs.; as well as *Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*. See also *Ahlbrecht*, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, pp. 335 et subs.

⁹¹¹ Draft statute for an international criminal tribunal and commentaries thereto, contained in: Report of the International Law Commission on the work of its forty-fifth session, 3 May - 23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, Annex A: Report of the Working Group on a Draft Statute for an International Criminal Court, UN Doc. A/48/10 (1993), pp. 100 et subs., hereinafter: 1993 Draft. A copy is also published as United Nations Documents A/CN.4/L.490 and A/CN.4/L.490/Add.1, July 19, 1993 in: 6 *Pace International Law Review* (1994), pp. 169 et subs.

⁹¹² See the list in *Bassiouni*, *The Legislative History of the International Criminal Court*, Vol. II, pp. xv and seq., plus the 1993 Draft, note 911, which is not contained in the said list.

⁹¹³ See *Behrends* in *Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, at p. 240.

⁹¹⁴ U.N. Doc. A/CONF.183/2, 14 April 1998, hereinafter: PrepCom Report.

⁹¹⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996, General Assembly Official Records, Fifty-first Session, Supplement No.22 (A/51/22), 13 September 1996 (hereinafter 1996 PrepCom Report Vol. I), as well as Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals), General Assembly Official Records, Fifty-first Session, Supplement No. 22A (A/51/22), 13 September 1996 (hereinafter: 1996 PrepCom Report Vol. II).

⁹¹⁶ The ICTY Statute was adopted as UNSC Resolution 808 on 25 May 1993. Indeed, the commentary contains various references to UNSC Resolution 808.

⁹¹⁷ U.N. Doc. A/CONF.183/2/Add.1, hereinafter: PrepCom Draft

officially the 1994 ILC Draft remained the working basis for the Rome Conference as well, many differing viewpoints had left their marks on it between 1994 and 1998, and thus the PrepCom Draft can be called, as elucidates from the drafting history as set out below, the *factual* working basis of the Rome Conference.

6.3.1.1 The 1993 Draft

As was just mentioned, the 1993 Draft, which dates from July 1993, is only slightly younger than the ICTY Statute and older than the Rules of Procedure and Evidence of the ICTY, which were adopted only in February 1994.⁹¹⁸ Even though it apparently “borrowed” from the ICTY Statute,⁹¹⁹ quite in contrast to the latter, the 1993 Draft already contained numerous procedural provisions, some of which related to disclosure. Overall, it consisted of 67 articles. We find two provisions relating to the disclosure of evidence between the parties, and one relating to the relationship between the Prosecutor and the States. The latter, to be sure, does not have anything to do with disclosure in the procedural sense, but, however, shows that the nomenclature used by the drafters was far from precise; which is another reason why we should not stick to the strictly formal meaning of the term. The provision was worded as follows:

Article 30. Investigation and preparation of the indictment

[...]

2. The Prosecutor shall have the power to request the presence of and to question suspects, victims and witnesses, to collect evidence, including the disclosure and production of any documentation or exhibits relevant to the complaint, and to conduct onsite investigations.

[...]

This draft provision obviously developed into what is now Art. 54 ICCSt, which, however, does not contain this specific power of the Prosecutor to demand the production of evidence anymore. It is not quite clear against whom this power could be exercised – whether only against the State which had made the complaint according to Art. 29 of the 1993 Draft⁹²⁰, or against *any* State. In any case, the ICC Statute today

⁹¹⁸ See original version of the RPE-ICTY, p. 1.

⁹¹⁹ See, e.g., *Scharf*, Getting Serious About an International Criminal Court, at pp. 108 et subs.

⁹²⁰ “Article 29. Complaint:

Any State Party with jurisdiction over a particular crime under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to article 23 of the Statute with respect to the crime or other State with such jurisdiction and which has accepted the jurisdiction

grants less powers to the Prosecutor, a trend which was already initiated with the next draft, as we will see instantly.⁹²¹

The two provisions dealing with disclosure of material between the parties were draft Articles 39 and 44 (3). Art. 39 provided:

Article 39. Duty of the Chamber

1. If the Bureau⁹²² has not already done so under article 32, the Chamber shall decide, as early as possible in each case:

(a) the place at which the trial is to be held, having regard to article 36;

(b) the language or languages to be used during the trial, having regard to article 18 and article 44, paragraphs 1 (f) and 2.

2. The Chamber may order:

(a) the disclosure to the defence of documentary or other evidence available to the Prosecutor, having regard to article 44, paragraph 3;

(b) the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial.

3. At the commencement of the trial, the Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, and allow the accused to enter a plea of guilty or not guilty.

The basic principle that the chamber dealing with the matter should be in charge of ruling on disclosure was thus already contained in the 1993 Draft. Furthermore, an “exchange of information” (but not evidence, as the latter would apparently be covered by sub-paragraph (a)) was envisaged by draft Art. 39 (2)(b). The purpose of this was apparently to prepare both parties for the trial, which can easily be reconciled with the procedural management aspect of disclosure; this is corroborated by the commentary

of the Court pursuant to article 23; or any State which has consented to the Court's jurisdiction under article 26; or the Security Council pursuant to article 25; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.”

⁹²¹ The question of the powers of the Prosecutor and its limitations was generally a much disputed issue in the genesis of the ICC and not least the Rome Conference, see, e.g., *Werle*, Principles of international criminal law, mn. 65 with further references.

⁹²² The “Bureau” of the Tribunal would be equivalent to the Presidency, see Art. 10 (3) 1993 Draft: “3. The President and the Vice-Presidents shall constitute the Bureau which, subject to this Statute and the Rules, shall be responsible for the due administration of the Court, and other functions assigned to it under the Statute.”

relating to Art. 39 of the 1993 Draft.⁹²³ Regarding the nomenclature of the provision, it is noteworthy that the draft obviously took the position that there should be an “exchange of information” between the Prosecutor and the defence, whereas an explicit *disclosure* obligation was only to be imposed onto the Prosecutor. On the other hand, as we have seen above, the transmittal of information to the Prosecutor by a State would also be called “disclosure”.

Art. 44 (3) of the Draft, to which Art. 39 (2)(a) makes reference, and which was the second direct reference to disclosure between the parties contained in the draft, was worded as follows:

Article 44. Rights of the accused

[...]

3. All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.

We can thus state that the principle of compulsory disclosure of exculpatory evidence was already contained in the 1993 Draft, which is quite remarkable, given the fact that the ICTY-RPE had not yet been adopted and the ICTY Statute does not contain an according provision. As Art. 67 (2) ICCSt today, this duty of the Prosecutor was established within the framework of the rights of the accused. Draft Art. 44 (3) only refers to “exculpatory evidence available to the prosecution”; the draft statute does not establish a positive duty of the Prosecutor to search for exculpatory evidence. Even though the Working Group of the ILC was aware that “the purpose of the trial is to determine the truth of the charges against the accused”⁹²⁴, the truth finding aspect of disclosure was thus apparently not on the mind of the drafters. They based their considerations entirely on the human rights aspect, a fact which is corroborated by the commentary regarding Articles 39 and 44 of the Draft.⁹²⁵

⁹²³ 1993 Draft, commentary regarding Art. 39, par. 4, p. 118: “The Chamber may also issue orders requiring the defence and the prosecution to exchange information so that both parties are aware of the issues to be decided at the trial and adequately prepared to present their arguments on those issues at the commencement of the proceedings. This will ensure that the trial is conducted efficiently and without unnecessary delays.”

⁹²⁴ 1993 Draft, commentary regarding Art. 52, p. 124.

⁹²⁵ 1993 Draft, commentary regarding Art. 39, p. 118: “The Chamber may issue pre-trial orders to ensure the right of the accused to have adequate time and facilities for the preparation of the defence. Prior to the commencement of the trial, the accused has the right to receive all incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution,

Furthermore, we note that the disclosure of incriminating evidence was also conceived of as a general matter of fair trial, as it is also included in the general provision on “rights of the accused”. Substantially, according to the Draft, the incriminating evidence which would need to be disclosed would comprise only such material on which the prosecution intended to rely. In contrast to the Ad Hoc Tribunals, we find no reference as regards disclosure of the material which supported the indictment when its confirmation was sought or any other evidentiary information; at the beginning of the proceedings, the accused was basically only informed of the charges against him and of his rights.⁹²⁶ Another difference to the Ad Hoc Tribunals at the time would be the fact that the indictment was not to be confirmed by a judge of the Trial Chamber (as in Art. 19 ICTYSt), but by the Bureau⁹²⁷, so that the Trial Chamber would not get to see any evidence beforehand. In any case, while it was envisaged that the indictment should be accompanied by supporting material, it is not entirely clear *how much* evidence would have to be transmitted to the Bureau for the indictment to be confirmed.⁹²⁸

according to article 44, paragraph 3. Article 39 authorizes the Chamber to order the Prosecutor to provide such information.”; See also the commentary regarding Art. 44, p. 120: “The accused is also entitled to receive all incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution in reasonable time to prepare for the defence, according to paragraph 3 of this article. Whereas the prosecution is required to provide the accused with all exculpatory evidence to give effect to the right to prepare and present a defence, the prosecution is not required to provide incriminating evidence which may be privileged or may jeopardize the safety of victims or witnesses if it is not going to be used by the prosecution during the trial.”

⁹²⁶ In fact, the 1993 Draft foresaw that the indictment was to be transmitted to the accused *via* the respective national State (Art. 33 (2) of the 1993 Draft) together with the following documents (Art. 33 (1)(b) of the 1993 Draft:

- “(i) the indictment and any order relating to the accused that may have been issued by the Court;
- (ii) a copy of the Statute of the Court;
- (iii) a copy of the rules of evidence and procedure of the Court;
- (iv) a statement of the accused's right to obtain legal assistance as set out in article 44, paragraph 1 (b) of the Statute; and
- (v) if one of the working languages of the Tribunal is not the principal language understood and spoken by the accused, a translation under the auspices of the Tribunal of the indictment and other documents referred to in the preceding subparagraphs.”

⁹²⁷ See note 922 *supra*.

⁹²⁸ The Draft merely provided:

“Article 32. The indictment

1. The indictment together with the necessary supporting documentation shall be submitted by the Prosecutor to the Bureau of the Court.”

What we also find in the 1993 Draft is the power of the chamber dealing with the matter to order the *production* of evidence which, as mentioned, is an integral part of the Ad Hoc Tribunals' procedural regime as well as the American FRCP:

Article 47. Powers of the Court

1. The Court shall, subject to the provisions of the Statute and in accordance with the rules of procedure and evidence of the Court, have, inter alia, the power to:

(a) require the attendance and testimony of witnesses;

(b) require the production of documentary and other evidentiary materials;

(c) rule on the admissibility or relevance of issues, evidence and statements;

(d) maintain order in the course of a trial.

[...]

In contrast to Rule 98 of the RPE of the Ad Hoc Tribunals, however, this provision does not explicitly mention that the production of the evidence can also be required from one of the parties; it therefore appears possible that the drafters rather had third persons in mind. The commentary⁹²⁹ does not contain any information on this point.

In the 1993 Draft we also find no reference to the relation and possible conflict of disclosure and the protection of national security information, as well as the protection of victims and witnesses. While national security interests are not mentioned at all, the protection of victims and witnesses is only spelt out in general terms.⁹³⁰

6.3.1.2 The 1994 Draft

The ILC Draft of 1994⁹³¹ followed the basic structure of the 1993 Draft, even though it consisted only of 60 articles (as compared to 67 of the 1993 Draft). It thus also contained some procedural provisions relating to disclosure. As to the above mentioned power of the Prosecutor to require the disclosure of material from States which had been included in the 1993 Draft, the 1994 Draft did not retain it, thereby limiting the

⁹²⁹ 1993 Draft, commentary regarding Art. 47, p. 122.

⁹³⁰ See Article 46 of the 1993 Draft:

“Protection of the accused, victims and witnesses.

The Chamber shall take all necessary measures available to it to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means.”

⁹³¹ See note 909 *supra*.

powers of the Prosecutor.⁹³² This is undoubtedly one of the attenuations due to political concerns for which the 1994 Draft has been referred to as “less satisfactory” than its 1993 predecessor.⁹³³

As regards disclosure between the parties, we once more find the power of the Court to rule on matters of disclosure. In contrast to the 1993 Draft, however, the 1994 Draft did not confer this power upon the chamber dealing with the matter, but upon the Presidency.⁹³⁴ Art. 27 of the 1994 Draft provided:

Article 27: Commencement of prosecution

[...]

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

[...]

(b) Requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) Providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

⁹³² Art. 26 (2) (“Investigation of alleged crimes”) of the 1994 Draft, which is a successor of Art. 30 (2) of the 1993 Draft, see section 6.3.1.1 above, was framed as follows:

“The Prosecutor may:

- (a) Request the presence of and question suspects, victims and witnesses;
- (b) Collect documentary and other evidence;
- (c) Conduct on-site investigations;
- (d) Take necessary measures to ensure the confidentiality of information or the protection of any person;
- (e) As appropriate, seek the cooperation of any State or of the United Nations.”

⁹³³ *Bassiouni*, *The Legislative History of the International Criminal Court*, Vol. I, at p. 63. See as to the difficulties in reaching consensus as regards the powers of the Prosecutor *Guariglia* in *Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 227 et subs.

⁹³⁴ The 1994 Draft now speaks of “Presidency” instead of “Bureau”. The composition, however, remained the same, see Art. 8 (3) of the 1994 Draft: “The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for: (a) The due administration of the Court; (b) The other functions conferred on it by this Statute.”

(d) Providing for the protection of the accused, victims and witnesses and of confidential information.

Some of the substantial content of this provision is now contained in Articles 57 (3)(c)⁹³⁵ and 61 (3)⁹³⁶ of the ICC Statute. The differentiation between the confirmation stage and the trial stage was not yet known at the time of this draft. Therefore, there was no ‘proper’ pre-trial stage, and accordingly also no pre-trial division or pre-trial chamber. In this regard, it must be noted that practically all of the functions which are fulfilled by the Pre-Trial Chamber under the Rome Statute were intended to be performed by the Presidency according to the 1994 Draft.⁹³⁷ The fact that the rulings on disclosure were to be taken away from the chamber dealing with the matter is quite remarkable. This does of course have the advantage that the chamber remains as unbiased as possible; however, to let the Presidency rule on these procedural matters might have resulted in being quite cumbersome – the chamber dealing with the matter is naturally, as it were, ‘closer to the action’. Unfortunately, the commentary accompanying the 1994 Draft does not contain any information on this matter.

Regarding the substantial scope of disclosable material, we note that the 1994 Draft went further than the 1993 Draft, in that “documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence” would need to be disclosed – as we have seen above, the 1993 Draft had specifically envisaged that only such evidence on which the Prosecutor intended to rely would have to be disclosed. Taken literally, however, this would have meant an all-embracing disclosure

⁹³⁵ “Article 57: Functions and powers of the Pre-Trial Chamber

[...]

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

[...]

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information; [...].”

⁹³⁶ “Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.”

⁹³⁷ See Art. 8 (4) of the ILC Draft: “Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.” See also *Guariglia in Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 233 et subs.

duty – given the fact that in that case it would have been unnecessary to provide for the disclosure of exculpatory material (see draft Art. 41), it must be doubted if this was intended by the drafters. Concerning the evidence to be presented to the Presidency for the confirmation of the indictment, the 1994 Draft contained even less information than the 1993 Draft, apparently even leaving open whether any specific information would have to be presented at all.⁹³⁸

As to the “exchange of information” contained in para. 5 (c), the provision remained substantially unaltered *vis-à-vis* Art. 39 (2)(b) of the 1993 Draft; also the apparent dichotomy of terms (“disclosure” obligation only from the Prosecutor to the defence, “exchange of information” both ways) was kept.

A ‘new’ provision in this context was para. 5 (d), bestowing upon the Presidency to provide for “the protection of the accused, victims and witnesses and of confidential information”. Art. 46 of the 1993 Draft⁹³⁹ might to a certain extent be seen as a predecessor of para. 5 (d). However, Art. 46 of the 1993 Draft was actually retained in the 1994 Draft as Art. 43, situated in a somewhat unclear context, between provisions regarding double jeopardy and general “Powers of the Court”. It may therefore be concluded that this provision was meant to be closely related to the trial proceedings. Any reference to “confidential information” is lacking. However, the latter has, as we shall see, played a decisive role in the further development of the Rome Statute as well as in the practice of the ICC.

The 1994 Draft maintained the principle of compulsory disclosure of exculpatory material, and also retained the systematical structure of this principle being phrased as a procedural right of the accused:

Article 41. Rights of the accused

[...]

⁹³⁸ “Article 27: Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) Whether a prima facie case exists [...]”. See in comparison, once again, Art. 32 of the 1993 Draft, note 928 *supra*.

⁹³⁹ “Article 46. Protection of the accused, victims and witnesses

The Chamber shall take all necessary measures available to it to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means.”

2. *Exculpatory evidence that becomes available to the Procuracy⁹⁴⁰ prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.*

The 1993 Draft (Art. 44 (3)) had lacked a provision regarding the competent authority to rule on matters of the disclosure of exculpatory evidence. In this respect, and in light of the fact that general matters of disclosure, according to Art. 27 (5)(b) of the Draft, should be ruled upon by the *Presidency*, it is remarkable that disputes between the parties regarding the disclosure of exculpatory materials should be settled by the *Trial Chamber* instead. In the light of the above mentioned possible argument of a “separation of powers” which should ensure that the Chamber dealing with the case remains as unbiased as possible, this separation is not understandable. A solution may, of course, lie in the substantive amendment of Art. 41 (2) *vis-à-vis* Art. 44 (3) of the 1993 Draft as considers the time frame: Disclosure should now take place *before the conclusion* of the trial, as opposed to “as soon as possible and in reasonable time to prepare for the defence” as contained in the 1993 Draft; which may, regardless of the extremely wide margin of applicability of the provision (after all, *before the conclusion of the trial* can mean anything, if the Prosecutor is not forced to disclose as soon as practicable) explain the competence of the Trial Chamber⁹⁴¹ Additionally, the Trial Chamber was also put in a position to *control* the fulfilment of the disclosure duties of the Prosecutor (which before trial would be up to the Presidency) – Art. 38 (1)(b) of the 1994 Draft provided:

Article 38. Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

[...]

(b) Ensure that articles 27, paragraph 5 (b), and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

[...]

5. The Chamber shall, subject to this Statute and the Rules have, inter alia, the power on the application of a party or of its own motion, to:

⁹⁴⁰ The “Procuracy” is what we know today as the Office of the Prosecutor; see Art. 13 of the 1993 Draft as well as Art. 12 of the 1994 Draft: “1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. [...] 2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, [...]”.

⁹⁴¹ See for a more detailed discussion of the genesis of Art. 67 (2) ICCSt 6.4.4 *infra*.

[...]

(b) *Require the attendance and testimony of witnesses;*

(c) *Require the production of documentary and other evidentiary materials;*

(d) *Rule on the admissibility or relevance of evidence;*

(e) *Protect confidential information;*

[...]

To start “ensuring” that the disclosure duties have been fulfilled only when the trial has already started would, however, have been quite pointless, since the trial would have to be adjourned immediately if this were not the case. It is probable that at some point in time during the proceedings, in fact after the commencement of the prosecution (Art. 27), but before the trial, the responsibility to watch over the disclosure and exchange procedures would shift from the Presidency to the Trial Chamber. It should be presumed that this moment would be the constitution of the Chamber. Apart from the provision that the members of the Trial Chamber should be nominated by the Presidency,⁹⁴² however, the 1994 Draft did not contain any information about the constitution of the Chamber; this was left to the prospective rules.⁹⁴³ This said and regarding the fact that the point *when exactly* exculpatory material would have to be disclosed was unclear, it must be concluded that the drafters at this point did not yet have a clear vision of the procedural ‘architecture’ of the future Court.

Apart from that, we notice that the general power of the Chamber to require the production of evidence was kept. The only material difference apart from the notion that powers of the Court were now explicitly bestowed upon the Trial Chamber (i.e. not “the Court” as such) appears to be the inclusion of a power to “protect confidential information”. In future drafts of the Statute, as we will see, this issue gained importance and in fact developed a life of its own.

6.3.1.3 The PrepCom Report 1998

The 1994 Draft was extended and refined, at first by the *Ad Hoc* Committee established by the UN General Assembly,⁹⁴⁴ later by a *Preparatory* Committee (PrepCom), which

⁹⁴² Art. 9 (5) of the 1994 Draft: “The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6, paragraph 1 (a).”

⁹⁴³ See also the commentary relating to Art. 9 of the 1994 Draft, par. 5, p. 32.

⁹⁴⁴ U.N. Doc. A/RES/49/53, 9 December 1994.

also had been established by the UN General Assembly.⁹⁴⁵ The latter had been given the task to prepare a consolidated text, based on the 1994 Draft, for the preparation of a conference of plenipotentiaries.⁹⁴⁶ However, even though the PrepCom was officially working on the basis of the 1994 Draft, many delegations introduced new proposals which oftentimes differed substantially from the original text, making the four years overall drafting process very difficult.⁹⁴⁷

The work of the PrepCom was concluded by the presentation of the “Report of the Preparatory Committee on the Establishment of an International Criminal Court”⁹⁴⁸, which as its first *addendum* contained a comprehensive draft statute for the prospective ICC.⁹⁴⁹ It included, for many of its articles, several different “options” or alternatives for the discussions at the Rome Conference.

In the PrepCom Draft we find the same basic system of disclosure provisions as in its predecessors. The general empowerment of the Court to rule on disclosure issues (Art. 29 (5) of the 1994 Draft) was now contained in Art. 58 (10) of the PrepCom Draft, which for its part contained two different options. They were framed as follows:

10. The [Presidency] [Pre-Trial Chamber] [Trial Chamber] may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) Option 1

requiring the disclosure to the defence [of the relevant evidence that the defence requests] within a sufficient time before the trial to enable the preparation of the defence, of [relevant] documentary or other evidence available to the Prosecutor [, whether or not the Prosecutor intends to rely on that evidence] [which the Prosecutor intends to rely upon]; [if the Prosecutor fails to comply with an order under this subparagraph, the evidence in question will be inadmissible at the trial;]

Option 2

save in respect of documents or information referred to in article 54, paragraph 4 (g), and subject to subparagraph (f) below, requiring the disclosure to the defence of documents or information which are either

⁹⁴⁵ U.N. Doc. A/RES/50/46, 11 December 1995.

⁹⁴⁶ *Ibid.*, par. 2.

⁹⁴⁷ See *Fernández de Gurmendi in Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 217 et subs., 224 et subs.

⁹⁴⁸ Note 914 *supra*.

⁹⁴⁹ Note 949 *supra*.

considered [material] [relevant] to the preparation of the defence, or are intended for use by the Prosecutor at trial or were obtained from the accused;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection of the accused, victims and witnesses and of confidential information;

(e) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection and privacy of victims and witnesses;

[(f) providing, at the request of either party or a State, or at the instance of the Court of its own volition, for the non-disclosure or protection of documents or information provided by a State the disclosure of which would [endanger] [prejudice] the national security or national defence interests of a State in accordance with criteria to be specified in rules made pursuant to this Statute.]⁹⁵⁰

First of all, we note that the PrepCom, in preparation of the Rome Conference, and instead of opting for a specific model of pre-trial procedure, now leaves open the question of which entity within the Court should be competent to rule on the issues mentioned in paragraph 10 of Art. 58. This is arguably due to the fact that in the PrepCom Draft a *hearing* on the confirmation of the indictment⁹⁵¹ was seriously contemplated, instead of a confirmation decision without a hearing as contained in both

⁹⁵⁰ Square brackets in original.

⁹⁵¹ In the present ICC nomenclature, there is no “indictment“, but rather “charges” and a “document containing the charges”, see Art. 61 (3) ICCSt. The PrepCom Draft, however, as well as its predecessors, still generally speak of an “indictment”, thus using the Anglo-American nomenclature, which is also utilised by the Ad Hoc Tribunals.

the 1993 and 1994 ILC Drafts;⁹⁵² this thought seems to have first appeared in the PrepCom Report of 1996.⁹⁵³

The different options regarding disclosure as foreseen in paragraph (b) are apparently partially based on the 1994 Draft and Rule 66 RPE-ICTY, respectively.

Option 1 takes up the 1994 Draft with a few modifications, which were, however, put in square brackets so as to embrace several different alternatives. These include a limitation as to “relevant” evidence and/or evidence specifically requested by the defence; also a limitation to evidence intended for use by the Prosecutor was contemplated, meaning a step backwards compared to the 1994 Draft, which had widened the scope of disclosure obligations in this regard. An entirely new feature which had not been contained in the 1994 Draft is the contemplated inclusion of a possible sanction for non-compliance of the Prosecutor: the mandatory inadmissibility of previously undisclosed evidence at trial.

Option 2, as mentioned, was apparently partially based on Rule 66 (B) RPE-ICTY⁹⁵⁴ (or, for that matter, Rule 16 (a)(1)(C) of the American FRCP), comprising disclosure obligations concerning material relevant for the preparation of the defence, planned to be used by the Prosecutor, or obtained from the accused. Option 2, however, also makes

⁹⁵² See Art. 58 (4) of the PrepCom Draft: “[4. After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the indictment to the accused, [set a deadline prior to the confirmation hearing, until which the Prosecutor and the defence may add new evidence [for purposes of such confirmation hearing]], and set a date for the review of the indictment. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his/her counsel, subject to the provisions of paragraph 8. In the hearing, the accused shall be allowed to object to the indictment and criticize the material on which it is based. [...]”

⁹⁵³ See 1996 PrepCom Report Vol. I, note 915 *supra*, par. 233, p. 51: “As regards the reviewing body, concerns were expressed over the concentration of authority vested with the Presidency as envisaged in the draft statute, and it was suggested that it would be more appropriate to give certain pre-trial responsibilities to another body, independent of the Prosecutor and the trial, and appeals chambers. In this connection, it was proposed that a pre-trial, indictment or investigations chamber be established to examine the indictment and to hold confirmation hearings, which would provide the accused with further necessary guarantees considering the very public nature of an indictment for serious crimes. The point was made that a permanent reviewing chamber would have the advantages of consistency of approach and avoidance of difficulties associated with a rotation of judges.”

⁹⁵⁴ Which in April 1998 was worded as follows: “The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.”, RPE-ICTY, 12th revision, November 1997.

reference to possible exceptions to disclosure based on confidentiality or national security concerns, as spelt out in Draft Articles 54 (4)(g) and 58 (10)(f).

Art. 54 of the PrepCom Draft contained in option 2 (g), for the first time, a specific provision regarding the possible non-disclosure of evidence which had been provided to the Prosecutor on a confidential basis. The draft, which, with some modifications, ultimately made its way into the Rome Statute as Art. 54 (3)(e), was worded as follows:

*(g) where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.*⁹⁵⁵

It is very reminiscent of Rule 70 RPE-ICTY,⁹⁵⁶ acknowledging the crucial importance of national security concerns in international criminal trials, which had only been fully recognized only after the ICTY had started its work. It is to be noted that the according amendment of Rule 70 RPE-ICTY took place in autumn 1994, thus at a very early stage, however too early to be reflected by the 1994 Draft of the ILC, even though the latter contains, in Art. 38 (5)(e), a general empowerment of the Trial Chamber to “protect confidential information”.

The importance given to the security and confidentiality concerns of states and other providers of information, certainly at least partially based on the practical experience of the Ad Hoc Tribunals, runs like a thread through the PrepCom Draft. Indeed, while the 1994 Draft had only occasionally made reference to national security or confidential information, from 1996 to 1998, in turn, the issue aroused rising interest and caused particular controversy.⁹⁵⁷ It has been noted that the relation between the Court and national systems was *the* most difficult task as concerns the drafting of the procedural provisions of the Rome Statute.⁹⁵⁸ In fact, Art. 71 of the PrepCom Draft, which

⁹⁵⁵ PrepCom Draft Art. 54 (4)(g) [option 2], p. 77.

⁹⁵⁶ See section 5.3.4 above.

⁹⁵⁷ *Piragoff*, Evidence, pp. 270 et subs., describes the discussions surrounding the topic as a “storm”. See also the *nota bene* accompanying draft Article 54 (g): “This paragraph, as well as articles 58, paragraph 10 (d) and (f) (Commencement of prosecution), 61, paragraph 2 (Notification of the indictment), 67, paragraph 2, 68, paragraph 9 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]), 71 (Confidential information), 90, paragraphs 2 and 6 (Other forms of cooperation [and judicial and legal [mutual] assistance]) all relate to confidentiality and they should be examined with a view to avoiding any duplication or contradiction.”

⁹⁵⁸ *Fernández de Gurmendi* in *Lee*, The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, p. 226: “The most controversial issues [...] pertained not so much to the exercise of powers of the Court over individuals, but to the relation between the Court and States.”

developed into Art. 72 ICCSt, is entirely dedicated to the protection of national security interests, and would possibly have a massive impact on disclosure.⁹⁵⁹

In addition to the possible non-disclosure of evidence due to security interests, we also find the notion of the protection of victims and witnesses and its possible impact on disclosure in a more explicit manner than in the preceding drafts. Whereas the 1993 and 1994 Drafts had only contained the general notion that the Chamber could rule on the protection of these persons, the 1998 PrepCom Draft, for the first time, contained a provision that particulars of witnesses and their statements could be withheld under certain circumstances. As we have seen above, the ICTY had, between 1994 and 1998, issued some decisions as to the anonymization of witnesses, which is probably one of the reasons why the drafters of the Statute saw a specific need for regulating this issue.⁹⁶⁰

Article 68: Protection of the [accused], victims and witnesses [and their participation in the proceedings]

[6. Notwithstanding paragraph 1 of article 58, if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

This provision obviously represents the predecessor of Art. 68 (5) ICCSt; we will shed some more light on the differences between the two provisions below.⁹⁶¹

Other than that, Art. 58 (10) of the PrepCom Draft kept the notion of “exchange” of information in preparation of the trial (draft Art. 58 (10)(c)) as opposed to “disclosure”; the same holds true for the general empowerment of the respective body (i.e. Presidency, Pre-Trial Chamber or Trial Chamber) to rule on “the protection of the accused, victims and witnesses and of confidential information” (draft Art. 58 (10)(d) and (e)).⁹⁶²

⁹⁵⁹ See as to the genesis of draft Art. 71 *Piragoff*, Evidence, pp. 275 et subs.

⁹⁶⁰ See also 1996 PrepCom Report Vol. I, *supra* note 915, paras. 274, 281.

⁹⁶¹ 6.6 *infra*.

⁹⁶² Why sub-paragraph (e) contains an additional notion of “protection and privacy” of victims and witnesses as opposed to “protection” of victims and witnesses as contained in sub-paragraph (d), remains unclear.

There was, however, an alternative option for Articles 58 to 61 according to the PrepCom Report put forward, which had been the result of an informal meeting of PrepCom members in Siracusa in April 1998,⁹⁶³ and meant to simplify the previous proposals regarding the pre-trial proceedings of the future Court.⁹⁶⁴ In substance, this alternative option for Articles 58 to 61 made their way into the Rome Statute. Draft Art. 61 (2) provided:

A reasonable time before the hearing, the person shall be provided with a copy of the charges on which the Prosecutor intends to seek trial, and be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may make orders regarding the disclosure of information for purposes of the hearing as may be appropriate under the Statute and the Rules.

This wording constituted not only a simplification of Option 1 of Art. 58 (10)(b) of the PrepCom Draft, but also a limitation of prosecution disclosure, since it was now made clear that only the evidence on which the Prosecutor intends to rely at the hearing is to be notified to the defence – and indeed, the provision in this new wording does not contain the word “disclose” anymore, but only the word “inform”, which leaves plenty of room for interpretation at the expense of the accused.

On the other hand and in any case, Art. 67 (2) of the PrepCom Draft maintained the right of the accused to disclosure of exculpatory evidence, as already featured in the preceding drafts:

[Exculpatory evidence] [Evidence which shows or tends to show the innocence] [or mitigate the guilt] of the accused or may affect the credibility of prosecution evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be [made available] [disclosed] to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide. [The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of a decision made under this subparagraph.]

It appears that the different options are, similar to Art. 58 (10) of the PrepCom Draft described above, a mix of the 1994 Draft and Rule 68 RPE-ICTY, the corresponding provision of the ICTY.⁹⁶⁵

⁹⁶³ “Further option for articles 58 to 61”, PrepCom Draft pp. 93 et subs., see *Fernández de Gurmendi* in *Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, p. 223 et seq.

⁹⁶⁴ “Further option for articles 58 to 61”, *ibid.*, note 25.

⁹⁶⁵ “Disclosure of Exculpatory Evidence

As to the powers of the Trial Chamber, we find, as in the predecessors of the PrepCom Draft, the authority of the Chamber to *proprio motu* demand the production of (additional evidence):

Article 64

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

[...]

(b) ensure that articles 58, paragraph 10 (b), and 61 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

[...]

6. The Trial Chamber shall, subject to this Statute and the Rules of Procedure and Evidence, have, inter alia, the power on the application of a party or of its own motion to:

[...]

(b) require the attendance and testimony of witnesses, and the production of documents and other evidentiary materials by obtaining, if necessary, the assistance of States as provided in this Statute;

[(b) bis order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;]

(c) rule on the admissibility or relevance of evidence;

(d) protect confidential information; [...]

The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of orders sought under subparagraph (d) above.

We see that these provisions follow the structure and, for the most part, the wording of the 1994 Draft. A major development must be seen in the further elaboration concerning confidential information according to sub-paragraph (d), which is now explicitly linked to disclosure. With regard to the powers of the Chamber, it is warranted to mention another interesting new feature of the PrepCom Draft, which is the explicit notion of truth-finding contained in the draft version of Art. 69 (3):

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.”, Rule 68 RPE-ICTY as of the 12th revision, December 1997.

3. *The Court has the authority to call all evidence that it considers necessary for the determination of the truth.*

Indeed, this “authority” complements the “powers” of the Trial Chamber listed in Art. 64 of the PrepCom Draft. It apparently goes back to French and German proposals which were contained for the first time in the PrepCom Report of 1996.⁹⁶⁶

In this context, it also appears worth mentioning the developments regarding the role of the respective chamber, its involvement in the disclosure process and particularly its own access to evidentiary material in the preparation of the trial. As stated above, the 1993 and 1994 ILC Drafts were somewhat unclear concerning the information which the confirming authority (i.e. the Bureau or the Presidency) would get to see in order to be able to confirm the indictment. The original version of Art. 58 of the PrepCom Draft⁹⁶⁷ is helpful in visualising the different options contemplated by the drafters:

Art. 58: Commencement of prosecution

1.[...] the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within the jurisdiction of the Court and shall be accompanied by [relevant] [sufficient] evidence collected by the Prosecutor

⁹⁶⁶ See draft Art. 121, proposed by France, in: 1996 PrepCom Report Vol. II, *supra* note 915, p. 187:

“Powers of the Chamber

1. The Trial Chamber may of its own motion call witnesses or experts to appear or have placed before it any new evidence which it deems useful for ascertainment of the truth.

2. The Prosecutor or the accused may request the appearance of a witness or of an expert who was not summoned to appear in accordance with article 118. The Chamber may deny such an appearance only if it can show that, for stated reasons, the appearance is not possible or if it will not contribute to ascertainment of the truth. The decision of the Chamber shall not be subject to appeal.”;

as well as the German proposal, *ibid.*, p. 207:

“Determination of proof

In order to determine the truth, the court shall, *ex officio*, extend the taking of evidence to all facts and evidence that are important for the decision. The court will decide on the taking of evidence according to its [free] conviction obtained from the entire trial.”

This wording is a clearly a translation of a combination of sections 244 par. 2 and 261 of the German Code of Criminal Procedure. See also *Piragoff in Triffterer*, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Art. 69, mn. 4.

⁹⁶⁷ As opposed to the alternative version, which in substance made its way into the Statute, see note 963 *supra* and accompanying text.

*for the purposes of confirmation [of the indictment] by the [Presidency] [Pre-Trial Chamber].*⁹⁶⁸

In the 1996 PrepCom Report⁹⁶⁹ the preceding options had been framed as follows:

*A. I(i) The indictment shall be accompanied by all evidence collected by the Prosecutor. Other evidence may be freely added by the Prosecutor up until the time when the indictment is considered by the Preliminary Investigations Chamber. However, without prejudice to the provisions of paragraph (iii) of this article, no evidence submitted to the Registrar for purposes of accompanying the indictment may be withdrawn by the Prosecutor].*⁹⁷⁰

It thus appears that a very far-reaching information of the respective confirming authority had been contemplated occasionally, which was later given up in favour of a more limited disclosure or information towards the accused and the respective organ of the court. In the end, the ‘alternative proposal’ for the confirmation proceedings prevailed, in which the information necessary for the confirmation is not presented by the Prosecutor to the Court *ex parte*, but within an adversary hearing.

The mentioned authority of the Court to call all evidence which it considers necessary for truth finding goes along with a corresponding duty of the Prosecutor to investigate ‘neutrally’. Article 54 (12) of the PrepCom Draft provided:

[12. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the Rules of Procedure and Evidence.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. The Prosecutor shall investigate equally incriminating and exonerating circumstances.]

The notion of the named powers of the Court also appeared for the first time in the PrepCom Report of 1996; apparently the proposal also came from the French delegation.⁹⁷¹ As previously mentioned, the combination of the duty of the Prosecutor to

⁹⁶⁸ Original draft of Art. 58, square brackets except “[...]” in original. The provision is followed by the different options of confirmation (i.e. with or without a confirmation hearing).

⁹⁶⁹ 1996 PrepCom Report Vol. II, *supra* note 915.

⁹⁷⁰ *Ibid.*, p. 120.

⁹⁷¹ 1996 PrepCom Report Vol. II, *supra* note 915, p. 113:

“B. Duty of the Prosecutor

5. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the rules.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may

investigate neutrally with his duty to disclose exculpatory material, brings, at least in theory, the protection of the rights of the defence in international criminal procedure to a new level.

Interestingly, the PrepCom Draft (as well as the Rome Statute) makes no reference whatsoever to disclosure by the defence, even though, as we have seen above, defence disclosure was implemented in the ICTY disclosure regime, and a reciprocal disclosure duty of the defence had in fact been contemplated during the drafting process of the Statute at least as early as 1996.⁹⁷² It is quite probable that this issue was considered too controversial or too technical to be included in the Statute, and that it was rather left to the Rules of Procedure and Evidence.⁹⁷³

6.3.1.4 The Rome Conference

Two months after the presentation of the PrepCom Report, on 15 June 1998, the Rome Conference started. Even though the provisions of Part 2 of the Rome Statute (jurisdiction, admissibility and applicable law), due to their political implications, were certainly the most difficult in reaching a consensus,⁹⁷⁴ the negotiations concerning the procedural provisions of the Statute at the Rome Conference were far from easy. Even though it was possible to agree on general principles, such as the need to compromise between the main legal systems of the world, the actual implementation of these principles, as we will see instantly, proved to be more difficult.⁹⁷⁵

It had occasionally been contemplated to pass both the ICC Statute and the Rule of Procedure and Evidence as its annex at the same time.⁹⁷⁶ There had been proposals for

follow. He shall investigate equally incriminating and exonerating circumstances.” It appears from the surrounding provisions that the proposal indeed came from France.

⁹⁷² See 1996 PrepCom Report Vol. I (note 915 *supra*), par. 274, p. 58.

⁹⁷³ See 6.3.2 *infra*. See as to the efforts not to overburden the Rome Statute with too many technical details *Fernández de Gurmendi* in *Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 224 et subs.

⁹⁷⁴ See *Bassiouni*, *The Legislative History of the International Criminal Court* Vol. 1, pp. 84, 89; see also *Kirsch/Holmes*, *The Rome Conference on an International Criminal Court: The Negotiating Process*, pp. 3 et subs.

⁹⁷⁵ *Fernández de Gurmendi* in *Lee*, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 217 et subs.; *Fernández de Gurmendi*, *The Elaboration of the Rules of Procedure and Evidence*, at p. 251.

⁹⁷⁶ See PrepCom Draft Art. 52, Option 1: “The Rules of Procedure and Evidence, including an elaboration of the elements of offenses that must be proven, annexed at _____, shall be an integral part of this Statute.”; see also *Fernández de Gurmendi* in *Lee*, *The International Criminal Court: The*

the RPE during the drafting process; a complete set of rules had, for example, been jointly proposed by Australia and the Netherlands as early as 1996.⁹⁷⁷ This proposal also contained a complete disclosure regime, which, however, reiterated the disclosure provisions of the ICTY practically verbatim.⁹⁷⁸ Notwithstanding, to pass both the Statute and the Rules at the same time proved materially impossible.⁹⁷⁹ One principal means of compromise at the Rome Conference was thus to eliminate disputed details by leaving them for the Rules of Procedure and Evidence.⁹⁸⁰

The differences concerning disclosure issues between the PrepCom Draft and its predecessors on the one hand and the Rome Statute on the other mainly lie in the definitive decision of the Rome Conference to adopt the above mentioned system of an oral confirmation hearing. Therefore, pre-trial disclosure as regulated in the Rome Statute now refers to pre-confirmation hearing disclosure as contained in Article 61 (3) ICCSt:

Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

Obviously, this is very similar to the above cited alternative option for Art. 61 (2) of the PrepCom Draft. In fact, there appears to be no material difference between the PrepCom Draft and the ICCSt on this point, as Art. 61 (3) ICCSt is apparently even simpler than the draft. Along with the decision as to the model of pre-trial procedure came as a logical consequence that the Pre-Trial Chamber would be the competent authority to rule on the matter. The Trial Chamber, however, once it is constituted and dealing with the matter, according to Art. 64 (3)(c) ICCSt retains the competence to rule on disclosure issues. A “separation of powers”, involving a third or, for that matter, fourth

Making of the Rome Statute: Issues, Negotiations, Results, p. 225. On the other hand, it had also been considered in the negotiation process of the Statute that the ICC, like the Ad Hoc Tribunals, should opt for judge-made Rules of Procedure and Evidence; see e.g., Art. 19 of the 1994 Draft.

⁹⁷⁷ Draft set of rules of procedure and evidence for the Court, working paper submitted by Australia and the Netherlands, A/AC.249/L.2; see 1996 PrepCom Report Vol. I (note 915 *supra*), p. 3.

⁹⁷⁸ See 1996 PrepCom Report Vol. II, note 915 *supra*, Rules 82 et subs., pp. 177 et subs.

⁹⁷⁹ *Fernández de Gurmendi*, note 976 *supra*, *ibid.*

⁹⁸⁰ *Fernández de Gurmendi*, *ibid.*

instance deciding over disclosure issues, as still contained in the 1994 Draft, was thus ultimately rejected.

We also note that, in contrast to Option 1 for Art. 58 (10)(b) of the PrepCom Report Draft, the delegates at the Rome Conference refrained from including a mandatory sanction for the Prosecutor's non-compliance with his disclosure obligations. Indeed, a mandatory non-admissibility of evidence in the case of non-disclosure generally conflicts, as we have stated regarding the situation at the Ad Hoc Tribunals, with the mandate of truth finding.

The disclosure obligation of the Prosecutor regarding exculpatory evidence as contained in Art. 67 (2) ICCSt and in all previous drafts of the Rome Statute from the beginning, was kept:

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

The plenipotentiaries opted for a simplification, and, to some extent, restriction of the wording of the PrepCom Draft.⁹⁸¹ As to the competent authority within the Court, any notion of the Trial Chamber or the Presidency as contained in previous drafts was given up, merely stating that "the Court" is to decide. Even though this theoretically leaves room for a competence of the Presidency, in the light of the overall procedural architecture of the ICC as contained in the Statute⁹⁸² (and, by now, further elaborated by the Rules), one would have to assume that the Chamber dealing with the matter would also be competent to rule on matters according to Art. 67 (2).

Without explicitly mentioning disclosure, the respective chambers dealing with the matter are empowered to rule on the protection of victims and witnesses (Art. 57 (3)(c), as well as Art. 64 (6)(e); a general provision regarding the protection of victims and witnesses was introduced by Art. 68). Other than that, the Trial Chamber has, according to Art. 64 (6)(b) and (c) and Art. 69 (3), the authority to demand the (additional) production of evidence.⁹⁸³ While this is, as we have seen, not a new feature,⁹⁸⁴ the

⁹⁸¹ See for the substantive details 6.4.4 *infra*.

⁹⁸² See only Art. 61 (3) S. 2, as well as Art. 64 (3)(c).

⁹⁸³ This is in contrast to the Pre-Trial Chamber, which can be inferred from the general procedural framework of the ICC, and e.g., Art. 61 (7)(c)(i), whereby the Pre-Trial Chamber can "request the Prosecutor to consider providing further evidence".

explicit reference to truth finding also made its way from the PrepCom Draft into the Rome Statute;⁹⁸⁵ the same holds true for the neutrality obligation and the explicit commitment of the Prosecutor to the finding of the truth.⁹⁸⁶ The ICC is thus the first international criminal court which incorporates truth finding explicitly as a fundamental principle laid down in its statute.

The power of the Chamber to rule on confidentiality issues as contained in both the 1994 Draft and the PrepCom Draft, was stricken from the Statute. However, the power is now contained in the already mentioned provision of Art. 54 (3)(e); the same holds true for Art. 72, the successor of the above cited Art. 71 of the PrepCom Draft. National security matters may thus also implicate severe restrictions concerning disclosure.

As already mentioned, disclosure by the defence is not explicitly contained in the Rome Statute. On the other hand, the Statute obviously does not prohibit disclosure by the defence either; and provisions like Art. 64 (6)(d), which allows the Trial Chamber to order the production of additional evidence, leave room for disclosure by the defence.

Finally, the notion of the “exchange” of evidence in preparation of the trial, which had been contained in all the predecessors of the Statute, was not kept; in fact, it does not appear in the Rules of Procedure and Evidence, either.

6.3.1.5 Conclusion

It appears from this overview that almost all basic disclosure provisions contained in the Rome Statute were, in one form or another, present in all relevant drafts since 1993. From the beginning onwards, disclosure as a procedural feature was contemplated to become a part of the Statute itself, not merely of the Rules of Procedure and Evidence. The acknowledgment that disclosure to the defence is an integral part of the fair trial rights of the accused, was contained in the drafts from the beginning. The relevant provisions were, in the course of the negotiations, structured and simplified. During the drafting process, however, while the overall procedural structure was widened, witness

⁹⁸⁴ See, once again, Art. 47 (1) of the 1993 Draft, Art. 38 (5)(b) and (c) of the 1994 Draft, Rule 98 RPE-ICTY as well as 17 (c) FRCP.

⁹⁸⁵ See Art. 69 (3): “The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.” See also, once again, the legal obligation of the Prosecutor to truthfulness contained in Art. 54 (1) ICCSt.

⁹⁸⁶ See, once again, Art. 54 (1)(a) ICCSt: “The Prosecutor shall [...], [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally [...].”

protection became a stronger issue; the same holds true to an even larger degree concerning the protection of national security interests and confidential information, which often run counter to the interests of the defence. On the other hand, the truth finding means of the Court were strengthened and emphasized; this also entails the described empowerment of the Court to watch over the disclosure process. In this regard, one must also mention the commitment of the Prosecutor to the truth and his obligation to investigate incriminating and exonerating circumstances equally. Probably the most particular or even peculiar feature of the procedural architecture of the ICC is the separation between the confirmation stage and the trial stage. This obviously has significant practical consequences for disclosure; not only concerning disclosure between the parties, but also the role of the respective Chamber and its involvement in the disclosure process – not least as regards the Chamber’s own access to evidentiary information. However, the Statute is not clear about any structural differences concerning disclosure in the two stages, leaving the regulation of these and other issues, such as the question of whether the defence can also be obliged to disclose part of its evidence, to the Rules of Procedure and Evidence.

6.3.2 The Rules of Procedure and Evidence⁹⁸⁷

The work on the details of the procedural law of the ICC apart from the Rome Statute was thus left until after the Rome Conference. In order to draft the supplementary legal framework, a Preparatory Commission for the International Criminal Court (abbreviated, like the Preparatory Committee, PrepCom) was established by the UN

⁹⁸⁷ On the general process of negotiations concerning the Rules of Procedure and Evidence see *Fernández de Gurmendi*, *The Elaboration of the Rules of Procedure and Evidence* as well as *Fernández de Gurmendi/Friman*, *The Rules of Procedure and Evidence and the Regulations of the Court*. The following considerations are partially based on the cited works. Ms. Silvia Fernández de Gurmendi (who is now a judge at the ICC) served as Coordinator for the Rules of Procedure and Evidence; see Summary of the proceedings of the Preparatory Commission at its first session (16–26 February 1999), PCNICC/1999/L.3/Rev.1, 22 March 1999, par. 12.

General Assembly via Resolution F of the Final Act of the Rome Conference.⁹⁸⁸ All in all, between 1999 and 2002, the PrepCom gathered ten times.⁹⁸⁹

The first session of the PrepCom took place from 16 to 26 February 1999, which was also when the ‘Working Group on Rules of Procedure and Evidence’, which naturally was in charge of elaborating the procedural rules relating to disclosure, took up its work.⁹⁹⁰

The draft text of the Rules of Procedure and Evidence was, together with the Elements of Crimes, finalized and adopted at the end of the *fifth* session on 30 June 2000;⁹⁹¹ the Rules were adopted by the Assembly of States Parties at the first session of the ASP in 2002.⁹⁹²

Generally, the discussions of the PrepCom on disclosure issues⁹⁹³ evolved around four questions: *who* should be under an obligation to disclose, *what* material should be disclosed, *when* should disclosure take place, and *how*, the latter question predominantly concerned with the role of the respective (pre-trial or trial) chamber within the disclosure process; it appears that the discussions were relatively difficult.⁹⁹⁴ Quite a few questions could not be agreed on conclusively, and so were left “constructively ambiguous” to be further developed by the jurisprudence of the Court.⁹⁹⁵

⁹⁸⁸ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10 (17 July 1998); Resolution F:

1. There is hereby established the Preparatory Commission for the International Criminal Court. [...]

5. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Rules of Procedure and Evidence; [...].

⁹⁸⁹ See *Bassiouni*, The Legislative History of the International Criminal Court, Vol. 1, pp. 103-110.

⁹⁹⁰ See Summary of the proceedings of the Preparatory Commission at its first session, note 987 *supra*.

⁹⁹¹ See Guide to the report of the Preparatory Commission, PCNICC/2002/3 (25 July 2002), B. 1. No. 7 (p. 5), as well as the finalized draft, PCNICC/2000/INF/3/Add.1, (reissued as PCNICC/2000/1/Add.1, 2 November 2000).

⁹⁹² New York, 3-10 October 2002, Official Records ICC-ASP/1/3.

⁹⁹³ See generally on the negotiations in the PrepCom concerning disclosure *Brady*, Disclosure of Evidence.

⁹⁹⁴ See *Brady*, Disclosure of Evidence, note 990, at pp. 403 et seq., as well as *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence, at pp. 251 et seq., and *Fernández de Gurmendi/Friman*, The Rules of Procedure and Evidence and the Regulations of the Court, at p. 806.

⁹⁹⁵ *Brady*, Disclosure of Evidence, *ibid.*, at p. 404; see also *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence. p. 240.

The first comprehensive proposal for the future Rules of Procedure and Evidence came from Australia, some weeks before the start of the session;⁹⁹⁶ a week later France also submitted a general outline for the future Rules.⁹⁹⁷ The Australian and French proposals proved to be the working basis for the overall drafting process of the Rules as a whole;⁹⁹⁸ as we will see below, this also holds true as regards the disclosure of evidence.

The Australian draft Rules in their Part 5 (draft Rules 66-73) contained a detailed set of provisions concerning disclosure, systematizing, like the ICTY and the other Ad Hoc Tribunals, the different disclosure duties of the parties according to different types of evidence, as well as including a detailed set of exceptions to disclosure (Rule 71 of the draft Rules). Nevertheless, the system of the provisions on disclosure contained in the Australian proposal differs from the ICTY Rules, which is certainly due to the fact that the ICC Statute was already in place and the provisions had to be regulated according to it.⁹⁹⁹ The technical provisions regarding disclosure as now contained in the RPE-ICC can, for the most part, be traced back to the original Australian proposal. It is important to note that the Australian proposal was based on the assumption that the ‘bulk’ of disclosure should not take place before the confirmation hearing but before the Trial.¹⁰⁰⁰

A different approach was taken by two French proposals¹⁰⁰¹ which had been presented on 12 February 1999 and put much more emphasis on the confirmation hearing, and thus opined that a large part of the disclosure was to occur prior to it;¹⁰⁰² this of course

⁹⁹⁶ Proposal submitted by Australia, Draft Rules of Procedure and Evidence of the International Criminal Court, PCNICC/1999/DP.1, 26 January 1999. This proposal followed a request to update Australia’s above-mentioned earlier draft which had been submitted jointly with the Netherlands (see, once again, the 1996 PrepCom Report Vol. I (note 915 *supra*), p. 3, as well as Vol. II, pp. 177 et subs.), *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence, p. 241.

⁹⁹⁷ Proposal by France. General Outline of the Rules of Procedure and Evidence, PCNICC/1999/DP.2, 1 February 1999.

⁹⁹⁸ *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence, p. 241.

⁹⁹⁹ See also *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence, *passim*.

¹⁰⁰⁰ See *Brady*, Disclosure of Evidence, note 990, at 405, as well as 6.3.2.1 *infra*.

¹⁰⁰¹ Proposal by France on Rules of Procedure and Evidence: Part 3, section 3, subsection 2 and 3, respectively, PCNICC/1999/DP.7 (hereinafter: “first French proposal”) and PCNICC/1999/DP.8 (hereinafter: “second French proposal”), both dated 12 February 1999.

¹⁰⁰² See French General Outline of the RPE (note 997 *supra*) par. 10: “It would not be advisable to include a section on disclosure of evidence in the general provisions. Rather, it would seem that the Pre-Trial Chamber, during the pre-trial phase, should settle such matters, so that the trial itself is not disrupted by problems related to disclosure.” See also *Brady*, Setting the Record Straight: A Short Note on Disclosure and ‘the Record of the Proceedings’, at p. 263 et seq., *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence, at p. 243, as well as *Tochilovsky*,

also would have had a strong impact on the question of the relation between the Pre-Trial Chamber and the Trial Chamber.¹⁰⁰³ The two French proposals apparently functioned as a kind of ‘counterweight’ *vis-à-vis* the Australian proposal, as far as disclosure was concerned.¹⁰⁰⁴ They contain the “ancestors” of the procedural provisions regarding the Confirmation hearing, and the ones systematically ‘complementing’ the technical pre-trial disclosure provisions, such as the principle that the Chamber dealing with the matter should get to see the material disclosed between the parties.¹⁰⁰⁵

Finally, a week after the two proposals, an *addendum* to the second French proposal was filed,¹⁰⁰⁶ which contained the ancestors of Rules 129 and 130, these two being the bridging provision for the transition from the confirmation hearing to the trial phase.

Before we look at the development of the disclosure provisions in the RPE-ICC more specifically, it appears useful, for a better understanding, to describe in some detail the mentioned drafts of Australia and France, taking these two conceptually different proposals as a starting point for our overall analysis. After that, we will briefly enumerate the relevant documents containing draft versions of disclosure provisions, which for their part represent further developments of the Australian and French proposals, in order to enable the reader to better understand the synopses which we will use below to illustrate the development of each of the respective legal norms in some detail. For the further analysis, it is important to keep in mind the said different conceptions as regards the function of the confirmation hearing as well as the role of the respective Chamber – a divide which is most probably due to differences stemming from Anglo-American and Roman-Germanic legal thinking.¹⁰⁰⁷

Prosecution Disclosure Obligations in the ICC and Relevant Jurisprudence of the Ad Hoc Tribunals, at p. 844 et seq.

¹⁰⁰³ See *Fernández de Gurmendi/Friman*, The Rules of Procedure and Evidence and the Regulations of the Court, at p. 806.

¹⁰⁰⁴ Compare *Brady*, Disclosure of Evidence, at pp. 405 et seq.

¹⁰⁰⁵ Rule 121 (10) as well as Rule 131 (1) RPE-ICC.

¹⁰⁰⁶ PCNICC/1999/DP.8/Add. 1. Draft Rule 66.1 provided:

“Rule 66.2. Constitution of the Trial Chamber

Upon receipt of the decision of the Pre-Trial Chamber and the record of the proceedings, the Presidency shall constitute the Trial Chamber and shall refer the case to it.

The Presidency may also refer the case to a previously constituted Trial Chamber.

The decision of the Pre-Trial Chamber and the record of the proceedings shall be transmitted to the Trial Chamber.”

¹⁰⁰⁷ Hinting to this conclusion *Brady*, Setting the Record Straight: A Short Note on Disclosure and ‘the Record of the Proceedings’, note 1002, at p. 264; see also *Fernández de Gurmendi*, The Elaboration of the Rules of Procedure and Evidence, pp. 251 et subs.

6.3.2.1 The Australian Proposal

As briefly mentioned, the Australian draft was, as far as disclosure is concerned, systematically modelled after the RPE-ICTY, a fact which was also expressly stated in a *nota bene* preceding the proposed rules for disclosure,¹⁰⁰⁸ as well as in the *nota bene* which accompanied the respective provisions. The first *nota bene* contains a note concerning the envisaged purpose of disclosure in general – once again, the human rights aspect of disclosure, and in fact only the human rights aspect, is emphasized:

*The disclosure of evidence goes to the heart of the right of an accused person to a fair trial. Many issues are raised in this area.*¹⁰⁰⁹

The fact that the numbering of the disclosure provisions contained in the Australian draft (Rules 66-73) is reminiscent of the numbering of the Rules of the Ad-Hoc Tribunals is coincidental. Even though the Australian draft was strongly influenced by the RPE-ICTY as concerns disclosure, the rest of the draft, for the most part, structurally does not resemble the RPE-ICTY. Just like the RPE-ICTY, the draft differentiates between disclosure obligations according to the kind of material that is to be disclosed: disclosure relating to prosecution witnesses (draft Rule 67¹⁰¹⁰), inspection of material in possession of the Prosecutor (draft Rule 68¹⁰¹¹), disclosure by the defence

¹⁰⁰⁸ See Australian Proposal, Note 996, before Rule 66 (p. 36): “The following rules seek to elaborate on the principles relating to disclosure laid down in the Statute. In doing so, they draw on, but do not adopt without amendment, ICTY Rules.”; see also *Brady*, Disclosure of Evidence, Note 990, at 409 (note 17).

¹⁰⁰⁹ Australian Proposal, note 996, *ibid*.

¹⁰¹⁰ “Rule 67: Pre-trial disclosure relating to prosecution witnesses

(a) The Prosecutor shall provide the defence with the names and addresses of witnesses whom the Prosecutor intends to call to testify at trial and copies of the statements made by those witnesses. This shall be done sufficiently in advance of the commencement of the trial to enable the adequate preparation of the defence.

(b) The Prosecutor shall subsequently advise the defence of the names and addresses of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

(c) The statements of prosecution witnesses shall be made available in a language which the accused fully understands and speaks.

(d) This rule shall be read subject to rule 71.”

As expressly stated in a *nota bene*, sub-rule (a) is modelled after Rules 66 (A)(ii) and 67 (A)(i) RPE-ICTY; sub-rule (b) resembles Rule 66 (A)(ii) RPE-ICTY.

¹⁰¹¹ “Rule 68: Inspection of material in possession or control of the Prosecutor

regarding ‘special defences’/grounds for excluding criminal responsibility according to Art. 31 (1) ICCSt (Rule 69¹⁰¹²), restrictions on disclosure (draft Rule 71¹⁰¹³), as well as a

(a) The Prosecutor shall on request permit the defence to inspect any books, documents, photographs and tangible objects in his or her possession or control which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the person.

(b) This rule shall be read subject to rule 71.”

This provision strongly resembles Rule 66 (B) RPE-ICTY, albeit without imposing reciprocal disclosure duties on the defence.

¹⁰¹² “Rule 69: Disclosure by the defence regarding the defence of alibi and certain grounds for excluding criminal responsibility recognized under article 31, paragraph 1

The defence shall notify the Prosecutor of its intent to:

(i) Plead the existence of an alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or

(ii) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1 (a) or (b); in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.”

As the *nota bene* states, the wording of Sub-Rule (i) is identical to Rule 67 (A)(ii)(a) RPE-ICTY. Sub-Rule (b) resembles Rule 67 (A)(ii)(b) RPE-ICTY, treating the “grounds for excluding responsibility” as special defences as understood in Anglo-American criminal law. See more on this below, 6.5.2.

¹⁰¹³ “Rule 71: Restrictions on disclosure

(a) Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

(b) Where material or information is in the possession or control of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter at the time for a ruling on whether the material must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. If the Chamber rules against disclosure, the Prosecutor may not subsequently introduce such material or information into evidence during the trial without adequate prior disclosure to the accused.

(c) Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material or information may not be subsequently introduced into evidence during the trial without adequate prior disclosure to the accused.

(d) Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material or information may not be subsequently introduced into evidence during the trial without adequate prior disclosure to the Prosecutor.

reaffirmation that disclosure duties are ongoing (Rule 73¹⁰¹⁴). The main difference to the ICTY disclosure regime of the time (14th revision of the RPE-ICTY, 4 December 1998) appears to be the lack of reciprocal defence disclosure obligations regarding tangible objects as was contained in Rule 67 (C) RPE-ICTY. In this regard, it may be noted that the proposal bases the limited disclosure obligation of the defence, i.e. concerning grounds for excluding criminal responsibility under Art. 31 (1) ICCSt, once again, on “fair trial rights for the Prosecutor”:

*The argument in support of the defence being required to notify its intent to offer such a defence is that it would be unfair for the Prosecutor to meet these defences on the run.*¹⁰¹⁵

(e) Where material or information is in the possession or control of the Prosecutor which falls within the scope of article 72, its treatment shall be governed by the provisions of that article.

(f) Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence during the trial without adequate prior disclosure to the accused.

(g) If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, the Trial Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.

(h) If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), the Trial Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.

(i) The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules (g) and (h).

(j) The Trial Chamber may order upon an application by the defence that, in the interests of justice, material or information in the possession of the accused, which has been provided under the same conditions as those set down in article 54, paragraph 3 (e), and is to be introduced into evidence, shall be subject to sub-rules (f), (g) and (h).”

This very detailed and voluminous set of exceptions to disclosure obligations is partially based on ICTY law, partially it aims at elaborating limitations contained in the ICC Statute. See *nota bene* to draft Rule 71 for details.

¹⁰¹⁴ “Rule 73: Continuing requirement to disclose

If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Statute or the Rules, that party shall promptly notify the other party and the Chamber dealing with the matter at the time of the existence of the additional evidence or material.”

This Rule, as the *nota bene* states, is based on Rule 67 RPE-ICTY.

¹⁰¹⁵ Australian proposal, note 996 *supra*, *nota bene* accompanying draft Rule 69.

This line of argument, as was shown in the introduction, must be rejected.¹⁰¹⁶

Furthermore, the wording of the Australian draft proves that indeed, it focuses on pre-trial disclosure, as opposed to pre-confirmation disclosure. It merely contains a *nota bene* addressing this latter point, doubting that a more specific provision than the one already contained in the Statute, Art. 61 (3) ICCSt, was needed:

Rule 66

Issue of disclosure orders by the Pre-Trial Chamber prior to hearing under article 61

(N.B. Article 61, paragraph 3, provides, in part, that the Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of a hearing under article 61. Consideration needs to be given to whether this provision needs to be elaborated.)

The Australian proposal formed the basis for a working paper¹⁰¹⁷, which for its part is an “ancestor” of the technical disclosure provisions contained in Rules 76-83 RPE-ICC.¹⁰¹⁸

6.3.2.2 The French Proposals

In contrast to the Australian proposal, the two French papers, obviously inspired by Continental European legal thinking, do not contain any technical disclosure provisions, but merely state that the Chamber dealing with the matter should keep watch over the obligations as provided in the Statute concerning disclosure according to Art. 61 (3).¹⁰¹⁹ The first one of the two French proposals, however, also contains the notion that the Chamber, in contrast to all jurisdictions we have looked at until this point, as a matter of principle should receive and get to see all of the evidence disclosed between the parties before trial.¹⁰²⁰ This indeed demonstrates a fundamental break from adversarial principles which aim to involve the court as little as possible. Notably, the draft placed this part of the disclosure obligations under the section “Conduct of investigations and

¹⁰¹⁶ See section 1.3.1.4. above.

¹⁰¹⁷ PCNICC/1999/WGRPE/RT.4, 25 February 1999.

¹⁰¹⁸ *Brady*, Disclosure of Evidence, p. 406, note 8. Rule 84 has a different history, see more on this below.

¹⁰¹⁹ See Rule 58.1 of the French draft, PCNICC/1999/DP.7: “In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person [...].

The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. [...]” See as to the second paper instantly.

¹⁰²⁰ PCNICC/1999/DP.7, note 1001 *supra*, Rule 58.2.

proceedings”, thus not explicitly referring to the confirmation hearing at this point, except from citing Art. 61 (3) – the investigations, according to Art. 61 (4) ICCSt, may continue until the confirmation hearing.¹⁰²¹ At the same time, it would be dysfunctional if the Prosecutor were allowed to go into the confirmation hearing with new evidence, without having to disclose it beforehand. The French approach is remarkable in the sense that the Rome Statute, as we have seen above, is unclear regarding differences concerning disclosure obligations during the respective phases of proceedings. The Statute does not explicitly envisage disclosure obligations during the investigation phase, except for the general obligation to disclose exculpatory evidence according to Art. 67 (2), which has to be fulfilled “as soon as practicable”. In addition to that, the disclosure procedures explicitly related to the confirmation hearing are contained in more detail in the *second* French proposal, which, for its part, explicitly adverts to the confirmation hearing, as its sub-heading reads “Preparation of the hearing on confirmation of charges”¹⁰²². This paper, consisting of two draft Rules on the preparation of the confirmation hearing (draft Rule 61.1) and the conduction of the hearing itself (draft Rule 61.2), however, goes somewhat beyond the communication of the material disclosed *inter partes* to the Chamber, and indeed probably further than anything previously known at international criminal courts. The relevant parts of the first provision of the proposal in this regard were drafted as follows:

Subsection 3. Closure of the pre-trial phase

Rule 61. Confirmation proceedings (in the presence of the person)

Rule 61.1. Preparation of the hearing on confirmation of charges

(a) [...]

Between this first appearance and the hearing on confirmation of charges, evidence shall be exchanged in accordance with rules 58 (1) to 58 (3).

¹⁰²¹ *E contrario*, one would be tempted to say that *after* the start of the confirmation hearing, further investigations must, at least at first, stop; however, the ICC Appeals Chamber held that this is not the case. Based on Art. 61 (9) ICCSt, the Chamber argues that while “ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing”, it is “not a requirement of the Statute.” *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", Appeals Chamber, 13 October 2006, par. 54. See also *Prosecutor v. Mbarushimana*, ICC Case No. 01/04-01/10, Judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", Appeals Chamber, 30 May 2012, par. 44.

¹⁰²² PCNICC/1999/DP.8, 12 February 1999.

(b) The Prosecutor shall make a list of the evidence which he or she has gathered and shall provide it to the Pre-Trial Chamber no later than 30 days before the date of the hearing on confirmation of charges. A precise description of the charges on which he or she intends to seek trial shall be attached to this list.

The Pre-Trial Chamber, by virtue of article 61, paragraph 3, shall take the necessary steps to notify the person of the charges on which the Prosecutor intends to bring him or her to trial, and to transmit to him or her the list of the evidence gathered by the Prosecutor. This notification and this transmittal shall take place no later than 21 days before the date of the hearing on confirmation of charges. In accordance with article 61, paragraph 4, the Prosecutor may amend the charges or bring new evidence, but such amendments and new evidence must always be brought to the knowledge of the person and transmitted to the Pre-Trial Chamber no later than two weeks before the date of the hearing.

(c) The person shall also make a list of the evidence which he or she has gathered and shall provide it to the Pre-Trial Chamber no later than two weeks before the date of the hearing on confirmation of charges. The list shall be transmitted to the Prosecutor no later than a week before the hearing.

The two-week time-limit set in the preceding paragraph shall be reduced to one week if the Prosecutor amends the charges or brings new evidence under paragraph (b) of this rule. The transmittal provided for in the preceding paragraph shall then take place no later than the day before the hearing.

[...]

(f) The Registry shall put together the record of the proceedings before the Pre-Trial Chamber. This record shall consist of all documents transmitted to the Pre-Trial Chamber pursuant to paragraphs (a) to (e) of this rule. It may be consulted by the Prosecutor and by the person.

(g) Victims and their legal representatives, who shall have access to the proceedings by virtue of article 68 of the Statute and in accordance with the conditions laid down in rules (x) to (xx), shall be notified of the date of the hearing on confirmation of charges and of any postponements.

They may consult the record of the proceedings put together in accordance with paragraph (f) of this rule. They may lodge written submissions with the Pre-Trial Chamber no later than two weeks before the beginning of the hearing. Such submissions shall be added to the record of the proceedings and transmitted to the Prosecutor and the person.

[...]

The relevant part of sub-rule (a) of the draft simply refers to the first French proposal,¹⁰²³ which, as said, provided that between the first appearance and the confirmation hearing disclosure (presumably according to Articles 67 (2) and 61 (3) ICCSt [exculpatory evidence and information regarding such evidence that the Prosecutor intends to present at the confirmation hearing]) shall take place *inter partes* between the Prosecutor and the defence, with the Chamber watching over the procedure and receiving all the evidence disclosed between the parties.

What is particularly interesting, however, are sub-rules (b) and (c).

Draft sub-rule (b) imposed upon the Prosecutor an obligation to submit a list of evidence to the Court; however, this list was, according to the French plans, not only to contain the evidence which the Prosecutor intended to present (which is the wording of Art. 61 (3)), but a list of “all evidence gathered by the Prosecutor”. It was thus apparently not planned to oblige the Prosecutor to provide the Court with the evidence itself, which practically would have resulted in a dossier approach, since a disclosure obligation of this magnitude can only be complied with by the handing over of a dossier, and would thus have departed entirely from disclosure in the formal sense (while, of course, resulting in *full* disclosure in the material sense). One is tempted to think that the handing over of a mere list of evidence was just to serve the procedural management of the confirmation proceedings; however, for this purpose, it would have been enough to only provide a list of the evidence the Prosecutor was planning to “rely on” at the confirmation hearing, as framed by Art. 61 (3), and not *all* of the gathered evidence. It may be that a balance between truth-finding and trial management was meant to be stricken, by enabling the Chamber to *proprio motu* take ‘investigative’ steps based on the information contained in the list of evidence.

The comprehensive list of evidence was also to be supplied to the accused person, albeit not directly from the Prosecutor to the defence, but rather *via* the Chamber dealing with the matter, which would also have had the task to notify the accused of the charges brought by the Prosecutor against him, underlining the central function of the Chamber which was envisaged by the proposal. The question of an amendment of the charges as foreseen in Art. 61 (4) ICCSt, however, raises new doubts as to the envisioned relation between the *list* of the evidence and the evidence *itself*, since the draft was worded in the sense that the new evidence, pertaining to the new charges, had to be “brought to the knowledge of the accused” and “transmitted” to the Chamber – here, the draft sub-rule does not mention a list, but rather appears to refer to the evidence itself.

¹⁰²³ See footnote 1019.

According to the draft, not only the Prosecutor, but also the person was obliged to “make a list of the evidence which he or she has gathered” (draft Rule 61 (1)(c)), meaning, just like the one of the Prosecutor, an all-encompassing duty. The list for its part was to be transmitted to the Prosecutor (presumably via the Chamber dealing with the matter, this notion can still be found in Rule 121 (6) RPE-ICC). The distinction between the duty of the Prosecutor and the duty of the defence apparently merely lay in the different time limits. It goes without saying that a mandatory disclosure duty of the accused of this magnitude would have been seriously conflicting with his privilege against self-incrimination.

The draft thus envisaged *independent* (as opposed to only *reciprocal*) disclosure duties of the Prosecutor and the Defence, albeit only referring to “lists of evidence”. Whether this was supposed to be sufficient for a fulfilment of Art. 61 (3) ICCSt, is not quite clear – after all, Art. 61 (3) does not, as its predecessor, speak of “disclosure”, but of “information”.

Sub-rule (f) imposed upon the Court, i.e., the Registrar, to create and maintain a record of the proceedings, which should contain all of the evidence disclosed between the parties via the Chamber. To be sure, the Rome Statute does not contain the notion of a record of the proceedings during the pre-trial phase, as Art. 64 (10)¹⁰²⁴ refers only to the Trial Chamber and the trial proceedings. According to the French proposal, the Prosecutor and the accused would be entitled to consult the record; draft sub-rule (g) also envisioned a right of access to the record of the proceedings by the victims.

The record of the proceedings would, according to the French draft, have been *the* central document of reference for all participants in the trial. It elucidates from the proposal that the delegation had something very close to a dossier system in mind.¹⁰²⁵ This view is corroborated by draft Rule 61.2 as contained in the second French proposal, which was framed as follows:

Rule 61.2. Hearing on confirmation of charges

(a) The President of the Pre-Trial Chamber shall ask the hearing Registrar to read out the charges as presented by the Prosecutor. The President shall then determine how the hearing is to be conducted and, in particular, establish the order and the conditions in which he or she intends the parties to explain the documentary evidence contained in the record of the proceedings.

¹⁰²⁴ “The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.”

¹⁰²⁵ In fact, the “record of the proceedings” in the French version of the RPE-ICC is called “le dossier de la procédure”.

(b) Before examining the record on the merits, the President of the Pre-Trial Chamber shall ask the Prosecutor and the person, and possibly the representatives of States, whether they intend to raise objections or make observations concerning the jurisdiction of the Court or the admissibility of the case, or concerning an issue related to the proper conduct of the proceedings prior to the hearing on confirmation of charges.

[...]

(d) During the examination of the record on the merits, and for each element of this record which the President of the Pre-Trial Chamber deems it necessary to present to the hearing, the Prosecutor's observations shall be heard, and then the person. The Prosecutor and the person shall present their arguments in accordance with paragraphs 5 and 6 of article 61.

The President of the Pre-Trial Chamber may also invite victims or their legal representatives to speak, if they have been allowed to participate in the hearing. In this case, the person and the Prosecutor shall always have the right to speak again after the victims or their legal representatives.

The Pre-Trial Chamber may order the appearance of a witness or an expert, on its own initiative or at the request of the Prosecutor or the person. The President shall question the witness or expert and then ask the Prosecutor and, subsequently, the person whether they have any questions to put to the witness or expert.

When he or she considers the elements of the record of the proceedings to have been sufficiently argued, the President of the Pre-Trial Chamber shall ask the victims or their legal representatives to present their final observations. He or she shall then ask the Prosecutor to present his oral submissions, and then the person to present his or her defence. The President of the Pre-Trial Chamber may, in exceptional cases, authorize a party to speak again. In all cases, the person shall be the last to speak.

The hearing was thus envisaged to be conducted “according to the record of the proceedings”, and indeed this principle is still contained in Rule 122 (1) RPE-ICC.¹⁰²⁶ Draft Rule 61.2 (b), however, which stated that the hearing should be conducted by “examining the record on the merits” would have given the procedural framework yet another ‘inquisitorial twist’; the same holds true for draft sub-rule (d), which reiterated the wording of draft sub-rule (b) and also spoke of “elements of the record of the

¹⁰²⁶ “The Presiding Judge shall determine how the hearing is to be conducted and, in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented.”

proceedings” being “sufficiently argued”. To be sure, the notion of a “record on the merits” is not contained in the procedural framework of the ICC anymore.

It is doubtful why draft sub-rule (a) referred specifically to the documentary evidence contained in the record of the proceedings, given the fact that other evidence, such as witness statements, would in any case have been disclosed by this stage and therefore contained in the record. This may, however, be due to the fact that witnesses would be heard by the Court anyway, whereas documentary evidence would require comments from the parties. In any case, draft Rule 61.2 taken as a whole shows the predominant role envisaged for the Presiding Judge by the French draft.

As may be seen from this short overview, the draft Rules contained in the two French papers of 12 February 1999 (draft Rules 58 and 61), were the early ancestors of Rules 121 and 122 RPE-ICC.¹⁰²⁷

6.3.2.3 The further developments¹⁰²⁸

6.3.2.3.1 Rules 76 to 83, Rule 121

As shortly mentioned above, the further development of the disclosure provisions took place based on the Australian proposal on the one hand, and the French proposals on the other. Whereas the Australian proposal contained the ancestors of Rules 76 to 84, which are the principal technical disclosure provisions in the procedural framework of the ICC, the French proposals predominantly tried to introduce a ‘limited’ or ‘down-sized’ dossier system, one of whose principal features, namely the information of the Chamber dealing with the matter, however, has made its way into the criminal procedure of the ICC.

At the end of the First Session of the PrepCom, these two ‘roots’ developed into two discussion papers, one of which was based on the French proposals and thus mainly concerned with the confirmation hearing,¹⁰²⁹ the other chiefly on the Australian one containing more general disclosure rules.¹⁰³⁰ It has been stated that the first discussion

¹⁰²⁷ See also *Brady*, Disclosure of Evidence, at p. 406, note 7.

¹⁰²⁸ The following remarks regarding the drafting process are chiefly based on *Brady*, Disclosure of Evidence, pp. 405 et subs., as well as *Brady*, Setting the Record Straight: A Short Note on Disclosure and 'the Record of the Proceedings'.

¹⁰²⁹ PCNICC/1999/WGRPE/RT.3, 25 February 1999, hereinafter: “Discussion Paper 1” or “the first discussion paper”, chiefly relevant for Rule 121.

¹⁰³⁰ PCNICC/1999/WGRPE/RT.4, 25 February 1999, hereinafter: “Discussion Paper 2” or “the second discussion paper”.

paper contained the ancestors of Rule 121 RPE-ICC, which determines the role of the responsible chamber concerning the disclosure process before the confirmation hearing, whereas the second discussion paper contained the ancestors of the technical provisions of Rules 76 to 83 RPE-ICC.¹⁰³¹ While this is correct, it is worth mentioning that the second discussion paper, which was based on the Australian proposal, already contained the feature of communication of the evidence disclosed between the parties to the Chamber; which originally was a French idea, and also made its way into Rule 121 RPE-ICC.¹⁰³²

The two discussion papers were incorporated into the annex to the summary of the first session of the PrepCom¹⁰³³ without further modifications.

The next discussions of the disclosure provisions took place during the second PrepCom session. They resulted in a “revised discussion paper”¹⁰³⁴, which, again, was taken over unmodified into the annex of the second report of the PrepCom.¹⁰³⁵ The Rules were not amended during the third and fourth sessions of the PrepCom, and hence appeared in the respective reports in an unmodified way.¹⁰³⁶

At an inter-sessional meeting in Mont Tremblant, Canada, the disclosure rules were discussed again and obtained a separate chapter, between the confirmation hearing and the trial, as elucidates from the outcome report of that meeting.¹⁰³⁷ At the Mont Tremblant meeting, the Rules were also restructured in that the sub-rules, which until that point had been identified by letters, now obtained numbers.

Finally, at the fifth session of the PrepCom in June 2000, the disclosure provisions were modified once more. The “informal” and “informal-informal” discussions held at the fifth session¹⁰³⁸ led to, as far as our context is concerned, two more discussion papers,¹⁰³⁹

¹⁰³¹ *Brady*, Disclosure of Evidence, p. 406, notes 7 and 8.

¹⁰³² Compare draft Rule 5.12 of Discussion Paper 2, note 1030 *supra*.

¹⁰³³ PCNICC/1999/L.3/Rev.1, 2 March 1999.

¹⁰³⁴ PCNICC/1999/WGRPE/RT.6, 5 August 1999.

¹⁰³⁵ PCNICC/1999/L.4/Rev.1, 18 August 1999.

¹⁰³⁶ PCNICC/1999/L.5/Rev.1/Add.1 (22 December 1999), as well as PCNICC/2000/L.1/Rev.1/Add.1 (10 April 2000), see also *Brady*, Disclosure of Evidence, p. 406, note 10.

¹⁰³⁷ “Outcome of the inter-sessional meeting held at Mont Tremblant, Canada, from 30 April to 5 May 2000, circulated at the request of Canada”, PCNICC/2000/WGRPE/INF/1, 24 May 2000.

¹⁰³⁸ *Brady*, Disclosure of Evidence, p. 406.

¹⁰³⁹ “Discussion paper proposed by the Coordinator regarding rules of procedure and evidence relating to Part 5 of the Rome Statute, concerning investigation and prosecution, Chapter 6: Disclosure”, PCNICC/2000/WGRPE(5)/RT.2, 23 June 2000; as well as “Discussion paper proposed by the Coordinator regarding rules of procedure and evidence relating to Part 5 of the Rome Statute,

which, with only one further change, were incorporated into the different parts of the report of the Working Group on Rules of Procedure and Evidence.¹⁰⁴⁰ Without further amendments, the finalized wording of the Working Group report was attached as an addendum to the report of the PrepCom.¹⁰⁴¹ As mentioned previously, this draft was adopted as the RPE-ICC by the ASP.¹⁰⁴²

Theoretically, counting the drafts from the first proposals to the final RPE, we could thus discern twelve different versions of the respective norms. However, as previously mentioned, the respective wording contained in the Working Group reports, in all but one case,¹⁰⁴³ equals the one contained in the respective discussion papers. Furthermore, there were no changes in the third and fourth sessions of the PrepCom. At last, the finalized draft and the final RPE have, except for the different numbering, the exact same wording as the last Working Group report of 27 June 2000. It therefore suffices for most provisions that we compare *five* different draft versions:

1. The respective Australian¹⁰⁴⁴ and French¹⁰⁴⁵ Proposals
2. The annex to the Summary of the first session of the PrepCom¹⁰⁴⁶, equalling the respective discussion papers¹⁰⁴⁷
3. The appendix to the Summary of the second session of the PrepCom¹⁰⁴⁸, equalling the “revised discussion paper”¹⁰⁴⁹
4. The outcome of the inter-sessional meeting in Mont Tremblant,¹⁰⁵⁰ and

concerning investigation and prosecution, Chapter 5: Investigation and prosecution”, PCNICC/2000/WGRPE(5)/RT.3, 23 June 2000.

¹⁰⁴⁰ Hereinafter: “Working Group Report”; in our context, three different parts of the working group report are relevant: “Chapter 5: Investigation and prosecution”, PCNICC/2000/WGRPE/L.5; “Chapter 6: Disclosure”, PCNICC/2000/WGRPE/L.6; as well as “Chapter 8: Evidence”, PCNICC/2000/WGRPE/L.8; all dated 27 June 2000. The only change *vis-à-vis* the discussion paper of 23 June appears to be the inclusion of the last sentence of Rule 5.32 (3), equalling Rule 81 (3) RPE-ICC. See more on this below (section 6.6.2).

¹⁰⁴¹ Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/INF/3/Add.1, 12 July 2000.

¹⁰⁴² See note 992 above.

¹⁰⁴³ See note 1040 *supra*.

¹⁰⁴⁴ See note 996 *supra*, relevant for all synoptical overviews except for Rules 121, 73 and 84.

¹⁰⁴⁵ See note 1001 *supra*, relevant for the synoptical overview of Rule 121.

¹⁰⁴⁶ See note 1033 *supra*.

¹⁰⁴⁷ See notes 1029 and 1030 *supra*.

¹⁰⁴⁸ See note 1035 *supra*.

¹⁰⁴⁹ See note 1034 *supra*.

5. The final version of the RPE, which equals, with the said exception concerning Rule 81, both the Working Group report¹⁰⁵¹ and the respective preceding discussion papers¹⁰⁵².

For Rule 81, there is a difference between the discussion paper of 23 June 2000 and the Working Group report, between which we have to distinguish; we will in this case thus have to compare *six* different versions.

6.3.2.3.2 Rules 73 and 84

As regards Rules 73 (dealing with privileged information) and 84 (“disclosure and additional evidence for trial”), the structure is a little different, because these two Rules were not discussed during the meetings specifically on disclosure, but rather during those on the trial proceedings;¹⁰⁵³ there are therefore no references as to these provisions in some of the above-mentioned documents dealing with disclosure.

The starting point regarding Rule 73, however, remains the Australian Draft of 26 January 1999.¹⁰⁵⁴

At the first session of the PrepCom, the trial provisions were not made an issue; the first discussions, which took place in Siracusa, and were apparently influenced by informal proposals by France and Italy,¹⁰⁵⁵ resulted in a discussion paper of 1 July 2000,¹⁰⁵⁶ which, in addition to the ancestor of Rule 73, contains the original version of Rule 84 (which had not been contained in the Australian Draft). The paper was revised shortly afterwards,¹⁰⁵⁷ and, a few days later, corrected once more.¹⁰⁵⁸ With this wording, it

¹⁰⁵⁰ See note 1037 *supra*.

¹⁰⁵¹ See note 1040 *supra*; the one on “Chapter 8: Evidence” is relevant for Rule 73; the one on “Chapter 5: Investigation and prosecution” is relevant for Rule 121; and “Chapter 6: Disclosure” is relevant for all other provisions.

¹⁰⁵² See note 1039 *supra*.

¹⁰⁵³ See *Lewis*, Trial Procedure, p. 539.

¹⁰⁵⁴ Note 1001 *supra*; the French papers did not play any role in this regard.

¹⁰⁵⁵ *Lewis*, Trial Procedure, *ibid*.

¹⁰⁵⁶ “Discussion paper proposed by the Coordinator, Part 6 of the Rome Statute: The Trial”, PCNICC/1999/WGRPE/RT.5, 1 July 1999.

¹⁰⁵⁷ “Revised Discussion paper proposed by the Coordinator, Part 6 of the Rome Statute: The Trial”, PCNICC/1999/WGRPE/RT.5/Rev.1/Add.1, 6 August 1999.

¹⁰⁵⁸ “Revised discussion paper proposed by the Coordinator, Rules of Procedure and Evidence related to Part 6 of the Statute”, PCNICC/1999/WGRPE/RT.5/Rev.1, 11 August 1999. *Lewis*, Trial

appeared in the appendix of the summary of the second PrepCom.¹⁰⁵⁹ The said provisions were also covered in the Mont Tremblant meeting and thus appear, renumbered, in the “outcome” of the inter-sessional meeting.¹⁰⁶⁰ After that, they appear in the relevant Working Group reports¹⁰⁶¹ and, of course, in the final draft of the RPE.

While, again, there are theoretically *nine* different versions of the respective provisions to compare, in practice it is sufficient to take a look at *four* versions as regards Rule 73, and only *two* different versions of Rule 84, the content of which was not altered anymore after the revised discussion paper of 6 August 1999.¹⁰⁶²

6.3.2.3.3 Rules 129, 130

Rules 129 and 130 deal with the transition from the confirmation proceedings to the trial phase, and determine the fate of the record of the proceedings before the Pre-Trial Chamber. The starting point of their history is different from all other provisions. Both Rules go back to an addendum to the second French proposal,¹⁰⁶³ which was later revised.¹⁰⁶⁴ Without any changes, they are next contained in the revised discussion paper of 5 August 1999 which also contained the mentioned general disclosure provisions.¹⁰⁶⁵ Naturally, they are also contained in the report of the second PrepCom and the Mont Tremblant meeting outcome, as well as in the discussion paper of 23 June concerning Chapter 5 (investigation and prosecution), which also contained the ancestors of Rule 121 RPE-ICC.¹⁰⁶⁶ As is the case with most other provisions, there were no changes of the provisions after that discussion paper, i.e. that the text of the discussion paper equals that of the final rules.

In the following, we will, similar to our analysis of the Ad Hoc Tribunals’ disclosure regimes, look at the relevant provisions one by one, in a systematical order. We will

Procedure, at p. 539, note 3, appears to be mistaken when he states that this document dates from 12 August 1999.

¹⁰⁵⁹ Note 1035 *supra*.

¹⁰⁶⁰ Note 1037 *supra*.

¹⁰⁶¹ Note 1040 *supra*.

¹⁰⁶² Note 1057 *supra*.

¹⁰⁶³ PCNICC/1999/DP.8/Add.1, 19 February 1999.

¹⁰⁶⁴ PCNICC/1999/DP.8/Add.1/Rev.1, 29 June 1999.

¹⁰⁶⁵ Note 1034 *supra*.

¹⁰⁶⁶ Note 1039 *supra*.

move from “more specific” to “less specific”, since the more general disclosure obligations, like the one to disclose exculpatory material, may serve as residuary clauses. Where appropriate, reference to relevant jurisprudence will be made.

6.4 Disclosure by the Prosecutor

As is the case at the *Ad Hoc* Tribunals as well as in national jurisdictions, also at the ICC the Prosecutor carries the main burden of disclosure obligations. As previously mentioned, disclosure by the Prosecutor is regulated in the Rome Statute and the Rules of Procedure and Evidence. In fact, it appears that in virtually all cases of disclosure, the Statute and the Rules need to be applied *jointly*.

Especially in the early jurisprudence of the ICC, disclosure was apparently occasionally based on provisions of the Rome Statute alone, or even just on general principles. In the early phase of the *Lubanga* proceedings, the Single Judge without further ado based a pre-confirmation disclosure obligation of the Prosecutor, ‘abstractly’, as it were, on Art. 61 (3)(b) ICCSt, where the latter norm, at least on the face of it, only imposes a duty of *information*¹⁰⁶⁷ regarding the evidence the Prosecutor intends to rely on during the confirmation hearing.¹⁰⁶⁸ The same Single Judge, even though also citing provisions contained in the Rules of Procedure and Evidence, applied Art. 67 (1)(b), which guarantees the right of the defence to have adequate time and facilities for the preparation of the defence, apparently as directly granting a right to disclosure.¹⁰⁶⁹ To

¹⁰⁶⁷ This is arguably less than *disclosure*, see already 6.3.1.3 *supra*; the term “disclosure”, which was originally contained, was replaced.

¹⁰⁶⁸ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, Pre-Trial Chamber (Single Judge), 23 March 2006, p. 3: “[...] the prosecution’s obligation to disclose to the defence within a reasonable period of time the Incriminating Evidence pursuant to article 61 (3) (b) of the Statute [...]”. It is also highly questionable if one can, as the Single Judge apparently does, equalise “the evidence on which the Prosecutor intends to rely at the hearing” with “incriminating evidence”.

¹⁰⁶⁹ See *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, Pre-Trial Chamber (Single Judge), 15 May 2006, par. 53: “Hence, while articles 67 (1) (b) and 67 (2) of the Statute and rule 77 of the Rules impose on the Prosecution the obligation to disclose to the Defence before the confirmation hearing those materials that are potentially exculpatory or are otherwise material for the Defence’s preparation for the confirmation hearing, [...]”, as well as par. 73: “In respect of the materials which the Prosecution must disclose to the Defence under articles 67 (1) (b) and 67 (2) of the Statute and rule 77 of the Rules and which neither party intends to use at the confirmation hearing, [...]”.

interpret disclosure provisions contained in the Statute and the Rules in accordance with general principles laid down in the Statute or elsewhere is one thing; to apply them directly as granting specific and concrete procedural rights is quite another.

It therefore appears reasonable, as previously signaled, to start with the specific disclosure provisions as contained predominantly in the Rules, for it is these norms which, for their part, shape the content of norms such as Art. 61 (3)(b) ICCSt.¹⁰⁷⁰

6.4.1 Rule 76 RPE-ICC: Pre-trial disclosure relating to prosecution witnesses

Rule 76 RPE-ICC relates to prosecution witnesses and their prior testimony. Its wording can be traced back to the very first proposal of Australia of 26 January 1999, which for its part, as mentioned above, was based on the RPE-ICTY,¹⁰⁷¹ to be more precise, on Rules 66 (A)(ii) and 67 (A)(i), a fact that is also expressly stated in the proposal.¹⁰⁷² Few substantive changes were made in the course of the negotiations. For ease of reference, the development shall be demonstrated by a synoptical overview:

¹⁰⁷⁰ See also *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", Separate Opinion by Judge Georgios M. Pikis, Appeals Chamber, 14 December 2006, p. 25, par. 4.

¹⁰⁷¹ See, once again, Australian Proposal, note 996 *supra*.

¹⁰⁷² *Ibid.*, *nota bene* 3.

Australian Proposal, 26 January 1999 ¹⁰⁷³	Discussion Paper, 25 February 1999 / PrepCom First Session Summary, Annex 1, 2 March 1999	Revised Discussion Paper, 5 August 1999 / PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000 / Working Group Report, 27 June 2000 / Final Draft, 30 June 2000 / RPE-ICC
<p>Rule 67 Pre-trial disclosure relating to prosecution witnesses (a) The Prosecutor shall provide the defence with the names and addresses</p> <p>of witnesses whom the Prosecutor intends to call to testify at trial</p> <p>and copies of</p> <p>the statements made by those witnesses.</p> <p>This shall be done sufficiently in advance of the commencement of the trial</p> <p>to enable the adequate preparation of the defence.</p> <p>(b) The Prosecutor shall subsequently advise the defence of the names and addresses</p> <p>of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.</p> <p>(c) The statements of prosecution witnesses shall be made available in</p> <p>a language which the accused fully understands and speaks.</p> <p>(d) This rule shall be read subject to rule 71.</p>	<p>Rule 5.15 Pre-trial disclosure relating to prosecution witnesses (a) The Prosecutor shall provide the defence with the names</p> <p>of witnesses whom the Prosecutor intends to call to testify at trial</p> <p>and copies of</p> <p>the statements made by those witnesses.</p> <p>This shall be done sufficiently in advance of the commencement of the trial</p> <p>to enable the adequate preparation of the defence.</p> <p>(b) The Prosecutor shall subsequently advise the defence of the names</p> <p>of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.</p> <p>(c) The statements of prosecution witnesses shall be made available in</p> <p>a language which the accused fully understands and speaks.</p> <p>(d) This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rule 5.19.</p>	<p>Rule 5.28 Pre-trial disclosure relating to prosecution witnesses (a) The Prosecutor shall provide the defence with the names</p> <p>of witnesses whom the Prosecutor intends to call to testify</p> <p>and copies of</p> <p>any prior statements made by those witnesses.</p> <p>This shall be done sufficiently in advance</p> <p>to enable the adequate preparation of the defence.</p> <p>(b) The Prosecutor shall subsequently advise the defence of the names</p> <p>of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.</p> <p>(c) The statements of prosecution witnesses shall be made available in</p> <p>a language which the accused fully understands and speaks.</p> <p>(d) This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rule 5.32.</p>	<p>Rule 5.28 Pre-trial disclosure relating to prosecution witnesses 1. The Prosecutor shall provide the defence with the names</p> <p>of witnesses whom the Prosecutor intends to call to testify</p> <p>and copies of</p> <p>any prior statements made by those witnesses.</p> <p>This shall be done sufficiently in advance</p> <p>to enable the adequate preparation of the defence.</p> <p>2. The Prosecutor shall subsequently advise the defence of the names</p> <p>of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.</p> <p>3. The statements of prosecution witnesses shall be made available in</p> <p>a language which the accused fully understands and speaks.</p> <p>4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rule 5.32.</p>	<p>Rule 76 Pre-trial disclosure relating to prosecution witnesses 1. The Prosecutor shall provide the defence with the names</p> <p>of witnesses whom the Prosecutor intends to call to testify</p> <p>and copies of</p> <p>any prior statements made by those witnesses.</p> <p>This shall be done sufficiently in advance</p> <p>to enable the adequate preparation of the defence.</p> <p>2. The Prosecutor shall subsequently advise the defence of the names</p> <p>of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.</p> <p>3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.</p> <p>4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 5.32 / 81 and 5.32 <i>bis</i> / 82.</p>

In comparison with the ICTY Rules at the time¹⁰⁷⁴, we note that the Australian proposal imposed wider disclosure obligations upon the Prosecutor, in that not only the statements of the witnesses were to be disclosed, but also their names and addresses. During the negotiation process, the requirement to disclose the address of the respective witnesses was given up again at an early stage, which had to do with the fact that many

¹⁰⁷³ See section 6.3.2 and particularly 6.3.2.3 for details and references regarding the different documents.

¹⁰⁷⁴ 14th revision, 4 December 1998

delegations expressed concern on this point.¹⁰⁷⁵ This is in line with the explicit mentioning of witness protection in sub-rule (D) of the next version; as a matter of fact, however, witness protection was obviously already contained in the restrictions on disclosure as envisaged by the Australian draft.¹⁰⁷⁶ A footnote was kept in the following drafts that further discussion might be required.¹⁰⁷⁷ In the revised discussion paper of 5 August 1999, the issue was connected with the general discussion on victims and witnesses;¹⁰⁷⁸ however, in the end, the footnote was deleted, which apparently had to do with expert advice from the ICTY given to the PrepCom at the time.¹⁰⁷⁹ Apart from this, the specific mentioning of the “protection and privacy of victims and witnesses” as well as the “protection of confidential information” has only a clarifying function. The fact that the versions until the discussion paper of 23 June only relate to *one* provision (Rule 5.32) and later to *two* (Rules 5.32 and 5.32 *bis* or Rules 81 and 82, respectively) is because the restrictions on disclosure were originally contained in one provision, which was later divided.¹⁰⁸⁰ The change from “the statements made by those witnesses” to “any *prior* statements by those witnesses” (emphasis added) had probably also a clarifying function – it is hard to imagine that a statement made by a witness at some point before a trial should not be a “prior statement”.

¹⁰⁷⁵ *Brady*, Disclosure of Evidence, p. 410.

¹⁰⁷⁶ Australian draft, Rule 71: Restrictions on disclosure

[...]

(c) Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material or information may not be subsequently introduced into evidence during the trial without adequate prior disclosure to the accused.

(d) Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material or information may not be subsequently introduced into evidence during the trial without adequate prior disclosure to the Prosecutor.”

¹⁰⁷⁷ See footnote in the Second Discussion Paper of 25 February 1999: “The question of the non-disclosure of the identity of witnesses needs further discussion.”

¹⁰⁷⁸ See footnote 47 in the Revised Discussion Paper: “This rule may need to be revised after the comprehensive discussion 47 on victims, in particular on the issue of non-disclosure of the identity of witnesses.”

¹⁰⁷⁹ See *Brady*, Disclosure of Evidence, p. 410; Contributions of the Chambers of the International Criminal Tribunal for the Former Yugoslavia, PCNICC/1999IWGRPE/DP.38, par. 30: “Rule 67(a) of the Australian Draft requires the Prosecutor to provide the defence with the name and address of witnesses whom the Prosecutor intends to call to testify at trial. The ICTY strongly urges the Preparatory Commission to not make this a mandatory requirement, as this could intimidate witnesses who may be in need of protection.”

¹⁰⁸⁰ See more on this below (6.6).

Other than that, a substantial change can be seen in the requirement to make the statements of prosecution witnesses available to the accused not only in a language which he fully understands and speaks, but additionally in original (change from the Mont Tremblant Draft to the discussion paper of 23 June 2000). This must be welcomed, as many uncertainties in international proceedings can obviously be caused by translation mistakes. In this regard, it is worth mentioning that, according to an early decision of the Pre-Trial Chamber in the proceedings against *Lubanga*, not *all* relevant documents within the proceedings need to be made available to the accused in a language which the accused fully understands and speaks, but only those concerning which the applicable law explicitly so demands, on the other hand, however, that a translator must be made available to the accused on a permanent basis.¹⁰⁸¹ This may in fact put the accused in a better position, than just providing him with a translation, since doubts as to the proper translation of documents are usually easier to solve with the permanent personal assistance of an interpreter.

One other substantial change is the one from “this shall be done sufficiently in advance of the commencement of the trial” to just “this shall be done sufficiently in advance”, leaving out the explicit reference to the trial phase of the proceeding. Even though the heading of the provision (“*Pre-trial* disclosure relating to prosecution witnesses”) was not changed, it was most probably to make clear that this provision should not only apply to pre-trial disclosure in the technical sense, but also to pre-confirmation-hearing disclosure. This assumption is in line with a *nota bene* contained in the revised discussion paper of 5 August 1999, referring to all disclosure provisions:

*N.B. Following the provisional structure of document PCNICC/1999/L.3/Rev.1^[1082], the rules below are given numbers referring to Part 5 of the Statute. Since the provisions on disclosure are primarily of a general nature, they may better be placed in a separate chapter of the Rules of Procedure and Evidence. This question will be addressed at a later stage when the general structure of the Rules of Procedure and Evidence is discussed.*¹⁰⁸³

Without making reference to this historical development of the Rule, the Appeals Chamber of the ICC came to the same conclusion on the very grounds that Chapter 4 of the RPE refers to “various stages of the proceedings”.¹⁰⁸⁴ This line of argument,

¹⁰⁸¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the Request of the Defence of 3 and 4 July 2006, Pre-Trial Chamber I, 4 August 2006.

¹⁰⁸² That is the summary of the first session of the PrepCom, see note 987 above.

¹⁰⁸³ Note 1034 *supra*, p. 15.

¹⁰⁸⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles

however, is, from an historical perspective, not entirely correct, since, as we have seen, “various stages of the proceedings” was a title deliberately chosen by the drafters as not necessarily meaning *all* stages.¹⁰⁸⁵ The fact that, in principle, Rule 76 applies to the pre-confirmation stage as well, does, however, not mean that there are no differences between the pre-trial and pre-confirmation stages in this regard. This is evidenced, for example, by Art. 68 (5), which states that summaries of materials may be used instead of the underlying materials “for the purposes of any proceedings prior to the trial”, if this is necessitated by the protection of witnesses. This was also endorsed by the Appeals Chamber of the ICC.¹⁰⁸⁶ In such a case, the Prosecutor will, in fact, “rely” on the summary of the evidence in the meaning of Art. 61 (3)(b). According to the Appeals Chamber, the same holds true for witness statements which are redacted for possible prejudice of ongoing investigations (Rule 81 (2) RPE-ICC), the unredacted parts of which may be relied upon, even though the Defence has only received the redacted versions of the statements in advance.¹⁰⁸⁷ As the interests of the accused are usually better served with receiving redacted evidence than not receiving any evidence at all, the view that Rule 81 (2) does not allow for redactions but only the complete non-disclosure of evidence together with a prohibition of its use,¹⁰⁸⁸ must be rejected.¹⁰⁸⁹ In the same case, the competent Pre-Trial Chamber had stated previously that Rule 76 (1) must be interpreted widely, holding that even though the provision speaks only of “witnesses whom the Prosecutor intends to call to testify”, names and statements which the Prosecutor intends to rely on in the confirmation hearing without calling the witness in person must also be disclosed according to Rule 76 (1), albeit with the said

Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, Appeals Chamber, 13 October 2006, par. 34.

¹⁰⁸⁵ See note 893 and related text and references *supra*.

¹⁰⁸⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06 (OA 5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, Appeals Chamber, 14 December 2006, paras. 35 et subs.

¹⁰⁸⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06 (OA 6), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, Appeals Chamber, 14 December 2006, paras. 35 et subs.

¹⁰⁸⁸ As held by Judge Pikis in his separate opinion (*ibid.*, note 1087 *supra*, pp. 24 et subs., at §§ 13 et subs.) It must be admitted that the wording of Rule 81 (2) indeed does not mention redactions.

¹⁰⁸⁹ The view that the possibility of redactions can be inferred from Rule 81 (2) RPE-ICC has been applied generally by the ICC, see, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Redacted Decision on the application to disclose the identity of intermediary 143, Trial Chamber I, 10 December 2009, par. 20.

possibility of redactions.¹⁰⁹⁰ As regards so-called “pre-assessment interviews”, in which the witness, before testifying, is examined, in order to decide whether he should testify or not, the ICC Trial Chamber held that they are not witness statements, but may qualify as exculpatory evidence or fall under Rule 77.¹⁰⁹¹

The exceptions to the obligatory disclosure of witness statements will be looked at in more detail below.¹⁰⁹²

6.4.2 Prior Statements of the accused?

The specific RPE-ICC disclosure provisions do not contain any reference as to prior statements of the accused. As we have seen above, the question of disclosure of prior statements of the accused himself was, particularly in national jurisdictions, a disputed issue; and even at the Ad Hoc Tribunals, the mandatory disclosure of the accused’s own prior statements were not included in the RPE before 1995.¹⁰⁹³ The original Australian proposal of 26 January 1999, just like the RPE-ICTY by then, did contain an according provision, which was worded as follows:

Rule 65

Prior statements of a person subject to a hearing under article 61

The Prosecutor, where such material will not otherwise be provided in accordance with article 61, paragraph 3, shall provide the person before the Court with copies of all prior statements given by that person to the Prosecutor. This shall be done within a reasonable time before the hearing to confirm charges against the person. This requirement is without prejudice to the application of rule 59.

¹⁰⁹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, Pre-Trial Chamber I, 15 May 2006, paras. 93 et subs. See also *Prosecutor v. Katanga/Chui*, ICC Case No. 01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, Pre-Trial Chamber I, 25 April 2008, paras. 143 et seq., as well as *Prosecutor v. Gbagbo*, ICC Case No. 02/11-01/11-30, Pre-Trial Chamber III, 24 January 2012, paras. 51 et subs.

¹⁰⁹¹ *Prosecutor v. Bemba*, ICC Case No. 01-05/01-08, Public redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the Consequences of non-disclosure"(ICC-01/05-01/08-750-Conf), Trial Chamber III, 9 April 2010, par. 33.

¹⁰⁹² See sections 6.6, and particularly 6.6.1 *infra*.

¹⁰⁹³ See section 5.2.1.2 *supra*.

Notably, however, this provision was originally not contained in Part 5 (“Disclosure”) of the Australian Draft, but in Part 4 (“Investigation and prosecution”), and within this part, in Section 5 “Confirmation of the charges”. As we have mentioned at various occasions, the Australian proposal envisaged disclosure to take place mainly before the trial, but after the confirmation hearing, and in fact, gave very little importance to the confirmation hearing as such.¹⁰⁹⁴ However, the purpose of the handing over of previous witness statements, according to a *nota bene*, was apparently the same as the one given to the disclosure provisions: the adequate preparation of the accused for the trial.¹⁰⁹⁵ Given the fact that the disclosure provisions in the Australian proposals were mostly based on the RPE-ICTY, this structural deviation is noteworthy. Draft Rule 65 only referred to “statements given by that person to the Prosecutor”, whereas Rule 66 (A)(i) RPE-ICTY would oblige the Prosecutor to disclose “all prior statements obtained by the Prosecutor from the accused”, which, as we have seen above, was interpreted by the ICTY as comprising all statements of the accused, regardless of how they were obtained, albeit only statements given in formal legal proceedings.¹⁰⁹⁶ The Australian Draft thus, in terms of possible legitimate interests of the accused, lagged behind the ICTY Rules, not comprising, for example, any of the accused’s statements uttered in national proceedings. In the summary of the report of the first session of the PrepCom, the draft rule is still contained as Rule 5.14 in an unaltered wording.¹⁰⁹⁷ As elucidates from the revised discussion paper of 5 August 1999, however, it was from this point onwards absorbed by draft Rule 5.10, an ancestor to Rule 112 (“recording of questioning in particular cases”).¹⁰⁹⁸ The latter prescribes the modalities of questioning a suspect and provides, among other things, that his statements must be audio-recorded and transcribed, and then handed over to the accused. While it is true that the content of draft Rule 65 as contained in the Australian proposal does not go beyond what is now contained in Rule 112, wherefore the dropping of the original provision is sensible, the question of disclosure of the accused’s own statements uttered towards national authorities remains. The argument that the Court, when it requests national co-operation

¹⁰⁹⁴ See, once again, section 6.3.2.3.1 *supra*; Section 5 (“Confirmation hearing”) of the Australian proposal contains no more than two provisions.

¹⁰⁹⁵ “N.B. This rule seeks to ensure that a person has a complete record of statements he or she has given to the Prosecutor prior to a hearing under article 61. The reference to “within a reasonable time before the bearing” reflects the wording used in the chapeau of article 61, paragraph 3.”, Australian Draft, p. 35.

¹⁰⁹⁶ See section 5.2.1.2 above.

¹⁰⁹⁷ See Rule 5.14 in the report, note 987 *supra*.

¹⁰⁹⁸ Note 14 of the revised discussion paper relating to Rule 5.10 states: “This rule replaces [...] rule 5.14 in document PCNICC/1999/L.3/Rev.1 [...]”.

from a State according to Articles 93 (1)(d), and 99, can request the national authorities to follow the procedure as envisaged by Rule 112,¹⁰⁹⁹ is not entirely convincing, because it may well be that a person is questioned by national authorities without a previous request for co-operation or the issuance of an arrest warrant concerning that person. The fact that statements of this kind will oftentimes be subject to other disclosure provisions, such as Art. 67 (2), is also not entirely satisfactory, because while “prior statements” is a descriptive element and a reasonably straightforward formula, a normative element such as “exculpatory character” will usually be harder to prove.

6.4.3 Rule 77 RPE-ICC: Inspection of material in possession or control of the Prosecutor

Rule 77 deals with certain materials in his possession to which the Prosecutor must allow inspection. As with Rule 76, the wording of Rule 77 can be traced back to the Australian proposal and, for that matter, to the disclosure provisions of the ICTY. In a synoptical overview, the drafting history can be visualized as follows:

¹⁰⁹⁹ As done by *Brady*, *Disclosure of Evidence*, pp. 411 et seq.

Australian Proposal, 26 January 1999	Discussion Paper 2, 25 February 1999 / PrepCom First Session Summary, Annex 1, 2 March 1999	Revised Discussion Paper, 5 August 1999/PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000/Working Group Report, 27 June 2000/Final Draft, 30 June 2000 / RPE- ICC
Rule 68 Inspection of material in possession or control of the Prosecutor	Rule 5.16. Inspection of material in possession or control of the Prosecutor	Rule 5.29 Inspection of material in possession or control of the Prosecutor	Rule 5.29 Inspection of material in possession or control of the Prosecutor	Rule 5.29 / 77 Inspection of material in possession or control of the Prosecutor
(a) The Prosecutor shall on request permit the defence to inspect any books, documents, photographs and tangible objects in his or her possession or control which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the person.	(a) The Prosecutor shall on request permit the defence to inspect any books, documents, photographs and tangible objects in his or her possession or control which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial or were obtained from or belonged to the person.	The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rule 5.32, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's possession or control which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.	The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rule 5.32, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.	The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 5.32 / 81 and 5.32 <i>bis</i> / 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.
(b) This rule shall be read subject to rule 71.	(b) This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rule 5.19.			

Rule 77, just like the corresponding provision of the RPE-ICTY (Rule 66 (B)), imposes upon the Prosecutor a duty to make available for inspection specific material. In fact, the Australian proposal copied Rule 66 (B) RPE-ICTY almost verbatim.¹¹⁰⁰ Materially, the provision did not change significantly during the drafting process. The reference to restrictions on disclosure for reasons of witness protection and confidentiality were moved from the end to the beginning. As regards the temporal scope of application of Rule 77, we find a parallel development also, as the exclusive mentioning of “evidence at trial” was given up in favour of “evidence for the purposes of the confirmation hearing or at trial”. Why the drafters chose to include the phrase “as the case may be” in the revised discussion paper of 5 August 1999, is difficult to say.

¹¹⁰⁰ Only the explicit subjection to Art. 66 Sub-Rule (C) RPE-ICTY was moved into an extra phrase.

Presumably for reasons of equal gender treatment and simplicity, “his or her” was replaced by just “the Prosecutor”. To what extent the wording “in the possession or control of the Prosecutor” represents a substantial difference *vis-à-vis* “in the Prosecutor’s possession or control”, remains unclear.

In contrast to Rule 76 and most other disclosure provisions, Rule 77 does not give the defence a right to disclosure *stricto sensu*, but only to inspection, meaning that the defence is not entitled to *receive* the material from the Prosecutor, but only to literally *inspect* them in the premises of the Prosecutor. This distinction is known also in the relevant provisions of the Ad Hoc Tribunals as well as, e.g., in the English legal system; indeed, we have, in the chapters on disclosure in England, seen that there were detailed provisions as to how many copies of the inspected material the defence could obtain and at what price.¹¹⁰¹ Other than that, however, the distinction between inspection and disclosure *stricto sensu* apparently did not gain much practical relevance. In any case, the ICC in *Lubanga* took a similar approach, stating that “inspection” must be interpreted to comprise the handing over of copies of those materials which the defence, after or during inspection, requests.¹¹⁰²

Regarding the substantial content of the norm, the alternatives “obtained from or belonged to the accused” are quite straightforward. The meaning of the phrase “intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing” is not entirely clear, given the fact that Art. 61 (3) speaks of the “reliance” of the Prosecutor on the evidence at the confirmation hearing; and also Rule 76 speaks of the witnesses whom the Prosecutor “intends to call”. It would thus have seemed natural to also phrase Rule 77 in a way such as ‘evidence intended to be relied on by the Prosecutor at the confirmation hearing’. This fact suggests that “for the purposes of the confirmation hearing or at trial” may have a wider scope than Art. 61 (3). It could, for example, be construed to comprise material which would only be used for purposes of cross-examination, even though the ICC has held that such evidence already falls under the materiality clause which is also contained in Rule 77.¹¹⁰³ The wording “for the

¹¹⁰¹ See section 2.1.1 *supra*.

¹¹⁰² *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, Pre-Trial Chamber I, 15 May 2006, paras. 113 et seq., see as to the differentiation also *Prosecutor v. Bemba Gombo*, ICC Case No. 01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, Pre-Trial Chamber III, 31 July 2008, par. 45.

¹¹⁰³ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, Trial Chamber I, 12 November 2010. See also *Prosecutor v. Katanga*, ICC Case No. 01/04-01/07. In the *Katanga* case, Judge Steiner, again Single Judge, transferred the *Lubanga* disclosure regime to the *Katanga* case, compare ICC-

purposes of the confirmation hearing or at trial” reappears both in Rules 78 and 121 (3)(c) (the latter referring to the confirmation hearing only), which we will take a look at below.

As regards the “materiality” of evidence, ICC, like the Ad Hoc Tribunals, appears to favour a wide interpretation. As was just mentioned, material which may serve to impeach witnesses and may thus be of use in cross-examination can be considered “material”;¹¹⁰⁴ the decision of the Trial Chamber, quite correctly, was based on the aspect of trial management, in that it encourages the defence to call only those witnesses which are reliable.¹¹⁰⁵ Needless to say, this is also in the interest of truth finding. The same holds true regarding the identity of so-called “intermediaries” as well, which serve as a liaison between the investigators and a witness. If it appears that an intermediary has had contact with one or more witnesses whose incriminating evidence has been materially called into question by other evidence, the identity of the intermediary needs to be disclosed.¹¹⁰⁶ According to the ICC Appeals Chamber, even material which is not directly related to the case but rather tends to explain the overall situation in a conflict scenario may be “material” in the sense of Rule 77.¹¹⁰⁷

01/04-01/07-T-12-ENG. See also *Prosecutor v. Abu Garda*, ICC Case No. 2/05-02/09, Second Decision on issues relating to Disclosure, Pre-Trial Chamber I, 15 July 2009, which was copied in *Prosecutor v. Banda/Jerbo*, ICC Case No. 02/05-03/09, Decision on issues relating to disclosure, Pre-Trial-Chamber I, 29 June 2010, as well as *Prosecutor v. Mbarushimana*, ICC Case No. 01/04-01/10, Decision on issues relating to disclosure, Pre-Trial Chamber I, 30 March 2011.

¹¹⁰⁴ Note 1103, *ibid.*

¹¹⁰⁵ *Ibid.*, par. 18.

¹¹⁰⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Redacted Decision on Intermediaries, Trial Chamber I, 31 May 2010, par. 139 b. This issue led to a serious controversy between the competent Trial Chamber and the Prosecutor, which finally culminated in a temporary stay of proceedings in the *Lubanga* trial, see *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Trial Chamber I, 8 July 2010

¹¹⁰⁷ See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Appeals Chamber, 11 July 2008, paras. 76-82; the decision dealt with material which showed the use of child soldiers in the situation of the DRC in general, without being specifically connected with the charges against Mr. Lubanga. *Swoboda*, The ICC Disclosure Regime, at p. 454 appears to hold that this is only the case *after* the confirmation hearing; in our opinion, there is no compelling reason why this should not apply to pre-confirmation disclosure as well.

6.4.4 Art. 67 (2) ICCSt, Rule 83 RPE-ICC: Exculpatory Evidence

Art. 67 (2) deals with the duty of the Prosecutor to disclose exculpatory evidence. The overall genesis of this provision has been dealt with above when discussing the general history of the Rome Statute.¹¹⁰⁸ It appears justified, however, to take a look at the different drafts in a little more detail, once again in a synoptical overview, which is complemented by a synopsis of Rule 83 RPE-ICC:

¹¹⁰⁸ See 6.3.1 *supra* and the respective drafts.

1993 Draft	1994 Draft	1998 PrepCom Report	1998 Rome Statute
<p>Article 44. Rights of the accused [...]</p> <p>3. All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence</p> <p>available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.</p>	<p>Article 41. Rights of the accused [...]</p> <p>2.</p> <p>Exculpatory evidence</p> <p>that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence.</p> <p>In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.</p>	<p>Article 67 Rights of the Accused [...]</p> <p>[Exculpatory evidence] [Evidence which shows or tends to show the innocence] [or mitigate the guilt] of the accused or may affect the credibility of prosecution evidence</p> <p>that becomes available to the Procuracy prior to the conclusion of the trial shall be [made available] [disclosed] to the defence.</p> <p>In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.</p> <p>[The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of a decision made under this subpara-graph.]</p>	<p>Article 67 Rights of the Accused [...]</p> <p>In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.</p> <p>In case of doubt as to the application of this paragraph, the Court shall decide.</p>

Australian Proposal, 26 January 1999 ¹¹⁰⁹	Discussion Paper, 25 February 1999 / PrepCom First Session Summary, Annex 1, 2 March 1999	Revised Discussion Paper, 5 August 1999 / PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000 / Working Group Report, 27 June 2000 / Final Draft, 30 June 2000 / RPE-ICC
<p>Rule 72 Ruling on exculpatory evidence</p> <p>The Prosecutor may request for good cause a hearing on an <i>ex parte</i> basis before the Chamber dealing with the matter at the time for the purpose of obtaining a ruling under article 67, paragraph 2.</p>	<p>Rule 5.20 Ruling on exculpatory evidence</p> <p>The Prosecutor may request as soon as practicable a hearing on an <i>ex parte</i> basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.</p>	<p>Rule 5.33 Ruling on exculpatory evidence</p> <p>The Prosecutor may request as soon as practicable a hearing on an <i>ex parte</i> basis before the Chamber of the Court dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.</p>	<p>Rule 5.33 Ruling on exculpatory evidence under article 67, paragraph 2</p> <p>The Prosecutor may request as soon as practicable a hearing on an <i>ex parte</i> basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.</p>	<p>Rule 83 Ruling on exculpatory evidence under article 67, paragraph 2</p> <p>The Prosecutor may request as soon as practicable a hearing on an <i>ex parte</i> basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.</p>

¹¹⁰⁹ See section 6.3.2 and particularly 6.3.2.3 for details and references regarding the different documents.

The material difference between Art. 44 (3) of the 1993 Draft and Art. 41 (2) of the 1994 Draft regarding the time of disclosure has been briefly mentioned above in relation with the somewhat confusing question of competences within the Court.¹¹¹⁰ From the wording of the latter provision, we must conclude that the disclosure of exculpatory material was envisaged to take place not necessarily at the earliest possible opportunity, but possibly only at a point in time when the trial would already have started. This is in stark contrast to the wording contained in the 1993 Draft which had provided that the disclosure of exculpatory material should take place “as soon as possible and in reasonable time to prepare for the defence”. The modification must be regarded as weakening the rights of the accused. In this context, it should be noted once again that when the ILC Draft was issued, the RPE-ICTY were already in place; and their Rule 68 explicitly foresaw the disclosure of exculpatory material to take place “as soon as practicable”; a fact which was apparently ignored by the ILC drafters: The commentary is, once again, silent in this regard. What it does tell, however, is the fact that obviously the drafters understood the provision to comprise only material which in itself would be admissible as evidence,¹¹¹¹ and thus not material which might be used by the defence only as a starting point for its own investigation. This, also, obviously restricts the right to preparation of the accused. These material amendments concerning the disclosure of exculpatory evidence, i.e. the deletion of the disclosure duty to be fulfilled as soon as possible before the commencement of the trial as well as to comprise only admissible evidence, however, may, as said above, to a certain extent explain the envisaged competence of the Trial Chamber as opposed to the Presidency.

In the PrepCom Draft, the regulation regarding the timing of the disclosure (“prior to the conclusion of the trial”) remained. From the wording, we can furthermore conclude that the drafters still had in mind that the provision should relate to evidence in the technical sense only, for otherwise it would not have made sense to include a notion as to its admissibility. An important exemption as to the disclosure of exculpatory material lies in the reference to Art. 58 (10)(f), regarding material relevant to national security, a feature, as we have seen, which was omnipresent in the PrepCom Draft.¹¹¹²

¹¹¹⁰ See 6.3.1.2 *supra*.

¹¹¹¹ Commentary relating to Art. 41 of the 1994 Draft, par. 3, p. 57: “Paragraph 2 lays down a general duty of disclosure on the Prosecutor in relation to exculpatory evidence that becomes available at any time prior to the conclusion of the trial, whether or not the Procuracy chooses to adduce that evidence itself. In case of doubt (*for example, as to whether the information would be admissible as evidence*), the Prosecutor should seek direction from the trial chamber. On the other hand there is no obligation to disclose incriminating evidence if it is not going to be used by the Prosecutor during the trial.”, emphasis added.

¹¹¹² See 6.3.1.3 *supra*.

As concerns substantial changes from the PrepCom Draft to the Rome Statute, it was decided that the disclosure should be *stricto sensu*, i.e. the material should be “disclosed” as opposed to “made available”.¹¹¹³ Also, the notion of admissibility of the disclosable evidence was given up. The expression “evidence”, however, was kept, thus still leaving open the question whether Art. 67 (2) ICCSt should refer to evidence *stricto sensu* as opposed to ‘material’ in general. The Appeals Chamber of the ICC rightly favours a wider interpretation of the norm, arguing that at least the Chamber must be put in a position to evaluate the material in order to rule on the applicability of Art. 67 (2) ICCSt, and that otherwise the Prosecutor could, e.g. on the grounds of confidentiality agreements, withhold large amounts of material without control.¹¹¹⁴

The substantial scope of the provision, however, was altered in that the assessment and decision on the exculpatory nature of the evidence would be primarily up to the Prosecutor (“which he or she believes shows or tends to show the innocence of the accused [...]”). This results in a restriction of the scope of Art. 67 (2). It is reminiscent of the amendments of Rule 68 (i)(A) RPE-ICTY in 2004.¹¹¹⁵ This issue is quite intimately intertwined with the question of which evidence must be communicated to the Chamber according to Rule 121 (2)(c) RPE-ICC, to which we will come below when looking at the role of the judges in the disclosure proceedings in more detail.¹¹¹⁶

The notion of evidence “becoming available” to the Prosecutor was given up in favour of a probably clearer “in possession or control” of the Prosecutor. This wording, however, is also more restrictive, since “availability” is much wider than “possession or control”. Nevertheless, the Prosecutor must, by virtue of Art. 54 (1)(a), investigate incriminating and exonerating circumstances equally; we must therefore conclude that he would have to ‘bring the exculpatory evidence under his control’ and subsequently disclose it to the defence.

As to the timing of disclosure, the delegates at the Rome Conference opted for the disclosure to take place “as soon as practicable”, which, in the light of the necessary protection of the rights of the accused, must be welcomed.

¹¹¹³ See as to the difference 6.4.3 *supra*.

¹¹¹⁴ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", Appeals Chamber, 21 October 2008, paras. 43 et subs.

¹¹¹⁵ See section 5.2.3.1 *supra*.

¹¹¹⁶ 6.8 *infra*.

The explicit exemption from disclosure of confidential material as contained in the PrepCom Draft was not upheld. However, Art. 54 (3)(e) ICCSt, in principle allowing the Prosecutor to withhold ('springboard') evidence on grounds of confidentiality, was implemented into the Statute, establishing an overarching possibility to protect information on grounds of confidentiality. The latter provision, as mentioned above, represents the successor of Art. 54 Option 2 (g) of the PrepCom Draft, without substantial modifications.

As regards the genesis of Rule 83, which is the corresponding provision for Art. 67 (2) in the Rules, we note that the Australian proposal made it to the RPE-ICC with only minor substantial amendments. The heading was changed as to now explicitly referring to Art. 67 (2); the "good cause" requirement was given up, as it is quite self-evident that the Chamber may only make exceptions to the general rule of full disclosure of exculpatory evidence if there is good cause to do so. The 'interim' inclusion of the term "Chamber of the Court" instead of just "Chamber" is substantially meaningless. The purpose of the inclusion of the phrase "as soon as practicable" is not entirely clear. Since the obligation of the Prosecutor to disclose exculpatory evidence according to Art. 67 (2) must be understood to be continuing¹¹¹⁷ throughout the proceedings, it must be concluded that the Prosecutor in fact *must* request a hearing before the Chamber if he has doubts concerning the application of Art. 67 (2); it may thus be understood that the term "may" just refers to the authority of the Prosecutor to make the request *ex parte*.

Substantially, like in the Ad Hoc Tribunals, Art. 67 (2) comprises three kinds of material: evidence which shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.¹¹¹⁸

A major issue with regard to exculpatory evidence has proved to be the question of whether and to what extent the assessment of an exculpatory character of the given evidence may depend on the procedural conduct of the defence, especially regarding

¹¹¹⁷ See also *Prosecutor v. Bemba Gombo*, ICC Case No. 01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, Pre-Trial Chamber III, 31 July 2008, p. 24, order no. 1.

¹¹¹⁸ See also, Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Trial Chamber I, 28 April 2008, par. 12, later endorsed by the complete Chamber, *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2006, par. 56.

disclosure by the defence of its general defence strategy.¹¹¹⁹ As we have seen, the disclosure regime of the Statute and the Rules does not provide for reciprocal disclosure, i.e. (full) disclosure by the Prosecutor is, in principle, not dependent upon disclosure by the defence.¹¹²⁰ In the proceedings against *Lubanga*, the Trial Chamber, in an oral ‘decision’¹¹²¹, held that

*[t]he Defence declined an invitation from the Chamber to set out the defences the accused is likely to rely on, together with the anticipated issues in the case. At this stage his stance is that he relies on the right to silence, which is his undoubted entitlement. However, unreasonable decisions by the Defence to make late disclosure may have an effect on determinations by the Chamber as to what constitutes a fair trial. For instance, given the need to protect witnesses and others who have provided information to the Court, if the Bench is — let me start that part again — if the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused. Accordingly, if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused.*¹¹²²

An application for leave to appeal by the defence was granted, with the Chamber explaining that it had not been its intention to impose a disclosure duty on the defence, but rather to address

*whether the prosecution has an inflexible obligation to disclose material, irrespective of whether or not the defence has acted unreasonably in revealing relevant aspects of the defence or the issues to be raised late in the case.*¹¹²³

The Appeals Chamber, by majority, upheld the ‘decision’ of the Trial Chamber.¹¹²⁴ It stressed that it constituted no “direct” infringement of the accused’s right to remain

¹¹¹⁹ See as to defence disclosure in more detail 6.5 *infra*.

¹¹²⁰ See also *Swoboda*, *The ICC Disclosure Regime*, p. 457.

¹¹²¹ In his separate opinion attached to the appeals judgment (see note 1124 *infra*, pp. 40 et subs.), Judge Song quite convincingly held that the relevant part of the transcript did not constitute a decision of the Trial Chamber in a technical sense and was therefore not appealable.

¹¹²² *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Transcript 18 January 2008, ICC-01/04-01/06-T-71-ENG ET WT, p. 9, lines 4 to 21, emphasis added.

¹¹²³ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, Trial Chamber I, 6 March 2008, par. 12.

silent, and that there may be cases in which the exculpatory nature of evidence will only become “apparent as a result of something the defence has disclosed”.¹¹²⁵ In the end, the Appeals Chamber saw itself

*unable categorically to rule out the possibility that if a factual situation arises in which it could be demonstrated that the Defence had unjustifiably and unreasonably held back the revelation of a line of defence or issue in circumstances that made it impossible for the Court to ensure the protection of the exculpatory witnesses, it may conceivably be possible for the accused to receive a fair trial notwithstanding the non-disclosure of certain limited material. Such a situation clearly does not arise from the Impugned Decision and is therefore not being considered by the Appeals Chamber in this appeal.*¹¹²⁶

It accordingly held that such situations would have to be solved on a case-by-case basis.¹¹²⁷ In his partially dissenting opinion, Judge Pikis held that this view constitutes an unjustified infringement upon the accused’s right to silence and the presumption of innocence;¹¹²⁸ the decision has also been criticised elsewhere.¹¹²⁹ Indeed, it is difficult to call the revelation of a line of defence “unjustifiably late”, if there is no duty of the defence to reveal anything at all in the first place. Notwithstanding, the view of the Chamber must, in essence, be endorsed – as a matter of fact, a situation as described by the Appeals Chamber *may* arise, making a certain witness or other evidence ultimately unavailable. This, in turn, is a natural occurrence in a criminal trial, and it does not *per se* render the proceedings as a whole unfair. However, it must be kept in mind that the Prosecutor must investigate incriminating and exonerating circumstances equally (Art. 54 (1)(a) ICCSt). His prerogative of assessment whether evidentiary material is exculpatory (Art. 67 (2)) carries with itself a corresponding *duty*. This means that he must carefully assess every piece of evidence *vis-à-vis* every reasonably thinkable line of defence. If in such a case a line of defence is revealed at a late stage of the proceedings and was not reasonably foreseeable, the trial may have to go on without the (then) unavailable evidence, and quite possibly might still have to be considered to be

¹¹²⁴ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 (OA 11), Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Appeals Chamber, 11 July 2008.

¹¹²⁵ *Ibid.*, paras. 35, 37.

¹¹²⁶ *Ibid.*, par. 54. This passage also shows quite well the reason why Judge Song declined to see an appealable issue: the Appeals Chamber is forced to confine itself to abstract and speculative statements.

¹¹²⁷ *Ibid.*, par. 53.

¹¹²⁸ Partially dissenting opinion of Judge Georghios M. Pikis, *ibid.*, pp. 32 et subs., paras. 14 et subs.

¹¹²⁹ *Swoboda*, *The ICC Disclosure Regime*, p. 458.

fair. This, however, is for the Court to decide, and must indeed be done on a case-by-case basis.¹¹³⁰

This consequence is related to another issue which appeared in the *Lubanga* case, in which the Trial Chamber had indicated that, though it stressed that it remained the ‘ultimate arbiter of the facts’, it might be willing to accept admissions of facts regarding potentially exculpatory evidence, whereby the evidence itself would not need to be disclosed anymore, in the interest, e.g., of witness protection.¹¹³¹ Dissenting, Judge Blattmann held that exculpatory evidence could never be ‘replaced’ by other pieces of evidence, both in the interests of the preparation of the defence and in the interests of truth-finding by the Chamber; and that “the concession of facts without the ability to investigate those facts does not contribute to the finding of the truth which is a main object and purpose of the trial as such.”¹¹³² This view, which once again shows the perceived truth-finding aspect of disclosure, must be endorsed.

Other jurisprudence of the ICC oftentimes related to the question whether exculpatory material disclosed between the parties needs to be communicated to the Chamber; these issues will be dealt with below when highlighting the role of the Chamber in the disclosure proceedings.¹¹³³

¹¹³⁰ See also *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC, pp. 161 et seq.

¹¹³¹ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Trial Chamber I, 24 April 2008, par. 90. The issue evolved mainly around witnesses who would refuse to co-operate with the Court for security concerns.

¹¹³² *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Trial Chamber I, 28 April 2008, paras. 17 et seq. Judge Blattmann instead proposes a ‘normal’ approach allowing redactions, which could be lifted upon application by the defence to the Chamber, see *ibid.*, par. 26. For the purposes of the confirmation hearing, however, in *Katanga*, Pre-Trial Chamber I held that the disclosure of ‘analogous evidence’ *in lieu* of actual evidence was acceptable, see *Prosecutor v. Katanga & Ngudjolo Chui*, ICC Case No. 01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, Pre-Trial Chamber I, 20 June 2008, paras. 65 et subs.

¹¹³³ 6.8 *infra*.

6.5 Disclosure by the Defence

As previously mentioned, the ICC Statute does not contain any explicit notion of defence disclosure which would go beyond the general right of the respective Chambers to order the production of evidence (see Articles 64 (6)(b), (d), 69 (3) ICCSt). The Rules, however, contained this feature from the first Australian Draft onwards. We can distinguish four different provisions within the Rules which specifically deal with disclosure by the defence: Rule 78, which partially mirrors disclosure by the Prosecutor regarding documents, tangible objects etc. according to Rule 77; Rule 79 (1)-(3), which deal with alibi and grounds for excluding criminal responsibility, Rule 80, which specifically deals with grounds for excluding responsibility under Art. 31 (3) ICCSt, as well as Rule 79 (4), which allows the Chamber to order the disclosure of “any other evidence”, and may thus serve as a residuary clause. Whereas the Australian proposal did contain the ancestors of Rule 79 (1)-(3) and 80, which regard ‘special defences’,¹¹³⁴ a predecessor of Rule 78 was not contained, let alone any provision equalling Rule 79 (4).

At the beginning of the first PrepCom Session, notwithstanding the Australian proposal, it was apparently discussed whether the defence should be required to disclose any evidence at all.¹¹³⁵ Given the fact that in practically all jurisdictions which we have looked at until now at least the disclosure of a defence of alibi or exclusion of mental responsibility was a common feature at the end of the 20th century, this comes as a surprise. However, as was briefly mentioned, the discussions in the PrepCom were far from easy, and indeed it seems that delegations at times demonstrated a dogmatism which they would probably not have had regarding their own national system.¹¹³⁶

Obviously, defence disclosure can conflict with the accused’s rights to remain silent and his privilege against self-incrimination (Articles 67 (1)(g), 55 (1)(a), (2)(b) ICCSt). Since the Statute is higher in rank than the Rules, the latter must be read subject to the former (Art. 51 (5) ICCSt). The same holds true for Regulations, which are even lower in rank than the Rules (Regulation 1 (1) RegCt) – nevertheless, Regulation 54 RegCt at the face of it widens the potential disclosure and notification duties of the defence

¹¹³⁴ To be sure, this terminology stems from the Anglo-American tradition and is (intentionally) not used by the Statute; compare *Ambos*, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, pp. 825 et subs. with further references. See, however, the footnote concerning draft Rule 69 of the Australian proposal of 26 February 1999, fn. 996 *supra*.

¹¹³⁵ See *Brady*, *Disclosure of Evidence*, p. 414.

¹¹³⁶ See also *Fernández de Gurmendi*, *The Elaboration of the Rules of Procedure and Evidence*, pp. 253 et subs.

extremely.¹¹³⁷ Generally, the ICC Chambers have emphasised that, given the fact that the person concerned has the right to remain silent and he cannot be forced to disclose evidence even in his favour,¹¹³⁸ disclosure can only be required in limited circumstances.¹¹³⁹

Apart from that, it has already been mentioned that, even though the Rules do not contain reciprocal disclosure duties of the defence, the conduct of the defence during disclosure, particularly the lack of notification of lines of defence, may have consequences regarding the disclosure of evidence by the prosecution.¹¹⁴⁰

¹¹³⁷ “Status conferences before the Trial Chamber

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, inter alia, the following issues:

- (a) The length and content of legal arguments and the opening and closing statements;
- (b) A summary of the evidence the participants intend to rely on;
- (c) The length of the evidence to be relied on;
- (d) The length of questioning of the witnesses;
- (e) The number and identity (including any pseudonym) of the witnesses to be called;
- (f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;
- (g) The number of documents as referred to in article 69, paragraph 2, or exhibits to be introduced together with their length and size;
- (h) The issues the participants propose to raise during the trial;
- (i) The extent to which a participant can rely on recorded evidence, including the transcripts and the audio- and video-record of evidence previously given;
- (j) The presentation of evidence in summary form;
- (k) The extent to which evidence is to be given by an audio- or videolink;
- (l) The disclosure of evidence;
- (m) The joint or separate instruction by the participants of expert witnesses;
- (n) Evidence to be introduced under rule 69 as regards agreed facts;
- (o) The conditions under which victims shall participate in the proceedings;
- (p) The defences, if any, to be advanced by the accused.

¹¹³⁸ To enforce the disclosure of *incriminating* material would obviously additionally infringe upon the accused’s privilege against self-incrimination.

¹¹³⁹ See, e.g. *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on disclosure by the defence, Trial Chamber I, 20 March 2008, paras. 27 et subs., as well as *Prosecutor v. Bemba Gombo*, ICC Case No. 01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, Pre-Trial Chamber III, 31 July 2008, paras. 30 et subs.

¹¹⁴⁰ See 6.4.4 *supra*.

6.5.1 Rule 78: Inspection of material in possession or control of the defence

Rule 78 currently provides as follows:

Rule 78: Inspection of material in possession or control of the defence

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

As was just mentioned, Rule 78 represents a parallel provision *vis-à-vis* Rule 77 which contains the corresponding disclosure duty of the Prosecutor. In contrast to Rule 77, however, was not included in the Australian proposal. While the latter did cover the question of defence notice of ‘special defences’,¹¹⁴¹ it did not foresee reciprocal disclosure duties of the defence concerning “Rule 77 material”. This is surprising, given that at the time of the Australian proposal Rule 67 RPE-ICTY contained a reciprocal disclosure duty of the defence,¹¹⁴² and also the above mentioned joint proposal of Australia and the Netherlands of 1996 had contained this feature.¹¹⁴³ The Australian proposal, to be sure, *did* mention the issue, but decided against it.¹¹⁴⁴ Starting with the following discussion paper, however, the contemplation of introducing a disclosure obligation of the defence regarding “Rule 77 material” was contained in a footnote of the respective draft.¹¹⁴⁵ Apparently, once again, considerations of fairness for the prosecution played a decisive role during the negotiations.¹¹⁴⁶

¹¹⁴¹ See section 6.5.2 *infra*.

¹¹⁴² See section 5.3.1 *supra*.

¹¹⁴³ See Rule 83 (C) of the Joint Proposal, note 977 *supra*.

¹¹⁴⁴ See the *nota bene* concerning draft Rule 68 of the Australian proposal (note 996 *supra*): “N.B. Sub-rule (a) closely follows rule 66 (B) of the ICTY Rules. The rule does not adopt the approach taken in rule 67 (C) of the ICTY Rules, which permits the Prosecutor, when a request to inspect has been received from the defence, to inspect material within the custody or control of the defence which it intends to use as evidence at trial. The issue of disclosure by the defence is dealt with in rule 69.”

¹¹⁴⁵ See footnote to Rule 5.16 in Discussion Paper 2 (note 1030 *supra*): “This rule relates only to the inspection of material held by the Prosecutor. The issue of whether the Prosecutor should have access to material held by the defence also needs consideration.” and the corresponding provisions in the subsequent drafts.

¹¹⁴⁶ *Brady*, Disclosure of Evidence, pp. 415 et seq.

The substantial content of the later Rule 78 was finally included in the Discussion Paper of 23 June 2000 regarding disclosure.¹¹⁴⁷ Since then, it has remained unaltered, which is why there is no need to present a synopsis.

Substantially, Rule 78 relates to the same material as Rule 77 (books, documents, photographs and other tangible objects). In contrast to Rule 77, there is no “materiality” test, which is understandable, given the fact that the defence is not bound to present or “rely on” any evidence during the confirmation hearing or the trial.¹¹⁴⁸ From our point of view, this conclusion is actually imperative, since, as we have seen several times already, there can be no equality of arms in favour of the prosecution.

In contrast to the disclosure regime of the Ad Hoc Tribunals at the time,¹¹⁴⁹ the disclosure obligation by the defence was always conceived of as independent from the corresponding one of the Prosecutor, so there was no reciprocity intended. The only ‘trigger’ of Rule 78 is thus the fact that the defence is planning to use the material “as evidence for the purposes of the confirmation hearing or the trial”.

As regards the wording “for the purposes of the confirmation hearing or at trial”, it has already been stated regarding Rule 77 that it could be understood to be wider than ‘evidence which the defence intends to rely on at the hearing’.¹¹⁵⁰ Since, in contrast to Rule 77, Rule 78 contains no materiality test, the view that the wording might comprise material which would only be used for cross-examination may, in contrast to Rule 78, gain significance.

6.5.2 Rules 79 (1)-(3): Notice of alibi/grounds for excluding criminal responsibility according to Art. 31 (1)

As was previously mentioned, even though there were fundamental discussions about defence disclosure at the beginning of the negotiations, the notion of the obligatory of defence notice and disclosure concerning, in the Anglo-American terminology, ‘special defences’¹¹⁵¹ was contained in the respective drafts of the Rules from the very beginning. The first three sub-rules of Rule 79 resemble Rule 67 (A)(ii)(a) RPE-ICTY

¹¹⁴⁷ Rule 5.29 *bis*, PCNICC/2000/WGRPE(5)/RT.2, note 1039 *supra*.

¹¹⁴⁸ See also *Prosecutor v. Bemba Gombo*, note 1139 *supra*, *ibid*.

¹¹⁴⁹ 14th revision of the RPE-ICTY, 4 December 1998.

¹¹⁵⁰ 6.4.3 *supra*. In a similar manner as in the context of Rule 77, *Swoboda*, The ICC Disclosure Regime (see note 1107 *supra*) at pp. 456 et seq. appears to apply Rule 78 exclusively to pre-trial and not pre-confirmation disclosure; there is in our opinion no apparent reason for this limitation.

¹¹⁵¹ See note 1134 *supra*.

of the time; the fact that the Australian proposal based the idea of disclosure by the defence on considerations of fair trial for the Prosecutor has already been mentioned.¹¹⁵² The overall development of Rule 79 can be visualised in the following way:

¹¹⁵² See also the already partially quoted *nota bene* concerning draft Rule 68 of the Australian proposal of 26 February 1999:

“N.B. This rule addresses the requirements placed on the defence to disclose material and information. Sub-rule 69 (i) is identical to rule 67 (A) (ii) (a) of the ICTY Rules. Clearly, the Prosecutor needs to be given an adequate opportunity to investigate evidence offered in support of an alibi. Sub-rule 69 (ii) draws on rule 67 (A) (ii) (b) of the ICTY Rules. That provision requires the defence to notify the Prosecutor of any "special defence" it intends to offer. The term "special defence" is defined to include that of "diminished or lack of mental responsibility". The argument in support of the defence being required to notify its intent to offer such a defence is that it would be unfair for the Prosecutor to meet these defences on the run. If a defence relating to the mental state of the accused is raised, a psychiatrist must examine the accused.”

Australian Proposal, 26 January 1999	Discussion Paper 2, 25 February 1999 / PrepCom First Session Summary, Annex 1, 2 March 1999	Revised Discussion Paper, 5 August 1999 / PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000 / Working Group Report, 27 June 2000 / Final Draft, 30 June 2000 / RPE-ICC
<p>Rule 69 Disclosure by the defence regarding the defence of alibi and certain grounds for excluding criminal responsibility recognized under article 31, paragraph 1</p> <p>The defence shall notify the Prosecutor of its intent to:</p> <p>(i) Plead the existence of an alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or</p> <p>(ii) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1 (a) or (b); in which case the notification shall specify the names and addresses</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the ground.</p> <p>This shall be done sufficiently in advance of the commencement of the trial</p> <p>to enable the Prosecutor to prepare adequately for trial.</p>	<p>Rule 5.17. Disclosure by the defence regarding the defence of alibi and certain grounds for excluding criminal responsibility recognized under article 31, paragraph 1</p> <p>(a) The defence shall notify the Prosecutor of its intent to:</p> <p>(i) Plead the existence of an alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or</p> <p>(ii) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1 (a) or (b); in which case the notification shall specify the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the ground.</p> <p>This shall be done sufficiently in advance of the commencement of the trial</p> <p>to enable the Prosecutor to prepare adequately for trial.</p> <p>(b) Failure of the defence to provide notice under this rule shall not limit the right of the accused to testify on the matters dealt with in paragraph (a).</p>	<p>Rule 5.30 Disclosure by the defence</p> <p>(a) The defence shall notify the Prosecutor of its intent to:</p> <p>(i) Plead the existence of an alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or</p> <p>(ii) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1; in which case the notification shall specify the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the ground.</p> <p>(b) With due regard to time limits set forth in other rules, notification under paragraph (a) of this rule shall be given</p> <p>sufficiently in advance</p> <p>to enable the Prosecutor to prepare adequately and to respond.</p> <p>The Chamber of the Court dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.</p> <p>(c) Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in paragraph (a) and to present evidence.</p>	<p>Rule 5.30 Disclosure by the defence</p> <p>1. The defence shall notify the Prosecutor of its intent to:</p> <p>(a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or</p> <p>(b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the ground.</p> <p>2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given</p> <p>sufficiently in advance</p> <p>to enable the Prosecutor to prepare adequately and to respond.</p> <p>The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.</p> <p>3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.</p>	<p>Rule 79 Disclosure by the defence</p> <p>1. The defence shall notify the Prosecutor of its intent to:</p> <p>(a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or</p> <p>(b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names</p> <p>of witnesses and any other evidence upon which the accused intends to rely to establish the ground.</p> <p>2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given</p> <p>sufficiently in advance</p> <p>to enable the Prosecutor to prepare adequately and to respond.</p> <p>The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.</p> <p>3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.</p>

		(d) This rule does not prevent a Chamber of the Court from ordering disclosure of any other evidence.	4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.	4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.
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During the drafting process, Rule 79 changed quite considerably. First and foremost, the inclusion of sub-rule 4 altered the substantial scope of the provision to a large extent; however, since sub-rule 4 systematically does not belong to the first three paragraphs of Rule 79, it will be dealt with below.¹¹⁵³

Sub-rule 1 (a) deals with the “existence of an alibi”. Similar to the question of ‘special defences’¹¹⁵⁴, the term “defence” is not used by the Rome Statute in this meaning, the Statute rather speaks of “grounds for excluding criminal responsibility” in order to avoid difficulties arising from different conceptions of criminal responsibility rooted in diverging legal traditions.¹¹⁵⁵ The term “defence of alibi” was, however, still contained in the heading of the provision until the summary of the first session of the PrepCom.¹¹⁵⁶ This issue is most probably in some parallel with the replacement of the term “plead” by the term “raise”, which came with the Mont Tremblant Meeting, and is more neutral.

Alibi as a legal concept is not contained in the Statute; however, the drafters of the Rules, following the tradition of the Anglo-American jurisdictions and, of course, the Ad Hoc Tribunals, chose to include it in the Rules. The wording of the original Australian proposal follows Rule 67 (A)(ii)(a) RPE-ICTY almost verbatim, with the exception that the RPE-ICTY speak of the “defence” of alibi, and utilize the term “offer” instead of “plead”.

Substantially, the scope of application of Rule 79 was first of all, and in parallel to the other disclosure provisions we have looked at until now, widened by dropping the notion of “sufficiently in advance of the commencement of the trial”, meaning that the provision applies to the pre-confirmation disclosure as well. In fact, however, the wording may also be interpreted as allowing the defence to raise the ground at a later stage, since the mere notion of “in advance” lacks a reference point.

¹¹⁵³ 6.5.4 *infra*.

¹¹⁵⁴ See *Ambos*, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, p. 825, note 1134 *supra*, with further references.

¹¹⁵⁵ *Ibid*.

¹¹⁵⁶ In fact, it is occasionally used even by the ICC Chambers, see, e.g., *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on disclosure by the defence, Trial Chamber I, 20 March 2008, par. 29 (a).

Another significant amplification of the provision, at the expense of the defence, lies in the dropping of the reference and limitation to sub-paragraphs (a) and (b) of Art. 31 (1), making Rule 79 (1) applicable to all of Art. 31 (1), thus including not only mental disease and intoxication, as originally envisaged, but also self-defence and duress. Here, the law of the ICC could be narrower than that of the Ad Hoc Tribunals, which require the notification concerning “any special defence” (Rule 67 (B)(i)(b) RPE-ICTY). In accordance with the example of the Ad Hoc Tribunals, however, sub-rule (3) makes clear that the defence will on no account lose its right to raise the named grounds for excluding criminal responsibility for lack of notice. This notion was not contained in the Australian proposal, but introduced by the Second Discussion Paper; at first closely following the wording of Rule 67 (B) RPE-ICTY¹¹⁵⁷, and later adapted to the ICC nomenclature. The consequences of non-compliance with disclosure obligations will be dealt with more generally below.¹¹⁵⁸

A substantial amendment can also be seen in the dropping of the obligation to disclose the addresses of witnesses in addition to their names. This is in complete parallel to the development of prosecution disclosure concerning witnesses according to Rule 76.¹¹⁵⁹ In contrast to the latter, however, the defence need not provide the Prosecutor with the *statements* of the witnesses.¹¹⁶⁰

With the revised discussion paper came an amendment regarding the timing of disclosure, in that the phrase “with due regard to time limits set forth in other rules” was introduced, as well as the possibility for an adjournment in favour of the prosecution was created.

Rule 79 (1)-(3) have as yet not been specifically applied by the ICC, for none of the accused have invoked any grounds for excluding criminal responsibility up to now.

¹¹⁵⁷ Now: sub-rule (C).

¹¹⁵⁸ 6.10 *infra*.

¹¹⁵⁹ See 6.4.1 *supra*.

¹¹⁶⁰ Notwithstanding, chambers have asked the defence to provide the Chamber (and the Prosecutor) with a short summary of the issues which the defence witnesses may testify upon; see, for example, *Prosecutor v. Ruto, Kosgey and Sang*, ICC Case No. 01/09-01/11, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, Pre-Trial Chamber II, par. 29 June 2011, as well as the according Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, Pre-Trial Chamber II, 25 July 2011, in which the Chamber asked the defence to submit a witness list “indicating their names and the scope and subject-matter of their proposed questioning”.

6.5.3 Rule 80: Grounds for excluding criminal responsibility under Art. 31 (3)

Rule 80 determines the procedure to be followed when a ground for excluding mental responsibility according to Art. 31 (3) is to be considered. In contrast to Art. 31 (1) ICCSt, Art. 31 (3)¹¹⁶¹ deals with grounds for excluding criminal responsibility which are not contained in the Statute but may be derived from the sources of law as contained in Art. 21.

Interestingly, this provision not only provides the *substantive* information that the Court is free to derive grounds for excluding criminal responsibility from national systems, but also contains a *procedural* twist in that it specifically states that these grounds can only be considered by the Court *at trial*. This is surprising, not only for the fact that one would not necessarily expect a clearly procedural norm in the middle of provisions regarding criminal liability of persons, but it is also unclear why the Pre-Trial Chamber should be banned from considering grounds for excluding criminal responsibility outside of the Rome Statute, and the issue be left to the Trial Chamber only. To be sure, the scope of the confirmation hearing is far smaller than that of the trial, as the Pre-Trial Chamber according to Art. 61 (7) ICCSt only needs to find that there are “substantial grounds to believe” that the accused has committed the crimes with which he is charged; and the same provision also states that the thresholds concerning the evidence to be presented are lower than at trial.¹¹⁶² However, this cannot sufficiently explain why grounds for excluding criminal responsibility according to Art. 31 (1) and those according to Art. 31 (3) should be treated so differently.

A provision similar to Art. 31 (3) ICCSt was not covered by the 1994 ILC Draft, but contained in both the 1996 PrepCom Report¹¹⁶³ and in the 1998 PrepCom Draft.¹¹⁶⁴ Both

¹¹⁶¹ “At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.”

¹¹⁶² “[...] The Prosecutor may rely on documentary or summary evidence and need not call the witnesses to testify at the trial.”

¹¹⁶³ 1996 PrepCom Report Vol. II, note 915 *supra*, pp. 103 et seq.:

“Article S

Exhaustive or enumerative list of defences

Proposal 1

Other defences

1. At trial the Court may consider a defence not specifically enumerated in this chapter if the defence:

wordings are equal to Art. 31 (3) ICCSt, as far as the beginning (“[a]t trial, the Court may [...]”) is concerned. As we have seen above, the procedural architecture of the 1998 PrepCom Draft already contained the notion of a separation between the confirmation hearing and the trial hearing; the structure in the 1996 version is less clear, even though it does contain thoughts and proposals for implementing a hearing for the “confirmation of the indictment” by a Pre-Trial Chamber or “Indictment Chamber”.¹¹⁶⁵ It does not appear impossible that the wording “at trial” was introduced at a time when a confirmation hearing as now contained in the Statute was not concretely contemplated – which could mean that the notion of “trial” as contained in Art. 31 (3) ICCSt was rather meant in a general sense, and not as opposed to the confirmation hearing.¹¹⁶⁶ After all,

(a) Is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) Deals with a principle clearly beyond the scope of the defences enumerated in this chapter and is not otherwise inconsistent with those or any other provisions of the Statute.

2. If an accused wishes to raise such a defence, he must notify the Court and the Prosecutor a reasonable time prior to trial. The Court shall give the Prosecutor the opportunity to be heard and shall issue an order deciding the matter. An accused who has failed to provide adequate notice shall be precluded from asserting the defence at trial; except that, where compelling circumstances exist, the Court may instead grant the Prosecutor a reasonable postponement to prepare for the issue at trial. [Footnote: The Rules of Procedure could provide further clarification regarding the conduct of any hearings required by the Court prior to ruling. The Statute or Rules might also permit interlocutory appeal by the Prosecutor of an adverse ruling.]

3. Denial of a request under this article shall not preclude an accused from seeking consideration of the basis of the asserted defence as a grounds for mitigation of punishment to the extent otherwise permitted by this Statute.”, footnotes partially omitted.

¹¹⁶⁴ 1998 PrepCom Draft, note 917 *supra*:

“Article 34: Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this part if the ground:

(a) is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of Procedure and Evidence.”

¹¹⁶⁵ See proposal concerning Art. 27 (2) of the ILC Draft, 1996 PrepCom Report Vol. II, note 915 *supra*, pp. 120 et seq.

¹¹⁶⁶ Compare also the heading of Rule 76 (“Pre-trial disclosure relating to prosecution witnesses”), which undisputedly refers to disclosure prior to the confirmation hearing as well.

the drafters of the Statute could have easily used the expression “the Trial Chamber” instead of “the Court” to avoid any ambiguities. The wording of Art. 31 (3) ICCSt could thus well be based on a redactional error. However, the drafters of the Rules of Procedure and Evidence obviously took the wording at face value, which is why Rule 80 only mentions the Trial Chamber. Synoptically, its development can be visualized as follows:

Australian Proposal, 26 January 1999	Discussion Paper 2, 25 February 1999 / PrepCom First Session Summary, Annex 1, 2 March 1999	Revised Discussion Paper, 5 August 1999 / PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000 / Working Group Report, 27 June 2000 / Final Draft, 30 June 2000 / RPE-ICC
<p>Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>(a) The defence shall give notice to both the Trial Chamber and the Prosecutor during the trial</p> <p>if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3, which has not previously been recognized in the jurisprudence of the Court.</p> <p>(b) Following notice given under sub-rule (a),</p> <p>the Trial Chamber shall hear both parties</p> <p>before deciding whether the defence can</p> <p>plead the ground for excluding criminal responsibility.</p> <p>The Trial Chamber may permit an appeal in accordance with article 82, paragraph 1 (d), from its decision on whether the ground can be pleaded.</p> <p>(c) If the defence is permitted to plead the ground either by the Trial Chamber or, following an appeal under article 82, paragraph 1 (d), by the Appeals Chamber,</p> <p>the Trial Chamber may grant the Prosecutor an adjournment to prepare to address the ground raised by the defence.</p>	<p>Rule 5.18. Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>(a) The defence shall give notice to both the Trial Chamber and the Prosecutor</p> <p>if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3.</p> <p>This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.</p> <p>(b) Following notice given under sub-rule (a),</p> <p>the Trial Chamber shall hear both parties</p> <p>before deciding whether the defence can</p> <p>plead the ground for excluding criminal responsibility.</p> <p>The Trial Chamber may permit an appeal in accordance with article 82, paragraph 1 (d), from its decision on whether the ground can be pleaded.</p> <p>(c) If the defence is permitted to plead the ground either by the Trial Chamber or, following an appeal under article 82, paragraph 1 (d), by the Appeals Chamber,</p> <p>the Trial Chamber may grant the Prosecutor an adjournment to prepare to address the ground raised by the defence.</p> <p>(d) Where a ground for excluding criminal responsibility under article 31, paragraph 3, was not raised prior to the trial, the Trial Chamber may grant the Prosecutor an adjournment to prepare to address the ground raised by the defence.</p>	<p>Rule 5.31 Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>(a) The defence shall give notice to both the Trial Chamber and the Prosecutor</p> <p>if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3.</p> <p>This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.</p> <p>(b) Following notice given under paragraph (a) of this rule,</p> <p>the Trial Chamber shall hear both parties</p> <p>before deciding whether the defence can</p> <p>plead the ground for excluding criminal responsibility.</p> <p>(c) If the defence is permitted to plead the ground,</p> <p>the Trial Chamber may grant the Prosecutor an adjournment to address the ground raised by the defence.</p>	<p>Rule 5.31 Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>1. The defence shall give notice to both the Trial Chamber and the Prosecutor</p> <p>if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3.</p> <p>This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.</p> <p>2. Following notice given under sub-rule 1,</p> <p>the Trial Chamber shall hear both parties</p> <p>before deciding whether the defence can</p> <p>raise a ground for excluding criminal responsibility.</p> <p>3. If the defence is permitted to raise the ground,</p> <p>the Trial Chamber may grant the Prosecutor an adjournment to address that ground.</p>	<p>Rule 80 Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>1. The defence shall give notice to both the Trial Chamber and the Prosecutor</p> <p>if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3.</p> <p>This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.</p> <p>2. Following notice given under sub-rule 1,</p> <p>the Trial Chamber shall hear both the Prosecutor and the defence</p> <p>before deciding whether the defence can</p> <p>raise a ground for excluding criminal responsibility.</p> <p>3. If the defence is permitted to raise the ground,</p> <p>the Trial Chamber may grant the Prosecutor an adjournment to address that ground.</p>

First of all, we note that the timing of disclosure changed from “during the trial” to “sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial”. This wording is similar to Rule 79 (2), and reminiscent of the notion of “equality of arms for the prosecution”; in any case, it removes an element of surprise and is in the interest of a better trial management. However, in contrast to Rule 79 (2) there is a specific point of reference: “the commencement of the trial”, which is straightforward. And unlike Rule 79, the defence is apparently not allowed to raise the ground at a later stage, a provision which would state that the failure of notice does not prevent the defence from raising the ground is lacking. This is compatible with the wording of Art. 31 (3) which says that the Trial Chamber “may consider” the ground “at trial”, albeit subject to a procedure as provided by the Rules. This point may be related to draft sub-rule (d) as contained in Discussion Paper 2 and the summary of the first session of the PrepCom, which apparently (and arguably in contradiction to the last sentence of sub-rule (a)) envisaged the ground to be raised at a later stage, but which, however, soon disappeared.

The next change is the dropping of the line “which has not previously been recognized in the jurisprudence of the Court”, as only contained in the original Australian proposal; this wording was just reiterating the text of Art. 31 (3) ICCSt and could thus be dropped without a substantial consequence. Paragraph (2) provides that both parties shall be heard. Paragraph (3) allows the Trial Chamber to grant an adjournment for further preparation of the prosecution, in the case that it permits the defence to raise the ground; this is in parallel with Rule 79 (2).

Until the end of the first PrepCom session, the draft had also contained the possibility of an appeal in accordance with Art. 82 (1)(d) ICCSt; this was dropped, which is probably due to the fact that Rule 155, which requires leave to appeal, was contemplated at this point as embracing all interlocutory appeals, making the specific notion in draft Rule 5.18 obsolete.

Just like the Rule 79 (1)-(3), Rule 80 has apparently not been applied by the ICC up to now.

6.5.4 Rule 79 (4): Other Evidence as ordered by the Chamber

Rule 79 (4) RPE-ICC provides that “[t]his rule does not prevent a Chamber of the Court from ordering disclosure of any other evidence”. As can be seen from the synopsis regarding Rule 79¹¹⁶⁷ the provision was introduced with the Revised Discussion Paper of

¹¹⁶⁷ See 6.5.2 *supra*.

5 August 1999 and remained unaltered. Even though Rule 79 (4) does not explicitly contain a reference as to defence evidence, the heading of Rule 79 and the location of the provision make clear that it refers to evidence in the hands of the defence.

On the face of it, Rule 79 is in obvious conflict with the above-mentioned rights of the person concerned to remain silent and his privilege against self-incrimination (Articles 67 (1)(g), 55 (1)(a), (2)(b) ICCSt); this holds true especially with the flanking provision of the already mentioned Regulation 54 RegCt¹¹⁶⁸. As mentioned, the ICC has had opportunity to make general remarks on defence disclosure in general and Rule 79 (4) in particular. In the proceedings against *Lubanga*, Trial Chamber I is apparently trying to implement a sort of 'proportionality approach', which has elements of reciprocal disclosure duties, stating, however, that it reserves the right to ask for more:

At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.

There is often likely to be a link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other.[...]

In order to ensure the trial process is fair, only proportionate disclosure obligations should be imposed on the accused in relation to the evidence he intends to advance. In the circumstances, the Chamber will reflect in any order it makes on defence disclosure that a material element of the prosecution's evidence is still outstanding (along, potentially, with evidence that is helpful to the accused)[...]. The Chamber is of the view that the obligations of disclosure on the accused, for these reasons, should be of an appropriately restricted nature.

[...] In Rule 79(1)(a) and (b), the expression "any other evidence" is used when imposing the obligation on the accused to give advance notice of those two defences and it would have been wholly superfluous for the drafters of the Statute thereafter to include a further provision empowering the court to order the disclosure of "any other evidence" relating to the same defences. It follows that Rule 79(4) reveals the Chamber has the power to order advance disclosure

¹¹⁶⁸ Note 1137 *supra*.

*of any evidence outwith those defences that the accused intends to rely on. This interpretation is supported by the provisions of Regulation 54.*¹¹⁶⁹

The Chamber is struggling hard to find its way through the thicket of the ICC's procedural framework. Systematically, especially the last argument of the Chamber must be criticized – the Regulations, being lower in rank, can never serve to interpret the Rules and the Statute. As we have seen regarding national jurisdictions, defence disclosure does not *per se* infringe upon the rights of the accused; however, “to order advance disclosure of any evidence outwith those defences that the accused intends to rely on” must be considered as infringing upon his right to silence – read in this way, Rule 79 would be incompatible with the Statute.

In essence, however, the said ‘proportionality approach’ appears to be the only way to make Rule 79 (4) work within the procedural architecture of the ICC. As long as the defence is thus willing to present evidence during the trial, it may, in a proportional way which indeed also involves the fulfilment of disclosure duties of the prosecution, and in the interests of the efficacy of justice, be obliged to disclose part of its evidence which is related to its line of evidence in advance. If the defence, however, chooses to remain silent, Rule 79 should have no scope of application.

6.6 Exceptions and Limitations to Disclosure

The applicable provisions of the ICC know the same basic categories of exceptions and limitations to disclosure as the Ad Hoc Tribunals. Most of them are contained in Rule 81, which refers to different provisions of the Rome Statute; additionally, there is the highly important exception to disclosure of confidential material according to Rule 54 (3)(e), to which Rule 82 refers. Finally, privileged communication according to Rule 73 represents an exception to disclosure which is not contained in Section II (“Disclosure”) of Chapter 4 of the Rules, but in Section 1 (“Evidence”).

Generally, the ICC Chambers have affirmed the principle that disclosure must be considered the rule, non-disclosure the exception.¹¹⁷⁰ Any non-disclosure of evidence must thus be based on a specific ground.¹¹⁷¹

¹¹⁶⁹ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on disclosure by the defence, Trial Chamber I, 20 March 2008, paras. 33-35, paragraph numbers omitted.

¹¹⁷⁰ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", Appeals Chamber, 13 October 2006, par. 39; *Prosecutor v. Katanga*, ICC

6.6.1 Rule 81 RPE-ICC: Restrictions on Disclosure

Rule 81, together with the provisions of the Rome Statute to which it refers, represents the basic overall provision concerning restrictions on disclosure. Apparently there was “relatively little debate” during the drafting process;¹¹⁷² and substantially the changes are quite few; even though the superficial structure of the provision was changed considerably. Originally, what are now Rules 81 and 82 was contained in one large single provision (draft Rule 5.32); with the Mont Tremblant meeting, this draft Rule was divided into two separate provisions (draft Rules 5.32 and 5.32 *bis*), the predecessors of Rules 81 and 82. Furthermore, as previously mentioned, Rule 81 was, in contrast to all other disclosure provisions, amended once more between the discussion paper of 23 June 2000 and the Working Group report of 27 June, which is why we have to distinguish *six* instead of five different versions.¹¹⁷³ Partially due to the said separation of the original draft into two separate provisions at the Mont Tremblant meeting, the order of the sub-rules was altered, which makes it more difficult to create a synoptical overview. We have therefore attempted to visualise the drafting history additionally by means of different colours:

Case No. 01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", Appeals Chamber, 13 May 2008, par. 70.

¹¹⁷¹ See also *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC, p. 166.

¹¹⁷² *Brady*, Disclosure of Evidence, p. 418.

¹¹⁷³ See 6.3.2.3.1 *supra*.

Australian Proposal, 26 January 1999	PrepCom First Session Summary, Annex 1, 2 March 1999	PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Working Group Report, 27 June 2000	Final Draft, 30 June 2000 / RPE-ICC
<p>Rule 71 Restrictions on disclosure</p> <p>(a) Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.</p> <p>(b) Where material or information is in the possession or control of the Prosecutor,</p> <p>the disclosure of which may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber</p> <p>dealing with the matter at the time for a ruling on whether the material</p> <p>must be disclosed to the defence. The matter shall be heard on an <i>ex parte</i> basis by the Chamber.</p> <p>If the Chamber rules against disclosure, the Prosecutor may not subsequently</p> <p>introduce such material or information into evidence during the trial</p> <p>without adequate prior disclosure to the accused.</p> <p>(c) Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material or information may not be subsequently introduced into evidence during the</p> <p>trial without adequate prior</p>	<p>Rule 5.19 Restrictions on disclosure</p> <p>(a) Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.</p> <p>(b) Where material or information is in the possession or control of the Prosecutor,</p> <p>the disclosure of which may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber</p> <p>dealing with the matter for a ruling on whether the material</p> <p>must be disclosed to the defence. The matter shall be heard on an <i>ex parte</i> basis by the Chamber.</p> <p>If the Chamber rules against disclosure, the Prosecutor may not subsequently</p> <p>introduce such material or information into evidence during the confirmation hearing or the trial</p> <p>without adequate prior disclosure to the accused.</p> <p>(c) Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material or information may not be subsequently introduced into evidence during the confirmation hearing or the</p> <p>trial without adequate prior</p>	<p>Rule 5.32 Restriction on disclosure</p> <p>(a) Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.</p> <p>(b) Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber of the Court</p> <p>dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an <i>ex parte</i> basis by the Chamber.</p> <p>However, the Prosecutor may not</p> <p>introduce such material or information into evidence during the confirmation hearing or the trial</p> <p>without adequate prior disclosure to the accused.</p> <p>(c) Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the</p> <p>trial without adequate prior</p>	<p>Rule 5.32 Restrictions on disclosure</p> <p>1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.</p> <p>2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber</p> <p>dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an <i>ex parte</i> basis by the Chamber.</p> <p>However, the Prosecutor may not</p> <p>introduce such material or information into evidence during the confirmation hearing or the trial</p> <p>without adequate prior disclosure to the accused.</p> <p>3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with</p>	<p>Rule 5.32 Restrictions on disclosure</p> <p>1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.</p> <p>2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber</p> <p>dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an <i>ex parte</i> basis by the Chamber.</p> <p>However, the Prosecutor may not</p> <p>introduce such material or information into evidence during the confirmation hearing or the trial</p> <p>without adequate prior disclosure to the accused.</p> <p>3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with</p>	<p>Rule 81 Restrictions on disclosure</p> <p>1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.</p> <p>2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber</p> <p>dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an <i>ex parte</i> basis by the Chamber.</p> <p>However, the Prosecutor may not</p> <p>introduce such material or information into evidence during the confirmation hearing or the trial</p> <p>without adequate prior disclosure to the accused.</p> <p>3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and members of their families, such information shall not be disclosed, except in accordance with</p>

<p>disclosure to the accused.</p> <p>(d) Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material or information may not be subsequently introduced into evidence during the trial without adequate prior disclosure to the Prosecutor.</p> <p>(e) Where material or information is in the possession or control of the Prosecutor which falls within the scope of article 72, its treatment shall be governed by the provisions of that article.</p> <p>[...]</p>	<p>disclosure to the accused.</p> <p>(d) Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material or information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.</p> <p>(e) Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles.</p> <p>[...]</p> <p>[Rule 5.13. Restrictions on disclosure The Pre-Trial Chamber</p> <p>shall, on its own motion, or at the request of the Prosecutor, the person concerned or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, particularly by authorizing the non-disclosure of their identity.]</p>	<p>disclosure to the accused.</p> <p>(d) Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.</p> <p>(e) Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles.</p> <p>[...]</p> <p>(k) The Chamber of the Court dealing with the matter</p> <p>shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, particularly by authorizing the non-disclosure of their identity.</p>	<p>those articles.</p> <p>4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, particularly by authorizing the non-disclosure of their identity.</p> <p>5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.</p> <p>6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.</p>	<p>those articles.</p> <p>When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.</p> <p>4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.</p> <p>5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.</p> <p>6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.</p>	<p>those articles.</p> <p>When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.</p> <p>4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.</p> <p>5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.</p> <p>6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.</p>
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6.6.1.1 Rule 81 (1): Internal Documents

Rule 81 (1) was obviously not modified during the drafting process of the Rules. It is modelled after Rule 70 (A) RPE-ICTY.¹¹⁷⁴

In the jurisprudence of the ICC, the provision has appeared on two occasions. For once, Rule 81 (1) has been brought in connection with the “table of incriminating evidence” or “in-depth analysis chart”.¹¹⁷⁵ As we will see in a little more detail when we look at the role and involvement of the ICC Chambers in the disclosure proceedings, the respective Chambers have increasingly asked the Prosecutor to provide the accused and the Chambers themselves not only with the evidence itself, but also with more or less sophisticated “in-depth analysis charts” or “tables of incriminating evidence” in which the evidentiary material is disclosed by the Prosecutor in an organised and structured manner.¹¹⁷⁶ In the proceedings against *Katanga and Ngudjolo Chui*, Trial Chamber II held that the said table of incriminating evidence “is nothing more than a procedural tool to make clear and accessible to the Defence and the Chamber the exact evidentiary basis of the Prosecution's case”,¹¹⁷⁷ and that “the impugned order does not oblige the Prosecution to provide the Chamber or the Defence with any internal work product relating to the internal analysis by the Prosecution of the evidence listed in the Table.”¹¹⁷⁸ In *Bemba*, Trial Chamber III approved this holding, stating that

in the view of the Chamber this document does not involve any of the prosecution's internal documents: to the contrary, it is based on material that has been filed as part of the prosecution's disclosure obligations; furthermore, it is a necessary and proportionate procedural tool that assists in revealing the

¹¹⁷⁴ See the *nota bene* contained in the Australian draft: “Sub-rule (a) closely follows rule 70 (A) of the ICTY Rules. It is appropriate to exclude internal working documents of the prosecution and defence from disclosure.”

¹¹⁷⁵ See *Prosecutor v. Katanga & Ngudjolo Chui*, ICC Case No. 01/04-01/07, Prosecution's Application for Leave to Appeal the “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, Office of the Prosecutor, 23 March 2009, par. 25; *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart, Office of the Prosecutor, 15 December 2009, par. 9.

¹¹⁷⁶ See 6.8 *infra*.

¹¹⁷⁷ *Prosecutor v. Katanga & Ngudjolo Chui*, ICC Case No. 01/04-01/07, Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", Trial Chamber II, 1 May 2009, par. 24.

¹¹⁷⁸ *Ibid.*, par. 33.

*prosecution's case against the accused, notwithstanding the resources that will be necessary for its completion.*¹¹⁷⁹

This reasoning must be endorsed. One might also say that the analysis chart was not a pre-existing internal document that would need to be disclosed, but indeed, as in the *Katanga* ruling, a procedural tool. It is not even known whether a similar document previously existed at all with the Prosecutor and his staff. Whether the Chambers of the ICC can ask the Prosecutor to perform a task as creating such a chart in the procedural framework of the ICC is a justified question – but certainly not one which is related to the exceptions to disclosure according to Rule 81 (1).

Other than that, the Prosecution apparently also tried to persuade the Court that the so-called pre-assessment interviews conducted before an actual witness interrogation¹¹⁸⁰ were internal documents according to Rule 81 (1); this was, rightly, denied by the Chamber.¹¹⁸¹

6.6.1.2 Rule 81 (2): Possible Prejudice of Ongoing Investigations

Rule 81 (2) deals with non-disclosure for reasons of protecting further or ongoing investigations. Oftentimes, particularly in the investigation of macro-criminality, it may be necessary to keep part of the investigation secret for some time. Rule 81 (2) also describes how such a situation should be dealt with procedurally, namely by an *ex parte* hearing of the Prosecutor. This entails a judicial ‘check’ of the Prosecutor’s investigation by a Chamber of the Court.¹¹⁸²

Rule 81 (2), which clearly originates from Rule 66 (C) RPE-ICTY,¹¹⁸³ did not change to a large extent during the drafting process. The first modification was the inclusion of the confirmation hearing in the last sentence; this goes along with the general tendency of

¹¹⁷⁹ *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", Trial Chamber III, 29 January 2010, par. 26.

¹¹⁸⁰ See 6.4.3 *supra*.

¹¹⁸¹ *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Public redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the Consequences of non-disclosure"(ICC-01/05-01/08-750-Conf), Trial Chamber III, 9 April 2010, par. 35.

¹¹⁸² See *Brady*, Disclosure of Evidence, pp. 418 et seq.

¹¹⁸³ See also the *nota bene* contained in the Australian proposal: “Sub-rule (b) draws, in part, on rule 66 (C) of the ICTY Rules. It seeks to protect the interests of the accused by requiring the Court to rule on disclosure and obliging the Prosecutor to disclose previously undisclosed material to the accused if he or she wishes to introduce it as evidence.”

the drafters to make most disclosure provisions of the Rules applicable to both pre-confirmation and pre-trial disclosure, which we have seen in most of the provisions we have looked at until now. Other than that, we note the inclusion of the phrase “which must be disclosed in accordance with the Statute”. As it would have been easy to include a wording such as “in accordance with the Statute and the Rules”, it is not quite clear why the wording is limited to the Statute. To be sure, as we have said above, the Rules mainly *shape* and *refine* the disclosure rights and obligations emanating from the Statute. In any case, in the jurisprudence of the ICC, this specific point has apparently not been an issue up to now. Rule 82 (2) *per se*, in turn, has proved to be of considerable practical importance, a fact which, however, has been extensively analysed elsewhere.¹¹⁸⁴

Obviously, according to the interpretation of the provision, Rule 81 (2) RPE can be a very powerful tool of the Prosecutor to reach non-disclosure. Crucial issues in the practice of the ICC appear to be the general capability of Rule 81 (2) to provide for *redactions* in material which must be otherwise disclosed, as well as ‘potential prosecution witnesses’. As to the first issue, it has been briefly mentioned above that most of the Judges of the ICC agree on the fact that Rule 81 (2) provides a legal basis for redactions in material which must be disclosed, even though the provision does not explicitly state so. The Judges thus do not necessarily determine, as the wording of Rule 81 (2) suggests, *whether* certain material must be disclosed, but rather *how much of it*.¹¹⁸⁵ Judge Pikis, in turn, is of the opinion that Rule 81 (2) necessitates *full* disclosure of the respective material, or non-disclosure, in which case the material may not be used by the Prosecutor.¹¹⁸⁶ While one may conclude that Judge Pikis’ opinion is closer to the wording of the Rule, it must be observed that the accused is usually served better with a

¹¹⁸⁴ *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC, pp. 168 et subs.

¹¹⁸⁵ See only *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 (OA 5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" as well as Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", Appeals Chamber, both dated 14 December 2006; as well as *Prosecutor v. Katanga*, ICC Case No. 01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", and Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", Appeals Chamber, both dated 13 May 2008.

¹¹⁸⁶ See separate and/or dissenting opinions of Judge Pikis attached to all decisions cited in note 1185.

redacted piece of evidence than with no evidence at all. According to the Rule, the Prosecutor must make an *ex parte* to the Chamber dealing with the matter, which allows or disallows the requested redactions. This, as a matter of course, means that the Chamber in any case gets to see the unredacted version of the respective evidence. Whether the *fact* that an *ex parte* application has been made needs to be disclosed to the defence, must, according to the ICC Appeals Chamber, be decided on a case-by-case basis.¹¹⁸⁷

The test whether and to what extent redactions can be granted according to Rule 81 (2) applied by the ICC Appeals Chamber is one of proportionality; the Chamber emphasizes that the defence must be given the right to be heard, and that redactions must be strictly necessary to prevent possible prejudice of further or ongoing investigations.¹¹⁸⁸ As usual, the Appeals Chamber refuses to take a definitive position, and rather retains its case-by-case approach.

6.6.2 Confidentiality provisions of the Rome Statute in conjunction with Rule 81 (3)/(4) RPE-ICC

Sub-rules (3) and (4) of Rule 81 deal with restrictions on disclosure on reasons of confidentiality. However, both sub-rules do not constitute the basis for non-disclosure but rather refer to confidentiality grounds as provided for in the Rome Statute. Sub-rule (3) relates to protective measures which are already in place; sub-rule (4), in turn, refers to protective measures which are about to be taken. In the jurisprudence of the ICC, sub-rule (4) has been applied in a large number of instances, whereas it appears that sub-rule (3) has not gained much significance.¹¹⁸⁹

As with most other sub-rules of Rule 81, the amendments during the drafting process were few. The Australian proposal exceptionally did not provide the predecessors of

¹¹⁸⁷ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", Appeals Chamber, 13 October 2006, par. 67.

¹¹⁸⁸ *Prosecutor v. Katanga*, ICC Case No. 01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", Appeals Chamber, 13 May 2008, paras. 68-73. See for more *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC, pp. 168 et subs.

¹¹⁸⁹ It appears in some of the mentioned separate/dissenting opinions of Judge Pikis, see note 1185 *supra*.

sub-rules (3) and (4). Both appear for the first time in discussion paper 2 of 25 February 1999. Whereas sub-rule (3) was always part of the general provision on restrictions to disclosure (draft Rule 5.19), sub-rule (4) originally related to the confirmation stage only (draft Rule 5.13), and was only later included in draft Rule 5.19; at the same time, the specific reference to the Pre-Trial Chamber was given up. As previously mentioned, Rule 81 (3) was the only disclosure provision which was modified once more after the discussion paper of 23 June 2000, by the inclusion of the phrase “when the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance”.

Both sub-rules refer to those Articles of the Rome Statute that relate to the protection of confidential information: Articles 54 (the fact that confidentiality agreements according to Art. 54 (3)(e) are covered by Rule 82 suggests that sub-rules (3) and (4) refer to Art. 54 (3)(f) only), 72 (national security information) and 93 (confidentiality issues arising with the cooperation of national states), as well as witness protection according to Art. 68. Additionally, sub-rule (3) refers to confidentiality measures (already) taken by a Chamber according to Articles 57 and 64 (functions and powers of the respective Pre-Trial and Trial Chambers).

In the practice of the ICC, particularly sub-rule (4) has become relevant, oftentimes in connection with sub-rule (2); as with the latter sub-rule, sub-rule (4) has been regularly applied as a basis of redactions, with the same dispute between Judge Pikis and the rest of the Judges involved.¹¹⁹⁰ The Appeals Chamber maintains that the test to be applied to Rule 81 (4) is the same as for Rule 81 (2);¹¹⁹¹ and indeed, in most of the mentioned decisions sub-rules (2) and (4) appear to overlap. Issues of practical relevance in this regard have mostly been related to the protection of different categories of (in the end, any category of) *persons*, including identity protection of prosecution staff,¹¹⁹² “potential/prospective prosecution witnesses”,¹¹⁹³ ‘victims’, which, while not being

¹¹⁹⁰ See references cited in notes 1185 and 1186 *supra*.

¹¹⁹¹ *Prosecutor v. Katanga*, ICC Case No. 01/04-01/07 (OA), Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", Appeals Chamber, 13 May 2008, par. 59.

¹¹⁹² *Prosecutor v. Katanga*, ICC Case No. 01/04-01/07 (OA), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", Appeals Chamber, 13 May 2008, paras. 89 et subs.

¹¹⁹³ *Prosecutor v. Katanga*, 13 May 2008, *supra* note 1191, paras. 45 et subs. The Appeals Chamber based its decision in this regard (also) on Rule 81 (2); in any case, as mentioned, it applies the same test under sub-rule (2) and sub-rule (4).

victims of the alleged crime with which the accused is charged, appear in statements of witnesses, but are not witnesses themselves, nor take part in the proceedings as participating victims,¹¹⁹⁴ or ‘innocent third parties’.¹¹⁹⁵ Once more, the Appeals Chamber proves its flexible approach to restrictions on disclosure.¹¹⁹⁶ In any case, and in contrast to the Ad Hoc Tribunals, sub-rule 4 makes clear that non-disclosure of the identity of witnesses during trial is impossible.

6.6.3 Art. 68 (5) ICCSt, Rules 81 (5)/(6) RPE-ICC

Rule 81 (5) shapes the application of Art. 68 (5) ICCSt, which deals with witness protection for prosecution witnesses; sub-rule (6) is concerned with the same protection for defence witnesses.¹¹⁹⁷ As with sub-rule 4, the genuine provision for non-disclosure concerning sub-rule (5) remains Art. 68 (5) ICCSt.¹¹⁹⁸ Both sub-rule (5) and (6) did not change during the drafting process, with the exception of the fact that the phrase “at the confirmation hearing” was included, to make clear that the application of these provisions is not confined to the trial proceedings.

We have briefly sketched the development of Art. 68 (5) above. The according provision in the 1998 PrepCom draft was as follows:

Article 68: Protection of the [accused], victims and witnesses [and their participation in the proceedings]

[6. Notwithstanding paragraph 1 of article 58, if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars

¹¹⁹⁴ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC Case No. 01/04-01/07 (OA 5) Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9", Appeals Chamber, 27 May 2008, par. 34.

¹¹⁹⁵ *Prosecutor v. Katanga*, 13 May 2008, *supra* note 1192, paras. 43 et subs.

¹¹⁹⁶ See for more, once again, *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC, pp. 171 et subs.

¹¹⁹⁷ See the *nota bene* contained in the Australian proposal: “Sub-rule (d) recognizes that the defence may need to protect information which, if disclosed prior to trial, may lead to the grave endangerment of a witness or his or her family.”

¹¹⁹⁸ See, once again the *nota bene* contained in the Australian proposal: “Sub-rule (c) provides a link to article 68, paragraph 5, which deals with the nondisclosure of material or information which threatens the security of a witness or his or her family. The sub-rule requires that, if the material or information is to be introduced as evidence, it must be disclosed to the accused.”

and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

Today, Art. 68 (5) provides:

Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Draft Art. 68 (6) of the PrepCom Draft made explicit reference to Art. 58 (1) of the draft.¹¹⁹⁹ It is in this light in which the references in draft Art. 68 (6) to the “particulars of the indictment” must be seen. We note that the scope of the provision was widened: whereas draft Art. 68 (6) required that the security of the witness or his family be *probably* gravely endangered, Art. 68 is applicable if the witness or his family *may* be gravely endangered. Other than that, Art. 68 (5) makes, in contrast to its predecessor, explicit reference to the fact that the rights of the accused must be safeguarded at all times.¹²⁰⁰ Also, the notion of the confirmation hearing is missing.

Art. 68 (5) specifically applies to any point in time “prior to the commencement of the trial”, thus chiefly the confirmation hearing, and basically enables the Prosecutor to submit summaries of evidence instead of the evidence itself; the provision appears to be connected with Art. 61 (5), which also allows the Prosecutor to rely on documentary or

¹¹⁹⁹ Article 58. Commencement of prosecution

1. If upon investigation [in the course of an investigation] the Prosecutor, having regard to the matters referred to in article 15, concludes that [the case is admissible, and] [a case does exist against one or more persons named,] [there is a prima facie case] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial,] [which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within the jurisdiction of the Court and shall be accompanied by [relevant] [sufficient] evidence collected by the Prosecutor for the purposes of confirmation [of the indictment] by the [Presidency] [Pre-Trial Chamber].

¹²⁰⁰ N.B.: This wording proves that the notion of ‘accused’ may be used as a general term to refer to the person against whom criminal proceedings are taking place, since Art. 68 (5) is applicable specifically at the confirmation stage (“prior to the commencement of the trial”, and thus *before* the confirmation of the charges).

summary evidence at the confirmation hearing.¹²⁰¹ The fact that, in turn, Rule 81 (5) refers to both the confirmation hearing and the trial, may be regarded as superfluous, since from Art. 68 (5) we can conclude *e contrario* that in any case material can be retained only until the commencement of the trial. In any case, it appears possible that *adequate* disclosure according to Rule 81 (5) entails that disclosure must actually take place at a point in time *sufficiently* before the trial.

Rule 81 (6), as stated, basically states the same thing as Rule 81 (5) regarding disclosure by the defence; in contrast to the latter, however, it also, in and of itself, conveys to the defence a right to temporary non-disclosure, which is necessary because Art. 68 (5) refers to prosecution witnesses only.¹²⁰²

6.6.4 Art. 54 (3)(e) ICCSt, Rule 82 RPE-ICC: Confidentiality Agreements

As is the case with Rule 81 (3) to (5), the basis of non-disclosure is actually not Rule 82, but Art. 54 (3)(e) directly. We have pointed various times already to the fact that the latter provision has caused considerable controversy up to now.

The drafting history of Rule 82 can be visualized as follows:

¹²⁰¹ As will be pointed out below (6.8.1), this fact is used as an argument to demonstrate the ‘subordinate’ significance of the confirmation hearing *vis-à-vis* the trial.

¹²⁰² See for more, once again, *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC, pp. 180 et subs.

Australian Proposal, 26 January 1999	PrepCom First Session Summary, Annex 1, 2 March 1999	PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Final Draft, 30 June 2000 / RPE-ICC
<p>Rule 71 Restrictions on disclosure</p> <p>[...]</p> <p>(f) Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence during the trial without</p> <p>adequate prior disclosure to the accused.</p> <p>(g) If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence,</p> <p>the Trial Chamber</p> <p>may not order the production of additional evidence received from the provider of the initial material or information, nor may</p> <p>the Trial Chamber</p> <p>for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.</p> <p>(h) If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e),</p> <p>the Trial Chamber</p> <p>may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.</p> <p>(i) The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations</p>	<p>Rule 5.19. Restrictions on disclosure</p> <p>[...]</p> <p>(f) Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without</p> <p>adequate prior disclosure to the accused.</p> <p>(g) If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence,</p> <p>the Chamber dealing with the matter</p> <p>may not order the production of additional evidence received from the provider of the initial material or information, nor may</p> <p>that Chamber</p> <p>for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.</p> <p>(h) If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e),</p> <p>the Chamber dealing with the matter</p> <p>may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.</p> <p>(i) The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations</p>	<p>Rule 5.32 Restriction on disclosure</p> <p>[...]</p> <p>(f) Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without</p> <p>the prior consent of the provider of the material or information and</p> <p>adequate prior disclosure to the accused.</p> <p>(g) If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence,</p> <p>the Chamber of the Court dealing with the matter</p> <p>may not order the production of additional evidence received from the provider of the initial material or information, nor may</p> <p>that Chamber</p> <p>for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.</p> <p>(h) If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e),</p> <p>the Chamber of the Court dealing with the matter</p> <p>may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.</p> <p>(i) The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations</p>	<p>Rule 5.32 bis Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)</p> <p>1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without</p> <p>the prior consent of the provider of the material or information and</p> <p>adequate prior disclosure to the accused.</p> <p>2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence,</p> <p>the Chamber dealing with the matter</p> <p>may not order the production of additional evidence received from the provider of the initial material or information, nor may</p> <p>that Chamber</p> <p>for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.</p> <p>3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e),</p> <p>the Chamber dealing with the matter</p> <p>may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.</p> <p>4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations</p>	<p>Rule 82 Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)</p> <p>1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without</p> <p>the prior consent of the provider of the material or information and</p> <p>adequate prior disclosure to the accused.</p> <p>2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence,</p> <p>a Chamber</p> <p>may not order the production of additional evidence received from the provider of the initial material or information, nor may</p> <p>a Chamber</p> <p>for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.</p> <p>3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e),</p> <p>a Chamber</p> <p>may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.</p> <p>4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations</p>

contained in sub-rules (g) and (h).	contained in sub-rules (g) and (h).	contained in paragraphs (g) and (h) of the present rule.	contained in sub-rules 2 and 3.	contained in sub-rules 2 and 3.
(j) The Trial Chamber	(j) The Chamber dealing with the matter	(j) The Chamber of the Court dealing with the matter	5. The Chamber dealing with the matter	5. A Chamber dealing with the matter
may order upon an application by the defence that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused	may order upon an application by the defence that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused	may order an application [sic] by the defence that, in the interest of justice, material or information in the possession of the accused which has been provided to the accused	may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused	may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused
under the same conditions as those set down in article 54, paragraph 3 (e), and is to be introduced into evidence, shall be subject	under the same conditions as those set down in article 54, paragraph 3 (e), and is to be introduced into evidence, shall be subject mutatis mutandis	under the same conditions as set forth in article 54, paragraph 3 (e), and is to be introduced into evidence, shall be subject mutatis mutandis	under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject mutatis mutandis	under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject mutatis mutandis
to sub-rules (f), (g) and (h).	to sub-rules (f), (g) and (h).	to paragraphs (f), (g) and (h) of the present rule.	to sub-rules 1, 2 and 3.	to sub-rules 1, 2 and 3.

As previously mentioned, Rules 81 and 82 were originally contained in a single provision. Once again, the Australian proposal drew much of the content of what is now Rule 82 from the ICTY Rules, which is also expressly stated in the draft.¹²⁰³ Originally, the provision merely stated that the introduction of the confidential evidence was not allowed without prior disclosure; since the revised discussion paper of 5 August 1999, the provision states that the Prosecutor is also bound by the confidentiality agreement, in that the evidence may not be introduced, i.e. it is inadmissible; this statement has, as we will see instantly, contributed to the controversy regarding the interpretation of Art. 54 (3)(e).

Furthermore, as usual, the reference to the Trial Chamber was deleted, and instead reference was made to the “Chamber dealing with the matter”; since the discussion paper of 23 June 2000, however, the provision merely speaks of “a Chamber”,

¹²⁰³ Australian proposal concerning draft Rule 71:

“Sub-rule (f) provides a link to article 54, paragraph 3 (e), which deals with the protection of confidential information. As with material withheld under article 68, paragraph 5, this sub-rule requires the Prosecutor to disclose previously undisclosed material to the accused if he or she wishes to introduce it as evidence. Article 54, paragraph 3 (e), reflects the approach taken to confidential information in rule 70 (B) of the ICTY Rules. Sub-rules 70 (C) to (F) of the ICTY Rules are linked to rule 70 (B), but are not reflected in article 54, paragraph 3 (e).

Sub-rule (g) reflects much of the substance of rule 70 (C).

Sub-rule (h) closely follows rule 70 (D).

Sub-rule (i) closely follows rule 70 (E).

Sub-rule (j) draws upon rule 70 (F).”

presumably meaning that confidentiality agreements and the ensuing inadmissibility of the evidence are to be observed by any Chamber of the Court, also in other cases. In sub-rule (5), which relates to confidentiality agreements of the defence, the wording “a Chamber dealing with the matter” was chosen; a reason for this is not apparent.

The current wording of Art. 54 (3)(e) is the following:

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.

As previously mentioned, the confidentiality agreements of the Prosecutor with numerous international organizations in the situation of the DRC caused considerable debate. The Prosecutor had, as a matter of standard procedure, acquired large amounts of evidence, among which there were many documents containing exculpatory evidence. Since these agreements also forbade the Prosecutor to disclose these documents to the Trial Chamber, the latter was unable to exercise its functions under, among other provisions, Art. 67 (2) ICCSt. Finally, after a long see-saw regarding whether the Prosecutor would get the consent of the information providers to disclose the evidence or not, Trial Chamber I stayed the proceedings:

The Chamber's overall conclusions can be shortly described:

- i) The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial;*
- ii) The prosecution has incorrectly used Article 54(3) (e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence; and*
- iii) The Chamber has been prevented from exercising its jurisdiction under Articles 64(2), Article 64(3) (c) and Article 67(2), in that it is unable to determine whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial.*

Adapting the language of the Appeals Chamber, the consequence of the three factors set out in the preceding paragraph has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.

*In consequence a stay is imposed on these proceedings.*¹²⁰⁴

It may be noted that, while the stay of proceedings is grounded on the accused's right to a fair trial, the Chamber is particularly unsatisfied also with the fact that the relevant evidence was kept secret from itself as well.

The decision was upheld by the ICC Appeals Chamber,¹²⁰⁵ and has been analysed by legal scholarship extensively.¹²⁰⁶ It may, however, contribute to the discussion to take a short look at the drafting history of Art. 54 (3)(e).

Trial Chamber I understands Art. 54 (3)(e) in such a way that it refers to evidence which is *obtained* by the Prosecutor *solely* for the purposes of *generating new evidence* (so-called 'lead-' or 'springboard'-evidence).¹²⁰⁷ The Prosecutor, in turn, interpreted Art. 54 (3)(e) ICCSt to not refer to the *kind* of evidence, but to the *use* of it. Reading Art. 54 (3)(e) in conjunction with Art. 93 (8)(b)¹²⁰⁸ and Rule 82 (1), it held that oftentimes, at the moment of the reception of the evidence, the prosecution will not know exactly whether the material itself has evidentiary value or will only provide lead evidence. The Prosecutor was, according to his interpretation, thus free to receive any kind of material, but restricted regarding the use of it.¹²⁰⁹ The Appeals Chamber did apparently not want to follow the interpretation of the Trial Chamber that Art. 54 (3)(e) may only be invoked to obtain lead evidence, and resorted to the fundamental notion that the Chamber must have the opportunity to rule on the issue, and that this may not

¹²⁰⁴ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2008, paras. 92 et subs., paragraph numbers omitted.

¹²⁰⁵ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", Appeals Chamber, 21 October 2008.

¹²⁰⁶ See, e.g., *Ambos*, Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations; *Swoboda*, The ICC Disclosure Regime; *Kuschnik*, International Criminal Due Process in the Making: New Tendencies in the Law on Non-Disclosure in the Proceedings of the ICC; *Whiting*, Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case.

¹²⁰⁷ *Prosecutor v. Lubanga Dyilo*, 13 June 2008, note 1204 *supra*, par. 71 et subs.

¹²⁰⁸ "The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence."

¹²⁰⁹ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 OA 13, Prosecution's Document in Support of Appeal against Decision to Stay Proceedings, 24 July 2008, paras. 6 et subs.

be prevented by confidentiality agreements.¹²¹⁰ *Ambos*, like the prosecution, wants to differentiate between the confidentiality and the use of the evidence. At the same time, he holds that the information provider may not decide over the use of the information, but that Art. 54 (3)(e) makes clear that the *only* use which can be made of the evidence is to gather new evidence, because the interest of the information provider is not in the specific use of the material, but only in the confidentiality of it.¹²¹¹

As mentioned above,¹²¹² we find one predecessor in the 1998 PreCom Draft; there is, however, also one related provision in the Prep-Com Report of 1996.

Art. 51. Cooperation and Judicial Assistance

[...]

F. Confidentiality

[...]

The requested State may, when it deems it to be in its interest, transmit documents, papers, files or information to the Prosecutor on a confidential basis. The Prosecutor may then use them only for the purpose of collecting new evidence.

*The State may automatically or at the request of the Prosecutor subsequently authorize the publication of such documents, papers, files or information. They may then be used as evidence, provided that they are previously communicated to the accused.*¹²¹³

The wording of the 1998 PrepCom Draft was the following:

Art. 54. Investigation of alleged Crimes

[...]

4. The Prosecutor may

*[...](g) where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.*¹²¹⁴

¹²¹⁰ *Prosecutor v. Lubanga Dyilo*, 21 October 2008, note 1205 *supra*.

¹²¹¹ *Ambos*, Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations, p. 554.

¹²¹² 6.3.1.3 *supra*.

¹²¹³ 1996 PrepCom Report Vol. II, note 915 *supra*, p. 259.

¹²¹⁴ PrepCom Draft Art. 54 (4)(g) [option 2], p. 77.

Originally a similar provision was thus not contained in the powers of the Prosecutor, but rather related to state cooperation. Part of why this was changed may have had to do with the fact that confidentiality of information should not only refer to states, but other entities as well. We note immediately that both ‘predecessors’ of Art. 54 (3)(e) were more straightforward than the latter. Both clearly differentiate between the obtaining of the material and the use of it. Originally, it appears that rather a right of a state was granted to submit material to the Prosecutor on a confidential basis. This changed, in that now and in the 1998 draft the right of states to provide material on a confidential basis only is apparently taken for granted; and the Prosecutor, in turn, is conveyed the authority to decline disclosure. The 1998 draft contains the notion that the evidence *has already been obtained* by the Prosecutor. However, the interpretation difficulties we have today with Art. 54 (3)(e) are already apparent: the notion that the materials “are, or are intended to be, used solely for the purposes of generating new evidence” already suggests a differentiation according to the *kind* of material which was also performed by Trial Chamber I. The current wording, however, complicates the issue even more in that the assurance of confidentiality and the obtaining of the evidence happen all together (“that the Prosecutor *obtains*”); at the same time, the notion of the ‘use’ of the material was deleted. This shows, however, that apparently it was indeed the intention of the drafters to tie the question of confidentiality to the use of the evidence, i.e. that, as a matter of fact, the Prosecutor is only allowed to *receive* the material on a confidential basis *if* he is planning to use it as lead evidence only, and that only in exceptional cases it can be introduced in the trial, according to Rule 82. This is in line with the interpretation of Trial Chamber I. The consequences, however, are impressively shown by the course of the events in the *Lubanga* case. Taken seriously, this interpretation makes Art. 54 (3)(e) dysfunctional in its application; the practical arguments brought forward by the Prosecutor are certainly right. The only solution appears to be more or less along the lines of the decision of the Appeals Chamber: the Prosecutor must use Art. 54 (3)(e) cautiously, and at all times ensure that the confidentiality agreements do not cover the Chamber dealing with the matter, so that it can exercise its controlling functions, particularly as far as Art. 67 (2) is concerned.

In any case, the warning shot of Trial Chamber I did not go unheard; the providers of the confidential information were ultimately persuaded to consent to the disclosure of the material to the Chamber; and the Prosecutor has become more cautious.¹²¹⁵

¹²¹⁵ Compare *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Status Conference 7 October 2009, Transcript, ICC-01/05-01/08-T-14-ENG ET WT 07-10-2009, p. 21, l. 16 – p. 22, l. 1:

“PRESIDING JUDGE FULFORD: [...] Article 54(3)(e), an article with [sic] Judge Odio Benito and myself and Judge Blattmann will never forget. Now have all of the issues on Article 54(3)(e) now

6.6.5 Rule 73 RPE-ICC: Privileged communications and information

The ICC recognizes the necessity of protecting the confidentiality interests which form part of the relationships between clients and lawyers as well as other groups where communication can reasonably be expected to be confidential. This notion is already contained in the Rome Statute (Art. 69 (5) ICCSt), and recognized in most national jurisdictions; it has also been endorsed by the European Court of Human Rights.¹²¹⁶ At the Rome Conference, it was apparently impossible to reach a consensus as to the content and scope of privileged communications, which is why the issue was left to be discussed in the context of the Rules.¹²¹⁷

As previously mentioned,¹²¹⁸ Rule 73 was not covered by the discussions on disclosure, but rather in context with the trial proceedings. However, the privilege of certain communication has obvious repercussions on disclosure.

The genesis of Rule 73 can be visualised as follows:

been resolved? We are aware that there have been four reports provided to the Chamber, the last of which was on 12 November 2008, in which at paragraph 10 it was suggested that all of the relevant information providers had consented to lift the redactions on all the relevant material. Now, that therefore seems to make Article 54(3)(e) a non-issue, but I wish to make sure that that is truly the position.

MS. KNEUER: Your Honour, that reflects the situation correctly. All items were disclosed and no further items under Article 54(3)(e) were collected.

PRESIDING JUDGE FULFORD: That demonstrates that no two trials are the same, Ms. Kneuer.”

¹²¹⁶ *Campbell v. UK*, Application No. 13590/88, Judgment, 25 March 1992, par. 46: “It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its *S. v. Switzerland* judgment of 28 November 1991 the Court stressed the importance of a prisoner’s right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6 (art. 6), that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.”

¹²¹⁷ See *Piragoff*, Evidence, pp. 358 et seq.

¹²¹⁸ See 6.3.2.3.2 *supra*.

Australian Proposal, 26 January 1999	Discussion Paper 1 July 1999	Revised and Corrected Discussion Paper, 11 August 1999 / PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000 / Working Group Report, 27 June 2000 / Final Draft, 30 June 2000 / RPE-ICC
<p>Rule 102 Lawyer-client privilege</p> <p>All communications between lawyer and client</p> <p>shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:</p> <p>(i) The client consents to such disclosure; or</p> <p>(ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.</p>	<p>Rule 6.4 Privileges</p> <p>(a) Communications between a person and his or her legal counsel</p> <p>shall be regarded as privileged, and consequently not subject to disclosure, unless:</p> <p>(i) The person consents to such disclosure; or</p> <p>(ii) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure; or</p> <p>(iii) The Chamber is satisfied that the communication was not for the purpose of giving or receiving legal advice.</p> <p>(b) Having regard to rule 6.1 (d), the Court shall treat other communications as privileged</p> <p>under the same terms as subparagraphs (i) and (ii) of paragraph (a), if a Chamber of the Court decides that:</p> <p>(i) Such communications were made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;</p> <p>(ii) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and</p> <p>(iii) Recognition of the privilege would further the objectives of the Statute and the Rules of Procedure and Evidence.</p>	<p>Rule 6.4 Privileged communications and information</p> <p>(a) Without prejudice to paragraph 1 (b) of article 67, communications made in the context of the professional relationship between a person and his or her legal counsel</p> <p>shall be regarded as privileged, and consequently not subject to disclosure, unless:</p> <p>(i) The person consents in writing to such disclosure; or</p> <p>(ii) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.</p> <p>(b) Having regard to rule 6.1 (e), communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure,</p> <p>under the same terms as subparagraphs (i) and (ii) of paragraph (a), if a Chamber of the Court decides in respect of that class that:</p> <p>(i) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;</p> <p>(ii) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and</p> <p>(iii) Recognition of the privilege would further the objectives of the Statute and the Rules of Procedure and Evidence.</p> <p>In making a decision, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those</p>	<p>Rule 6.4 / Rule 73 Privileged communications and information</p> <p>1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel</p> <p>shall be regarded as privileged, and consequently not subject to disclosure, unless:</p> <p>(a) The person consents in writing to such disclosure; or</p> <p>(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.</p> <p>2. Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure,</p> <p>under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:</p> <p>(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;</p> <p>(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and</p> <p>(c) Recognition of the privilege would further the objectives of the Statute and the Rules.</p> <p>3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those</p>

		<p>related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.</p> <p>(c) The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past ICRC official or employee,</p> <p>any information, documents or other evidence which</p> <p>came into the possession of the International Committee of the Red Cross (ICRC)</p> <p>in the course, or as a consequence of, the performance by the</p> <p>ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:</p> <p>(i) After consultations undertaken pursuant to paragraph (e), the</p> <p>ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or</p> <p>(ii) Such information, documents or other evidence is contained in public statements and documents of the ICRC.</p> <p>(d) Nothing in paragraph (c) shall affect the admissibility of the same evidence obtained from a source other than the ICRC and its officials or employees when such evidence has also been acquired by this source independently of the ICRC and its officials or employees.</p> <p>(e) If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and the ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than the ICRC, the interests of justice and of victims, and the performance of the Court's and the ICRC's functions.</p>	<p>related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.</p> <p>4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of</p> <p>in the course, or as a consequence, of the performance by</p> <p>ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:</p> <p>(a) After consultations undertaken pursuant to sub-rule 6,</p> <p>ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or</p> <p>(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.</p> <p>5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than</p> <p>ICRC and its officials or employees when such evidence has also been acquired by this source independently of</p> <p>ICRC and its officials or employees.</p> <p>6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and</p> <p>ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than</p> <p>ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.</p>
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The history of the drafting process of Rule 73 has been described in detail elsewhere.¹²¹⁹ Summing it up, we note that Rule 73 was heavily amended during the drafting process. The Australian draft was worded verbatim according to Rule 97 RPE-ICTY; however, the draft already contained a *nota bene* which envisaged widening the provision as to contain other groups apart from lawyers.¹²²⁰ The text of the Australian proposal and thus that of Rule 97 RPE-ICTY, has made its way into the sub-rule (1), with the sole amendments that the term “lawyer” was replaced by the broader term “legal counsel”¹²²¹ and that the consent to disclosure must be in writing. It appears, however, that it was contemplated to narrow the provision, by including a phrase that would limit the scope of applicability to the actual purpose of legal advice, which could be controlled by the Chamber, by including sub-rule (iii) in the Discussion Paper of 1 July 1999.¹²²² With the Revised and Corrected Discussion Paper of 11 August, this limitation was given up again and an explicit reference to Art. 67 (1)(b) ICCSt included, to express that the right of the accused to freely communicate with his counsel not be infringed upon.¹²²³

The bulk of the amendments obviously relates to the inclusion of relationships apart from that of a person and his legal counsel; whereas at first, these relations were described in the abstract only, eventually examples of certain professional groups, such as doctors and clerical persons were included.¹²²⁴

Sub-rules (4) and (5) refer specifically to information obtained by the International Committee of the Red Cross (ICRC), which required a special role in order to protect its employees and its role as an actor in the field in international humanitarian law issues. The initiative came from the ICRC itself, which took part in the PrepCom sessions; the compromise reached foresees that, in principle, information originating from the ICRC is privileged, unless the Court determines that the material is “of great importance for a

¹²¹⁹ Piragoff, Evidence, pp. 359 et subs.

¹²²⁰ “(N.B. This is the text of rule 97 of the ICTY Rules. It is reproduced to provide a starting point for discussions.

Article 69, paragraph 5, provides for privileges on confidentiality to be addressed in the Rules. There was debate in the Preparatory Committee and the Diplomatic Conference about which relationships should be afforded such a privilege. ICTY rule 97 deals only with the lawyer-client relationship. Strong support was expressed for other relationships to be afforded a privileged status, such as those between medical practitioners and patients and those of a religious nature. Consideration also needs to be given to the psychiatric counsellor-patient relationship.)”, Australian Proposal, note 996 *supra*, p. 51.

¹²²¹ See Piragoff, Evidence, p. 359.

¹²²² See also Piragoff, Evidence, *ibid*.

¹²²³ Piragoff, Evidence, pp. 360 et subs.

¹²²⁴ Piragoff, Evidence, *ibid*.

particular case” (Rule 73 (6)). In this case, the Court must consult with the ICRC in order to reach a compromise. If no compromise is reached, the Court has the right to order disclosure, unless the ICRC objects in writing or the information is contained in public statements or documents of the ICRC (Rule 73 (4)).¹²²⁵

In the judicial practice of the ICC, Rule 73 has apparently not gained importance up to now. The only time that it actually appeared in a decision of an ICC Chamber, appears to have been the already mentioned issue of pre-assessment interviews,¹²²⁶ which according to the Chamber and against the argument of the Prosecutor, do not fall under Rule 73 (2), as the relationship between the Prosecutor and a potential witness is not one in which the potential witness can expect that the communication to remain confidential, in fact, quite the opposite is the case.¹²²⁷ Indeed, this line of argument of the Prosecutor is entirely absurd.

6.7 Continuing requirement to disclose and Rule 84

As we have seen in the chapter on the Ad Hoc Tribunals, disclosure obligations have usually been regarded as ongoing throughout different phases of the proceedings; in fact, Rule 67 (D) RPE-ICTY expressly stated this fact from the beginning. During the drafting process of the ICC-RPE, all drafts contained an according provision; however, the draft Rule was deleted after the Mont Tremblant meeting:

¹²²⁵ See *Piragoff*, Evidence, pp. 365 et subs., 368.

¹²²⁶ 6.4.1 *supra*.

¹²²⁷ *Prosecutor v. Bemba*, ICC Case No. 01-05/01-08, Public redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the Consequences of non-disclosure"(ICC-01/05-01/08-750-Conf), Trial Chamber III, 9 April 2010, par. 36

Australian Proposal, 26 January 1999	PrepCom First Session Summary, Annex 1, 2 March 1999	PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000 / Final Draft
<p>Rule 73 Continuing requirement to disclose</p> <p>If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Statute or the Rules, that party shall promptly notify the other party and the Chamber dealing with the matter at the time of the existence of the additional evidence or material.</p>	<p>Rule 5.21. Continuing requirement to disclose</p> <p>If either party intends to present additional evidence or material, whether previously or newly discovered, which should have been disclosed earlier pursuant to the Statute or the Rules, that party shall promptly notify the other party, and the Chamber dealing with the matter, of the existence of the additional evidence or material.</p>	<p>Rule 5.34 Continuing requirements to disclose</p> <p>If either party intends to present additional evidence or material, whether previously or newly discovered, which should have been disclosed earlier pursuant to the Statute or the Rules on Procedure and Evidence, that party shall promptly notify the other party, and the Chamber of the Court dealing with the matter, of the existence of the additional evidence or material.</p>	<p>Rule 5.34 Continuing requirements to disclose</p> <p>If either party intends to present additional evidence or material, whether previously or newly discovered, which should have been disclosed earlier pursuant to the Statute or the Rules of Procedure and Evidence, that party shall promptly notify the other party, and the Chamber of the Court dealing with the matter, of the existence of the additional evidence or material.</p>	-

As usual, the Australian proposal was drafted according to the ICTY precedent (Rule 67 (D) RPE-ICTY).¹²²⁸ During the drafting process, the draft rule was amended, in that it was clarified that not only evidence which would be discovered later, but simply that *all* evidence which the parties intended to rely on would have to be disclosed, regardless of the time of discovery. On the other hand, the notion that only such evidence would have to be disclosed which the parties actually intended to present, meant a strong limitation of the scope of the rule – in fact, exculpatory evidence which the Prosecutor would not intend to present, would not have had to be disclosed according to *that* rule, notwithstanding Art. 67 (2). Additionally, the provision did not *stricto sensu* cover disclosure, but only an obligation to *inform* the other party of the *existence* of the other evidence or material (even though, as we have seen, the ICTY jurisprudence concludes an actual disclosure obligation from this wording).¹²²⁹

From 1 July 1999, however, the respective drafts concerning the trial phase also contained the predecessor of Rule 84:

¹²²⁸ See footnote in the Australian proposal: “N.B. This rule closely follows rule 67 (D) of the ICTY Rules.”

¹²²⁹ See section 5.2.3.1 *supra*.

Australian Proposal, 26 January 1999	Discussion Paper 1 July 1999	Revised Discussion Paper, 6 August 1999 until final RPE-ICC
-	<p>Rule 6.20 Disclosure and additional evidence</p> <p>In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2),</p> <p>make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and</p> <p>ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.</p>	<p>Rule 6.20/84 Disclosure and additional evidence (for trial)</p> <p>In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5,</p> <p>make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to</p> <p>ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.</p>

As we see, with the exception of the explicit subjection to Art. 68 (5) ICCSt and the addition of the words “for trial” in the heading, which came with the Working Group Report of 27 June 2000, Rule 84 remained unaltered. The draft rule concerning the continuing requirement to disclose and the predecessor of Rule 84 were thus contained in the respective drafts simultaneously for quite some time, albeit in different chapters (“investigation and prosecution” vs. “the trial”). The substantial content of both provisions is limited, as they appear to be mostly declaratory. At the fifth session of the PrepCom, Rule 5.34 was deleted, as it was held that its substance “was implicit” in Rule 84.¹²³⁰

In any case, the ICC Chambers, rightly and without much ado, came to the same conclusion, i.e. that disclosure obligations within the ICC framework are continuing.¹²³¹

6.8 The Role of the Chamber

As was mentioned many times in the course of this thesis, the ever growing influence of the respective courts within the disclosure proceedings both on the national as well as

¹²³⁰ *Brady*, Disclosure of Evidence, p. 422.

¹²³¹ See, e.g., *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04 – 01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", Appeals Chamber, 13 October 2006, par. 55; *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04 – 01/06, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, Trial Chamber I, 9 November 2007, par. 28; *Prosecutor v. Bemba*, ICC Case No. 01/05 – 01/08, Public redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the Consequences of non-disclosure"(ICC-01/05-01/08-750-Conf), Trial Chamber III, 9 April 2010, par. 34.

the international level appears to be a key feature of the modern concept of disclosure of evidence as a whole. We have already hinted to the fact that the French delegation at the PrepCom intended to implement a sort of dossier approach *en miniature*.¹²³² While this, as we have already seen, did not work out completely, the role of the Chamber in the disclosure proceedings at the ICC is stronger than in any other international criminal court or tribunal.

While almost all of the technical disclosure provisions we have looked at until now are applicable both to pre-confirmation and pre-trial disclosure, the roles of the respective Chambers vary according to the phase of the proceedings. As previously said, the French proposals put particular emphasis on the preparation of the confirmation hearing and the disclosure process before the confirmation. This has resulted in a very strong involvement of the Pre-Trial Chamber in the disclosure process, and, most particularly, a high level of information of the Pre-Trial Chamber regarding the material which is disclosed between the parties; this notion is also contained in the Rules, particularly Rule 121. As concerns disclosure in preparation of the trial proceedings and during trial, the involvement of the Trial Chamber is less apparent from the Rules; however, the ICC Chambers have already produced a considerable amount of jurisprudence in this regard. This said, it appears sensible to analyse the roles of the Pre-Trial and Trial Chambers separately.

6.8.1 Pre-confirmation disclosure

The concept and purpose of the confirmation proceedings under the Rome Statute is far from clear. This is already shown by the first proposals from Australia and France, which, as we have seen, had entirely different concepts regarding when the bulk of disclosure should take place, and what evidence the Pre-Trial Chamber should get to see – the French position was that most of the disclosable evidence would have to be disclosed and communicated to the Chamber before the confirmation hearing, whereas the Australian proposal initially did not even see a need to regulate pre-confirmation disclosure beyond the content of Art. 61 (3) ICCSt. In this regard, it should be remembered that one of the main purposes, if not *the* main purpose for the creation of the confirmation hearing and the Pre-Trial Chamber as a procedural institution of the ICC was the control of the Prosecutor's *proprio motu* investigation and prosecution

¹²³² See 6.3.2.2 *supra*.

powers. As poignantly explained by *David Scheffer*, head of the U.S. delegation at the Rome conference¹²³³:

Knowing that the proprio motu prosecutor had become a fait accompli in the negotiations, we knew that we needed to create an oversight mechanism to ensure that the Prosecutor would have to act responsibly and within well-defined limits. The US position morphed into strong support for a Pre-Trial Chamber that would regulate the Prosecutor's efforts [...]. In Rome, US negotiators seized every opportunity to strengthen the PTC's oversight powers of the Prosecutor. The PTC essentially would be the brake on Prosecutor's accelerator. [...]

*The PTC was never intended to be the trial chamber, where all relevant evidence is examined. The PTC has a limited but vital purpose that demands professional due diligence by the Prosecutor. The PTC stands primarily as a defendant-friendly chamber and a watchdog for compliance with due process requirements. The best-case scenario would have the Prosecutor using his or her discretion cautiously and responsibly and within the parameters set by the PTC, which itself acts within its statutory boundaries.*¹²³⁴

This is in line with some of the provisions contained in the Statute: the charges must be confirmed as soon as there are “substantial grounds to believe” that the suspect has committed the crime with which he is charged (Art. 67 (7) ICCSt); at the confirmation hearing, the Prosecutor (and accordingly also the Pre-Trial Chamber) “may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial” (Art. 67 (5) ICCSt). Also, whereas the Trial Chamber, according to Art. 64 (6)(b) and (d), may call witnesses and order the production of evidence, a parallel empowerment of the Pre-Trial Chamber is missing in Articles 57 and 61. The fact that the Pre-Trial Chamber according to Art. 61 (7)(c)(i) ICCSt may “request the Prosecutor to consider providing further evidence” speaks *e contrario* against any such powers of the Pre-Trial Chamber. Notwithstanding, the Statute’s framework is not entirely unequivocal – the accused can, according to Art. 61 (6), challenge the incriminating evidence, present evidence of his own, raise grounds for excluding criminal responsibility etc.; furthermore, Art. 69 (3) ICCSt provides that “[t]he Court

¹²³³ Who, according to *Haq*, ICC and its Power of Prosecution, coined the expression of an unchecked ICC Prosecutor being comparable to a “Master of the Universe”.

¹²³⁴ *Scheffer*, A review of the experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court regarding the disclosure of evidence, pp. 152 et seq. See also *Ambos/Miller*, Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective, pp. 340 et seq.: “Indeed, the primary function of the confirmation procedure is to *check* and *balance* the Prosecutor.”, emphasis in original.

shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”, and thus is apparently not restricted to the Trial Chamber. Additionally, the overall procedural architecture in this regard was significantly altered by the Rules. As noted by *Helen Brady* concerning the discussions during the PrepCom:

Mixed views were expressed [...] at the Preparatory commission, mainly arising from different conceptions of the nature of the confirmation proceedings. Some viewed the confirmation hearing as a relatively short procedure – a “filter” to ensure that only cases reaching a certain standard or significance go to trial – namely, those where the Prosecutor put forward sufficient evidence to establish substantial grounds to believe that the persons committed the crime or crimes charged.[...] The opposing camp saw the confirmation hearing as a more lengthy procedure, pointing to the fact that the person could challenge the evidence presented by the Prosecutor and could present his own evidence. They also noted that article 61, paragraph 7, gave the Pre-Trial Chamber significant powers to request the Prosecutor to conduct further investigations or to amend the charges¹²³⁵.

These difficulties, as we will see, have also made their way into the jurisprudence of the Court, as evidenced by different approaches of different Chambers. In any case, it can be noted that all of the Pre-Trial Chambers took their task in confirming the charges, i.e. submitting their cases to trial quite seriously – the confirmation hearings took between four and 22 days; the confirmation decisions range between 103 and 226 pages. It is doubtful whether this level of scrutiny is desirable – and whether the ICC can uphold it with a growing caseload.

At any rate, the central norm for the involvement of the Chamber regarding pre-confirmation disclosure is Art. 61 (3) in conjunction with Rule 121. As was previously said, Rule 121 is strongly based on the two French proposals of 25 February 1999; and has indeed increased the significance of the confirmation hearing. The following synopsis shows, for a complete reference, the drafting process of Rule 121 as a whole; in our analysis, we will limit ourselves to the role of the Chamber in the disclosure process, particularly as regards the access of the Chamber to evidence before the confirmation hearing.¹²³⁶

¹²³⁵ *Brady*, Disclosure of Evidence, pp. 422 et seq., footnotes omitted.

¹²³⁶ As far as Rule 121 makes reference to victims participating in the proceedings and their access to the record, see 6.9.1 *infra*.

2 nd French Proposal, 12 February 1999	Discussion Paper 1, 25 February 1999 / PrepCom First Session Summary, Annex 1, 2 March 1999	Revised Discussion Paper, 5 August 1999 / PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May 2000	Discussion Paper, 23 June 2000/Working Group Report, 27 June 2000/Final Draft, 30 June 2000/RPE-ICC
<p>Rule 61. Confirmation proceedings (in the presence of the person)</p> <p>Rule 61.1. Preparation of the hearing on confirmation of charges</p> <p>(a) A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, upon arriving at the Court.</p> <p>Upon his or her initial appearance before the Pre-Trial Chamber and throughout the course of the proceedings,</p> <p>the person shall enjoy the rights set forth in article 67.</p> <p>In accordance with article 60, paragraph 1, the President of the Pre-Trial Chamber shall satisfy himself or herself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under the Statute.</p> <p>At the end of this first appearance,</p> <p>the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges,</p> <p>in accordance with article 61, paragraph 1.</p> <p>It shall ensure that this date, and any postponements under paragraph (d) of this rule, are adequately publicized. Between this first appearance and the hearing on confirmation of charges, evidence shall be exchanged in accordance with rules 58 (1) to 58 (3).</p> <p>[Rule 58.1, 1st French Proposal 12 February 1999</p> <p>In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued.</p>	<p>Rule 5.9</p> <p>(a) A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court.</p> <p>Subject to the provisions of Article 60 and 61,</p> <p>the person shall enjoy the rights set forth in article 67.</p> <p>At this first appearance,</p> <p>the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges.</p> <p>It shall ensure that this date, and any postponements under paragraph (d) of this rule, are made public. Between this first appearance and the confirmation hearing, evidence shall be disclosed in accordance with rules x to xx.</p> <p>[Rule 5.11 Disclosure for the purposes of the confirmation hearing, Discussion Paper 2, 25 February 1999</p> <p>In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued.</p>	<p>Rule 5.18 Proceedings before the confirmation hearing</p> <p>(a) A person subject to a warrant of arrest or a summons to appear under article 58, shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court.</p> <p>Subject to the provisions of articles 60 and 61,</p> <p>the person shall enjoy the rights set forth in article 67.</p> <p>At this first appearance,</p> <p>the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges.</p> <p>It shall ensure that this date, and any postponements under paragraph (e) of this rule, are made public.</p> <p>(b) In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has</p>	<p>Rule 5.18 Proceedings before the confirmation hearing</p> <p>1. A person subject to a warrant of arrest or a summons to appear under article 58, shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court.</p> <p>Subject to the provisions of articles 60 and 61,</p> <p>the person shall enjoy the rights set forth in article 67.</p> <p>At this first appearance,</p> <p>the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges.</p> <p>It shall ensure that this date, and any postponements under sub-rule 7, are made public.</p> <p>2. In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has</p>	<p>Rule 5.18 / Rule 121 Proceedings before the confirmation hearing</p> <p>1. A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court.</p> <p>Subject to the provisions of articles 60 and 61,</p> <p>the person shall enjoy the rights set forth in article 67.</p> <p>At this first appearance,</p> <p>the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges.</p> <p>It shall ensure that this date, and any postponements under sub-rule 7, are made public.</p> <p>2. In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has</p>

<p>This person shall enjoy the rights provided for in article 67. In particular, during disclosure the person concerned may be assisted or represented by the counsel of his or her choice or by counsel assigned to him or her.</p> <p>The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case a pre-trial judge</p> <p>shall be appointed to organize such status conferences, which shall be held at least once every three months, and as the need arises within these intervals, at the request of the Prosecutor or the person concerned, or of the judge of his own motion.]</p> <p>[Rule 58.2, 1st French Proposal, 12 February 1999 All evidence disclosed between the Prosecutor and the person concerned</p> <p>shall be communicated to the Pre-Trial Chamber.]</p> <p>Rule 61.1 [continued] (b) The Prosecutor shall</p> <p>make a list of the evidence which he or she has gathered and shall</p> <p>provide it to the Pre-Trial Chamber no later than 30 days before the date of the hearing on confirmation of charges.</p> <p>A precise description of the charges on which he or she intends to seek trial shall be attached to this list.</p> <p>The Pre-Trial Chamber, by virtue of article 61, paragraph 3, shall take the necessary steps to notify the person of the charges on which the Prosecutor intends to bring him or her to trial, and to transmit to him or her the list of the evidence gathered by the Prosecutor. This notification and this transmittal shall take place no later than 21 days before the date of the hearing on confirmation of charges.</p> <p>In accordance with article 61, paragraph 4, the Prosecutor may amend the charges or bring new</p>	<p>During disclosure the person concerned may be assisted or represented by the counsel of his or her choice or by counsel assigned to him or her.</p> <p>For that purpose, the Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a pre-trial judge</p> <p>shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person concerned.]</p> <p>[Rule 5.12 Communication of the disclosed evidence to the Pre-Trial Chamber, Discussion Paper 2, 25 February 1999 All evidence disclosed between the Prosecutor and the person concerned for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.]</p> <p>Rule 5.9 [continued] (b) The Prosecutor shall</p> <p>provide to the Pre-Trial Chamber and to the person no later than 30 days before the date of the confirmation hearing</p> <p>a detailed description of the charges together with a list of the evidence which he or she intends to present at that hearing.</p> <p>Where the Prosecutor intends to amend the charges pursuant to article</p>	<p>been issued.</p> <p>During disclosure the person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her.</p> <p>For that purpose, the Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a pre-trial judge</p> <p>shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person concerned.</p> <p>All evidence disclosed between the Prosecutor and the person concerned for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.</p> <p>(c) The Prosecutor shall</p> <p>provide to the Pre-Trial Chamber and to the person no later than 30 days before the date of the confirmation hearing,</p> <p>a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.</p> <p>Where the Prosecutor intends to amend the charges pursuant to article</p>	<p>been issued.</p> <p>During disclosure: (a) The person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her; (b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person;</p> <p>(c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.</p> <p>3. The Prosecutor shall</p> <p>provide to the Pre-Trial Chamber and to the person, no later than 30 days before the date of the confirmation hearing,</p> <p>a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.</p> <p>4. Where the Prosecutor intends to amend the charges pursuant to article</p>	<p>been issued.</p> <p>During disclosure: (a) The person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her; (b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person;</p> <p>(c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.</p> <p>3. The Prosecutor shall</p> <p>provide to the Pre-Trial Chamber and to the person, no later than 30 days before the date of the confirmation hearing,</p> <p>a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.</p> <p>4. Where the Prosecutor intends to amend the charges pursuant to article</p>
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<p>evidence, but such amendments and new evidence must always be brought to the knowledge of the person and transmitted to the Pre-Trial Chamber no later than two weeks before the date of the hearing.</p> <p>(c) The person shall also make a list of the evidence which he or she has gathered and shall provide it to the Pre-Trial Chamber no later than two weeks before the date of the hearing on confirmation of charges. The list shall be transmitted to the Prosecutor no later than a week before the hearing.</p> <p>The two-week time-limit set in the preceding paragraph shall be reduced to one week if the Prosecutor amends the charges or brings new evidence under paragraph (b) of this rule. The transmittal provided for in the preceding paragraph shall then take place no later than the day before the hearing.</p> <p>(d) The Prosecutor and the person may ask the Pre-Trial Chamber to postpone the date of the hearing on confirmation of charges.</p> <p>The Pre-Trial Chamber may also, of its own motion, decide to postpone the hearing. The other time-limits set in paragraphs (b) and (c) of this rule may not, however, be changed.</p> <p>The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time-limit has expired.</p> <p>Moreover, when notification under paragraphs (b) and (c) of this rule is given after the time-limits set in these rules have expired, the date of the hearing shall be automatically deferred by</p>	<p>61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing.</p> <p>Where the Prosecutor intends to present new evidence at the hearing he or she shall provide the Pre-Trial chamber and the person with a list of that evidence.</p> <p>(c) If the person intends to present evidence under article 61, paragraph 6, the person shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay.</p> <p>The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.</p> <p>(d) The Prosecutor and the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing.</p> <p>The Pre-Trial Chamber may also, of its own motion, decide to postpone the hearing.</p> <p>The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time-limit, or any extension thereof, has expired.</p>	<p>61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing.</p> <p>Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence.</p> <p>(d) If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay.</p> <p>The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.</p> <p>(e) The Prosecutor or the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing.</p> <p>The Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing.</p> <p>The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired.</p>	<p>61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing.</p> <p>5. Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence.</p> <p>6. If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay.</p> <p>The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.</p> <p>7. The Prosecutor or the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing.</p> <p>The Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing.</p> <p>8. The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired.</p>	<p>61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing.</p> <p>5. Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence no later than 15 days before the date of the hearing.</p> <p>6. If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay.</p> <p>The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.</p> <p>7. The Prosecutor or the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing.</p> <p>The Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing.</p> <p>8. The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired.</p>
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<p>a month.</p> <p>(e) The Prosecutor or the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and of law,</p> <p>no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.</p> <p>Such submissions may concern, inter alia, issues related to the jurisdiction of the Court or the admissibility of the case, as well as the application of the grounds for excluding criminal responsibility set forth in article 31, paragraph 1.</p> <p>(f) The Registry shall put together the</p> <p>record of the proceedings before the Pre-Trial Chamber.</p> <p>This record shall consist of all documents transmitted to the Pre-Trial Chamber pursuant to paragraphs (a) to (e) of this rule.</p> <p>It may be consulted by the Prosecutor and by the person.</p> <p>(g) Victims and their legal representatives, who shall have access to the proceedings by virtue of article 68 of the Statute and in accordance with the conditions laid down in rules (x) to (xx), shall be notified of the date of the hearing on confirmation of charges and of any postponements. They may consult the record of the proceedings put together in accordance with paragraph (f) of this rule. They may lodge written submissions with the Pre-Trial Chamber no later than</p> <p>two weeks before the beginning of the hearing. Such submissions shall be added to the record of the proceedings and transmitted to the Prosecutor and the person. They may also ask to intervene during the hearing, by addressing a written request to that</p>	<p>(e) The Prosecutor or the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and of law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1,</p> <p>no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.</p> <p>(f) The Registry shall create and maintain a</p> <p>record of the proceedings before the Pre-Trial Chamber,</p> <p>including all documents transmitted to the Pre-Trial Chamber pursuant to this Rule.</p> <p>The record may be consulted by the Prosecutor and by the person.</p> <p>(g) Victims and their legal representatives, who shall have access to the proceedings by virtue of article 68 of the Statute and in accordance with the conditions laid down in rules (x) to (xx), shall be notified of the date of the confirmation hearing and any postponements thereof. They may consult the record of the proceedings put together in accordance with paragraph (f) of this Rule. They may lodge written submissions with the Pre-Trial Chamber no later than</p> <p>15 days before the date of the hearing.</p>	<p>(f) The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1,</p> <p>no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.</p> <p>(g) The Registry shall create and maintain a</p> <p>record of the proceedings before the Pre-Trial Chamber,</p> <p>including all documents transmitted to the Chamber pursuant to this rule.</p> <p>The record may be consulted by the Prosecutor and by the person.</p> <p>(h) Victims and their legal representatives, who have been given access to the proceedings by virtue of article 68 and in accordance with the conditions laid down in rules X to XX, shall be notified of the date of the confirmation hearing and of any postponement thereof. They may consult the record of the proceedings put together in accordance with paragraph (g) of this rule. They may lodge written submissions with the Pre-Trial Chamber no later than</p> <p>15 days before the date of the hearing.</p>	<p>9. The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1,</p> <p>no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.</p> <p>10. The Registry shall create and maintain a</p> <p>record of the proceedings before the Pre-Trial Chamber,</p> <p>including all documents transmitted to the Chamber pursuant to this rule.</p> <p>The record may be consulted by the Prosecutor and by the person.</p> <p>They may consult the record of the proceedings put together in accordance with paragraph (g) of this rule. They may lodge written submissions with the Pre-Trial Chamber no later than</p> <p>15 days before the date of the hearing.</p>	<p>9. The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1,</p> <p>no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.</p> <p>10. The Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber,</p> <p>including all documents transmitted to the Chamber pursuant to this rule.</p> <p>Subject to any restrictions concerning confidentiality and the protection of national security information,</p> <p>the record may be consulted by the Prosecutor, the person and victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.</p>
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<p>effect to the Pre-Trial Chamber no later than two weeks before the date of the hearing.</p> <p>The Pre-Trial Chamber shall rule on the request after receiving the observations of the Prosecutor and the person.</p> <p>(h) States wishing to challenge the jurisdiction of the Court or the admissibility of the case before the Pre-Trial Chamber at the time of the hearing on confirmation of charges shall make a written request to that effect no later than 30 days before the date of the hearing. States may request the Pre-Trial Chamber to postpone the date of the hearing, in accordance with the conditions laid down in paragraph (d) of this rule. They shall lodge their written submissions with the Registry no later than two weeks before the hearing.</p> <p>Such submissions shall be joined to the record of the proceedings and transmitted to the Prosecutor, the person and the victims or their legal representatives, in accordance with the conditions laid down in rules (x) to (xx).</p>	<p>The Pre-Trial Chamber shall rule on the request after receiving the observations of the Prosecutor and the person.</p> <p>They may also ask to intervene during the hearing, by addressing a written request to that effect to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall rule on the request after receiving the observations of the Prosecutor and the person.</p> <p>(h) States wishing to challenge the jurisdiction of the Court or the admissibility of the case before the Pre-Trial Chamber at the time of the confirmation hearing shall make a written request to that effect no later than 30 days before the date of the hearing. States may request the Pre-Trial Chamber to postpone the date of the hearing, in accordance with the conditions laid down in paragraph (d) of this rule. They shall lodge their written submissions with the Registry no later than 15 days before the hearing.</p> <p>Such submissions shall be joined to the record of the proceedings and transmitted to the Prosecutor, the person and the victims or their legal representatives, in accordance with the conditions laid down in rules (x) to (xx).</p>	<p>They may also ask to intervene during the hearing, by addressing a request to that effect to the Pre-Trial Chamber no later than 15 days before the hearing. The Pre-Trial Chamber shall rule on the request after receiving the observations of the Prosecutor and the person.</p> <p>(i) States wishing to challenge the jurisdiction of the Court or the admissibility of the case before the Pre-Trial Chamber at the time of the confirmation hearing shall make a request to that effect no later than 30 days before the date of the hearing. States may request the Pre-Trial Chamber to postpone the date of the hearing.</p> <p>They shall lodge their written submissions with the Registry no later than 15 days before the date of the hearing.</p> <p>Such submissions shall be joined to the record of the proceedings and be transmitted to the Prosecutor, the person and the victims or their legal representatives, in accordance with rules X to XX.</p>	<p>They may also ask to intervene during the hearing, by addressing a request to that effect to the Pre-Trial Chamber no later than 15 days before the hearing. The Pre-Trial Chamber shall rule on the request after receiving the observations of the Prosecutor and the person.</p>	
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We see that quite a few of the notions contained in the original French proposals, at first contained in different draft provisions, merged into one draft Rule with the revised discussion paper of 5 August 1999, and finally ended up in the Rules. As pointed out above,¹²³⁷ the French proposals contained a ‘down-sized’ dossier approach, with disclosure taking place *inter partes*, albeit *via* the Chamber (which may already be seen as paradox). The Chamber would accordingly have acted like a ‘hub’ for disclosure, receiving *all* evidence *disclosed* between the parties (Rule 58.2 of the first French

¹²³⁷ 6.3.2.2 *supra*.

proposal), and a *list of all* evidence *gathered* by the parties (Rule 61.1 (b) and (c) of the second French proposal). Furthermore, the French proposals envisaged a “record of the proceedings” which would have consisted of all documents transmitted to the Pre-Trial Chamber according to draft Rule 61.1, and hence all evidence disclosed between the parties – the Rome Statute envisages the creation of a record of the proceedings as an obligatory document only for the Trial Chamber (Art. 64 (10) ICCSt).

In a modified way, all three of these central elements were finally included in the Rules. The communication of evidence disclosed between the parties to the Pre-Trial Chamber, was, somewhat surprisingly, agreed on between the negotiators at an early stage; we learn from the synopsis that it was in fact contained in discussion paper 1 already, which was predominantly based on the Australian proposal rather than on the French one. The delegates apparently saw the advantages for better trial management (or ‘management of the confirmation proceedings’, for that matter) if the Chamber was informed of the evidence beforehand.¹²³⁸ A central point in this regard appears to have been the very fact that, especially by the negotiators with an Anglo-American legal background, the confirmation of the charges was seen as a swift procedural step, in which there would be no decision on guilt or innocence of the accused and thus possible bias of the Pre-Trial Chamber because of their previous knowledge of the evidence was not seen as much of a problem.¹²³⁹ Furthermore, the envisaged lists of evidence of the parties are now contained in Rule 121 (3) and (6). Third, the record of the proceedings comprising all evidence communicated to the Pre-Trial Chamber is now regulated in Rule 121 (10).

However, all three elements, i.e. the communication of evidence to the Chamber, the lists of evidence and the record of the proceedings, were altered.

First of all, the lists of evidence now do not comprise *all* of the evidence gathered by the parties, but only the evidence on which they intend to rely (sub-rules (3) and (6)). Furthermore, Rule 121 (6) makes clear that the accused is only obliged to provide a list of evidence *if* he in fact intends to present evidence, as otherwise his rights to silence, and quite possibly, his privilege against self-incrimination, might have been infringed.

As regards the evidence which must be communicated to the Chamber, as we have seen, the French draft envisaged that “all evidence disclosed between the Prosecutor and the person concerned shall be communicated to the Pre-Trial Chamber” (draft Rule 58.2 first French proposal). However, already with discussion paper 2 (25 February 1999),

¹²³⁸ *Brady*, Disclosure of Evidence, p. 424; *Brady*, Setting the Record Straight: A Short Note on Disclosure and 'the Record of the Proceedings', p. 267.

¹²³⁹ *Ibid.*

this wording was revised and now read “all evidence disclosed between the Prosecutor and the person concerned *for the purposes of the confirmation hearing* shall be communicated to the Pre-Trial Chamber”. This was obviously meant to narrow the scope of the provision. We have come across the phrase “for the purposes of the confirmation hearing” two times already.¹²⁴⁰ Once again, its content is unclear. As mentioned at the beginning of this section, taking the wording of Rule 121 (2)(c) literally, the “purpose” of the confirmation hearing as such is in dispute. Had the drafters meant to limit the scope of Rule 121 (2)(c) to evidence on which the parties intend to rely at the confirmation hearing, they could have easily said so, as they did concerning the lists of evidence. Obviously, there may be cases in which parties do not wish to rely on evidence which has been disclosed to them at an early stage; this may also be the case with exculpatory evidence. The Chamber would not get to see this evidence, if Rule 121 (2)(c) is understood to encompass only such evidence on which the parties intend to rely. Once again, it can only be concluded that “all evidence for the purposes of the confirmation hearing” is certainly narrower than “all evidence”, but probably wider than “evidence on which the parties intend to rely”. In fact, this may well be one of those provisions which were left “constructively ambiguous”, to be clarified and determined by the jurisprudence of the Court.¹²⁴¹ The latter, however, as we will see instantly, has not presented a uniform approach to the matter.

Thirdly, the concept of the record of the proceedings might also have changed. Whereas the French proposal had envisaged that the record of the proceedings *consist of* all documents transmitted to the Pre-Trial Chamber (i.e. all the evidence as well as submissions from the parties, Rule 61.1 (f) of the draft), this was amended to provide that the record should *include* all of those documents (Rule 5.9 (f)). This amendment may have repercussions concerning the question who should have access to the record of the proceedings. According to the French proposal and all following drafts, as well as the RPE-ICTY, this should have been the defence and the Prosecution as well as the victims. The Pre-Trial Chamber itself, however, is not enumerated in Rule 121 (10). In the case that the record *consists of* all documents communicated to the Chamber, one would logically have to assume that the Chamber must have access to the entire record as well, since there is no difference between the record and what the Chamber already has. If the record, in turn, only *includes* the disclosed material, it may theoretically contain material not previously communicated to the Chamber. It is quite possible that this line of argument is overly captious. Nevertheless, the negotiators of the PrepCom left the Chamber out of the text of Rule 121 (10). The same issue, though more

¹²⁴⁰ See 6.4.3 as well as 6.5.1 *supra*.

¹²⁴¹ See *Brady*, Disclosure of Evidence, *passim*; this particular issue, however, is not addressed.

'explosive', arises from Rule 131, which deals with the fate of the record of the pre-trial proceedings after it has been transmitted to the Trial Chamber – it must be noted Rule 131 (2) has the same wording as Rule 121 (10) and thus also does not mention the Chamber. Regarding Rule 131 (2), however, the Trial Chamber was left out intentionally, making Rule 131 (2) yet another “constructively ambiguous” provision.¹²⁴² Be that as it may, the Pre-Trial Chambers of the Court assume that, as elucidates from their decisions, they themselves may consult the record of the proceedings before them.

In the first (preliminary) disclosure decision in *Lubanga*, the Single Judge of Trial Chamber I, being somewhat reminiscent of the original French proposal, decided that disclosure should actually take place *via* the record of the proceedings; i.e. that the Registry of the Court would receive the evidence, file it in the record, and give the other party access to it.¹²⁴³ The parties, however, rejected this approach, and an *inter partes* disclosure regime was implemented.¹²⁴⁴ The Single Judge held that whereas pre-confirmation disclosure serves protecting the rights of the accused, communication of the evidence to the Chamber serves trial management purposes.¹²⁴⁵ Furthermore, she held that the “communication to the Pre-Trial Chamber” in fact *consists* of filing the evidence with the record of the proceedings.¹²⁴⁶ As regards the question of the scope of Rule 122 (2)(c), the Single Judge decided that only material which would be relied on by the parties should be communicated to the Pre-Trial Chamber:

In the view of the single judge, if all materials disclosed by the Prosecution before the confirmation hearing, on which neither party intends to rely, were filed in the record of the case and presented thereat, the nature of the confirmation hearing would be significantly altered and the right of the Defence to decide whether to rely on such materials at the hearing would be infringed on.[...]

In the opinion of the single judge, it is not the role of the Pre-Trial Chamber to find the truth concerning the guilt or innocence of Thomas Lubanga Dyilo, but

¹²⁴² *Brady*, Setting the Record Straight: A Short Note on Disclosure and 'the Record of the Proceedings', p. 271, see also *Lewis*, Trial Procedure, p. 540.

¹²⁴³ *Prosecutor v. Lubanga*, ICC Case No. 01-04/01/06, Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, Pre-Trial Chamber I (Single Judge), 23 March 2006, p. 4 et seq.

¹²⁴⁴ *Prosecutor v. Lubanga*, ICC Case No. 01-04/01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, Pre-Trial Chamber I (Single Judge), 15 May 2006, par. 64.

¹²⁴⁵ *Ibid.*, paras. 29 et seq.

¹²⁴⁶ *Ibid.*, par. 33. The Rules, however, envisage the procedure to go the other way round: the evidence is transmitted to the Chamber (Rule 121 (2)(c)); and (only) the evidence which is communicated to the Chamber becomes part of the record (Rule 121 (10)).

to determine whether sufficient evidence exists to establish substantial grounds to believe that he is criminally liable for the crimes alleged by the Prosecution. The single judge considers that it would be contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing.

[A]ccording to their teleological interpretation, rules 121 (2) and 122 (1) of the Rules serve several purposes. These include enabling the Pre-Trial Chamber to properly organise and conduct the confirmation hearing; ensuring that the parties will have access to the evidence to be presented at the confirmation hearing before it commences, regardless of problems arising during the disclosure process; and enabling the victims to properly exercise their procedural rights during that hearing. In the view of the single judge, these goals will be achieved if, following the literal and contextual interpretation of rules 121 (2) and 122 (1) of the Rules referred to above, only the evidence on which the parties intend to rely at the confirmation hearing is communicated to the Pre-Trial Chamber by filing it in the record of the case.¹²⁴⁷

This reasoning is certainly maintainable.

In the *Bemba* case, however, Pre-Trial Chamber III took an entirely different approach, based on a different view of the confirmation procedure. The Chamber sweeps away the argument of Pre-Trial Chamber I that the confirmation proceedings do not have the function of truth-finding, and declares Art. 69 (3) (even though in a ‘restricted’ manner) applicable to the Pre-Trial Chamber, holding:

The Chamber notes that, pursuant to rule 122(9) of the Rules, article 69 of the Statute shall apply mutatis mutandis at the confirmation hearing, subject to the provisions of article 61 of the Statute. Thus, the rules concerning evidence in article 69 of the Statute, including the authority of the Chamber to request the submission of further evidence, apply at the pre-trial stage of the proceedings, taking into account the specific purpose and limited scope of the confirmation of the charges. To that end, it needs to be noted that the application of article 69(3) of the Statute at the confirmation phase is restricted since, in contrast to the trial phase, the Chamber does not have to determine the guilt of the person prosecuted beyond reasonable doubt. It has simply to determine whether there are substantial grounds to believe that the person prosecuted committed the crimes charged. Finally, the Chamber considers that the authority it derives from article 69(3) of the Statute at the pre-trial phase is crucial for the determination of the scope of the charges to be retained if the case is sent to trial.

¹²⁴⁷ Ibid., paras. 41-43, paragraph numbers and footnotes omitted.

*The Chamber further emphasises that the search for truth is the principal goal of the Court as a whole. In contributing to this ultimate goal, the Pre-Trial Chamber, in particular, shall prevent cases which do not meet the threshold of article 61(7) of the Statute to proceed to the trial stage. In order to fulfil its duty, the Chamber considers it vital not only to conduct properly the confirmation hearing but to organise meaningfully the disclosure proceedings.*¹²⁴⁸

The Chamber further holds that it has an important function in shaping the scope of the later truth-finding process at the trial, since the scope of the trial is defined by the charges as confirmed by the Pre-Trial Chamber.¹²⁴⁹ In consequence, Pre-Trial Chamber III finds that “it should not be confined to the evidence which the parties intend to rely on for the purposes of the confirmation hearing”¹²⁵⁰, for a proper assessment of the case before it, ensuring that the rights of the accused are not infringed upon, and an efficient management of the trial.¹²⁵¹ We note that these points are exactly those which we have identified as the purposes of disclosure in the introduction. The Chamber also puts forward an historical argument in favour of its view:

*The Chamber notes that under rule 121(2)(c) of the Rules "all evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber". The reference to "all evidence" in rule 121(2)(c) of the Rules implies that communication to the Chamber comprises all the evidence disclosed between the parties and that it is not limited to the evidence which the parties intend to rely on or to present at the confirmation hearing. The travaux préparatoires" of that rule indicate that it was first placed in the section of disclosure as draft rule 5.12, preceding rules concerning both disclosure stricto sensu and inspection which have now become rules 76 to 79 of the Rules. However, delegations decided that draft rule 5.12 would be better placed in the rule concerning the confirmation hearing. Without any modification, that draft rule was then transferred and incorporated into the present rule 121 of the Rules. In the Chamber's view, this is a further indication that the drafters intended rule 121(2)(c) of the Rules to cover all elements of disclosure referred to in what are now rules 76 to 79 of the Rules.*¹²⁵²

¹²⁴⁸ *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, Pre-Trial Chamber III, 31 July 2008, paras. 10 et seq.

¹²⁴⁹ *Ibid.*, par. 15.

¹²⁵⁰ *Ibid.*, par. 16.

¹²⁵¹ *Ibid.*, paras. 17-25.

¹²⁵² *Ibid.*, par. 43.

While the statement of the Chamber as to the drafting history of the provision is correct, it appears that the Judges do not sufficiently take into account the fact that Rule 5.12, as its predecessor in the French proposal, Rule 58.2, as we have seen, *always* referred to the confirmation hearing. The actual ‘key point’ of the provision, as it were, is thus not the notion of “*all evidence*”, but that of “*all evidence for the purposes of the confirmation hearing*”, the interpretation of which, as pointed out, is difficult.

The same dispute arose in the proceedings against *Abu Garda*, where the majority of Pre-Trial Chamber I followed its previous approach taken in *Lubanga*, while Judge *Tarfusser* dissented on similar arguments as put forward by Pre-Trial Chamber III in *Bemba*.¹²⁵³

It must be asked whether at the confirmation stage as envisaged by the drafters of the Statute, as already said, the level of scrutiny as shown in *Bemba* as well as in Judge *Tarfusser’s* dissent is justified. On the other hand, the Pre-Trial Chambers of the ICC have occasionally also declined to confirm the charges, meaning that a certain intensity of enquiry is desirable in order for the Pre-Trial Chamber to serve as an efficient filter.¹²⁵⁴ In any case, the ICC should develop a standard procedure for this issue.

The *Bemba* decision is interesting also for another reason, namely regarding the form of submission of the disclosed material. Not only did the Chamber ask the parties to submit all evidence disclosed (including also Rule 77 material)¹²⁵⁵, but also to submit it by way of an “in-depth analysis chart”, which we have already briefly mentioned in the context of Rule 81 (1).¹²⁵⁶ The Chamber essentially requested that the Prosecutor file a chart concerning each and every piece of evidence communicated to the Chamber, stating what it is, whether it is incriminating, (potentially) exculpatory or mixed, and in what way it is relevant to the case and the charges, i.e. which element of crime is to be proved by it.¹²⁵⁷ The Chamber held:

¹²⁵³ *Prosecutor v. Abu Garda*, ICC Case No. 2/05-02/09, Second Decision on issues relating to Disclosure, Pre-Trial Chamber I, 15 July 2009, and attached Partly Dissenting Opinion of Judge Cuno Tarfusser, *ibid.*, pp. 21 et subs.

¹²⁵⁴ *Prosecutor v. Abu Garda*, ICC Case No. 2/05-02/09, Decision on the Confirmation of Charges, 8 February 2010.

¹²⁵⁵ *Prosecutor v. Bemba*, note 1248, par. 49.

¹²⁵⁶ See 6.6.1.1 *supra*.

¹²⁵⁷ *Prosecutor v. Bemba*, note 1248, paras. 64 et subs, see in this regard also the Annex to the decision: “Case “The Prosecutor v. Jean-Pierre Bemba Gombo”, Technical protocol (“e-Court Protocol”) for the provision of evidence, material and Witness Information in electronic form for the confirmation of charges”, ICC-01/05-01/08-55-Anx 31-07-2008.

In the Chamber's opinion, the most important factor in both safeguarding the rights of the defence and enabling the Chamber to exercise its functions is not for the Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory. In fact, disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings.

*The Chamber considers that disclosure of truly relevant evidence presupposes an in-depth analysis by the Prosecutor of each piece of evidence prior to its disclosure, whether that evidence is incriminating or exculpatory.*¹²⁵⁸

Furthermore, the Chamber took a step backwards to the very first preliminary decision of Pre-Trial Chamber I,¹²⁵⁹ in that it held that the disclosure should be “facilitated through the Registry”. A request for leave to appeal by the Prosecutor was denied by the Chamber.¹²⁶⁰

Obviously, this practice serves the needs and rights of the accused as well as the preparation of the Chamber. After all, it is certainly in the interest of justice to force the Prosecutor to prepare his case in such a way that the trial can be conducted efficiently, with the side effect that the defence can prepare its case more easily. It may even be in the interest of the Prosecutor himself to be forced to work diligently and use his resources effectively and in a co-ordinated manner. In fact, it appears that the Prosecutor is not entirely unhappy with the practice anymore.¹²⁶¹

In a later decision, however, the Chamber apparently meant the in-depth analysis to refer only to incriminating evidence.¹²⁶²

Meanwhile, the practice of demanding an in-depth analysis chart has been taken over in the trial proceedings in the *Katanga* case using the term “table of incriminating

¹²⁵⁸ Ibid., paras. 67 et seq.

¹²⁵⁹ See note 1243 *supra*.

¹²⁶⁰ *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, Pre-Trial Chamber III, 25 August 2008.

¹²⁶¹ *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", Office of the Prosecutor, 15 December 2009.

¹²⁶² *Prosecutor v. Bemba*, ICC 01/05-01/08, Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence, Pre-Trial Chamber III, 10 November 2008.

evidence”,¹²⁶³ and, as already mentioned regarding the question whether the in-depth analysis chart falls into Rule 81 (1), in the trial proceedings against *Bemba* as well.¹²⁶⁴

This section shows that the principle of early information of the Chamber in the interest of trial management and truth-finding was envisaged for the ICC proceedings from the beginning. The ICC Pre-Trial Chambers have, in addition, developed a relatively active approach regarding disclosure; however, the level of information they demand from the parties, especially the Prosecutor, varies.

6.8.2 Pre-trial disclosure

The question whether the Trial Chamber should get to see any evidence before the trial itself, basically divided the PrepCom in two – those coming from an Anglo-American procedural tradition spoke out against it, fearing that the Chamber might be biased, and perhaps influenced by evidence which it had seen beforehand, but which was ultimately not presented at trial. Those coming from a Continental-European background stressed that prior and ongoing knowledge of the evidence would enable the Chamber to better fulfil its functions under the Statute, regarding orders for disclosure between the parties, asking appropriate questions to witnesses and thus ultimately contribute to the truth-finding process.¹²⁶⁵ As *Brady* points out, intents to resolve the issue failed, which ultimately led the delegations to resort to the technique of “constructive ambiguity”:

The exact contents of 'the record of the proceedings,' and the question of what the Trial Chamber should see prior to trial, proved to be complex issues on which delegations expressed widely divergent and strongly held views. This divergence of views was shaped by differing views on the nature and scope of confirmation proceedings and trial proceedings, and the respective roles of the Pre-Trial and Trial Chambers. The final approach in the Rules harmonizes the

¹²⁶³ See *Prosecutor v. Katanga and Ngudjolo Chui*, ICC Case No. 01/04-01/07, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, Trial Chamber II, 13.3.2009, par. 11: “In order to better assist the Chamber and to enable each Defence Counsel to prepare their case effectively, the Prosecution is hereby ordered to submit an analytical table of all the evidence it intends to use during the trial. The table shall be based on the charges confirmed and follow the structure of the Elements of crimes. An example is attached in Annex A to this decision. This table will be referred to as the 'Table of Incriminating Evidence'.”

¹²⁶⁴ *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", Trial Chamber III, 29 January 2010; see also 6.8.2 *infra*.

¹²⁶⁵ *Brady*, Disclosure of Evidence, pp. 424 et seq.

*various approaches in an 'open' manner. This ambiguity in the text is quite intentional and reserves to the future Court scope to further develop procedures best suited to hearing cases while maintaining the highest standards of due process and fairness under international law.*¹²⁶⁶

Notwithstanding, however, as regards the record of the proceedings before the Pre-Trial Chamber, the Rules are unequivocal. Rules 129 and 130 provide that, after the charges are confirmed, the record of the proceedings is submitted to the Presidency, which, after having established a Trial Chamber, for its part submits the record to the latter. Despite of this fact, however, the principle that the record of the pre-trial proceedings, including all of the evidence disclosed to the Pre-Trial Chamber, should be submitted to the Trial Chamber, was envisaged from the beginning throughout the sessions of the PrepCom. The drafting history of Rules 129 and 130 has been outlined above.¹²⁶⁷ Visualised by a synoptical overview, it looks as follows:

¹²⁶⁶ *Brady*, Setting the Record Straight: A Short Note on Disclosure and 'the Record of the Proceedings', p. 272

¹²⁶⁷ See 6.3.2.3.3 *supra*.

Second French Proposal, Addendum, 19 February 1999	Second French Proposal, revised Addendum,, 29 June 1999	Revised Discussion Paper, 5 August 1999/PrepCom Second Session Summary, Appendix, 18 August 1999	Mont Tremblant meeting outcome, 24 May	Discussion Paper, 23 June / Working Group Report, 27 June 2000, Final Draft, 30 June 2000, RPE-ICC
<p>Rule 66.1. Notification of the Presidency</p> <p>The decision taken by the Pre-Trial Chamber under rule 64</p> <p>shall be communicated to the Presidency. The record of the proceedings of the Pre-Trial Chamber shall accompany this notification.</p> <p>Rule 66.2. Constitution of the Trial Chamber</p> <p>Upon receipt of the decision of the Pre-Trial Chamber and the record of the proceedings, the Presidency shall constitute the Trial Chamber and shall refer the case to it.</p> <p>The Presidency may also refer the case to a previously constituted Trial Chamber.</p> <p>The decision of the Pre-Trial Chamber and the record of the proceedings shall be transmitted to the Trial Chamber.</p>	<p>Rule 65.1. Notifications</p> <p>The decision of the Pre-Trial Chamber on the confirmation of the charges and the commitment of the person to the Trial Chamber shall be notified</p> <p>to all those who have participated in the hearing on the confirmation of the charges.</p> <p>Such decision and the record of the proceedings of the Pre-Trial Chamber shall be notified to the Presidency.</p> <p>Rule 65.2. Constitution of the Trial Chamber</p> <p>When the Presidency constitutes the Trial Chamber and refers the case to the Trial Chamber, the Presidency shall notify the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber.</p>	<p>Rule 5.26 Notification of the decision on the confirmation of charges</p> <p>The decision of the Pre-Trial Chamber on the confirmation of charges and the committal of the accused to the Trial Chamber shall be notified, if possible,</p> <p>to the person concerned and his or her counsel and, if applicable, to the victims or their legal representatives.</p> <p>Such a decision and the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency.</p> <p>Rule 5.27 Constitution of the Trial Chamber</p> <p>When the Presidency constitutes and refers the case to the Trial Chamber, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber..</p>	<p>Rule 5.26 Notification of the decision on the confirmation of charges</p> <p>The decision of the Pre-Trial Chamber on the confirmation of charges and the committal of the accused to the Trial Chamber shall be notified, if possible,</p> <p>to the person concerned and his or her counsel and, if applicable, to the victims or their legal representatives. participating in the proceedings pursuant to rules 6.30 to rule 6.30 <i>ter</i>.</p> <p>Such a decision and the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency.</p> <p>Rule 5.27 Constitution of the Trial Chamber</p> <p>When the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber.</p>	<p>Rule 5.26/129 Notification of the decision on the confirmation of charges</p> <p>The decision of the Pre-Trial Chamber on the confirmation of charges and the committal of the accused to the Trial Chamber shall be notified, if possible, to the Prosecutor, the person concerned and his or her counsel.</p> <p>Such decision and the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency.</p> <p>Rule 5.27/130 Constitution of the Trial Chamber</p> <p>When the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber.</p>

We note that substantially, Rules 129 and 130 have not changed very much during the drafting process, maybe except for the notion that it was temporally envisaged to let the victims participating in the proceedings be formally informed of the outcome of the confirmation hearing; in the end, however, the victims were left out and the Prosecutor included.

Following the transmittal of the record to the Trial Chamber, the Registrar, according to Rule 131 (1) “shall maintain the record of the proceedings transmitted by the Pre-Trial Chamber, pursuant to Rule 121 (10)”, presumably meaning that the record shall be

maintained along the lines of the confirmation hearing. What happens then, is (intentionally, as we have seen) left uncertain by the Rules. As briefly mentioned above, Rule 130 (2), which, like Rule 121 (10), enumerates the participants which may consult the record – the Trial Chamber, however, is purposely not mentioned. One is tempted to think that if the record is *transmitted* to the Trial Chamber, the latter must logically be entitled to look into it. However, this is not entirely clear. According to Rule 137, an extra record of the trial proceedings must be created; and it is unclear whether the pre-trial record becomes part of the trial record. On the other hand, once the pre-trial phase is over, it is not clear why the record should be *maintained* by the Registrar, and not just *kept*. If one assumes that the Trial Chamber gets to see the record, it of course gets to see all of the evidence that came before the Chamber, whether by communication from the parties or by their presentation during the hearing. As pointed out in the previous section, these two classes of evidence may vary according to the approach taken by the Pre-Trial Chamber regarding the interpretation of Rule 121 (2)(c).

However, while assuming that disclosure obligations are ongoing for the whole duration of the proceedings, the Rules do not contain a provision equal to Rule 121 (2)(c) for the *trial* proceedings. It is thus unclear whether the evidence disclosed between the parties *after* the end of the confirmation proceedings must also be communicated to the Trial Chamber and become part of the record. Also a provision like Rule 122, which makes the record of the proceedings the basis for conducting the confirmation hearing, is missing for the trial stage – Rule 140, which would be the corresponding provision for the trial proceedings, gives very little guidance on the conduction of the trial hearing in general, and certainly does not mention the record of the proceedings.¹²⁶⁸

The Trial Chambers of the ICC, however, generally appear to follow a more or less generous approach. As seen above, starting with *Lubanga*, the Pre-Trial Chambers went, as it were, the opposite way *vis-à-vis* the provisions of the Rules: whereas the Rules provide that the disclosed evidence is to be communicated to the Pre-Trial Chamber and *afterwards* filed with the record of the proceedings (Rules 121 (3)(c) and (10)), the Pre-Trial Chambers had the parties file the evidence with the Registry into the record, and the communication to the Chamber happens by the Chamber consulting the record. In practice, it thus appears that the Registry is in charge of the communication procedure, and not the Chamber, even though it naturally supervises the Registry. The practice established in the Pre-Trial Chambers apparently, absent a specific decision of the Trial Chambers modifying this practice, simply went on during the trial stage.

¹²⁶⁸ Rule 140 has been described as “one of the most controversial of all the Rules”, *Lewis*, Trial Procedure, p. 547.

For *Lubanga* and *Katanga*, this would mean that the Trial Chamber, after having received the record of the pre-trial proceedings, gets to see the only the evidence on which the Prosecutor intends to rely. In the *Katanga* Case, however, this was significantly modified, as mentioned, in the way that the evidence must be submitted together with the “table of incriminating evidence”, structured by the elements of crimes. The Chamber, in its decision, made explicit reference to the record of the pre-trial proceedings and the need for specific information of the Chamber for its truth-finding function:

The Chamber notes that, in accordance with Rule 121 (10), it already has access to the record of all the proceedings before the Pre-Trial Chamber, including all the evidence that was submitted during those proceedings. However, since the end of the pre-trial proceedings, the Prosecution has continued to disclose evidence to the accused on an inter partes basis. At the same time, the Chamber observes that the Prosecution continued to release further evidence to the Chamber in Ringtail¹²⁶⁹ on an ex parte basis, without providing any metadata. As a result, the Chamber has an incomplete overview of the incriminating evidence in the present case. This is an undesirable situation, which hampers the Chamber in fulfilling its responsibilities and obligations regarding the preparation of the trial.

In order to remedy this situation, the Prosecution shall, when submitting the Table of Incriminating Evidence, file all the evidence referred to in the Table with the Registry. There is no need to re-file any particular item of evidence that was filed during the pre-trial phase. However, if a particular item of evidence has previously been disclosed in a format (e.g. summary or redacted versions) other than the one the Prosecution intends to use at trial, the Prosecution shall file the evidence in the format it intends to use at trial.¹²⁷⁰

As seen above, the *Bemba* Pre-Trial Chamber originally had taken the most extensive view as to what should be communicated to the Chamber, and ordered that *all* evidence disclosed should be filed with the Registry. Additionally, the Prosecutor was, as we have seen, to provide an in-depth analysis chart, at first, regarding all evidence, including exculpatory evidence and Rule 77 material. This, however, later changed in that the in-depth analysis chart was only to refer to incriminating evidence.¹²⁷¹ It is unclear how this change of mind came about. As with the above mentioned cases of

¹²⁶⁹ Ringtail is a trademark of a company producing trial management software, which is used by the ICC.

¹²⁷⁰ *Prosecutor v. Katanga and Ngudjolo Chui*, 13.3.2009, note 1263 *supra*, paras. 24 and 25, footnotes and paragraph numbers omitted.

¹²⁷¹ *Prosecutor v. Bemba*, 10 November 2008, note 1262 *supra*, par. 8.

Lubanga and *Katanga*, this practice apparently continued after the confirmation of the charges, meaning that the order once put in place by the Pre-Trial Chamber, and the ‘work instructions’ given to the Registry and the parties, just went on, absent any new order of the Trial Chamber which was now in charge of the matter. This means that evidence apart from incriminating evidence would be disclosed *inter partes* only, with the Chamber, however, being notified of the transaction between the parties:

PRESIDING JUDGE FULFORD: [...] Now, the next question, Ms. Kneuer, is whether it would be either convenient or helpful for us at this stage to review the disclosure regime which did not follow the disclosure regime which Trial Chamber I established and which has been followed by Trial Chamber II, or whether it would be unhelpful to do so and to no effect to do so at this stage?

MS. KNEUER: The Prosecution proposes that we follow the procedure that was established in the Bemba case, meaning that we disclose the incriminatory evidence inter partes with the Defence and file it to the record and the potentially exculpatory material and the Rule 77 material to the Defence, notifying the Chamber.

PRESIDING JUDGE FULFORD: But not entering it into the Court documents system so that each and every item is given a number by the Registry?

MS. KNEUER: That is correct.

*PRESIDING JUDGE FULFORD: Thank you.*¹²⁷²

It thus appears that the Trial Chambers take similar approaches as the respective Pre-Trial Chambers concerning the question of what material enters the record of the proceedings. In the *Bemba* case, however, the original far-reaching approach of the Pre-Trial Chamber, that also exculpatory evidence and Rule 77 material should become part of the record and entered into the in-depth analysis chart, was given up half-way, still at the pre-trial stage, so that this ‘attenuated’ record regime went on during the trial phase. The Trial Chambers are thus, in any case, informed of at least the incriminating evidence beforehand.

6.9 Disclosure and Victims

The active participation of victims in international criminal proceedings was an entirely new feature when the ICC was created.¹²⁷³ Even though the participating victims are not

¹²⁷² *Prosecutor v. Bemba*, ICC Case No. 01/05-01/08, Status Conference Transcript, 7 October 2009, p. 17, lines 10-22.

a party, their influence on the proceedings has generally increased. It is therefore not surprising that victims' issues have also impacted on the disclosure regime of the ICC.

6.9.1 'Disclosure to Victims'

As was said concerning the involvement of the Chamber in the disclosure process, in the nomenclature of the ICC, disclosure *stricto sensu* only takes place between the parties; as far as other participants of the proceedings are involved, this happens by "communication" in the sense of Rule 121 (2)(c) RPE-ICC, as well as by "consultation", as in the meaning of Rule 121 (10). Materially, however, as soon as victims get to see the evidence which is disclosed between the parties, we can speak of 'disclosure to the victims'.

As far as the confirmation proceedings are concerned, we note that Rule 121 (10) indeed confers upon the victims the right to consult the record of the proceedings, which, as we have seen, contains at least the evidence on which the parties intend to rely at the confirmation hearing. For the trial proceedings, Rule 131 confers the same right upon the victims.

As to the historical development of Rule 121 (10), it has been visualized above.¹²⁷⁴ In this regard, we note that a right to consultation of the record of the proceedings was envisaged already in the Second French Proposal of 25 February 1999 (draft Rule 61.1 (g)). The provision remained unaltered at first; however, its first sentence was marked as deleted in the report of the outcome of the Mont Tremblant meeting (draft Rule 5.18 (10)). It is quite probable that this was a redactional mistake, since the remainder of the provision would not have made sense on its own (the phrase "[t]hey may also ask to intervene during the hearing" would be nonsensical if it referred to the prosecution and the defence). These rights of the victims to intervention were eventually deleted from Rule 121; they can now be found in the general provisions regarding witness participation (Rules 89 et subs. RPE-ICC).

¹²⁷³ See generally on victims' participation at the ICC *Bitti/Friman in Lee*, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, as well as *Safferling*, *Das Opfer völkerrechtlicher Verbrechen: Die Stellung der Verbrechenopfer vor dem Internationalen Strafgerichtshof*. Nowadays, we find victims' participation in other international or hybrid tribunals as well, such as in the Extraordinary Chambers in the Courts of Cambodia, see Rules 23 et subs. of the Internal Rules of the ECCC.

¹²⁷⁴ See 6.8 *supra*.

In the relevant jurisprudence of the ICC, Trial Chamber I stated that generally the victims should have access only to the public filings contained in the record, that, however, if their personal interests are related to specific confidential material contained in the record and this material is relevant to their participation, “consideration shall be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place.”¹²⁷⁵ As regards inspection according to Rules 77 and 78, the Chamber also went quite far:

*Turning to inspection, the Trial Chamber agrees with the prosecution that inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence. However, as a matter of general principle, and in order to give effect to the rights accorded to victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing. The participating victims should also be provided with the public evidence listed in the prosecution's annexes 1 and 2 to its "summary of presentation of evidence" subject to a demonstration of relevance to their personal interests as stated above. If part of a document in this context is confidential, the document should be made available in a suitably redacted form.*¹²⁷⁶

It is quite clear that the victims should not be able to inspect material in the possession or control of the defence. However, also to grant the victims access to material in possession of the Prosecutor and to lift the confidentiality of certain material does not appear necessary. Given the fact that the material in the possession of the Prosecutor will generally be incriminating, providing this material to the victim may result in the accused facing two prosecutors.

¹²⁷⁵ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on victims' participation, Trial Chamber I, 18 January 2008, par. 106.

¹²⁷⁶ *Ibid.*, par. 111, footnote omitted.

6.9.2 Disclosure by Victims

The far-reaching participation rights granted to victims before the ICC have led to the question whether the participating victims should also be under an obligation to disclose (exculpatory) material to the accused on fairness grounds.¹²⁷⁷

To be sure, the procedural framework of the ICC does not foresee such a duty, which is also the main reason why the Chambers of the Court have answered this question in the negative. The Trial Chamber in *Katanga & Ngudjolo Chui* pointed out that there can be no duty of the victims to disclose evidence, because there is no specific right for them to present evidence, either.¹²⁷⁸

In the appeals judgment, the Chamber held that victims can only ‘present’ evidence via a request of the Chamber and that it is up to the latter, during trial, to ensure that the accused receives adequate disclosure:

The Appeals Chamber underlines once again that victims do not have the right to present evidence during the trial; the possibility of victims being requested to submit evidence is contingent on them fulfilling numerous conditions. Firstly, their participation is always subject to article 68 (3) of the Statute, which requires that they demonstrate that their personal interests are affected by the evidence they request to submit. Secondly, when requesting victims to submit evidence, the Trial Chamber must ensure that the request does not exceed the scope of the Trial Chamber's power under article 69 (3) of the Statute. In addition, the Trial Chamber will "ensure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the accused", which includes the right to "have adequate time and facilities for the preparation of the defence".¹²⁷⁹

As specifically regards exculpatory information, the Chamber, quite consequently, also rests the responsibility on the prosecution and, ultimately, the Trial Chamber:

[U]nder article 54 (1) (a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54 (3) (b) of

¹²⁷⁷ See *Prosecutor v. Katanga & Ngudjolo Chui*, ICC Case No. 01/04-01/07, Defence for Germain Katanga's Additional Observations on Victims' Participation and scope thereof, Defence, 10 November 2009, par. 3.

¹²⁷⁸ *Prosecutor v. Katanga & Ngudjolo Chui*, ICC Case No. 01/04-01/07, Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, par. 105.

¹²⁷⁹ *Prosecutor v. Katanga & Ngudjolo Chui*, ICC Case No. 01/04-01/07 O A 11, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", Appeals Chamber, 16 July 2010, par. 48, footnotes omitted.

the Statute, the Prosecutor may, with respect to his investigations "[r]equest the presence of and question persons being investigated, victims and witnesses". The Appeals Chambers therefore considers that it is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence.

[...]

[t]he Appeals Chamber recalls that article 69 (3) of the Statute provides the Trial Chamber with the authority to request the submission of all evidence that the Trial Chamber considers necessary for the determination of the truth. This decision is within the Trial Chamber's discretion. Thus, even if the Trial Chamber decides that it is satisfied that the personal interests of the Victims have been demonstrated and that it will request the Victims to submit incriminating evidence, nothing precludes the Trial Chamber from then requesting that any exculpatory evidence in the possession of the Victims is also submitted, in order to ensure that the Trial Chamber does not receive the evidence in a distorted manner.

Secondly, in relation to victim participation in particular, the Trial Chamber has broad authority under article 68 (3) of the Statute and rules 91 (3) and 93 of the Rules of Procedure and Evidence to determine the conduct of the proceedings, and retains the authority to order the production of exculpatory or mitigating evidence itself, if and when it considers that such information would be necessary for the determination of the truth. This is also the case where it is specifically brought to the attention of the Trial Chamber by one of the parties or participants that potentially exculpatory information exists and is in the possession of a participating victim. Finally, the Appeals Chamber recalls that the Trial Chamber also has the authority to take any measures necessary to ensure the accused's rights to a fair trial, if and when a request to present evidence is granted.¹²⁸⁰

This puts the victims into a quite comfortable position. Nevertheless, the approach of the Appeals Chamber appears reasonable. It would be asking too much from the victims to disclose exculpatory evidence; this might also raise their significance in the proceeding to such an extent that they could in fact play the role of a second prosecutor, which would be unacceptable. It is indeed the role of the Prosecutor to investigate exculpatory circumstances. Other than that, the Chambers should use utmost care when

¹²⁸⁰ Ibid., paras. 81, 85 et seq., footnotes and paragraph numbers omitted.

requesting evidence from the victims, both in the interest of truth finding and trial management.

6.9.3 ‘Disclosure of Victims’

Finally, one could also speak of a ‘disclosure of victims’, in the sense of whether the identity of participating victims must be revealed to the accused. In the light of the risk that victims participating in the proceedings may in essence mean the accused facing a second prosecutor, “faceless” victims in the proceedings should be avoided. In the above-mentioned decision in *Lubanga*, the Chamber would not commit itself to a clear statement:

[T]he Trial Chamber is of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused. While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants. Given the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.¹²⁸¹

The participation of victims can thus influence the disclosure proceedings of the ICC from several angles. It remains to be seen how this new feature of international criminal law develops in the future.

6.10 Sanctions for non-compliance

The ICC provisions are silent regarding possible sanctions for non-compliance with disclosure obligations by the parties, with the exception of Rule 79, which provides that a failure of the defence to provide prior notice of certain grounds for excluding criminal responsibility may not be sanctioned by non-admission of raising the ground or

¹²⁸¹ Decision on victims’ participation, note 1275 *supra*, par. 131.

presenting evidence. Other than that, the legal provisions are silent; even a norm which would be comparable to Rule 68 *bis* RPE-ICTY does not exist.

In the relevant chapter regarding the Ad Hoc Tribunals, we have made some general remarks regarding what possible sanctions might be desirable.

As at the Ad Hoc Tribunals, there is the possibility to exclude evidence according to Art. 67 (7), which, however, would oftentimes not be in the interest of truth-finding and therefore problematic; after all, the inadmissibility of evidence not previously disclosed had been contemplated, but was not kept.¹²⁸² In any case, the complete withholding of evidence, i.e. non-disclosure followed by non-presentation, is even worse from a truth-finding perspective. Delaying the proceedings, as proposed in the scholarship,¹²⁸³ may indeed be of use only when the action desired by the Prosecutor is a certain warrant or the confirmation of proceedings – delaying the trial is usually detrimental to the interests of the accused, whereas the Prosecutor's interests are virtually untouched by a delay.

As was already mentioned in the Chapter on the Ad Hoc Tribunals, the ICC has, for two times, by ordering a stay of proceedings and threatening to release the accused, meaning the most drastic sanction for non-disclosure of evidence by the Prosecutor. As was previously mentioned, in *Lubanga*, the Prosecutor had, in the view of Trial Chamber I, abused its power under Art. 54 (3)(e) ICCSt, which ultimately led to his inability to disclose exculpatory material according to Art. 67 (2). Since the Prosecutor also saw himself unable to disclose the material to the Chamber in order to obtain a ruling under Art. 67 (2) in connection with Rule 83 (in fact, the Prosecutor also refused to disclose to the Chamber the identity of most of the providers of information), the Chamber stayed the proceedings, holding:

The Chamber's overall conclusions can be shortly described:

- i) The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial;*
- ii) The prosecution has incorrectly used Article 54(3) (e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence; and*

¹²⁸² See, once again, Art. 10 (b)(Option 2) the 1998 PrepCom Draft, section 6.3.1.3 *supra*.

¹²⁸³ *Scheffer*, A review of the experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court regarding the disclosure of evidence, at p. 162 proposes, in addition to taking disciplinary action, delaying the approval of warrants of arrest and the confirmation of charges.

iii) The Chamber has been prevented from exercising its jurisdiction under Articles 64(2), Article 64(3) (c) and Article 67(2), in that it is unable to determine whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial.

Adapting the language of the Appeals Chamber, the consequence of the three factors set out in the preceding paragraph has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.

*In consequence a stay is imposed on these proceedings.*¹²⁸⁴

The Appeals Chamber endorsed this holding;¹²⁸⁵ in the end, the material could be disclosed to the Trial Chamber and the proceedings continued.

The second decision to stay the proceedings also, though indirectly, had to do with non-disclosure of potentially exculpatory or material evidence. As mentioned above, the disclosure of the identity of intermediaries, which serve as contact persons between the actual witnesses and Court personnel, must be disclosed under certain conditions.¹²⁸⁶ In one instance, the Prosecutor refused to follow an order of the Trial Chamber to disclose the identity of an intermediary;¹²⁸⁷ whereupon the Court stayed the proceedings again. Nominally, the reason for the stay of proceedings was thus the refusal of the Prosecutor to follow an order of the Chamber; however, the trigger for this situation was, once more, the non-disclosure of evidence. In the same procedural situation, the Chamber

¹²⁸⁴ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber I, 13 June 2008, paras. 92 et seq.

¹²⁸⁵ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", Appeals Chamber, 21 October 2008.

¹²⁸⁶ See 6.4.3 *supra*.

¹²⁸⁷ *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Trial Chamber I, 8 July 2010. This decision, however, was quashed by the Appeals Chamber, for non-observance of the Chamber's margin of appreciation, see *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06 OA 18, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", Appeals Chamber, 18 October 2010.

also issued a warning regarding sanctions for misconduct according to Art. 71 and Rule 171 towards the Prosecutor and the Deputy Prosecutor.¹²⁸⁸ In the end, however, apparently no fines or other disciplinary measures were imposed.¹²⁸⁹

As previously said in the context of the Ad Hoc Tribunals, the Court should not be too hesitant to impose sanctions for personal misconduct, given that the sanctions foreseen by Rule 171 (exclusion from the courtroom for a maximum of 30 days and a fine up to 2000 €) do not appear particularly high.¹²⁹⁰

6.11 Conclusion

The development of the procedural law of the ICC, as well as its whole procedural framework is very special. In contrast to the Ad Hoc Tribunals, the statutory framework (Rome Statute, Rules and Regulations) is very detailed, and took a lot of time to draft. Also, we find many ‘inquisitorial’ elements of the Roman-Germanic procedural tradition realized in the procedure, whereas the Ad Hoc Tribunals have still retained a widely adversarial system. This is exemplified particularly with the ‘neutral’ role of the Prosecutor, and the numerous explicit hints to truth finding, both concerning the Prosecutor and the Court.

As regards *inter partes* disclosure technicalities, the ICC’s disclosure regime is widely comparable with the one of the Ad Hoc Tribunals. The systematization of disclosure duties by parties and the contents of disclosure duties was actually borrowed from the Rules of the ICTY; the same holds true for restrictions to disclosure. The jurisprudence of the ICC is hesitant to be too definitive in the application of the respective provisions. In any case, disclosure is considered to be the rule, non-disclosure the exception; further than that, however, particularly the ICC Appeals Chamber decides on a case-by-case basis whenever it can.

A new feature is the involvement of victims in the disclosure process, who get access to the evidence via the record of the proceedings. This evokes questions of possible specific disclosure duties of the victims, which, however, have been rightly denied by the ICC Chambers.

¹²⁸⁸ See *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Trial Transcript of 8 July 2010, ICC-01/04-01/06-T-313-ENG ET WT 08-07-2010, p. 2, line 18 – p. 5, line 1.

¹²⁸⁹ See *Prosecutor v. Lubanga Dyilo*, ICC Case No. 01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 119 through 123.

¹²⁹⁰ Notwithstanding, some authors argue that sanctions for personal misconduct should be reserved for the most serious cases, see *Swoboda*, *The ICC Disclosure Regime*, p. 454.

What is new also is the particularly strong involvement of the respective Chamber. This development can also be observed at the Ad Hoc Tribunals, but at the ICC, it was envisaged from the beginning. The Pre-Trial Chambers get to see a considerable amount of the evidence disclosed between the parties; and the development shows that also the Trial Chambers are provided at least with the material on which the parties intend to rely beforehand. Furthermore, the Chambers have forced the Prosecutor to provide by electronic means a preliminary analysis of the evidence. The fact that the Chambers are taking their task seriously and are willing to get involved is also evidenced by the proceedings in *Lubanga*, where the Prosecutor had agreed to keep large amounts of (potentially exculpatory) evidence secret not only from the public and the accused, but from the Trial Chamber as well. The latter showed by its decision to halt the proceedings that it is indeed not willing to sacrifice the rights of the accused and its own role and responsibility in the truth-finding process on considerations of convenience for the Prosecutor and his sources of investigation, among others, the United Nations, which, however apparently heard the warning shot. The involvement of the Chamber in the disclosure process, in our opinion, shows a general tendency in both national and international procedure, which allows some conclusions regarding disclosure and its relation with truth finding, in connection with the specific functional roles of the participants of the trial; we will elaborate a little more on this point in our overall conclusion.

7 Conclusion

The development of the disclosure of evidence in criminal proceedings both on the national and international level in the 20th century is remarkable. It is characterized by a strong increase of disclosure obligations for both parties.

Whereas an accused in the United States was, until the middle of the 20th century, occasionally legally prevented from even receiving his own prior statement in a case where his life was at stake, we can now state that the rights of the accused on both sides of the Atlantic are much better protected than before – which does not mean that they are always sufficiently protected; this is shown by the considerable amount of jurisprudence of the ECtHR on the matter, oftentimes, though by far not always, involving the United Kingdom.¹²⁹¹ However, the human rights aspect is only one of at least three purposes of disclosure. The second one, enhanced trial management and judicial economy, which was given more and more importance over time, has resulted in wider disclosure obligations not only on the side of the prosecution but also of the defence, a fact which, in turn, may run counter to the interests and rights of the accused. Thirdly, the truth-finding function of the criminal trial, regardless of the criminal justice system, has become increasingly important, a factor which has also contributed to a widening of disclosure obligations of both parties. Both trial management and truth finding are closely related with an ever growing influence of the court in the disclosure proceedings.

On the international level, we can observe a similar development, especially as concerns the Ad Hoc Tribunals. It is interesting to note that particularly defence disclosure obligations at the Ad Hoc Tribunals were very limited at the beginning, and have significantly widened during the existence of the Tribunals. This gives us the impression that the drafters of the relevant provisions were particularly aware of the necessity to protect the rights of the accused, trying to lay out the regulatory framework, on the one hand, in an ‘ideal’ way to keep up with the fair trial rights of the accused. After all: we know of no national code of criminal procedure which would contain a general provision, solely laying down, in an abstract way, the procedural rights of an accused in the like in Articles 21/20 of the ICTY/ICTR Statutes, or Article 67 of the

¹²⁹¹ As said previously on the occasion of the differentiation between disclosure in the formal and disclosure in the material sense, the issues underlying disclosure (fair trial, judicial economy and truth finding) arise in any jurisdiction; the relevant ECtHR cases more often than not originate from Continental-European jurisdictions as well.

Rome Statute. Admittedly, this regulatory technique is probably necessary in the way that, as pointed out in the introduction, none of the international criminal courts and tribunals are technically bound by the relevant international human rights treaties. Nevertheless, it appears that the drafters of the respective rules at the beginning wanted to ‘do everything right’, and not commit the same mistakes concerning fairness as were, from a modern viewpoint, made in Nuremberg. On the other hand, if we look at the highly controversial discussions at the Rome Conference, and later in the Preparatory Committee for the Rules of Procedure and Evidence, we can conclude that oftentimes *all which could be agreed on* regarding criminal procedure without endless discussions were fair trial rights of the accused, as contained in the relevant human rights documents. At the Ad Hoc Tribunals, there was no time for in-depth discussions on the matter. And indeed, the fair trial rights of the accused must form the basis of any kind of international proceedings, in order to reach acceptance of the international community, which is the basis of positive general prevention. Furthermore, however, many of the early judges at the international criminal courts and tribunals were (and some are still) not experienced practitioners, but rather academics, politicians or diplomats. The judges, with a rudimentary set of rules, were soon ‘caught up with’ by the reality of criminal proceedings, which forced them to find pragmatic solutions for the problems posed in the proceedings – some of these problems immediately concerned disclosure. One important development in this regard is quite directly related to truth-finding: the protection of confidential information, be it on the grounds of (national) security interests or witness protection. In many cases, relevant evidence can only be obtained on the assurance of confidentiality; this is even more true in an international than in a national setting. The protection of confidentiality interests obviously restricts the fair trial rights of the accused. At the same time, however, the chambers of the international tribunals, which is a development we have also observed in the national jurisdictions, have acquired a more active role in monitoring the non-disclosure processes; indeed, the *Lubanga* case shows that the judges are not willing to accept secret evidence to a major extent – even though the first decision to halt the proceedings was based on fair trial rights of the accused, it is obvious that the Chamber was dismayed by the behaviour of the Prosecutor, keeping the evidence secret from the Chamber itself, so it could not fulfil its tasks properly. This development is certainly partially due to the growing influence of the Continental-European tradition in international criminal proceedings, in which the judges traditionally acquire a more active role. However, the fact that the stronger involvement of the respective chambers happens on the national level as well, shows that this phenomenon cannot be fully explained with the ‘mix’ of adversarial and inquisitorial elements which is inherent in international criminal proceedings, regardless of a possible ‘convergence’ of the systems. Instead, it appears that the judges

increasingly take a pragmatic approach to criminal proceedings, having in mind the rights of the accused, however, balanced with considerations of judicial economy, and truth-finding, which some of the judges, as we have seen, regard as the foremost goal of the proceedings.

From a functional perspective, it appears that the judges take a more active part in this truth-finding process, by demanding the submission or communication of evidence which is to be presented in advance. At the Ad Hoc Tribunals, this started with *Dokmanović* and resulted in the Pre-Trial and Pre-Defence Conferences and the pre-trial briefs which must be submitted to the chambers before the trial. It is meant to facilitate a better preparation of the trial by the Chamber; however, the involvement of the Chamber with, admittedly, not the evidence itself, but lists of evidence, has a direct bearing on the truth-finding procedure as well. At the ICC, this is even more true. The Rules themselves provide that the Pre-Trial Chamber receives not only lists of evidence, but copies of the evidence disclosed between the parties. Even though the exact scope of the evidence which must be communicated to the Pre-Trial Chamber is in dispute between the ICC Chambers, the fact that this principle is ‘officially’ laid down in the Rules is remarkable. As we have seen, this agreement was only possible based on the assumption of the drafters that the Pre-Trial Chamber does not decide over the guilt of the accused. However, the complete record of the Pre-Trial proceedings is communicated to the Trial Chamber; with the bulk of disclosure taking place before the confirmation hearing and not the trial, this is a remarkable level of involvement of the chamber. And not only that: while the Rules are intentionally silent on disclosure during the trial phase, the practice of some of the Pre-Trial Chambers to involve the Registry in the disclosure process has led to a situation where ‘automatically’ at least a large part of the evidence ends up in the record of the proceedings; and this practice has at times simply continued during trial. This means that also the Trial Chambers get to see part of the evidence in advance – if they wish to, that is; it appears, of course, possible that some of the judges, as a matter of principle, refrain from inspecting the record.

It elucidates from what we have seen, that disclosure (in the material sense) takes place between those participants in the trial which are responsible for conducting the truth-finding procedure. In an adversarial procedure, where truth is found by a ‘dumb’ jury on evidence presented by two parties, the evidence will be disclosed between the parties. With ‘ideal’ parties strictly following the procedural rules, one would not even need a judge. In an inquisitorial proceeding, in turn, it is essential that the inquisitorial judge gets to see the evidence beforehand, so that he can sensibly conduct the truth-finding process, in which parties, apart from the accused, are not needed at all, if the judge does everything right. These ideal pictures, however, as we have seen, are not reality

anywhere in the world – in fact, in such an ideal world disclosure would not be required at all: The protection of fair trial rights of the accused can, regardless of the legal system, only work within a framework of checks and balances. This is why the described ideal systems are not functional in a legal system committed to the rule of law, and this is also why disclosure is essential. The ideal picture of the adversarial process is based on the assumption that both parties have ‘the same chance of winning’; this sportsmanship element is also the reason why we can speak of the ‘fairness’ of the proceedings at all. If this were true, we would need no disclosure (as was the general practice in the United States until less than 70 years ago). This assumption, however, is false, since the prosecution will at all times be in a stronger position to investigate the case than the defence. This structural disadvantage of the defence must be compensated by giving the defence (in principle) the same level of information (‘equality of arms’). In an adversarial trial, the prosecutor must thus provide the defence with the necessary information. The fulfilment of this obligation by the prosecutor, however, must be controlled by some authority. In practice, this is nowadays, both at the national as at the international level, accomplished by the judicial body dealing with the matter. And this control mechanism can only work if, at least in a case of dispute between the parties, the court gets access to the matter in dispute: the evidence. In an inquisitorial trial, the situation is a little more straightforward. Here also, in an ideal world, no ‘disclosure’ will be needed, since the inquisitorial judge will have collected the evidence himself in a purely objective manner. For the obvious disadvantages of this system, it has been abolished in most parts of the world – either the investigating judge will not be the same as the one who decides over the guilt of the accused, or the investigation and prosecution is performed by a ‘neutral’ prosecutor. The judge, in any case, retains the prior access to the collection of evidence, to enable him to investigate the matter in court properly. The prosecution will play a double role: in addition to its prosecutorial function, it performs a controlling function over the court. The same holds true for the defence, who will be allowed to play, in certain limits, a more partisan role. Both of the latter participants, however, are also called upon to be part of the truth-finding process in controlling the court. For the fulfilment of these tasks, they must have knowledge of the evidence beforehand, which means nothing but disclosure in the material sense. The system of disclosure is therefore dependent on the distribution of the procedural roles within the proceedings as a whole.

For the question *what* must be disclosed, we must also put the three purposes of disclosure into relation.

The human rights aspect, i.e., generally speaking, the right to a fair trial, is the only ‘fixed’ parameter within the system of disclosure. While there is certainly a certain

margin of ‘fairness’, the red line to ‘unfairness’ must not be crossed. This is in contrast to the other two aspects, judicial economy and truth-finding. While they can be balanced against the right to a fair trial, the trial must, as a whole, remain fair at all times. If the only way to keep the trial fair is at the expense of truth-finding or judicial economy, the fairness aspect must prevail.

This fairness aspect, as we have seen, works solely in favour of the accused. Regarding disclosure, we can thus state that fairness demands as much prosecution disclosure as possible, whereas it limits defence disclosure as much as possible.

Judicial economy will usually also be enhanced by disclosure. However, this is only true as long as the quantity of the material remains manageable. This has apparently been recognized particularly by the Chambers of the ICC, when they demanded that the Prosecutor provide an analysis of the incriminating evidence prior to trial, which must be updated by the Prosecutor on a continuous basis.

The truth-finding aspect is also ambiguous. Generally, one will naturally have to say that liberal disclosure leads to better truth-finding. However, as we have seen, some actors, particularly in the international field, are extremely hesitant to disclose information if they do not get a guarantee that it will remain confidential. As stated, truth-finding and judicial economy can be balanced, fair trial rights cannot.

For a reasonable access to disclosure of evidence in international criminal proceedings, we must look at the purpose(s) of an international criminal justice system as a whole. Up to now, there appears to be no comprehensive definition or even collection of these purposes – it has rightly been held that there is an “overabundance” of (irrealistic) perceived goals of international criminal justice by different groups.¹²⁹²

In any case, we can assume that, as stated in the introduction concerning criminal justice in general, the *acceptance* of the respective criminal justice system by the society in which it operates is a key factor for an effective criminal justice system. This means, as stated previously, that first and foremost the fair trial rights of the accused must be observed, as an overarching element on which, in principle, general consensus has been reached. Looking at the context of international criminal justice, it appears fair to assume that also truth-finding is a decisive factor in this regard – many post-conflict societies going through transitional justice processes, like, e.g., South Africa or Rwanda, work not, or not only, with criminal justice to come to terms with their past, but (also) with truth- and reconciliation commissions and similar institutions. In the pursuit of this goal, as history shows, disclosure can play a key role.

¹²⁹² Damaška, *Problematic Features of International Criminal Procedure*, at pp. 177 et subs.

The history of disclosure in international criminal justice demonstrates that, while there are drawbacks like some unfortunate decisions of the Ad Hoc Tribunals, the judges of the international criminal courts and tribunals have increasingly understood that pragmatic solutions are needed, keeping the fundamental prerequisite of a fair trial in mind. Particularly at the ICC, there are some encouraging developments in this regard. While it is important for an analysis of the law to look at its history and analyse its roots in different national legal systems, we may not stop at this point. Instead, we must accept the statutory framework of the existing international criminal procedure and, most of all, develop a new legal thinking that goes beyond the ‘common law’-‘civil law’ dichotomy, but accepts that international criminal procedure is a reality that exists and is operational as a *sui generis* procedural system. It appears that, despite of some setbacks, the international criminal practice is, overall, on the right track.¹²⁹³

¹²⁹³ See already *Bünger*, Die Entwicklung der Disclosure of Evidence in internationalen Strafverfahren - Annäherung der Traditionen? p. 232 et seq.

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