A Fair Trial at the International Criminal Court?  
Human Rights Standards and Legitimacy

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Doctor of Philosophy

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by

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Abstract

Can the procedure at the International Criminal Court be regarded as fair? And why is the level of fairness important for the ICC’s legitimacy? This thesis argues that the right to a fair trial is an indispensable prerequisite for international tribunals and that the ICC’s level of procedural fairness can be improved despite the Prosecutor’s obligation to search for inculpatory and exculpatory evidence equally. Questions of procedural fairness typically involve the principle of equality of arms and the right to adversarial proceedings. My argument is different. In a comprehensive analysis, I create a yardstick drawn from regional human rights decisions and the Human Rights Committee and measure the ICC’s procedure against this yardstick. The upshot is that the ICC’s procedure does not violate any procedural human rights law. Rather than being a cause for complacency, however, this apparently favourable result reveals an important limitation of existing legal standards of fairness: they do not take sufficient account of the importance of the investigative process as an integral part of a fair trial procedure. My argument draws on the work of Niklas Luhmann and Ronald Dworkin to argue that a weak level of fairness may lead to a loss of the ICC’s legitimacy, and that an adequate account of fairness must find a middle ground between an exclusive concern with procedural rights on the one hand or accuracy of outcomes on the other. An alternative is needed to a Prosecutor, who is required, on the one hand, to carry out investigations impartially and, on the other hand, to become a trial party at some point of the procedure. Having considered the option of a Co-Investigative Judge, this thesis concludes that fair trial procedures at the ICC can be improved through the setting-up of an Investigation Oversight Office and explains why such an office would achieve an enhancement in terms of fairness, procedural impartiality and expeditious trials.
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### Abbreviations

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<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AC</td>
<td>Appeals Chamber</td>
</tr>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>African Court Protocol</td>
<td>Protocol to the African Charter on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>AfComHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>AfCtHPR</td>
<td>African Court on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>CIJ</td>
<td>Co-Investigating Judges</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>CP</td>
<td>Co-Prosecutors</td>
</tr>
<tr>
<td>DCC</td>
<td>Detailed Description of the Charges</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>EComHR</td>
<td>European Commission on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>HRC</td>
<td>UN Human Rights Committee</td>
</tr>
<tr>
<td>IAComHR</td>
<td>Inter-American Commission on Human Rights</td>
</tr>
<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee for the Red Cross</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>IDAC</td>
<td>In-Depth Analysis Chart</td>
</tr>
<tr>
<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal</td>
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<tr>
<td>IMTFE</td>
<td>International Military Tribunal for the Far East</td>
</tr>
<tr>
<td>IOO</td>
<td>Investigation Oversight Office</td>
</tr>
<tr>
<td>IR</td>
<td>Internal Rules (Rev. 7) of the Extraordinary Chambers in the Courts of Cambodia as revised on 23 February 2011</td>
</tr>
<tr>
<td>LoE</td>
<td>List of Evidence</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
</tr>
<tr>
<td>OAS</td>
<td>Organisation of American States</td>
</tr>
<tr>
<td>OPCV</td>
<td>Office of Public Counsel for Victims</td>
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<tr>
<td>OCIJ</td>
<td>Office of the Co-Investigating Judges</td>
</tr>
<tr>
<td>OCP</td>
<td>Office of the Co-Prosecutors</td>
</tr>
<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
</tr>
<tr>
<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<tr>
<td>RP</td>
<td>Rules of Procedure</td>
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<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
</tr>
<tr>
<td>SCR</td>
<td>Security Council Resolution</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>SG</td>
<td>Secretary-General</td>
</tr>
<tr>
<td>SPSC</td>
<td>Special Panels for Serious Crimes</td>
</tr>
<tr>
<td>STL</td>
<td>Special Tribunal for Lebanon</td>
</tr>
<tr>
<td>TC</td>
<td>Trial Chamber</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UN-RGC Agreement</td>
<td>Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Kampuchea</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>VWU</td>
<td>Victims and Witnesses Unit</td>
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Chapter 1: Introduction

On 17 July 1998, a UN Diplomatic Conference adopted a treaty called the Rome Statute which established the International Criminal Court—competent to try the most serious crimes of international concern. Just four years later, the Statute entered into force with its 60th ratification. A permanent international criminal institution was born, making it unique and distinct from its modern predecessors: the two UN ad hoc tribunals ICTY and ICTR. Furthermore, the creation of the ICC stressed the rapid development of international criminal law during the 1990s, shown by the establishment of so-called hybrid tribunals such as in East-Timor, Sierra Leone, Kosovo, Cambodia or Lebanon. Providing the Court could exercise its jurisdiction, impunity would end from now on and the responsible perpetrators of grave human rights violations would be brought to justice.

Punishing the ‘most serious crimes of concern to the international community’ implies, inter alia, a judicial process, which should not be regarded unilateral. Justice is not exclusively a process from the victim’s or the Prosecutor’s perspective but is also the process undergone by the accused during trial. Only when the established human rights can be relied upon by everybody—including perpetrators of the most serious crimes—is justice fully served. If one wanted to describe the ICC’s mandate in Mirjan Damaška’s words, it could be said that ‘two roads of justice [diverge] in its midst.’ The International Criminal Court has to travel both but is just one traveller.

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2 Art. 12 in conjunction with Art. 126 (1) RS.
3 Preamble of the ICC Statute.
5 Prosecutor v. Tadić, IT-94-1-T, Court Transcripts, Opening remarks of Defence Counsel Michail Wladimiroff, 7 May 1996. Transcript pages 1-136, at 53, lines 1-2: ‘The Tribunal has not been established to satisfy the victims only, but to bring justice to all, including the accused.’ Professor Zappalà suggests that ‘victims do not have such a right [to a fair trial] as far as the criminal trial is concerned.’ See: ZAPPALÀ, S. 2010. The Rights of the Victims v the Rights of the Accused. 8 Journal of International Criminal Justice 137-164, at 149. A similar view is taken by McDermott, who argues that actors such as the Prosecutor, witnesses or victims may be regarded as ‘interest holders’ in the international criminal process. In fact, it was ‘only’ the accused who should be the ‘actor’ holding ‘enforceable rights related’ to his or her status at trial. See: McDERMOTT, Y. 2013. Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law. In: Schabas, W.A., McDermott, Y. and Hayes, N. (eds.) The Ashgate Research Companion to International Criminal Law. Ashgate Publishing Ltd., p. 166.
8 Ibid.
1. The object of this thesis and its research questions

One of the fundamental goals of this research is to identify whether the court procedure at the International Criminal Court can be perceived as fair from a human rights perspective. If so, the thesis also needs to reveal why there may still be doubts with regards to the overall fairness of the trial proceedings at the ICC. Although there is no ‘uniform theory and design for the organization of international criminal proceedings’, one could at least state that there are ‘general principles governing international criminal trials’, which stem from the human rights notion of the right to a fair trial. Whether or not some of these principles can fully be applied in a court structure, which represents a blending of the common and civil law models remains to be seen. Furthermore, the general right to a fair trial is hard to define. Yet, it is possible to break it down into related component sections.

One of these components is, for example, the principle of equality of arms, which has been described as going ‘to the heart of the fair trial guarantee.’ Equality of arms and disclosure of evidence, in turn, are often mentioned in one breath. It remains to be seen, however, whether or not equality of arms is the adequate principle to solve the question of fairness and disclosure of evidence in the framework of this thesis. Be that as it may, the European Court of Human Rights has used equality of arms as one of the yardsticks to assess whether or not there have been fair trial violations, often particularly related to the disclosure of evidence. At the same time, the disclosure or non-disclosure of evidence played a major role at the ICC during its first proceedings against Thomas Lubanga Dyilo and initiated a debate about the overall fairness of the ICC’s trial procedure. This is why the jurisprudence of the ECtHR will be the starting point for the human rights assessment in Chapter 2. Various judgements of the ECtHR and other regional human rights courts have been imported by the ICC and they all deal with questions of fairness, disclosure of evidence, equality of arms and the right to adversarial proceedings.

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The second component section of the right to a fair trial which will be scrutinised in this thesis is the right to have witnesses examined. The Grand Chamber judgment in the case of Al-Khawaja and Tahery initiated a tremendous amount of literature appertaining to the question of the extent to which the accused’s right to confrontation can be limited. The strict application of the right to have witnesses examined was replaced by a more flexible version of the ‘sole or decisive’ rule. This new doctrine may bring about a conviction based on an uncross-examined witness statement, even in cases where the evidence is regarded as sole or decisive. What is not entirely clear at this stage is which counterbalancing arguments international criminal tribunals require to justify such a conviction in these cases. Hence, it is vital to investigate the ICC’s practice in order to be able to answer the research questions of this thesis.

For the sake of coherence, Chapter 3 will investigate the case law of the remaining regional human rights jurisdictions by particularly looking at the disclosure of evidence and the right to have witnesses examined. Furthermore, the third chapter will complement some kind of yardstick of human rights standards which will be measured against the ICC’s procedure at a later stage. In particular, Chapter 3 will start off with decisions of the Human Rights Committee, followed by an assessment of the case law of the Inter-American Court of Human Rights and, finally, the African Court of Human and Peoples’ Rights.

In addition to the human rights perspective, this thesis crucially looks into the jurisprudence of the two ad hoc tribunals in Chapter 4. The conclusions will reveal whether or not equality of arms is an adequate principle to solve the research questions of fairness, and whether or not there is a visible inclination supporting the argument of a connection between the disclosure of evidence and the overall fairness of the trial. For the last twenty years, the ad hoc tribunals have often been confronted with the interpretation of the rights of the accused, and their jurisprudence offers a range of relevant material for an assessment as to how fair trial issues, including the disclosure of evidence and the right to confrontation have been counselled.

Chapter 5 will then attempt to juxtapose the ICC’s procedural system with the yardstick of human rights law and, by measuring the two jurisdictions against each other, the first part of the hypothesis can be tested. Irrespective of what the outcome reveals, there still may be questions concerning the ICC’s investigative procedure and
whether or not its disclosure regime can be improved. Therefore, it will be crucial for Chapter 5 to establish an assumption of fairness and scrutinise and explain why the court procedure of the ICC still falters, even if the drafters of the Rome Statute have taken into account the weaknesses from the two predecessors ICTY and ICTR.

Only with an established assumption of fairness and, irrespective of whether or not the ICC complies with international human rights standards, Chapter 6 will explain why a flawed procedure with regards to fairness might weaken the ICC’s overall legitimacy. The chapter will use a socio-legal lens to establish a nexus between fair procedures and the legitimacy of the ICC. Professor Luhmann, for example, has examined procedure as a social institution and provided answers as to how procedure itself can be a legitimizing mechanism. He describes court procedure as a bipolar process, containing an internal and an external aspect. If the ICC’s disclosure and investigative process is constantly perceived as unfair externally, the acceptance of the Court in public and hence, its legitimacy will decrease. Therefore, a socio-legal lens on general acceptance may provide a ‘fresh, more coherent and deeper understanding of the mechanisms of international criminal justice.’ At a later stage in Chapter 6, Luhmann’s ideas of legitimacy and general acceptance will be linked to Dworkin’s thoughts on fairness, evidence and procedure. Inspired by Dworkin, the thesis will suggest a new middle ground of two radical edges, namely procedural rights on the one hand and their limitation in order to reach more accuracy on the other. This new middle ground may be useful to anticipate whether or not the ICC’s level of fairness may be publicly accepted. Critical and creative thinking on the ICC’s procedure may finally improve its legitimacy. Hence, if any theoretical components from other disciplines provide suggestions to ameliorate the current procedure, they shall be addressed.

The present debate by African states on withdrawal from the Rome Statute in conjunction with a flawed court procedure would only add more fuel to the fire rather than calming the situation—and a loss of credibility, in turn, would be detrimental for the International Criminal Court. Some state leaders such as the Sudanese president

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15 LUHMANN, N. 1983. *Legitimität durch Verfahren.* 3rd ed. Suhrkamp, pp. 27-37. Luhmann calls this external variable “a general acceptance of decisions by modern society” or, to use the German term ‘Generalisierung.”
Omar Al-Bashir consider the Court a tool of Western politics acting in a biased manner.\(^{19}\) Although the latter has been repeatedly rejected by the Office of the Prosecutor,\(^{20}\) any argument which promotes these ideas would be detrimental for the ICC.\(^{21}\) Generally speaking, the Darfur case was triggered by a Security Council Resolution and thus has been initiated with allegedly a large consensus amongst the international community,\(^{22}\) but still there are allegations that the UNSC influences the work of the ICC.\(^{23}\) By means of illustration, one could mention that human rights violations in other parts of the world, for example, in Syria or some of the incidents in the Gaza Strip irrespective of which side committed them, have not found the necessary consensus amongst the five permanent members to be referred to the ICC.\(^{24}\) In addition, the African Union alleges that the ICC is used to leverage the EU’s political power in Africa as the EU provides 70% of its funding.\(^{25}\) It appears only logical that due to such criticism, the International Criminal Court needs to aim at the highest procedural standards. As a consequence, this thesis will have to tackle the question whether or not, and to what extent, fair trial standards are applied in the ICC’s trial procedure.

But what if our comparison of human rights standards does not reveal any breaches of the Rome Statute? And what if the appropriate vehicle to produce justice, i.e. the ICC’s court procedure, still falters whilst seemingly adhering to human rights law? As hinted at before, Chapter 5 will have to establish an assumption of fairness and elaborate on the structure of the Rome Statute. To this end, it will be crucial to argue that the disclosure of evidence already starts at the investigative phase of a case, finally leading to the assertion that the procedural difficulties at the Court stem from the


merging of the adversarial and inquisitorial traditions, and that the issue of disclosure of evidence can be enhanced by an amendment of the ICC Statute. This analysis is complex and involves questions as to how the Rome Statute administers justice, how the mixture of adversarial and inquisitorial systems may affect the fairness of the court procedure and whether there are opportunities to improve the ICC’s system. According to Caianiello, certain exceptions to the ICC’s predominant accusatorial model make it ‘partially ineffective’ and these inconsistencies seem ‘to be paid by the defence, which is systematically disadvantaged.’ The indeed interesting debate on how facts are established in international criminal investigations and whether or not there should be common standards for investigators of international tribunals, however, would overstep the boundaries of this thesis. As a result, this thesis focusses more on the question of fairness from an institutional perspective, that is, whether or not there should be a control mechanism for the ICC Prosecutor.

In order to prevent a loss of legitimacy, one has to think about possible solutions. This is why Chapter 7 portrays the procedure of the Extraordinary Chambers in the Courts of Cambodia. The goal is to explore the ECCC’s different modus operandi with regards to investigations and place it in the context of the ICC’s procedure. The ECCC has incorporated typical components of the civil law procedure and acts with so-called Co-Prosecutors as well as Co-Investigating Judges. Therefore, this thesis will scrutinize whether or not a body such as a Co-Investigating Judge may act more impartially whilst adding evidence than a Prosecutor, whose mission is to gather ‘incriminating as well as exonerating circumstances equally’ but who faces, at the same time, the burden of proof. At the ECCC, it is the task of the Co-Investigating Judges to ‘ascertain the truth’ and to ‘conduct the investigation impartially, whether the evidence is inculpatory or exculpatory.’ As a result, they neither serve the interests of the prosecution nor those of the defence.

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26 Similar allegations have been made by BIBAS, S. and BURKE-WHITE, W.W. 2010. International Idealism Meets Domestic-Criminal-Procedure Realism. 59 Duke Law Journal 637-704, at 695: ‘Our argument is not that a pure adversarial or inquisitorial system is preferable. Our fear is that the mishmash of the two has abandoned some distinctive checks on which each system depends.’
29 Art. 54 (1) (a) RS.
30 Art. 66 (2) RS.
31 Rule 55 (5) IR.
32 Ibid.
To sum up, the object of this thesis is to explore whether the trial procedure at the ICC respects internationally recognized human rights standards in the areas of the disclosure of evidence and the right to confrontation. A further objective is to create an assumption of fairness, explain parameters of court procedure and portray why fairness plays such a crucial role for legitimate trial procedures. It needs to be reiterated that the thesis is designed neither to promote nor to discourage the common or the civil law system. Rather, it aims to transcend this traditional dichotomy with a ‘deeper understanding of the mechanisms of international criminal justice.’ Finally, the comparison between the Cambodian system and the ICC will provide answers as to whether Co-Investigating Judges could conduct ICC investigations more impartially and whether this, in turn, can affect the overall procedure positively.

In the light of the above, the thesis will answer the following research questions:

- Does the ICC’s court procedure comply with standards from regional human rights courts and the HRC?
- How could fairness be defined in the context of international criminal procedure and why is there still room to enhance the level of fairness at the ICC?
  A sub-question which has to be clarified in this realm is the question of the principle of equality of arms and whether or not it seems to be suitable to provide answers as to the assumption of fairness in the context of this research.
- Is there a nexus between fairness and legitimacy? What are the implications of Luhmann’s and Dworkin’s theories of procedural justice for international criminal justice?
- Can a body such as the Co-Investigating Judge, known from the ECCC’s model, represent a solution for the ICC and is there an alternative to improve the ICC’s procedure?

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33 SWART (n 16) 89.
2. Fairness, justice and legitimacy

Fairness is ‘as contentious as it is elusive’ and to provide a solid definition of what it really is appears to be an overambitious goal.\(^35\) It is, however, possible to find a lowest common denominator of what is associated with the term *fairness*. Zappalà describes fairness in the context of the right to a fair trial as

the standard for assessing the behavior of public authorities towards the individual against whom criminal charges are laid and who is then subjected to criminal prosecution.\(^36\)

Thus, fairness can be regarded as a standard for a certain assessment. Looking into language dictionaries reveals further relevant information about fairness. The adjective *fair* is described as something ‘just, unbiased, equitable or impartial.’\(^37\) Furthermore, *fair* can be associated with being ‘legitimate or in accordance with the rules or standards.’\(^38\) According to Collins Cobuild dictionary ‘something that is fair is reasonable according to a generally accepted standard or idea about what is right and just.’\(^39\) In addition, there is another meaning of the word *fair* regarding conditions, especially related to sports, where it is identified as ‘offering an equal chance of success.’\(^40\) Fletcher describes this similarly when he points out that ‘fair procedures are those in which both sides have an equal chance of winning.’\(^41\) The noun *fairness* is depicted as ‘honesty, impartiality and justice’\(^42\) and following its definition given previously from Collins Cobuild, *fairness* is defined as ‘the quality of treating all people equally without allowing personal feelings to influence judgements.’\(^43\) As a result, when we use the words *fair* or *fairness*, one can assume that it can be a standard to assess something and that it is linked—to whatever extent—to the words just or justice. Furthermore, fairness is also linked to the term legitimacy, and legitimacy in turn implies some acceptance according to the law.\(^44\)


\(^38\) *Shorter Oxford English Dictionary on Historical Principles* (ibid) 920.


\(^40\) *Shorter Oxford English Dictionary on Historical Principles* (n 37) 920.


\(^42\) *Shorter Oxford English Dictionary on Historical Principles* (n 37) 921.

\(^43\) Collins Cobuild (n 39) 509.

Looking into a French language dictionary, the aforementioned can be confirmed. The adjective *juste* is being translated into English as ‘just’ or ‘fair’ in the context of being *équitable* and, accordingly, the French noun *justice* is described as ‘justice’ or ‘fairness.’ The same applies to the Spanish adjective *justo* having been equated to the English words ‘just’ or ‘fair.’ The German language goes even a step further and has implemented the word *fair* into its own language. A renowned German dictionary describes the German adjective *fair* with being *gerecht*, *anständig* or *den Regeln entsprechend*. *Gerecht* would correspond to the English ‘just’ and *den Regeln entsprechend* would be ‘to be in conformity with rules or standards.’ *Anständig*, having various meanings in the German language, could be translated with ‘appropriate’ or ‘reasonable’ in the context of a fair hearing. The author agrees with the fact that there seems to be confusion whenever the terms ‘fairness’ and ‘justice’ are translated into other languages; and that the difference between the two terms becomes clearly visible in the criminal process. ‘Victims demand justice. Defendants want fairness.’

The words ‘just’ or ‘justice’ stem from the Latin adjective *justus* or the noun *justicia*. *Justus* has been translated as ‘just, upright or righteous,’ and the respective nouns for *justicia* would be ‘justice, equity, righteousness and uprightness.’ But what is justice? An English dictionary of law describes it as

A moral idea that the law seeks to uphold in the protection of rights and punishment of wrongs. Justice is not synonymous with law—it is possible for a law to be called unjust. However, English law closely identifies with justice and the word is frequently used in the legal system;

*The New Oxford Companion to Law* confirms this definition when it states that ‘justice is a moral concept relating to human relationships generally, but closely associated with the operation of legal institutions.’ The dictionary then elaborates on different spheres of justice and mentions that justice may, *inter alia*, be focused on the procedure that

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46 Ibid.
47 Collins Spanish Dictionary. 2008. 5th ed. HarperCollins Publishers, p. 227; as in the French example, the translation refers to the context of the Spanish word *equitativo*.
50 FLETCHER (n 41) 134-137.
ought to be followed.\textsuperscript{55} With regards to ‘pure procedural justice,’ it is mentioned that
the outcome may not be known or disputed in advance.\textsuperscript{56} Independent of what the result
may be, the procedure could still be considered as just if it was ‘thought to be fair and
impartial.’\textsuperscript{57} Hence, if we perceive the overall procedure as fair, justice can be delivered
irrespective of the outcome. This, in turn, confirms that one needs fairness as the
yardstick to assess the court procedure. Consequently, fairness has to be defined or one
has to at least, develop an assumption of fairness. At the same time, fairness has the
potential to tip the scales when it comes to general acceptance. This is why the thesis
will elaborate on the aspect of court procedure and general acceptance in Chapter 6.

The counterpart of ‘procedural justice’ has been labelled ‘substantive justice’\textsuperscript{58}
and John Rawls considers justice as being the ‘first virtue of social institutions, as truth
is of systems of thought.’\textsuperscript{59} He regards the primary subject of justice as ‘the way in
which the major social institutions distribute fundamental rights and duties and
determine the division of advantages from social cooperation.’\textsuperscript{60} This thesis, however,
will use the lens of ‘procedural justice’ whilst focussing on the legitimacy of institutions
and finally try to illustrate why a fair procedure is needed to reach legitimacy, which
contains the aspect of general acceptance. What can be confirmed at this stage is that the
concepts of fairness and justice are not the same,\textsuperscript{61} however, they are to some extent
interlinked. H.L.A. Hart supports this idea in his famous \textit{The Concept of Law} whilst
admitting that

The distinctive features of justice and their special connection with law begin to emerge
if it is observed that most of the criticisms made in terms of just and unjust could almost
equally well be conveyed by the words ‘fair’ and ‘unfair.’\textsuperscript{62}

To sum up the aforementioned in the context of this thesis, one could draw the
conclusion that \textit{fairness} is needed as the yardstick to measure the body called court
procedure. The court procedure, successively, tries to establish justice. This thesis,
however, does not necessarily elaborate on justice but focusses on fairness and

\textsuperscript{55} \textit{Ibid.} It is explained that ‘justice concerns both the correct or fair distribution of benefits and burdens as between groups or classes
of persons (social justice), and treating individuals properly or fairly (individual justice). More specifically, justice can be about the
proper basis for agreements or exchanges (commutative justice) or about putting right past wrongs or injustices (corrective justice).’

\textsuperscript{56} \textit{Ibid.}

\textsuperscript{57} \textit{Ibid.}

\textsuperscript{58} Substantive justice is also called ‘distributive justice’ or ‘outcome justice.’ \textit{See e.g.} RÖHL, K.F. 1997. Procedural Justice:


\textsuperscript{60} \textit{Ibid.}

\textsuperscript{61} \textit{Ibid.}


legitimacy; and if legitimacy implies general acceptance, the yardstick of fairness can draw a conclusion as to whether or not an institution can be regarded as legitimate.

3. Origins and fundamental treaties of the right to a fair trial

The right to a fair trial has been described as one of the ‘most cherished, celebrated and venerable human rights’ which illustrates humanity’s development regarding legal civilization. Human rights movements go back to antiquity. In the Roman Empire, for example, values such as dignity, equality and freedom formed the basis for the establishment of what has been described by scholars as ‘cosmopolitan documents.’ Although the overall human rights situation in those days was still unacceptable due to the legality of slavery, there was an important idea behind the establishment of these records: the admission that every person, men, women and slaves, possessed dignity at all—though the degree varied. In addition, there have been contemplations that inequalities infringing the law would seek remedy and hence should be corrected by the law and, if necessary, by a trial. All of this, of course, was not a guarantee for a fair trial for accused people. Nonetheless, these principles of freedom, equality and dignity can be regarded as the ‘root of the contemporary civil rights movement.’

A more concrete document with regards to the right to a fair trial was established in the middle ages. The Magna Carta, or the Great Charter of King John, granted on 15 June 1215, explicitly mentioned that ‘to none will we sell, to none will we deny, to none will we delay right or justice’ in its section 40. Furthermore, section 39 stated that ‘no free-man shall be […] imprisoned […]; nor will we condemn him […], excepting by the legal judgment of his peers, or by the laws of the land.’ The latter expresses a strong will to guarantee a trial for free men, irrespective how difficult it may have been to invoke these rights hundreds of years ago. Further ideas against arbitrariness in criminal accusations evolved in the 18th century. They were integrated in section VIII of the Virginia Bill of Rights of 1788 and in the French Revolution’s Déclaration des Droit de L’Homme et du Citoyen of 1789. Over many decades and after two world wars in the

65 Ibid 85. The right to a fair trial presupposes some sort of state authority, however, even if state powers are involved they must not violate human dignity. Hence, the right to a fair trial guarantees dignity; SAFFERLING. Towards an International Criminal Procedure (n 12) 28, 29.
66 HONORÉ (n 64) 85.
67 Ibid.
69 Ibid 239.
20th century, the notion of the right to a fair trial emerged as an accepted principle in international humanitarian law, human rights law and international criminal law.\textsuperscript{70}

In 1948, the UN General Assembly was able to proclaim a document which did not contain any restrictions of rights and freedom of any kind: the Universal Declaration of Human Rights.\textsuperscript{71} In Article 10, it entitles everyone ‘in full equality to a fair and public hearing.’ Adopted as a non-binding resolution then, the UN General Assembly agreed upon a further crucial document with regards to the right to a fair trial in 1966: the International Covenant on Civil and Political Rights.\textsuperscript{72} Article 14 of this treaty guarantees to everyone ‘a fair and public hearing by a competent, independent and impartial tribunal.’ In conjunction with the International Covenant on Economic, Social and Cultural Rights\textsuperscript{73} and the Optional Protocols, the documents are referred to as the ‘International Bill of Human Rights.’\textsuperscript{74} They finally entered into force in 1976 after the 35\textsuperscript{th} ratification and the number of ratifications has steadily increased over the years.\textsuperscript{75} Despite the codification of the right to a fair trial in human rights law, it is also significantly embedded into international humanitarian law, regional human rights law and the statutes of the international criminal tribunals.

As mentioned above, the right to a fair trial is also a constituent element of international humanitarian law, ‘identical to the guarantees offered by existing universal and regional systems of human rights protection.’\textsuperscript{76} Some treaties were already signed in 1864,\textsuperscript{77} hence, humanitarian law is a predecessor of international human rights law.\textsuperscript{78} Nowadays, the two areas overlap although they underwent a ‘separate evolution’ until

\textsuperscript{70} With regards to human rights law, Safferling elaborates on the question whether human rights have reached the status of customary international law. See: Safferling. Towards an International Criminal Procedure (n 12) 24-25. Lillich and Meron, for example, suggest that the right to a fair trial has reached the status of customary international law, however, not jus cogens. Meron. T. 1989. Human Rights and Humanitarian Norms as Customary Law. Clarendon Press. There is, however, a third approach suggested by Bruno Simma and Philip Alston, who suggest that human rights should be considered as a ‘general principles of law recognized by civilised nations’ in the sense of Art. 38 (1) (c) ICJ Statute. See: Alston, P. and Simma, B. 1988. The Sources of Human Rights Law. 5 Australian Yearbook of International Law 82-108.

\textsuperscript{71} A/RES/217A (III) of 10 December 1948.

\textsuperscript{72} A/RES/217A (III) of 10 December 1948. ICESCR.


the late sixties. International humanitarian law, expressed with the older term the ‘laws of war’ or *jus in bello*, is the type of law focussing on the conduct of armed conflict and military occupation. In addition, it deals with the international crimes of genocide and crimes against humanity. Using the terminology of the Rome Statute, it could also be described as ‘the international law of armed conflict.’ Currently, there are six treaties in force: the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. All of the four Geneva Conventions include the guarantee of trial in the so-called ‘common Article 3,’ which prohibits the

Passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Basically, the Geneva Conventions apply to situations of international armed conflict. Article 3 common to the four Conventions, however, represents a rule which also has to be respected in non-international conflicts, considered as internal affairs. As a result, one might think that international humanitarian and human rights law would be in conflict with each other. The International Court of Justice, however, emphasized that both sorts of law may apply simultaneously. Hence, there is a ‘close relationship between international humanitarian and human rights law.’ Returning to the fair trial origins, further guarantees can be found in Articles 71 to 75 of the fourth Geneva Convention—applicable to civilians. Moreover, Article 75 of the Additional Protocol I and Article 6 of Additional Protocol II also refer to fair trial, protecting victims of international armed conflicts as well as victims of internal wars.

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79 GASSER in Doria et al. (n 77) 1,113, 1,114. After the Six Days War in the Middle East, the UN held a conference in Teheran to discuss the further development of human rights and humanitarian law in 1968. The UN General Assembly Resolution 2444 (XXIII) recognized the necessity of applying basic humanitarian principles in all armed conflicts and invited the Secretary-General to ‘study, in consultation with the ICRC, steps which could be taken to secure the better application of existing international humanitarian conventions and rules in all armed conflicts.’


81 See e.g. Arts. 8 (2) (e) (iii) and 21 (1) (b).

82 The four conventions are: (1) The Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, (2) the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, (3) the Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949 and (4), the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

83 The two protocols consist of: (1) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Protocol I). (2) Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims on Non-International Armed Conflicts of 8 June 1977 (Protocol II).

84 Article 3 (1) (d) of all four Geneva Conventions.


86 GASSER in Doria et al (n 77) 1,113; MERON in Warner (n 78) 97-105.
Switching from international humanitarian to regional human rights law, it is now relevant to mention the Council of Europe, which should not be confused with the European Union. The Conseil de l’Europe was the first regional organisation to include the protection of human rights in its treaties. After its establishment in 1949, one of the biggest achievements of the Council was the adoption of the European Convention on Human Rights, which finally entered into force in 1953. The Convention contains fourteen additional protocols which are open for ratification by the contracting states. The right to a fair trial is embodied in Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms and requires that

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Over the years, the European Court of Human Rights in Strasbourg had to interpret Article 6 in a range of cases and some of them have even been mentioned in decisions of the ICC. As a result, they will be addressed in Chapter 2.

The Organisation of American States represents the equivalent to the Council of Europe with regards to regional human rights protection in Northern and Latin America. Two of its crucial treaties are the Charter of the Organization of American States and the American Convention on Human Rights of 1969. Whereas the Charter generally refers to the conduct of states in relation to each other, the Convention guarantees rights for individuals with the intention of harmonizing the domestic law of the signatory states with its norms. The right to a fair trial can be found in Article 8 of the Convention and comprises a range of individual rights listed from subsection (1) to (5), though the term fair is not explicitly mentioned. The first sentence of Article 8 ensures for every person

89 The ECHR is also referred to as the Convention on the Protection of Human Rights and Fundamental Freedoms.
90 These fourteen additional protocols include, for example, an extension of rights and freedoms in the Fourth Protocol of 1963, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto. Another important protocol is the sixth of 2 May 1983 – concerning the abolition of the death penalty. The last protocol entering into force on 1 June 2010 was the Fourteenth Protocol amending the control system of the Convention.
91 Art. 6 (1) ECHR.
95 Article 25 (the right to judicial protection) can be regarded as a further duty of state parties to respect.
The right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law.

The competent organs to oversee these commitments made by the state parties are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The cases of the latter bodies will be outlined in Chapter 3.

The right to a fair trial also plays a major role in Africa where the Organisation of African Unity—nowadays the African Union—adopted the African Charter on Human and Peoples’ Rights in 1981. Sometimes it is also referred to as the ‘Banjul Charter’. Having entered into force after its 26th ratification in 1986, Africa became the third region to protect human rights in a separate system. Although Article 7 of the Charter does not, similarly to the American Convention, mention the term fair in its wording, the guaranteed rights show the same provisions as in other regional or international documents. In Article 30, the Banjul Charter established the African Commission on Human and Peoples’ Rights to safeguard and ‘ensure the protection’ of these rights. In addition to Article 7 of the Charter, the latter Commission adopted the Resolution on the Right to Recourse and Fair Trial in 1992, which includes a list of what is considered as a fair trial. Furthermore, in 1999, the Commission established a ‘Working Group’ in order to draft general principles and guidelines on the right to a fair trial. The competent body to protect and complement the mandate of the Commission is the African Court on Human and Peoples’ Rights. It was created by a protocol to the Banjul Charter in 1998 until it finally went into force in January 2004. The case law of the African Court will also be addressed in Chapter 3.

Other documents including fair trial issues such as the Charter of Fundamental Rights of the European Union, the Cairo Declaration on Human Rights in Islam or the Hong Kong Bill of Rights cannot be considered in this work since the comparison of part one intends to refer to case law of regional human rights courts and the two UN ad hoc tribunals.

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97 TRECHSEL, S. 2005. Human Rights in Criminal Proceedings. OUP, p. 81. Prof. Trechsel suggests that the ‘omission of the term was due to its perceived ties to the common law and to the United States.’ He sees, however, ‘no reason to assume that the provision was intended to have a substantively different meaning from its counterparts in other texts.’
98 Art. 33 (a) in conjunction with Art. 34 ff ACHR.
99 Art. 33 (b) in conjunction with Art. 52 ff ACHR.
101 BUERGENTHAL. Grundzüge des Völkerrechts (n 74) 130.
102 ACHPR/RES.4 (XI) 92.
103 ACHPR/RES.41(XXVI) 99.
104 Article 2 of the Protocol on the Establishment of an African Court on Human and Peoples’ Rights.
With regards to international criminal law, it can be held that the right to a fair trial formed part of the Charter of the Nuremberg Tribunal\textsuperscript{105} as well as the Charter for the Tokyo Tribunal.\textsuperscript{106} Yet, the jurisdiction to prosecute individuals for international crimes still remained the task for national courts after the Second World War tribunals had accomplished their mission.\textsuperscript{107} Basically, this has not changed until today since the complementary feature of the Rome Statute still highlights the primary task of national courts to prosecute crimes of international concern.\textsuperscript{108} Nonetheless, the right to fair trial is strongly anchored in international criminal law and there is a strong connection between international criminal law, humanitarian and human rights law.\textsuperscript{109} The latter can be confirmed by way of two examples. Firstly, although not formally bound by international human rights treaties,\textsuperscript{110} international criminal jurisdiction was expected to respect human rights standards as announced by the then UN Secretary-General Boutros Boutros-Ghali in 1993.\textsuperscript{111} Secondly, the jurisprudence of the ad hoc tribunals serves as empiric evidence that decisions of the international criminal tribunals were held with reference to the interpretation on issues of human rights law\textsuperscript{112} as well as matters of humanitarian law.\textsuperscript{113} As a consequence, the overlap of these different areas of law is noticeable. In addition, the right to a fair trial has been set out in the statutes of the international criminal tribunals explicitly. Hence, it is directly applicable in the proceedings of the respective tribunals.\textsuperscript{114} Following the algorithm that human rights and humanitarian law are not in conflict with each other, it can be mentioned that the

\textsuperscript{105} Charter of the International Military Tribunal, Article 16: Fair Trial for Defendants.

\textsuperscript{106} International Military Tribunal for the Far East Charter (IMTFE Charter), Article 9: Procedure of Fair Trial (under Section III: Fair Trial for Accused).

\textsuperscript{107} GASSER in Doria et al. (n 77) 1.116.


\textsuperscript{109} GASSER in Doria et al. (n 77) 1.116.

\textsuperscript{110} CRVER, R. et al. 2007. An Introduction to International Law and Procedure. CUP, p. 354.

\textsuperscript{111} Report of the Secretary-General pursuant to paragraph 2 of SCR 808 (1993), UN Doc. S/25704 of 3 May 1993, at para. 106: ‘It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the SG, such internationally recognized standards are, in particular, contained in article 14 of the ICCPR.’

\textsuperscript{112} In the ICTR’s Kajelijeli case, for example, the Appeals Chamber held that customary international law was reflected, \textit{inter alia}, in the ICCPR. Furthermore, custom could also be found in regional human rights treaties, namely the ACHPR, the ECHR and the ACHR. See: ICTR, Kajelijeli \textit{v.} Prosecutor, ICTR-98-44A-A, AC, Judgment, 23 May 2005, para 209. See also: ICTY, Prosecutor \textit{v.} Delalić \textit{et al}, TC, Decision on the motions by the Prosecutor for protective measures for the prosecution witnesses pseudonymed “B” and through to “M”, 28 April 1997, para 27: ‘[d]ecisions on the provisions of the ICCPR and the ECHR have been found to be authoritative and applicable.’

\textsuperscript{113} In Tadić, the Appeals Chamber decided that there are ways to hold individuals criminally responsible before international criminal tribunals for crimes committed in so-called non-international conflicts: ICTY, \textit{Prosecutor \textit{v.} Tadić}, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 94. As explained on pages 13 and 14 of this work, internal affairs could be referred to international humanitarian or human rights law but not necessarily to international criminal law.

\textsuperscript{114} CRVER. An Introduction to International Law and Procedure (n 110) 354.
significance of the right to fair trial has not only emerged in humanitarian or human rights law but has equally risen in international criminal law.

The ICTY Statute, for instance, includes the right to a fair trial in Article 21 ensuring that the accused ‘shall be entitled to a fair and public hearing, subject to article 22 of the statute.’\textsuperscript{115} A similar wording is used in the Statute of the ICTR when Article 20 requires a ‘fair and public hearing’ for the accused. The Rome Statute of the ICC sets out the main ‘rights of the accused’ in Article 67; some other specific guarantees which may be included under the umbrella of fair trial, however, can be found in other articles.\textsuperscript{116} In any case, the Trial Chamber of the ICC is required to ensure that ‘a trial is fair and expeditious and is conducted with full respect for the rights of the accused.’\textsuperscript{117} According to Schabas, the provisions of Article 67 may not merely depict something called ‘minimum guarantees.’\textsuperscript{118} Moreover, he admits that individual problems of a fair hearing which did not result in a violation of the fair trial may still be regarded as a breach if there has been an accumulation of minor encroachments of Article 67.\textsuperscript{119} To conclude, it can be held that the right to a fair trial is a solid principle embedded in the Rome Statute ensuring that the accused is adequately able to defend his or her case.

In the light of the above, the right to a fair trial plays a major role in all three domains of law which finally meet together: humanitarian law, human rights law and international criminal law.\textsuperscript{120} This, in turn, implies that the principal legal instruments of the right to a fair trial should be read in conjunction with the three types of law. Hence, the comparison of the case law of different judicial bodies dealing with the right to a fair trial is a logical consequence of the comparative action within the following chapters.

\textsuperscript{115} The importance of the right to a fair trial was, for example, stressed in: ICTY, Prosecutor v. Tadić, IT-94-1-A, AC, Judgment, 15 July 1999, paras 45–46.

\textsuperscript{116} See e.g. Art. 20 RS (ne bis in idem principle); Art. 22 RS (nullum crimen sine lege); Art. 23 (nulla poena sine lege); Art. 24 (non-retroactivity ratione personar).

\textsuperscript{117} Art. 64 (1) RS.


\textsuperscript{119} Ibid.

\textsuperscript{120} GASSER in Doria et al (n 77) 1,117.
4. International criminal procedure—looking ahead

Until recently, international criminal procedure appeared to be a rather unexplored field. There were questions about its nature, its legitimacy and where it could find its place in international criminal law ‘within the broader regime of international law.’\(^{121}\) Although the term did not necessarily represent a novelty,\(^{122}\) two or three decades ago, international criminal procedure was still dismissed by the legal scholar Schwarzenberger,\(^{123}\) who considered it as ‘no more than an idea or aspiration.’\(^{124}\) Some scholars would have agreed with Professor Schwarzenberger then, others would not.\(^{125}\) The fact is that even in 2008 Professor Cassese still stated that there were ‘no general rules on international criminal proceedings.’\(^{126}\) In 2009, Vasiliev explained that some areas of international criminal procedure had ‘remained largely uncodified and therefore misty,’\(^{127}\) whereas others simply described it as a ‘very young field of law.’\(^{128}\) Today, the situation looks different. In the introduction of a monograph on international criminal procedure of 2013, the editors describe international criminal procedure as

The specialized body of international law that governs the conduct of criminal proceedings, including matters of both procedure and evidence, in the context of the international legal order. International criminal procedure has as its principal objective, and indeed its most usual function, the effective and fair enforcement of substantive international criminal law by international and hybrid criminal tribunals.\(^{129}\)

Safferling had already in 2004 established a similar definition with the following three components: Firstly, international criminal procedure must be a norm which finds its roots in public international law; secondly, the norm shall have the aim to enforce international criminal law and, thirdly, the enforcement must be carried out by an


\(^{123}\) Georg Schwarzenberger did not regard the Nuremberg and Tokyo tribunals as evidence of an international criminal jurisdiction. He considered it as a confederation of states exercising extraordinary jurisdiction that they could have done individually. See: SCHWARZENBERGER, G. 1983. The Province of International Law. 1 Notre Dame International Law Journal. 21-32, at 25.

\(^{124}\) BOAS et al. (n 11) 3.

\(^{125}\) In the introduction of the book International Criminal Procedure: Principles and Rules, the editors mention that Schwarzenberger’s view was not necessarily representative. For example, the authors refer to Professor Quincy Right, who had a more optimistic view in international criminal procedure in 1974. See SLUITER et al. (n 9) 4.

\(^{126}\) CASSESE International Criminal Law. 2nd ed. (n 10) 378.

\(^{127}\) VASILIEV (n 121) 21. According to the author, the investigative measures at the pre-trial stage could be considered as a ‘notable example.’


\(^{129}\) SLUITER et al. (eds.) (n 9) 13.
international institution or body.\textsuperscript{130} This does, on the other hand, of course, not mean that a hybrid court which is ‘firmly embedded’ in a domestic system could not apply the rules from international criminal procedure.\textsuperscript{131} Boas also provided a definition of international criminal procedure and considers it to be a coherent body of rules (albeit with internal variations) that are derived from the traditional sources of international law and legitimised by their adherence to legal principles entrenched in the human rights regime – in particular, the \textit{jus cogens} norm of the right to a fair trial.\textsuperscript{132}

As one can see, the debate on international criminal procedure includes a debate on the coherence of this body of law resulting in the question of whether or not it constitutes a ‘discrete and identifiable area of international law.’\textsuperscript{133}

What has evolved in the meantime is a vital debate on the notion of \textit{principles} and \textit{rules} in the area of international criminal procedure, their normative components and their possible interpretation.\textsuperscript{134} With exactly this attempt at defining the \textit{principles} and \textit{rules} in the domain of international criminal procedure, scholarship claims to have established a proposal of ‘some definitions and a schematic algorithm.’\textsuperscript{135} Therefore, it is suggested that this ‘array of legal norms’, \textit{i.e.} principles and rules of international criminal procedure, can be considered as a branch of law which is on an ‘equal footing’ with other bodies of law due to a unified corpus of norms.\textsuperscript{136} To this end, definitions of what is understood under \textit{principles} and \textit{rules} have been established. \textit{Principles} have been defined as ‘general, highly abstract, and inconclusive legal prescriptions which are shared by all individual tribunals due to their fundamental and mandatory nature’ whereas \textit{rules} would be regarded as ‘specific legal prescriptions which give conclusive guidance, accord with and give effect to the principles, and are not so fundamental and mandatory as to require uniform adherence.’\textsuperscript{137}

Returning to the mission of this thesis, which investigates whether or not the ICC’s trial procedure can be regarded as fair from a human rights perspective, it may be appropriate to state that the current status of international criminal procedure will not

\begin{itemize}
\item \textsuperscript{130} Safferling in Renzikowski (n 122) 151.
\item \textsuperscript{131} Sluiter et al. (eds.) (n 9) 14.
\item \textsuperscript{132} Boas et al. (n 11) 14.
\item \textsuperscript{133} Ibid 3. The authors provide their approach about the coherence issue on pages 13 and 14: ‘Far from being a set of discordant and disembodied rules created and applied in a haphazard manner, international criminal procedure is a coherent body of rules (albeit with internal variations) that are derived from the traditional sources of international law and legitimized by their adherence to legal principles entrenched in the human rights regime – in particular, the \textit{jus cogens} norm of the right to a fair trial.’
\item \textsuperscript{134} Sluiter et al. (eds.) (n 9) 19.
\item \textsuperscript{135} Ibid.
\item \textsuperscript{136} Ibid.
\item \textsuperscript{137} Ibid 21.
\end{itemize}
affect the outcome of the research in one way or the other. This thesis is more devoted to what Boas has described as ‘internal variations.’ After the court procedure of the International Criminal Court has been measured against human rights standards, the thesis tries to establish an assumption of fairness and raises questions as to whether the implementation of a new body into the ICC’s system might enhance its overall procedure. Until today, there is no ideal model of how international criminal procedure can administer justice best, and therefore—at least for this research—it is crucial to compare the functioning of different bodies who are involved in the procedures. This, in turn, may provide solutions as to whether the application of the right to a fair trial in practice can be enhanced.

What should be briefly addressed, on the other hand, is from which angles the human rights notion of the right to a fair trial can be regarded. The discussion about principles of international criminal procedure returns the debate to the broader question of principles in public international law. Of course, it is necessary to remember where the essence of the fair trial is located; that is to say, its origins are located in humanitarian, human rights and international criminal law. Perhaps it is here, where the fundamental principles of public international law find their roots—and one of these guiding principles is called ‘respect for human rights.’ Since there is a certain dichotomy between the traditional approach of international law and one of its specialist systems called human rights, the idea of separation has emerged—expressed by the term ‘fragmentation.’ As a result, human rights law can be perceived in many different ways.

In the sense of traditional international law, one could argue that only states have to be regarded equally and hence, no state has ‘enough power to impose standards of behavior’ over other states. The foundation of the United Nations in 1945, however,

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138 BOAS et al. (n 11) 14.
140 The thesis follows the approach that the right to fair trial is a human right and is hence under the roof of international human rights law. Respect for human rights is regarded as a ‘new principle’ of international law which emerged after World War II and is sometimes in conflict with the ‘traditional principles’ of the sovereign equality of states and the principle of non-interference; see CASSESE, *International Law* (n 139) 47, 59. Since it is difficult to co-ordinate the traditional principles and the new principles, the international law community went into the debate of ‘fragmentation;’ see: Report of the ILC (58th session) on the fragmentation of international law, UN Doc. A/CN.4/L.682. According to Kammenga and Scheinin, who refer to the ILA’s Committee on International Human Rights Law and Practice, there are two broad approaches on the relationship between general international law and international human rights law: These two are the so-called ‘fragmentation’ approach and the ‘reconciliation’ approach. Whereas the ‘fragmentation’ approach assumes that the rules and principles of general international law are not applicable to international human rights law, the ‘reconciliation’ approach makes the point that human rights law is part of general international law and that the two branches should be reconciled with each other as much as possible. This thesis follows the ‘reconciliation’ approach. KAMMINGA, M.T. and SCHEININ, M. 2009. *The Impact of Human Rights Law on General International Law*. OUP, p. 2. See also: Report of the 72nd Conference of the International Law Association (2006). Further reading: SIMMA, B. 2008. Der Einfluss der Menschenrechte auf das Völkerrecht: Ein Entwurf [Translation: The Impact of Human Rights on International Law: A Draft]. In: Buffard, I. et al. (eds.) *International Law between Universalism and Fragmentation*. Festschrift in Honour of Gerhard Hafner. Martinus Nijhoff Publishers, p. 729 ff.
141 CASSESE, *International Law* (n 139) 46-47. Broadly speaking, the report of the 72nd Conference of the International Law Association (2006) would label this as the ‘fragmentation’ approach.
initiated a new era of international law and after two World Wars, states agreed on main goals such as maintaining international peace and security and promoting human rights as well as social progress.\textsuperscript{142} The UN Charter set out some fundamental principles which have been applied and interpreted various times over the years.\textsuperscript{143} Today, they may be regarded as ‘constitutional principles of the international community.’\textsuperscript{144} Respect for human rights, including fair trial, represents one of these universal values.\textsuperscript{145}

Somehow embedded into this mesh of treaty and custom and besides the discussion of separation, human rights law is regarded from different angles by different scholars: Some consider it to be a \textit{jus cogens} norm of international law;\textsuperscript{146} others, as previously mentioned, regard it as a customary norm.\textsuperscript{147} In addition, it can also be perceived as a ‘general principle of law recognized by civilized nations.’\textsuperscript{148} A crucial difference between custom and Article 38 (1) (c) of the ICJ Statute has been set out by Simma and Alston. They see an advantage if there were no discrepancy between the commitment of states to human rights treaties and their actual state practice, \textit{i.e.} their action in reality.\textsuperscript{149} If one regards the right to a fair trial to be a customary norm of international law, the element of state practice plays a role to some extent; whereas if one regards the right to a fair trial as a general principle of law, the mere consent of a state to a certain human rights treaty would depict the crucial recognition of the state to a human rights document.\textsuperscript{150} This could help to establish a clearer normative frame for

\textsuperscript{143} CASSESE. \textit{International Law} (n 139) 47.
\textsuperscript{144} Ibid 48.
\textsuperscript{145} Ibid 59.
\textsuperscript{146} BOAS et al. (n 11) 12. On \textit{jus cogens} generally, see: BROWNLEE, I. 2003. \textit{Public International Law}. 6\textsuperscript{th} ed. OUP, p. 488 ff;
\textsuperscript{147} MERON Human Rights and Humanitarian Norms as Customary Law (n 70) 246-247: ‘In the process of the formation of customary human rights different types of evidence and practice are important […] but this study of the creation of customary norms […] can be accommodated within the doctrine and methodology of international law.’ In order to read about customary international law in general: \textit{CASSESE. International Law} (n 139) 153 ff.
\textsuperscript{148} On the definition of what is understood by ‘general principles of law recognized by civilized nations’ in the sense of Art. 38 (1) (c) ICJ Statute, see: VASILIEV in Sluiter and Vasiliev (n 121) 31 ff. Vasiliev concludes that ‘general principles of law’ can be interchangeable with ‘general principles of international law.’ According to his research, there are 3 possibilities referred to under Art. 38 (1) (c): natural law, national law and international law. It would, however, also be possible to create a blend of natural law and national law OR national law and international law. As a consequence, there are a number of ways how the three components could be combined. One of these options would either include positive principles from international and national orders OR principles stemming solely from national legal systems. Hence, the term ‘general principles of law’ is interchangeable with ‘general principles of international law.’ It may, on the other hand, only refer to national orders and then it has to be strictly distinguished. Further reading: BASSIOUNI, M.C. 1990. A Functional Approach to ‘General Principles of International Law’ 11 \textit{Michigan Journal of International Law} 768-818; \textit{CASSESE. International Law} (n 139) 188.
\textsuperscript{149} SIMMA in Buffard (n 140) 741.
\textsuperscript{150} ALSTON and SIMMA (n 70) 107: ‘Finally, law-making through international acceptance of general principles appears to be much better suited than customary law to meeting the requirements for the formation of \textit{jus cogens}.’
international law because, very often, state practice heavily deviates from what has been declared as opinio juris in advance.\footnote{AREND, A.C. 2003. International Law and the Preemptive Use of Military Force. 26 The Washington Quaterly 89-103, at 100, citing WEISBURD, A.M. 1997. Use of Force. The Practice of States Since World War II. Pennsylvania State University Press, p. 315: ‘[S]tate practice simply does not support the proposition that the rule of the UN Charter can be said to be a rule of customary international law.’}

Having addressed the different angles of the human rights notion of the right to a fair trial in public international law, it can be stated that this thesis wants to focus on some details of how the concept—right to a fair trial—is applied at the ICC; and returning to the debate on coherence of principles and rules, it can be held that the rules may differ at other international criminal tribunals.\footnote{Regarding the distinction of basic norms into ‘principles’ and ‘rules’ see: ALEXY, R. 1994. Theorie der Grundrechte. 1st ed. Suhrkamp, pp. 39 ff. (English version: ALEXY, R. 2002. A Theory of Constitutional Rights. Translated by Julian Rivers. OUP).} As a result, it is irrelevant in terms of this thesis whether the right to a fair trial is surrounded by a fully coherent body of international procedural rules since it can still be regarded as a fundamental principle of international criminal law.\footnote{WERLE, G. 2009. General Principles of International Criminal Law. In: Cassese, A. (ed.) The Oxford Companion to International Criminal Justice. OUP, p. 54ff: ‘[a]ny international criminal justice system must respect and ensure the rights and guarantees enshrined in international human rights law for the protection of the accused.’} It is, however, admitted that a coherent application of international procedural rules with regards to the disclosure of evidence and the right to have witnesses examined would adequately reflect the underlying principles.

As Bergsmo correctly noticed, international criminal jurisdictions co-exist next to each other and are not about to become one.\footnote{BERGSMO, M. 2011. Prosecutorial Discretion. Institutional or Professional Reform? FICHL Policy Brief Series No. 7. Torkel Opsahl Academic EPublisher. [Online] Available: http://www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/FICHL_PB7.pdf [Accessed 17 August 2015]} Moreover, the jurisdictions of the ad hoc tribunals will expire in the future, leaving the ICC’s procedure as the permanent one.\footnote{Ibid.} Hence, the plurality of the co-existing court procedures can ‘generate different solutions that can be compared and assessed against each other.’\footnote{Ibid.} One can regard this as an opportunity to improve the ICC’s procedure. In addition, coherence probably faces its limits whilst looking at the basic structures of the international tribunals. These structures find their roots in the common and civil law tradition, although the ever ongoing discussion about the differences of the two systems may be perceived as odd and outdated. Yet, it is necessary to view the traditional systems to a certain extent in order to locate the cause of the flaws, if there are any.

For this thesis, it is more important to elucidate whether or not a change in the ICC’s system might enhance its court procedure. If the amalgam of common and civil law procedure evidently bears flaws, can a slight shift from the common tradition to civil law principles improve the court procedure practically? Scholarship suggests that
looking beyond the common and civil law traditions would help create a unique procedural system;\textsuperscript{157} nonetheless, the question of what this unique body would look like still remains unclear.\textsuperscript{158} The \textit{International Criminal Law Practitioner} refers to Jackson, who suggests an orientation towards fundamental goals of international criminal justice, including ‘truth-telling, reconciliation, and establishing a historical record.’\textsuperscript{159} In addition, it is proposed that a degree of detachment from thinking in terms of national procedure and how national procedures operate will be necessary in order to facilitate the application of principles at international criminal tribunals.\textsuperscript{160}

This thesis agrees with the aforementioned. At the same time, it points out a further crucial element in order to enhance the procedure of the ICC. That is that free from pre-occupation, one has to look at the problems occurring in practice, locate their reasons and try to provide answers with an objective mind not restricted by any means of national influence. Since it is unlikely to invent a completely new prototype of international criminal procedure, the inclusion of the common and civil law debate is at some stages justifiable in order to locate discrepancies. As a result, it will still be necessary to mention the difference of the two law traditions occasionally to locate flaws and provide answers for the future.

\textbf{5. Significance of the thesis}

The argument of this thesis suggests that while the ICC’s procedure does not violate any procedural human rights law with regards to the fair trial, there are still grounds to criticize the fairness of its procedure. A weak level of fairness, in turn, may lead to a loss of the ICC’s legitimacy. In order to prove this argument, the thesis firstly creates a yardstick drawn from regional human rights courts and the HRC against which the ICC’s procedure is measured; this comparison reveals whether or not the ICC’s procedure complies with international human rights standards. Secondly, even if there is no violation of human rights law in the ICC’s procedure, this thesis will drill deeper explaining why the level of fairness can still be enhanced. During the ICC’s very first trial, \textit{The Prosecutor v. Thomas Lubanga Dyilo} the level of fairness played a major role and a halt of the trial for almost six months raised questions about the overall fairness and the Court’s legitimacy; these questions continued to draw the Chambers’ attention.

\textsuperscript{157} \textit{CRYER. An Introduction to International Law and Procedure} (n 110) 354.
\textsuperscript{158} \textit{BOAS et al.} (n 11) 15.
\textsuperscript{159} \textit{Ibid} 16 citing \textit{JACKSON} (n 13) 22.
\textsuperscript{160} \textit{BOAS et al.} (n 11) 16. The authors suggest here: ‘Freedom from the perceived constraints of procedure derived from national legal precedent will facilitate a clearer application of principles developed in the context of the international legal system and encourage lawyers and judges to look at these issues in their context, rather than through the lens of their own domestic legal experience.’
As a consequence, the original contribution of this work is a proposal as to how the court procedure of the ICC may be enhanced by analysing decisive parameters of court procedure of the common and civil law models. The judicial institutions for the assessment of the international human rights standards include, in detail, the ECtHR, the HRC, the Inter-American Court of Human Rights as well as the African Court on Human and Peoples’ Rights. Furthermore, the two UN ad hoc tribunals will also be taken into consideration. Due to administrative restrictions, the thesis does not discuss in any detail the Special Tribunal for Lebanon, the Special Court of Sierra Leone or other hybrid tribunals. However references will be made whenever they appear to be instructive.

Regarding the general right to a fair trial, it must be held that trying to create a definition of what it is would represent an overambitious goal. Therefore, this thesis will focus on two very specific aspects. The right to a fair trial in the framework of this thesis especially refers to the disclosure of evidence and the right to examine witnesses, which are two of the minimum guarantees of criminal proceedings and frequently assessed in relation to the principle of adversarial proceedings and equality of arms.

The thesis argues that there is room for improvement in the court procedure of the ICC with regard to the level of fairness. It seeks to demonstrate this both by theoretical argument and by a comparison with the ECCC model. The goal is to scrutinize whether the model of the ECCC may serve as precedent to improve the procedure of the ICC. Whereas the purposes of both tribunals—trying serious crimes of international concern and ending impunity—are similar, their structures with regard to the distribution of investigation competences differ from each other. Comparative studies help, inter alia, to better understand legal systems and thus their ‘aims, goals, substance or efficacy.’ As a result, the third part of the thesis compares different investigative structures and finally draws conclusions on fairness and effectiveness.

6. Methodology

This thesis is a qualitative study of primary and secondary sources of international law. The primary sources are the UN treaties, regional human rights treaties and the procedural rules or statutes and case law of the various tribunals mentioned in the

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161 See e.g. Prosecutor v. Bemba, ICC-01/05-01/09 OA, AC, 16 December 2008, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber II entitled “Decision on application for interim release”; Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-2388, TC II, 14 September 2010, Decision on the ‘Prosecution’s Application Concerning Disclosure by the Defence pursuant to Rules 78 and 79(4)’.

The methodology of this thesis may be considered an example of comparative law in as much it engages in ‘an intellectual activity with law as its object and the comparison as its process.’ Such comparative analysis is undertaken for two specific purposes related to the overall aim of the thesis. In part one, the jurisprudence of the various tribunals regarding the elements of the right to a fair trial is compared in order to construct what was referred to above as a ‘yardstick’, that is, a standard of fairness that commands a consensus among the international tribunals. In part three, different systems of investigation are compared with a view to assessing their fairness, according to a view of fairness that goes beyond that embodied in the consensual ‘yardstick’. By this means, the thesis aims at illustrating a fairer way in which the procedure at the ICC could be developed in the future.

With regards to the legal theory, different kinds of theories will be applied. For example, the first and major part of the thesis represents a descriptive comparison of human rights standards with the procedure of the ICC, whereas the second part tries to establish a normative assumption of fairness and links this assumption to the Court’s overall legitimacy. The third part scrutinizes the ECCC’s procedure with the intention to suggest improvements for the ICC’s procedure.

Consequently, the thesis will regard the law from the following perspectives:

- Part I (Chapters 2 – 5): descriptive comparative analysis—considering the law as it is *(de lege lata)*
- Part II (Chapter 6): a hybrid of normative and empiric thoughts from the social sciences, portrayed in normative legal theory—law as it ought to be *(de lege ferenda)*
- Part III (Chapter 7): descriptive comparison of a different procedural system combined with a normative solution—law as it ought to be *(de lege ferenda)*

As one can see, the aims of this comparative study slightly vary. Whereas part one is a gathering of hard law, which then will be tested against the ICC’s system, part two tries to improve the law under a normative frame and contends how the law ought to be.

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Finally, part three analyses the structure of a different procedural system and may suggest reform.

I now want to provide an explanation of what kind of data will be collected, analysed and justified. The data used in all three parts of my thesis will exclusively refer to sources of qualitative legal research. This includes an interpretation of the respective statutes and case law on the one hand, and an analysis of secondary sources such as books and journal articles on the other. With regards to the jurisprudence of the regional human rights courts, my research includes a range of cases of the ECtHR, reports of the EComHR, Communications of the HRC, advisory opinions and judgments of the IACtHR, reports of the IAComHR as well as Communications of the AfComHPR. The selected data from the international criminal tribunals includes decisions and judgments of the ICTY and the ICTR. Furthermore, there will be references made to the STL and the Special Court of Sierra Leone whenever it is deemed useful. As mentioned before, primary sources of legislation, *i.e.* the Rome Statute and all sources of legal texts stemming from it will be taken into consideration as well as the Statutes and RPE of the *ad hoc* tribunals.

Part two also uses qualitative data for its theory building. For example, secondary sources such as monographs and journal articles will support the assertion that legitimacy includes an element called ‘general acceptance.’\(^{164}\) The thoughts on legitimacy will then be put into the context of Dworkin’s theory of procedural fairness.\(^ {165}\) Regarding the research data of the third part, it can only be reiterated that part three of the thesis uses qualitative legal research material such as primary legal texts, *i.e.* the UN-RGC Agreement, the ECCC Law, the Internal Rules and secondary sources of literature. In addition, existing case law of the ECCC must equally be scrutinized.

One last aspect, which needs to be taken into consideration whilst carrying out a comparative analysis between different institutions is the problematic of scrutinising ‘like with like.’\(^ {166}\) If the ‘intention of a project is to suggest reform of one area based on the other,’ it is essential to prove that both institutions neither depend, nor are based on one another.\(^ {167}\) This research concerns the relationship between the ICC and the ECCC. Being an independent, treaty based institution, any interrelationship between the

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164 LUHMANN (a 15) 27-37.
167 Ibid (Cryer) 29.
International Criminal Court and the ECCC can be denied. The fact that Cambodia is a signatory state to the Rome Statute does not affect the aforementioned—both courts are independent from each other. The ECCC is a national court with international assistance, a so-called hybrid tribunal, and is by no means influenced directly from the ICC. Thus, the comparative method in part three provides an adequate tool to analyse the aspects of institutional differences. In addition, it may suggest reform for one institution based on the model of the other.

Figure 1: The methodology of this thesis
Chapter 2: The European Court of Human Rights

Article 6 ECHR

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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 facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
1. Locating the obligation to disclose evidence

1.1 The right to a fair trial—Article 6 of the ECHR

The tenet of the right to a fair trial can be regarded as being salient to the heritage of the rule of law.1 Over the years, it has significantly influenced decisions about the fairness of trial procedures. According to Professor Trechsel, the “guarantee of a fair trial is ‘only’ a procedural guarantee.”2 Article 6 (1) of the ECHR entitles ‘everyone to a fair and public hearing’ both in the ‘determination of his civil rights and obligations’ or in case of ‘any criminal charge against him.’3 As a result, there is a general supposition included in the right to a fair trial that refers to all relevant kinds of proceedings: civil proceedings, criminal proceedings and cases of administrative law.4 In addition, Article 6 (3) comprises so-called ‘minimum rights’ for accused persons in cases of a criminal charge or charges.5 Hence, there is a ‘broader’ relevance to the fair trial and a ‘narrower’ one, specifically referring to criminal proceedings.6 This means that fair trial requirements in civil cases are “not necessarily identical to the requirements in criminal ones.”7 The ECtHR decided that the contracting states have less discretion to interpret what constitutes a fair trial when dealing with criminal cases.8

There is, however, no clear distinction between the general guarantees of Article 6 (1) and the specific ones of Article 6 (3). Instead, the case law of the ECtHR very often combines the general guarantees with the specific ones and draws a conclusion afterwards.9 This approach is called ‘evaluation of the proceedings as a whole.’10 Some scholars perceive this holistic approach as ‘clearly unsatisfactory’ and relate it to the

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3 The procedural nature of the fair trial guarantee has also been confirmed in a judgment of the German ‘Federal Constitutional Court’ (Bundesverfassungsgericht), 2 BvR 2025/07 of 18 March 2009, at para 15: ‘The right to a fair trial – representing an essential part of the rule of law in criminal proceedings – guarantees procedural rights and opportunities to reasonably defend[d].’ A different view, however, is held by ECtHR Judge Loukis Loucaides. See LOUCAIDES, L. 2003. Questions of Fair Trial under the European Convention of Human Rights. 3 Human Rights Law Review 27-51.
4 Scholars equate the wording ‘fair hearing’ with that of ‘fair trial’ or ‘trial proceedings;’ see VIERING in Van Dijk et al. (n 2) 578; GROGER, A. 2009. Das Akteneinsichtsrecht im Strafverfahren unter der besonderen Berücksichtigung der Europäischen Menschenrechtskonvention. Verlag Dr. Kovac, p. 18. A detailed evaluation of the usage of the terms can be found in: BRAINTSCH, T. 1991. Gerichtssprache fur Sprachunkundige im Lichte des “fair trial”-Viering. Peter Lang, p. 119.
5 The distinction between general and specific rights of Article 6 (1) is confirmed in: CLAYTON, R. and TOMLINSON, H. 2001. Fair Trial Rights. OUP, content number 11.183. The authors furthermore divide Article 6 into two different categories of rights: ‘Express’ and ‘implied’ ones. Both equality of arms and the right to adversarial proceedings would belong to the category ‘implied’ rights.
6 The definition of the term ‘criminal charge’ has been established in the case of Engel and Others v. The Netherlands, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, judgment of 8 June 1976, §§ 80-85.
7 TRECHSEL (n 2) 85. ‘It is possible […] to differentiate between the right to fair trial in the broader and in the narrower sense.’
8 VIERING in Van Dijk et al. (n 2) 579.
9 Dumbo Beheer v. The Netherlands, no. 14448/88, 27 October 1993, § 32: ‘[t]he Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.’
10 Hadjiyanastassiou v. Greece, no. 12948/87, 16 December 1992, § 31: ‘As the requirements of paragraph 3 of Article 6 (art. 6-3) constitute specific aspects of the right to a fair trial, guaranteed under paragraph 1 (art. 6-1), the Court will examine the complaint under both provisions together.’
11 See e.g.: Colac v. Romania, no. 26504/06, 10 February 2015, § 40; Tasquet v. Belgium [GC], no. 926/05, 16 November 2010, § 84; Mielih v. France (No. 2), no. 18978/91, 26 September 1996, § 43; Goddi v. Italy, no. 8966/80, 9 April 1984, § 28.
Court’s ‘reluctance to provide an exact meaning of the specific rights of the defence.’

Others regard it in line with the goals of the Convention: to safeguard effectively the recognition of the declared rights. According to Gröger, the jurisprudence of the ECtHR represents a dynamic process. The latter dynamic especially created new principles which are now included in the notion of the fair trial although they are not explicitly mentioned in the Convention. By way of an example, one could cite the principles of equality of arms and the right to adversarial proceedings. Furthermore, the right to a fair trial has to fit into many different national particularities of the contracting states; hence its practical application can only work flexibly.

The consequence of evaluating the procedures as a whole leaves us with an unclear distinction between the general guarantees of the fair trial and the specific ones. This unclear evaluation, in turn, has led to different outcomes in criminal cases regarding the right to a fair trial. To sum up, it can be held that the Court often combines special guarantees of the fair trial with general ones and vice versa. As mentioned by Professor Dijk, certain aspects may conflict with the principle of a fair hearing per se, ‘irrespective of the course of the proceedings.’ Others, however, do not. As a result, the final application of Article 6 also depends on the ‘stage of the proceedings and its special features.’ In addition, the ECtHR may even consider issues regarding the fair trial which are not included into Article 6 and then draw a final conclusion. There are only a few cases dealing exclusively with the specific guarantees of Article 6 (3). Hence, these cases remain the exception rather than a common rule.

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11 TRECHSEL (n 2) 87. Goss considered the so-called ‘proceedings as a whole’ test as inconsistent and incoherent. Furthermore, Goss asserts that ‘the ‘proceedings as a whole’ test is not necessarily the same as the European Court’s tendency […] to ‘take together’ two or more component parts of Article 6.” See: GOSS, R. 2014. Criminal Fair Trial Rights. Article 6 of the European Convention on Human Rights. Hart Publishing, pp. 124-125.

12 GRÖGER (n 3) 15.


15 See e.g. Oao Neftyanova Kompaniya Yukos v. Russia, no. 14902/04, 20 September 2011, § 538. Goss labelled equality of arms and the right to adversarial proceedings (among others) as ‘implied rights.’ See: GOSS (n 11) 90-91.

16 VIERING in Van Dijk et al. (n 2) 579.

17 Ibid 579.

18 GRÖGER (n 3) 15. Translation: ‘The formal adherence to the guarantees mentioned in Article 6 does not yet represent a patent that the trial was fair.’

19 Lueddicke, Belkacem and Koç v. Germany, nos. 6210/73; 6877/75; 7132/75, 28 November 1978, §§ 38-50: violation of Art. 6 (3) (e) regarding interpretation costs; Can v. Austria, no. 9300/81, 30 September 1985, §§ 17, 18: concerning Art. 6 (3) (c), consultation of the suspect with his lawyer.
Whether or not the aforementioned methods to decide on fair trial issues can be perceived as appropriate is not the task of this thesis. Rather, this work focuses on the ECtHR’s jurisprudence in order to detect similarities of decisions about the fair trial, especially in the area of the disclosure of evidence and confrontation, and finally measures these doctrinal human rights standards against the procedure of the ICC. It is not necessarily salient whether the similarities stem from Article 6 (1) or (3); the importance rests on what has been decided. Before this thesis can begin to scrutinize the respective case law, it is, however, crucial to pay attention to two significant principles included in the fair trial, namely the principle of equality of arms and the right to adversarial proceedings. Although these principles are not explicitly mentioned in the Convention, they have developed into fundamental characteristics of the concept of the fair trial over the years.

1.2 Equality of arms

The principle of equality of arms has often been used in order to assess the question of fairness in criminal proceedings. It is a significant element of the fair trial and stresses the idea of equality between the parties. Hence, equality can be regarded as a ‘comparative term.’ In criminal cases, it is an example of an equilibrium which can only be achieved by balancing the differences between the prosecution and the defence. Practically, however, a complete equality of the proceedings in criminal cases is hardly possible. Nonetheless, the European Commission of Human Rights pointed out that ‘equality of arms, which is the procedural equality of the accused and the public prosecutor, is an inherent element of fair trial.’ It applies to both of the relevant

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20 Prof. Trechsel mentions the scholars Rzepka and Esser who criticize the ECtHR for ‘neglecting its task to develop the jurisprudence of the convention in a clear way.’ See e.g. ESSER, R. 2002. Auf dem Weg zu einem europäischen Strafverfahrensrecht: Die Grundlagen im Spiegel der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte in Strasbourg, De Gruyter Recht, p. 403. Prof. Esser mentions that there would be no clear shape of procedural fairness at the different stages of criminal proceedings. Furthermore, he criticizes the general application of Article 6 (1) when a violation of the lex specialis norm, namely Article 6 (3) can be determined.


22 SUMMERS, S. J. 2007. Fair Trials – The European Criminal Procedural Tradition and the European Court of Human Rights. Hart Publishing, p. 104; TRECHSEL (n 2) 95. Summers and Trechsel suggest that equality of arms is not culturally related. Prof. Trechsel denies the approach of equality of arms being interlinked with the general guarantee of non-discrimination. A different approach can be found in: GRABENWARTER and PABEL (n 1) 523.

23 TRECHSEL (n 2) 85.

24 WASEK-WIADEREK (n 13) 50: “In my opinion the full, real ‘equality of arms’ between the parties, equality which does not permit exceptions, is not possible in a criminal process because of its specific character.”

paragraphs of Article 6: paragraph 1 and 3. Summers described equality of arms as the ‘requirement that a balance of fairness is maintained between the parties.’

The principle of equality of arms has emerged from the ECtHR’s case law and was first explicitly mentioned in a judgment in the Neumeister v. Austria case of the late sixties. In 1993, a first definition of what could be understood as constituting equality of arms was delivered by the Court in a case concerning a civil litigation. In the case of Dombo Beheer, the ECtHR held that equality of arms applied

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.

After some years, a similar formula was used in the criminal case Bulut v. Austria—almost providing the same wording. In Bulut, the public prosecutor’s office submitted an opinion about the applicant’s appeal to the Chamber but not to the defence. Consequently, the defence did not have any opportunity to comment on the prosecution’s opinion. The final definition established with regards to equality of arms in the Bulut case reads as follows:

Each party must be afforded a reasonable opportunity to present his case under the conditions that do not place him at disadvantage vis-à-vis his opponent.

In addition to the definition of equality of arms, it is furthermore necessary to mention some of the aspects which are included in the principle. It is not the case that equality of arms depicts a certain right. This has been emphasized by the ECtHR since it has never mentioned equality of arms as a right. According to Trechsel, equality of arms does not guarantee specific rights, such as the right to be heard, but instead it seeks to ensure that these rights are fairly applied.

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26 Report of the Commission, Jespers v. Belgium, no. 8403/78, 14 December 1981, § 55: “[T]he Commission has already had occasion to point out that the so-called ‘equality of arms’ principle could be based not only on Article 6 (1) but also on Article 6 (3), […]”.
27 SUMMERS (n 22) 104. According to her, equality of arms does not fit within other guarantees of Article 6, i.e. ‘reasonable time’, ‘public trial’ or ‘independent and impartial tribunal’.
29 Dombo Beheer B.V. v. The Netherlands, § 33.
30 Bulut v. Austria, no. 17358/90, 22 February 1996, § 47.
31 Ibid. See also: Ocalan v. Turkey [GC], no. 46221/99, 12 May 2005, § 140: ‘When examining these issues, the Court will have regard to its case-law to the effect that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.’ The definition of equality of arms concerning an administrative case reads similar: Gorraiz Lizarraga and Others v. Spain, no. 62543/00, 27 April 2004, § 56.
32 SUMMERS (n 22) 104: ‘Equality of arms does not guarantee specific rights, such as the right to be heard, but instead it seeks to ensure that these rights are fairly applied.’
33 TRECHSEL (n 2) 97.
arms has been referred to as being a concept, a principle or a requirement. Alternatively, the ECtHR sometimes simply states ‘there should be equality of arms between the prosecution and the defence.’ As a result, there can be no violation of the equality of arms principle when both sides have been denied something which might have been of use for both of them. On the other hand, one can state that equality of arms ‘entails that the parties must have the same access to the records and other documents pertaining to the case, at least insofar as these may play a part in the formation of the Court’s opinion.’ To repeat, the ‘guarantee of equality itself will be of no assistance in situations where a person is deprived of a right which other individuals have also been deprived of.’

A further aspect included in the principle of equality of arms is when one party, which is in practice mostly the defence, suffers a disadvantage. The threshold of this detriment, however, is hard to determine in general. Basically, it can be said that any departure from the principle of equality between prosecution and defence does lead to the conclusion of an unfair trial. However, there exists a judgment of the ECtHR where inequality was not considered as a ‘detriment.’ In this exceptional case, it was obvious that the difference did not concern the importance of the proceedings. Hence, it can be held that the decisive point on the sensitive issue about inequality lies in the determination whether or not the inequality led to a detriment to one of the parties. Even if such a detriment appears to be of minuscule size, it can nevertheless result in a disadvantage and would therefore depict a violation of Article 6. As the Court held in the Bulut case, “the principle of ‘equality of arms’ does not depend on further quantifiable unfairness flowing from a procedural inequality.” Furthermore, the disadvantage could also be of, inter alia, inequality caused by circumstances affecting the procedure. In Makhfi v. France, a defence counsel had to wait some fifteen hours during the night to finally plead his case on the morning of the following day.
conclude, inequality implies some sort of disadvantage; be it even a tiny one of a procedural nature or be it linked to the circumstances accompanying the procedures.

The function of so-called advocate generals in criminal proceedings and how their actions can be regarded in terms of equality plays only a minor role in this thesis; there is no equivalent in the procedures of the ICC. Nonetheless, the cases need to be addressed because the jurisprudence of the ECtHR on this matter is contradictory. In the case of Delcourt, for example, the Court held that the participation of an advocate general did not violate the rights of the applicant.\(^{45}\) In the case of Borgers, on the contrary, the ECtHR deviated from its former decision. It determined an inequality due to the fact that an advocate general participated in the Court’s deliberations after the hearing in the absence of representatives of the defence. Specifically this inequality had finally led to a violation of the principle of equality of arms.\(^{46}\) The more recent decision of the ECtHR in Borgers makes a decisive point: that is that both parties should be present at all kinds of proceedings. The absence of the prosecution in, for example, an oral hearing may constitute as significant a problem as the absence of the accused or his defence counsel in an appeal hearing. Following the explanation of equality of arms, there would be no problem if both parties were absent.\(^{47}\)

Equality of arms can also comprise the selection of so-called expert evidence. In the case of Khodorkovskiy and Lebedev, for example, relevant expert evidence proposed by the defence was declared inadmissible by the national court.\(^{48}\) The prosecution, on the other hand, had the right to select experts, formulate questions and produce such expert reports.\(^{49}\) Having determined that it was basically for the domestic courts to decide on the admissibility of evidence, the ECtHR stressed its ‘task to ascertain whether the way in which evidence was taken was fair.’\(^{50}\) Although the judges of the ECtHR admitted that the term ‘same conditions’ does not mean that the defence has always the exact ‘search and seizure powers as the prosecution,’ it must nonetheless be possible to conduct an ‘active defence – for example, by calling witnesses on its behalf or adducing other evidence.’\(^{51}\) As a result, the ECtHR saw the defence in a disadvantageous position and concluded that there was a violation of equality of arms.

\(^{47}\) Jasper v. United Kingdom [GC], no 27052/95, 16 February 2000, § 57.
\(^{48}\) Khodorkovskiy and Lebedev v. Russia, nos. 11082/06 and 13772/05, 25 July 2013, § 728.
\(^{49}\) Ibid, § 730.
\(^{50}\) Ibid, §§ 718-720, 725.
\(^{51}\) Ibid, § 728.
between the parties. Moreover, the expert reports of the prosecution were obtained during the preliminary investigations and thus the defence was not able to challenge them, which violated the right to adversarial proceedings.

The right to adversarial proceedings, in turn, is closely linked to the principle of equality of arms, and having mentioned that the thesis intends to focus on issues of the disclosure of evidence, it needs to be pointed out that issues concerning the disclosure of evidence are sometimes addressed under the principle of equality of arms and sometimes under the right to adversarial proceedings. In fact, the ECtHR occasionally mentions equality of arms when it refers to the adversarial character. More recent case law, on the other hand, shows a clear distinction between the two notions. In any case, the crucial point is that there is nothing indicating that ‘this inconsistency has had any influence on the outcome of the cases.’ Some cases which could have been mentioned under equality of arms will later be addressed under the disclosure of evidence. Before the thesis embarks on the disclosure of evidence, however, the second vital notion within the right to a fair trial, namely the right to adversarial proceedings needs to be elaborated.

1.3 Right to adversarial proceedings

Although closely linked to equality of arms, the right to adversarial proceedings does not focus on establishing a certain balance of the trial procedure. Rather, it requires that both parties involved must be given the opportunity to challenge the submissions of the opposing party. Viering describes it as the freedom of decision of the parties as to whether they would like to respond to any piece of evidence or written statement—provided that a decision is not merely in favour of the accused. Thus, adversarial proceedings is regarded as ‘a matter of the parties to assess whether a submission

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52 Ibid, § 735.
53 Ibid, § 729.
54 SUMMERS (n 22) 110; VIERING in Van Dijk et al. (n 2) 580; TRECHSEL (n 2) 90; WHITE and OVEY (n 1) 261. Cases: Samokhvalov v. Russia, no. 3891/03, 12 February 2009, § 46; Rowe and Davis v. United Kingdom (GC), no. 28901/95, 16 February 2000, § 60; Belziuk v. Poland, no. 45/1997/829/1035, 25 March 1998, § 37; Brandstetter v. Austria, nos. 11170/84, 12876/87 and 13468/87, 28 August 1991, § 66.
55 TRECHSEL (n 2) 99; the Professor relates to the case of GB v. France and states that ‘although the Court relied on equality of arms, it is in fact the adversarial character of the defence which was at issue.’ In the case Borgers v. Belgium (n 57) §§ 24-27, the Court determined a violation of equality of arms because the applicant did not have any opportunity to reply to submissions put before a national court. Usually, this would be classified as an issue of the right to adversarial proceedings rather than equality of arms. Yet, more recent case law of the ECtHR distinguished between equality of arms and adversarial proceedings in Juričić v. Croatia, no. 58222/09, 26 July 2011, § 73.
56 Juričić v. Croatia, no. 58222/09, 26 July 2011, § 73: ‘[a]lthough the Court has not found a breach of the principle of equality of arms, it nevertheless has to examine whether the same set of facts breached the applicant’s right to adversarial proceedings.’
57 TRECHSEL (n 2) 90.
58 SUMMERS (n 22) 112; FEDOROVA (n 21) 47-55.
59 VIERING in Van Dijk et al. (n 2) 585. Summers classifies it as the ‘opportunity to comment on the other side’s submissions,’ see: SUMMERS (n 22) 120 ff.
deserves a reaction. That, in turn, requires that the parties have knowledge of the ‘observations filed and the evidence adduced’ on the one hand, and that the court takes into account what the parties would like to announce on the other. To sum up, it can be held that if the adversarial process wants to ‘work effectively it is important, in civil and criminal proceedings, that relevant material is available to both parties.’ The opportunity to challenge the accusations of the other party stems from the vital right to be heard in criminal proceedings. This right is considered as an ‘absolute guarantee’ and regarded as “the fundamental aspect of ‘fairness’ in proceedings.” Summers points out that the right to adversarial proceedings encompasses two main facets. The first one is that the accused is present at trial and the second one required that the defence was able to challenge the prosecution’s submissions and observations.

With regards to the definition of the right to adversarial proceedings, the case law of the ECtHR started using the term ‘adversarial argument’ in relation to Article 6 in the case of Barberà, Messegué and Jabardo v. Spain in the late 1980s. The judges pointed out that ‘all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument.’ As a result, one could state that the term adversarial ‘essentially means that the relevant material or evidence is made available to both parties.’ A more concrete definition was provided by the Court in 1991, when the ECtHR held in Brandstetter v. Austria:

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.

Today, there exist a whole range of cases in which the ECtHR repeated and underlined this definition. Whilst looking at it, one can determine two different types of material

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60 VIERING in Van Dijk et al. (n 2) 585.
61 Rowe and Davis v. UK [GC], § 60.
62 Quadrelli v. Italy, no. 28168/95, 13 February 2001, § 34; TRECHSEL (n 2) 89.
63 WHITE and OVEY (n 1) 261.
64 TRECHSEL (n 2) 89.
65 Ibid 90.
67 Kampanis v. Greece, no. 17977/91, 13 July 1995, § 47: “According to the Court’s case-law, the possibility for a prisoner ‘to be heard either in person or, where necessary, through some form of representation’ features in certain instances among the ‘fundamental guarantees of procedure applied in matters of deprivation of liberty[.]’”
68 SUMMERS (n 22) 113. She also mentions that the defence should be able to ‘lead its own evidence.’ A similar approach is mentioned in: CLAYTON and TOMLINSON (n 4) content number 11.183.
69 SUMMERS (n 22) 110-111. The author admits that there have been earlier cases in which ‘adversarial procedure’ was required however these cases concerned Article 5 (4) rather than Article 6; see e.g.: Sanchez-Reissee v. Switzerland, § 50.
70 Barberà, Messegué and Jabardo v. Spain, no. 10590/83, 6 December 1988, § 78.
72 Brandstetter v. Austria, § 67.
which both parties should know and be able to comment on, that is the ‘observations filed’ and the ‘evidence adduced.’ The difference of the terms and when they apply is explained by Trechsel, who indicates that the ‘observations filed’ refer to situations in which the defence was not able to adequately reply to submissions of the prosecution whereas the ‘evidence adduced’ related to ‘the duty of the prosecution to disclose evidence.’ The disclosure of evidence, however, is not unlimited. There are grounds such as public security, the protection of witnesses and victims or the hiding of secret police investigation methods which may justify that certain pieces of evidence are held back. Consequently, the trial process has to weigh the disclosure of evidence against the reasons for withholding, which may include witness protection. Very often, there is only a narrow ridge between these opposing interests. Therefore, this thesis tries to reveal whether or not a change of the ICC’s procedural model might enhance the overall fairness of its trial proceedings.

2. Disclosure of evidence at pre-trial stage

As previously mentioned the right to a fair trial is explicitly incorporated into Article 6 of the ECHR and—due to its wording—seems to refer exclusively to proceedings at trial stage. Nonetheless, Articles 5 and 6 of the Convention are ‘closely connected’ since they describe the ‘stages of the process in the administration of criminal justice.’ Detention can form part of this process, even if it depicts a means of last resort. Hence, the two articles cannot be examined in isolation. Today, there is no doubt that Article 6 can be applied to pre-trial proceedings, especially when a suspect requires the assistance of a lawyer at the initial stages of an investigation. In its pre-trial section about the disclosure of evidence, the thesis specifically refers to the habeas corpus guarantees under Article 5 (4) of the ECHR. This article entitles everyone to ‘take proceedings by which the lawfulness of the detention shall be decided speedily by a court’ and requires ‘his release ordered if the detention is not lawful.’ Article 5 (4) is

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77 See e.g.: Lees v. Estonia, no. 59577/08, 6 March 2012, § 78; Sharonov v. Russia, no. 8027/02, 15 January 2009, § 44; Laukkanen and Manninen v. Finland, no. 50230/99, 3 February 2004, § 34; Skondrianos v. Greece, nos. 63000/00, 74291/01 and 74292/01, 18 December 2003, § 29; Ernst and others v. Belgium, no. 33400/96, 15 July 2003, § 60; Fitt v. United Kingdom [GC], no. 29777/96, 15 July 2003, § 44; Mefath and others v. France [GC], nos. 32911/96, 35237/02 and 34595/97, 26 July 2002, § 51; Rowe and Davis v. UK [GC], § 60; Kamasinski v. Austria, no. 9783/82, 19 December 1989.

78 TRECHSEL (n 2) 89.

79 Fitt v. UK [GC], § 45: ‘[t]he entitlement to disclosure of relevant evidence is not an absolute right[.].’ Same wording in Jasper v. UK [GC], no 27052/95, 16 February 2000, § 52; Natunen v. Finland, no. 21022/04, 31 March 2009, § 40.

80 Ibid.

81 Article 6 (1) ECHR: ‘[i]s entitled to a fair and public hearing in a reasonable time by an independent and impartial tribunal established by law[;] see also: BRAITSCH. (n 3) 127.


83 German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 971/07 of 6 June 2007, at para 21.

84 FAWCETT (n 78) 69.

85 See e.g.: Panovits v. Cyprus, no. 4268/04, 11 December 2008, §§ 64-66; Salduc v. Turkey [GC], no. 36391/02, 27 November 2008, §§ 54-56.
 applicable for everyone in detention irrespective whether or not there has been a violation of Article 5 paragraph 1.82

When examining the lawfulness of the detention, the ECtHR focusses on ‘procedural requirements’ on the one hand, and on the ‘reasonableness of the suspicion which finally grounded the arrest’ on the other.83 The wording of Article 5 (4), however, does not provide for any details about the proceedings themselves. Yet, there are some requirements as to the powers of a court and the procedural guarantees which need to be satisfied.84 Similar to Article 6, the right to adversarial proceedings and the principle of equality of arms have emerged within the scope of Article 5 (4) over the years.85 Regarding the relationship to Article 6, it can be held that Article 5 (4) depicts the lex specialis norm of the right to a fair trial at pre-trial stage and, although the fair trial guarantees of Articles 5 (4) and 6 (1) are not exactly the same, they should at least ‘in principle, and to the largest extent possible’86 meet the basic requirements of the fair trial.87 As a result, equality of arms and the right to adversarial proceedings play a major role at the pre-trial as well as at the trial stage.88

2.1 Equality of arms and adversarial proceedings under Article 5 (4)

One of the first cases dealing with equality of arms under the auspices of Article 5 (4) was Neumeister v. Austria in 1968. In this decision, the ECtHR held that the principle of equality of arms was not necessarily ‘applicable to the examination of request of provisional release.’89 Article 5 (4) did ‘in no way relate to the procedure to be followed.’90 Rather than focussing on procedural principles, Article 5 (4) referred to institutional features; that is that such proceedings should be taken before a ‘court’91 and that the latter institution possessed ‘judicial character.’92 This meant in particular that

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82 BLEICHRODT in Van Dijk et al. (n 2) 498.
84 Hussain v. United Kingdom, no. 21928/93, 21 February 1996, § 62: ‘[t]here has been a violation of Article 5 para. 4 […] in that the applicant […] was unable to bring the case […] before a court with the powers and procedural guarantees satisfying that provision.’ See also, Bezchiervi v. Italy, no. 8/1988/152/206, 26 September 1989, § 20: In this case, the ECtHR required that the proceedings of Art. 5 (4) were available for the detainee in ‘reasonable intervals’ because new issues regarding the firm grounds of the warrant may arise at a later stage and hence change the legal situation.
85 See e.g. Osvjannikov v. Estonia [GC], no. 1346/12, 20 February 2014, § 72; Fodale v. Italy, no. 70148/01, 1 June 2006, § 41.
87 A. and Others v. UK [GC], no. 3455/05, 19 February 2009, § 203; Chruciński v. Poland, no. 22755/04, 6 November 2007, § 54; Reinprecht v. Austria, no. 67175/01, 15 November 2005, § 31.
88 Schöps v. Germany, § 44; Imbroiscia v. Switzerland, no. 13972/88, 24 November 1993, §§ 36-38. In Imbroiscia, the ECtHR held that ‘in order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case.’
89 Neumeister v. Austria, § 22.
91 The ECtHR described the term ‘court’ also as the ‘authority called upon’ in the Neumeister judgment at § 24.
92 Neumeister v. Austria, § 24.
the institution (i.e. the court) examining the lawfulness of the detention had to be ‘independent of the executive and of the parties to the case.’

Today, this opinion seems to have been superseded. In 1971, the ECtHR already changed its view. It was not satisfied by the mere feature of the authority ‘being independent of the executive’ anymore. Rather, it asked for ‘guarantees of judicial procedure.’ In fact, these forms of procedure did not necessarily have to be ‘identical in each case.’ Still, certain fundamental guarantees needed to be met. Such guarantees, for example, were the ‘benefit of an adversarial procedure’ and the ‘indispensable’ principle of equality of arms. The latter was determined in the case of Sanchez-Reisse when the ECtHR had to decide about the detainee’s inability to reply to the opinion of the Federal Police Office and to appear in person before a court. The ECtHR judges deemed that written comments to the police office could be interpreted as ‘appropriate means’ of adversarial procedure. In the present case, however, the applicant was not ‘offered such a possibility.’ Furthermore, providing the detainee with the right to be ‘heard either in person or through some form of representation’ depicted a ‘fundamental guarantee of procedure,’ which applied ‘in matters of deprivation of liberty.’ Hence, it is essential to provide the applicant with a chance to appear at court and to let him access documents in order to question the grounds of his detention in advance. National laws of procedure in order to invoke the right of access to documents still have to be respected. On the other hand, it is not crucial whether or not the detainee or the prosecution finally make any comments whilst being present. Here, the paradigm of having this opportunity represents the significant point. As a consequence, both the appearance of the applicant at court as well as access to documents can ‘be regarded as a means of ensuring respect for equality of arms.’

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93 Ibid.
94 ESSER (n 20) 346.
95 Neumeister v. Austria, § 24.
97 Ibid; A. and Others v. UK [GC], § 203; Solovyev v. Russia, no. 918/02, 24 July 2012, § 132.
98 Chrusciński v. Poland, §§ 54-56; Sanchez-Reisse v. Switzerland, § 51.
99 Ibid (Sanchez-Reisse v. Switzerland) §§ 48-51.
100 Ibid, § 51.
101 Ibid.
102 Ibid. See also: Solovyev v. Russia, § 133; Allen v. UK, no. 18837/06, 30 March 2010; Kampanis v. Greece, § 47; De Wilde, Ooms and Versyp v. Belgium, § 76.
104 Schips v. Germany, § 46: ‘[a]n accused complaining of a denial of access to the investigation files must in principle have duly applied for such access in compliance with the national law.’ See also: Kampanis v. Greece, §§ 50, 51.
105 Toth v. Austria, no. 11894/85, 12 December 1991, §§ 83 and 84. In this case, the Austrian Government tried to bring forward the argument that the prosecution, which was present at an oral hearing, did not make any statements. The ECtHR denied this argument because, in fact, Mr Toth did not have ‘the opportunity to contest properly the reasons invoked to justify the continuation of his detention.’
106 Kampanis v. Greece, § 47.
2.2 The presence of the charged at pre-trial level

As the paragraphs above have shown, it is crucial for the applicant to present his or her arguments against the detention. Especially when a national court decides about the ‘gravity of the charges,’ the applicant should not be put in a ‘vulnerable situation vis-à-vis the prosecution.’ In the case of Solovyev v. Russia, the applicant’s lawyer was not present at the first-instance hearing, which was considered as the decisive point according to the ECtHR because the applicant did not have the ‘opportunity to present his arguments.’ Again, the latter decision underlines the importance of the detainee and his legal representative being present at court. In addition to the flaw at first-instance, the applicant’s unanswered request to attend the appeal proceedings led to the fact that only his defence counsel was finally present at the appeal hearing. This, in turn, was not regarded as ‘sufficient to ensure that the proceedings were adversarial and that the principle of equality of arms was respected.’ Yet, it is possible to regard the procedure of an appeal hearing to be in line with the Convention in the mere presence of the applicant’s lawyer. Such cases, however, require a first-instance hearing with ‘sufficient procedural guarantees.’ Having considered these detention proceedings as a whole, and acknowledging that the first-instance hearing was flawed, the ECtHR concluded that there had been a violation of Article 5 (4) in Solovyev.

The case of Koroleva v. Russia dealt with the question of issuing notifications to applicants in order to be aware of the hearings. In this case, the government claimed that the applicant had been notified of the appeal hearings by summonses. The notification was, according to the government, sent to her defendant’s counsel. Nonetheless, the authorities could not deliver any evidence to confirm this to the ECtHR. As a consequence, neither the applicant, nor her lawyer was present at the hearings and the Strasbourg judges were not persuaded about the notification of the defence counsel. The refusal of the national courts to grant the applicant leave to take part in an appeal hearing was therefore considered to be a violation of Article 5 (4). Even the fact that the prosecution did not attend the hearing did not undermine this decision. Hence, Koroleva stresses the importance of a detainee’s presence and it furthermore reveals the authorities’ obligation to prove that the applicant has been duly informed of the hearing.

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107 Solovyev v. Russia, § 135.
109 Ibid, § 137.
111 Solovyev v. Russia, § 138.
112 Koroleva v. Russia, no. 1600/09, 13 November 2012, § 114.
113 Ibid, §§ 114 and 115.
A similar outcome was held in *Pyatkov v. Russia* where the ECtHR went a step further with regards to the duty of national courts to notify the applicant of an appeal hearing. After the Strasbourg Court held that it was not possible for a national court of second-instance to ‘examine the applicant’s appeal in his absence properly,’ the judges had to answer the question whether or not the appeal court had duly notified the applicant.114 As a general rule, the ECtHR admits domestic rules of procedure to require a formal request of attendance under Article 5 (4).115 Such a request had been lodged in *Pyatkov*. For some reason, however, it did not reach the appeal court. On this specific issue, the appeal court should have ‘verified whether the applicant had been duly notified of the appeal hearing […] and if he had not,’ the appeal court should have considered adjourning it.116 Finally, the ECtHR determined that there had been a breach of Article 5 (4) because the applicant had been ‘deprived of an effective control of the lawfulness of his detention.’117

All of the aforementioned cases reveal a strict application of the right to be present at court when the lawfulness of the detention is scrutinised within the ambit of Article 5 (4). Basically, a denial of the applicant’s presence must be regarded as a breach of the Convention. In addition, the mere presence of the applicant’s defence counsel is, in some cases, still not sufficient to safeguard this fundamental guarantee. As a result, the presence of the detainee at the hearings can be regarded as a fundamental guarantee of the Convention’s pre-trial procedure.

### 2.3 Access to documents

One of the fundamental cases concerning access to documents was *Lamy v. Belgium*. In this case, the ECtHR determined that there would be a failure ‘to ensure equality of arms’ if the procedure was not duly adversarial.118 The case started with Belgian authorities ordering an arrest warrant against the applicant on the grounds of fraudulent bankruptcy.119 After having been arrested, neither the applicant nor his defence counsel were able to ‘inspect anything in the [accusing] file’ for the first thirty days of his custody.120 This meant, in particular, that the defence was unable to look into any reports of the investigating judge or the police. Although domestic Belgian law at the time did allow such a criminal procedure, the ECtHR considered it to be a violation of

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115 Ibid, § 132.
116 Ibid.
117 Ibid.
118 *Lamy v. Belgium*, no. 10444/83, 30 March 1989, § 29.
120 Ibid, § 29.
Article 5 (4). The fact that the defendant’s counsel did not have the opportunity to ‘effectively challenge’ the statements on which the prosecution based their arguments was regarded as a failure to ensure equality of arms. According to the Strasbourg judges, it was crucial to inspect files and documents especially at a stage when a court had ‘to decide on a remand in custody or a release.’ Therefore, access to documents should have been granted. This was confirmed in Nikolova v. Bulgaria, where the ECHR used exactly the same wording as in Lamy. The Court stressed that the proceedings had to be “adversarial and must always ensure ‘equality of arms’ between the parties, i.e. the prosecutor and the detainee.” This was not the case if the defence counsel was denied access to documents to the ‘investigation files’ which are ‘essential to effectively challenge the lawfulness of the detention.’ Moreover, in cases of an arrest within the ambit of Article 5 (1) (c), it was compulsory to hold a hearing with the detained being present.

In a nutshell, it can be held that the cases of Lamy and Nikolova definitively strengthened the right of detainees to retrieve files and documents in order to be able to challenge their arrest. Yet access to documents may not depict an absolute right. In 2001, German prosecution authorities tried to argue in favour of a limitation of the access to documents on various grounds, such as ‘endangering the course of the investigations,’ ‘tampering with evidence or undermining the course of justice.’ In the three cases of Garcia Alva, Lietzow and Schöps, the ECHR had to evaluate whether or not the restricted information provided by the prosecution was sufficient for the applicants to challenge the lawfulness of their detention.

In Lietzow v. Germany, the applicant was provided with a brief ‘summary of the facts’ which underlined ‘the charges against him.’ This summary, however, only referred to the evidence used—in this case it was two statements of other suspects—but did not deliver any information about the content of these statements. The applicant’s counsel argued that the given information did not ‘offer a sufficient basis to ensure the defence,’ because without having access to the statements, it was not possible to prove...
the unlawful detention of his client.\textsuperscript{130} The prosecution, on the other hand, had full knowledge of the two statements. At some point, the statements were handed over to the German court but the court, in turn, did not provide the information to the applicant or his counsel.\textsuperscript{131} As a result, both the prosecution and the German court were familiar with the decisive statements but the defence was not.\textsuperscript{132} This meant that the applicant’s counsel was not able to question the ‘reliability or the conclusiveness of the statements.’\textsuperscript{133} In its judgment, the ECtHR generally admitted a restriction of access to documents in sensitive cases. However, this goal could never be ‘pursued at the expense of substantial restrictions on the rights of the defence.’\textsuperscript{134} In addition, essential information to challenge the ‘lawfulness of a person’s detention should be available to the suspect’s lawyer in an appropriate manner.’\textsuperscript{135} Withholding substantial information and repeating the facts of the arrest warrant in a hearing orally was not considered as being sufficient for the detainee to prepare his defence,\textsuperscript{136} and, hence, the ECtHR finally concluded that there had been a violation of Article 5 (4).\textsuperscript{137}

A similar approach was held in \textit{Garcia Alva v. Germany}. In this case, the public prosecutor argued that to completely reveal the contents of the investigation files would ‘endanger the purpose of the on-going investigations.’\textsuperscript{138} Therefore, the applicant was denied access to the content of the files, including the statement of a key witness. He was only allowed to know the facts mentioned on the arrest warrant, \textit{i.e.} the abstract charges against him.\textsuperscript{139} The German courts of appeal confirmed the prosecutor’s decision when they reviewed the lawfulness of the applicant’s detention. According to them, the applicant’s request to have access was ‘not wholly excluded.’\textsuperscript{140} Furthermore, the oral information about the witness’ statement during the hearings had been ‘sufficient to effectively defend himself.’\textsuperscript{141} The ECtHR did not follow this approach. It allocated a ‘key role’ to the witness’ statement which was the definitive factor on whether or not the applicant should be held in further custody.\textsuperscript{142} According to the ECtHR, the denial of access to documents resulted in the consequence that it was

\begin{thebibliography}{99}
\item[{\textsuperscript{130}}} Ibid., § 41.
\item[{\textsuperscript{131}}} Ibid., § 46.
\item[{\textsuperscript{132}}} Ibid.
\item[{\textsuperscript{133}}} Ibid.
\item[{\textsuperscript{134}}} Ibid., § 47; \textit{See also: Moor\text{e}n v. Germany [GC]}, § 125; \textit{Moor\text{e}n v. Germany}, § 92; \textit{Shishkov v. Bulgaria}, no. 38822/97, 9 January 2003, § 77.
\item[{\textsuperscript{135}}} Ibid. (\textit{Lietzow v. Germany}), § 47.
\item[{\textsuperscript{136}}} Ibid., § 45. Confirmed in: \textit{Moor\text{e}n v. Germany [GC]}, § 121.
\item[{\textsuperscript{137}}} Ibid (\textit{Lietzow v. Germany}, § 48).
\item[{\textsuperscript{139}}} Ibid., § 37.
\item[{\textsuperscript{140}}} Ibid., § 18.
\item[{\textsuperscript{141}}} Ibid.
\item[{\textsuperscript{142}}} Ibid., § 41.
\end{thebibliography}
neither possible for the applicant nor his counsel to ‘adequately challenge the findings referred to by the Public Prosecutor.’ Moreover, it was ‘hardly possible for an accused to challenge the reliability of such an account properly without being made aware of the evidence on which it is based.’ As in Lietzow, the ECtHR held that a restriction of access to documents cannot be ‘pursued at the expense of substantial restrictions on the rights of the defence.’ A similar approach was taken in the more recent case of Ovsjannikov where the ECtHR found it problematic that there was no consideration of whether it was ‘imperative to completely withhold the evidence from the defence.’

The third German case, Schöps v. Germany also dealt with information which was withheld from the applicant’s counsel. In this case, the government contended that the applicant allegedly waived his right to access and that it did not receive any application for access to documents. Furthermore, in a second hearing, it tried to justify the withholding of additional evidence citing procedural requirements of national law. The defence claimed to have applied for access in both hearings whereas the authorities argued they had not received any such request. The judges generally admitted that the detainee or his counsel is required to apply in accordance with national law in order to retrieve information. The ‘mere absence of any record of such a request,’ however, was not a sufficient proof that an application had not been made. Furthermore, the ECtHR had its doubts regarding a telephone conversation between the court’s rapporteur and the counsel prior to the hearing, in which the defendant allegedly waived his right to access. The ECtHR held that a ‘waiver of a right guaranteed by the Convention—if at all—must be established in an unequivocal manner’ and that a ‘waiver of procedural rights required minimum guarantees.’ According to the ECtHR, it could not be said that the defence counsel gave up his right to inspect files since the ‘precise content of the telephone conversation was in question.’ Moreover, the hearing was important to the applicant. Neither he nor his counsel was able to inspect the investigation files and some of the information denied was ‘essential.’

The fact that the appeals court had received the files from the prosecution more than six

\[143\] Ibid.
\[144\] Ibid, § 41.
\[145\] Ibid, § 42; See also: Moooren v. Germany [GC], § 125; Moooren v. Germany, § 92.
\[146\] Ovsjannikov v. Estonia [GC], § 77.
\[147\] Schöps v. Germany, § 46; Kampanis v. Greece, § 51.
\[149\] Ibid (Schöps v. Germany), § 42.
\[150\] Ibid, § 48.
\[151\] Ibid.
\[152\] Ibid, § 49.
weeks previously also showed that it would have been possible to ‘facilitate the consultation of the files by the defence.’ Hence, it was necessary for the defence to access the information in order to effectively challenge the lawfulness of the applicant’s detention before the first hearing.

Regarding the second hearing, the arguments of the government were similar. At some stage, the charges in the case were amended and the prosecution argued that counsel’s request to retrieve files only referred to the initial charges and not to the ones acquired later. The ECtHR denied this. According to the Human Rights Court, it was an ‘over-formalistic and disproportionate response to require yet another request to access to the numerous new volumes of the case file.’ The Convention was ‘intended to guarantee rights that are not theoretical or illusory, but practical and effective.’ Finally, the ECtHR held that the defence should have had access to all of the case files in order to challenge the accusations as amended. As a result, it determined a breach of the basic requirements of judicial procedure.

An unlawful restriction of access to documents, due to flawed practice of ambivalent national law was also determined in Shishkov v. Bulgaria. Similarly as in Schöps, the government claimed that there was not sufficient proof of the defence’s intention to access the case files before the first appeal hearing. As a result, the defence counsel was not provided with any case files before the hearing. The ECtHR held that the defence counsel was ‘thus unable to study any of the documents that were essential’ in order to determine whether or not his client’s detention was lawful. The Prosecutor, on the contrary, had full knowledge of the files which represented a clear violation of the equality of arms requirement—according to the Court. In addition, the ECtHR had to decide on the lawfulness of the rejection of appeals by the applicant. Admittedly, the judges confirmed that the applicant may have missed a deadline required under Bulgarian national law, the so-called ‘seven-day period.’ At the same time, however, it highlighted that in cases of deprivation of liberty, procedural

153 Ibid, § 47.
154 Ibid, § 51.
155 Ibid, § 42.
156 Ibid, § 47.
157 Ibid, see also: Svipsta v. Latvia, § 129 (b); Artico v. Italy, no. 6694/74, 13 May 1980, § 33.
158 Schöps v. Germany, § 47.
159 Ibid, § 53.
160 Shishkov v. Bulgaria, § 90.
161 Ibid, §§ 78, 79.
162 Ibid, § 80.
163 Ibid, §§ 80, 81.
164 Ibid, §§ 82, 83.
limitations ‘must be subject to a particularly strict scrutiny.’\textsuperscript{165} The judges reiterated that providing the defence with no files before the hearing ‘hampered the preparation of the appeal.’\textsuperscript{166} Furthermore, the ECtHR criticised the length of time of the applicant’s detention after his first appeal had been rejected.\textsuperscript{167} According to the Human Rights Court, a detention which was ‘initially lawfully ordered’ may become unjust at a later stage.\textsuperscript{168} Therefore, it was vital to have ‘periodic judicial reviews at reasonable intervals’ in order to decrease the risk of unlawful detention.\textsuperscript{169} In Shishkov, Bulgarian national law required a ‘change of circumstances’ to argue in favour of a new appeal hearing.\textsuperscript{170} Without having access to documents, it would, however, be hard to prove such a change. Hence, the applicant had to remain in custody for a period of five more months after his first appeal was rejected. Finally, the ECtHR determined on a violation of Article 5 (4) due to a ‘lack of clarity in domestic law’ and the applied practice with regards to the seven-day time limit.\textsuperscript{171}

The \textit{Shishkov} judgment clearly revealed one more time how essential and almost non-derogable the right of access to documents is, even in cases when national laws of procedure have been violated. Yet the applicants need to indicate and specify—as much as possible—which documents, evidence or facts they would have needed to inspect more thoroughly in order to effectively challenge their detention.\textsuperscript{172} A simple and general complaint about the mere denial of access to documents, as was the case in Andrei Georgiev v. Bulgaria, is different from cases in which the prosecution or the domestic courts relied upon facts that the applicant was denied full access to.\textsuperscript{173} Such access was denied in Svipsta v. Latvia where the prosecution and the national courts based the withholding on grounds of preventing the undermining of justice.\textsuperscript{174} Despite the fact that the counsel specified the documents that he or she required access to and complained twice about the non-disclosure, the defence was denied access to witness statements, physical evidence, expert reports and other information related to the case.\textsuperscript{175} The ECtHR deemed these documents as ‘crucial’ in determining her continuing detention. It was thus ‘vital for the defence to consult the files in order to effectively

\textsuperscript{165} Ibid, § 85. The Court also stated the importance of taking into consideration the ‘practical realities and specific circumstances of the detained person’s position’ as it did in Conka v. Belgium, no. 51564/99, 5 February 2002, §§ 53-55.
\textsuperscript{166} Ibid (Shishkov v. Bulgaria), § 86.
\textsuperscript{167} Ibid, § 88.
\textsuperscript{168} Ibid.
\textsuperscript{169} Ibid.
\textsuperscript{169} Ibid, § 89.
\textsuperscript{170} Ibid.
\textsuperscript{171} Ibid.
\textsuperscript{172} Andrei Georgiev v. Bulgaria, no. 61507/00, 26 July 2007, § 89.
\textsuperscript{173} Ibid.
\textsuperscript{174} Svipsta v. Latvia, § 137.
\textsuperscript{175} Ibid, § 138.
challenge the lawfulness’ of the applicant’s detention on remand. Following its consistent case law, the ECtHR saw a breach of the fundamental requirement of equality of arms.

The ECtHR continued to emphasise the ‘key role’ played by the disclosure of documents in the determination of the prolongation of an applicant’s detention. In Mooren v. Germany, the ECtHR reiterated that it was ‘impossible for an accused to properly challenge the reliability [of facts] without being aware of the evidence on which it is based.’ As in previous judgments, the Court admitted that restrictions may be legitimate but never at the ‘expense of substantial restrictions of the rights of the defence.’ Furthermore, the Mooren case confirmed that an oral account of the facts at the hearing, and not before, does not imply sufficient procedural standards for the preparation of a case. In addition, it was held that procedural guarantees can only be effective if they are ‘applied speedily.’ The failure to grant access to documents unduly delayed the applicant’s detention and the belated disclosure of the files could not remedy the flaws in the earlier stages of the proceedings. Hence, the ECtHR affirmed a violation of Article 5 (4) which was confirmed by the Grand Chamber at a later stage.

2.3 Evaluation

Similarly to Article 6, the European Court of Human Rights evaluates the procedures at pre-trial stage on the whole. There is a strict application of the right to be present at court. In addition, the ECtHR needs to be convinced that the applicant had an opportunity to present his/her arguments properly either in the hearing of first-instance or in the subsequent review proceedings. Every denial of a detainee to be present at a hearing or not to be represented by a defence counsel depicts a breach of the Convention. Moreover, an appeal hearing with mere presence of the applicant’s defence counsel is not sufficient if the hearing of first-instance was flawed, that is that the applicant was not present at the initial hearing. The applicant needs to be duly notified of the hearings and the authorities have the burden of proof. If the defence did not have

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176 Ibid.
177 Ibid. § 139.
178 Mooren v. Germany, § 93.
179 Ibid. § 95.
180 Ibid. § 96.
181 Ibid.
182 Ibid. § 98.
183 Ibid.
184 Mooren v. Germany [GC], § 125.
185 Solovyev v. Russia, §§ 133-138.
the opportunity to present their case, it is irrelevant whether or not the prosecution would attend or comment in a hearing. In certain cases, national courts even have to verify whether or not the applicant was duly notified.

Regarding access to documents, the case law of the ECtHR shows a strict application in favour of the detainee. The applicant must be given the chance to effectively challenge the lawfulness of the arrest and can only do so when a certain content of evidence or essential facts are handed over. In cases of Article 5 (1) (c) (reasonable suspicion of having committed an offence), a hearing is required. This procedural requirement may appear, *inter alia*, relevant for the comparison with the court procedure of the ICC. Generally, the European Court of Human Rights admits a restriction of access to documents, however, not at the expense of substantial restrictions on the rights of the defence. Whenever documents are regarded as being crucial or playing a key role, any restriction represents a breach of the Convention. Furthermore, an oral account of facts during the hearing cannot remedy the denial of access. National laws to request access still have to be respected. They must, however, not be applied over-formalistically or disproportionately, and procedural limitations are subject to a particular strict scrutiny. Moreover, procedural rules need to be effective and applied speedily. Practice has shown that the importance of crucial evidence overrides the right to restrict access to documents at pre-trial stage. As a result, any restriction of access to documents may represent a violation of Article 5 (4) which thus underlines the importance of a strong defence in cases of deprivation of liberty.

3. Disclosure and non-disclosure of evidence at trial stage

3.1 Reasons for limitation—leading judgments

The paragraphs about equality of arms and the right to adversarial proceedings have revealed that there is a general obligation to disclose evidence, which can be restricted under certain circumstances. As previously mentioned, both parties should be given ‘the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.’\(^{186}\) This was confirmed in *Edwards v. UK* when the ECtHR stressed that it was ‘a requirement of fairness under Article 6 (1) that the prosecution authorities disclose all material which is for or against the accused.’\(^{187}\) A failure of non-disclosure would give rise to a defect in the trial proceedings.\(^{188}\)

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\(^{186}\) *Brandstetter v. Austria*, § 67.


\(^{188}\) Ibid.
Although this defect could finally be remedied by a court of appeal, the case of *Edwards* confirms the general obligation for the prosecution to disclose evidence. Yet, the disclosure faces limits when the right to a fair trial conflicts with other fundamental rights of the Convention.\(^{189}\)

In *Doorson*, for example, the Court admitted that it needed to take into consideration the interests of witnesses when ‘their life, liberty or security may be at stake’—although the wording of Article 6 did not explicitly require the interests of witnesses in general.\(^{190}\) In these situations, the notion of the fair trial required a ‘balance of the interests of the defence against those of witnesses or victims who are called to testify.’\(^{191}\) This argumentation was confirmed in *Van Mechelen and Others* when the ECtHR concluded that the use of statements made by anonymous witnesses was ‘not under all circumstances incompatible with the Convention.’\(^{192}\) At the same time, however, the Strasbourg judges admitted some difficulties for the defence which should normally not be involved in criminal proceedings if the prosecution maintained the anonymity of these witnesses.\(^{193}\) Therefore, it required that the handicaps under which the defence had to work were ‘sufficiently counterbalanced by the judicial authorities.’\(^{194}\) By no means should a conviction be based ‘solely or to a decisive extent on anonymous statements.’\(^{195}\) The latter sentence made the difference between the two cases. Whereas in *Doorson* there was—apart from the anonymous witnesses—other evidence which identified the accused as the perpetrator,\(^{196}\) in *Van Mechelen and Others* the evidence merely relied on statements of anonymous police officers.\(^{197}\) As a consequence, the *Doorson* case was in conformity with Article 6 of the Convention whereas *Van Mechelen and Others* was not.\(^{198}\) Notwithstanding the two different outcomes, the limitation of the disclosure of evidence due to witness protection can be regarded as affirmative in both cases. This has, for example, been confirmed in *Al-Khawaja and Tahery v. the UK [GC]*\(^{199}\) or *Cevat Soysal v. Turkey*.\(^{200}\)


\(^{190}\) *Doorson v. The Netherlands*, no. 20524/92, 26 March 1996, § 70.

\(^{191}\) Ibid.


\(^{193}\) Ibid, § 54.

\(^{194}\) Ibid. Confirmed in: *Natunen v. Finland* § 40; *Luboč v. Poland*, no. 37469/05, 15 January 2008, § 60.

\(^{195}\) *Van Mechelen and Others v. The Netherlands*, § 55.

\(^{196}\) Ibid, § 64; see also: *Doorson v. The Netherlands*, § 76. In the decision as to the admissibility in the case of *Kok v. The Netherlands*, for example, the ‘considerable alternative evidence’ besides the statements of the anonymous witness played a major role for the ECtHR to conclude on a non-violation of the rights of the defence.

\(^{197}\) *Van Mechelen and Others v. The Netherlands*, § 63.

\(^{198}\) Ibid, § 65.

\(^{199}\) *Al-Khawaja and Tahery v. the UK [GC]*, nos. 26766/05, 22228/06, 15 December 2011, § 118.

\(^{200}\) *Soysal v. Turkey*, no. 17362/03, 23 September 2014, § 65.
Limitations to the duty of disclosure were also confirmed in *Fitt v. UK* when the Grand Chamber of the ECtHR highlighted the competing interests of the disclosure of evidence and national security or the need to protect witnesses.\(^{201}\) The Court reiterated the fundamental aspects of the adversarial trial and equality of arms in criminal proceedings. However it also described ‘the entitlement of disclosure of relevant evidence’ not as being an ‘absolute right.’\(^{202}\) Referring to *Doorson* and *Van Mechelen*, the ECtHR stressed that 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.’\(^{203}\) In *Fitt*, the prosecution had applied *ex parte* to the trial judge for an order allowing to withhold certain material of evidence to the defence.\(^{204}\) The judge of first instance granted the prosecution’s request and the defence was given a summary ‘omitting any reference to source of information.’\(^{205}\) The Court of Appeal upheld the applicant’s conviction since the judge of first instance made clear that he would have ordered disclosure ‘if any of the material had or might have helped the defence.’\(^{206}\)

The second *ex parte* application of this case ‘was followed by an *inter partes* hearing’ dealing with the question whether or not a witness statement after a guilty plea should be disclosed to the defence. This time, the defence was able to argue its case in the hearing. They followed the argumentation of the prosecution and accepted the judge’s decision why he had ordered non-disclosure before.\(^{207}\) In addition, this time the defence was provided with a summary of sources of information although the judge had finally decided ‘against full disclosure’ of the witnesses’ statement. When the ECtHR evaluated the case, it concluded that there was a non-violation of Article 6 (1) due to two important arguments. First, the Court was ‘satisfied that the defence were kept informed and were permitted to make submissions and participate in the decision-making process as far as possible.’\(^{208}\) Second, the judges of the ECtHR saw a further crucial safeguard of the fair trial in the fact that ‘the need for disclosure was at all times under assessment by the trial judge.’\(^{209}\) The ECtHR considered it as the judge’s duty to ‘monitor the fairness’ and there were no reasons to believe ‘that the judge was not

\(^{201}\) *Fitt v. UK* [GC], § 45.
\(^{202}\) Ibid, §§ 44, 45.
\(^{203}\) Ibid, § 45.
\(^{204}\) Ibid, § 10.
\(^{205}\) Ibid, § 12.
\(^{206}\) Ibid, § 17.
\(^{207}\) Ibid, § 47.
\(^{208}\) Ibid, § 48.
\(^{209}\) Ibid, § 49.
independent and impartial within Article 6 (1).”210 As a result, the non-disclosure of evidence can be in accordance with the right to a fair trial if it is under constant assessment of a trial judge.211

Three years earlier, a similar approach had been taken in the case of Jasper v. UK. In this case, the prosecution similarly applied ex parte to the trial judge to withhold material on grounds of public interest immunity.212 The applicant had been charged with the offence of ‘being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis.’213 ‘Caught red handed’ and not having given evidence during his trial, the applicant was convicted in the first instance and his appeal was dismissed for the same reason.214 Since the Commission did not determine on a violation in its report either,215 the applicant had to take his case to the ECtHR. He contended ‘that the ex parte hearing before the judge violated the fair trial because it afforded no safeguards against judicial bias or error and no opportunity to put arguments on behalf of’ him—‘the accused.’216

The ECtHR denied his claim after having scrutinized the entire trial procedure.217 The reasoning was similar, partly identical to the Fitt decision which followed in 2003. Again, the Court found it important that the defence ‘were notified’ of the prosecution’s application.218 Though they were not told the ‘category of material’ withheld, the defence were given the opportunity to outline their case.219 As in Fitt, the Grand Chamber of the Court regarded it as sufficient that ‘the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as possible’ without having been given the material which ‘the prosecution sought to be kept secret on public interest grounds.’220 The fact that a trial judge assessed the ‘need for disclosure at all times’ saved the fair trial procedure.221 Furthermore, no reason indicated that the judge did not act ‘independent and impartial within Article 6 (1).’210

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210 Ibid.
211 The decision of the judgment itself was very close, it appeared to be a 9 to 8 vote. The judgment is nonetheless firm and solid and the dissenting opinions will be taken into consideration at a later stage of this thesis.
212 Jasper v. UK [GC], § 8.
213 Ibid. § 9.
214 Ibid., §§ 13, 18.
215 Ibid., §§ 40, 49.
216 Ibid., § 43. Furthermore, the defence tried to invoke a counterbalance for the exclusion of the defence from the procedure in form of the appointment with an independent counsel who could state arguments on behalf of the defence. This argument, however, was based on national law, § 44. In addition, the defence tried to argue with a telephone intercept, §45.
217 It needs to be pointed out that the ECtHR merely focuses on the decision making procedure itself rather than deciding on the fact whether it was strictly necessary to withhold evidence in essence. Cases: Edwards v. UK (n 205) § 34: ‘it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and […] it is for these courts to assess the evidence before them. The Court’s task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair.’ A similar decision was held in Fitt v. UK [GC], § 46 and in Jasper v. UK [GC], § 53.
218 Jasper v. UK [GC], § 54.
219 Ibid.
220 Ibid., § 55.
221 Ibid., § 56.
impartial.\textsuperscript{222} Hence, the domestic trial’s standards were in conformity with Article 6 since it weighed the ‘public interest in concealment against the interest of the accused in disclosure.’\textsuperscript{223} As a result, the conclusion of Jasper is the same as in Fitt: if the non-disclosure of evidence is under the constant assessment of a trial judge, it can be in conformity with the right to a fair trial.

It was this constant assessment of a trial judge that was lacking in Rowe and Davis v. UK.\textsuperscript{224} In this case, the ‘prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest’ during the trial of first-instance.\textsuperscript{225} The Court of Appeal realised the problem which had occurred; however it regarded the defect of the first-instance proceedings as remedied by the appeals procedure and thus did not determine on a violation.\textsuperscript{226} Since the prosecution had notified the defence about the withholding of information in the appeals proceedings and due to the Court of Appeal constantly assessing and confirming the non-disclosure, the Appeal Court judges saw no violation of the fair trial.\textsuperscript{227} The ECtHR, however, did not consider such a procedure to be in conformity with Article 6 (1).\textsuperscript{228} It held that the prosecution itself was not allowed to ‘assess the importance of concealed information and weigh it against the public interest’ while keeping it secret.\textsuperscript{229} Moreover, the ECtHR did not consider the procedure before the appeal court as

[s]ufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel.\textsuperscript{230}

Only the judge of first-instance would have been in a position to monitor the need for disclosure when new issues had emerged during the first trial, and only at this stage would it have been possible to evaluate the credibility of key witnesses and to suspend the non-disclosure if necessary.\textsuperscript{231} As a consequence, the ECtHR determined a violation

\textsuperscript{222} Ibid.
\textsuperscript{223} Ibid.
\textsuperscript{224} Rowe and Davis v. UK [GC].
\textsuperscript{225} Ibid, § 63.
\textsuperscript{226} Ibid, §§ 23-27.
\textsuperscript{227} Ibid, § 64.
\textsuperscript{228} Ibid, § 63.
\textsuperscript{229} Ibid.
\textsuperscript{230} Ibid, § 65.
\textsuperscript{231} Ibid.
of Article 6 (1).\textsuperscript{232} The case of \textit{Rowe and Davis v. UK} clearly reveals that the prosecution is not authorized to decide about disclosure or non-disclosure of evidence.\textsuperscript{233} Yet, there is an option to remedy procedural defects of a first-instance trial with regards to unlawful non-disclosure. If the prosecution disclosed \textit{all} the information withheld during the first-instance before the appeal proceedings start, it may be possible to remedy such flaws.

The \textit{Dowsett} case dealt with such a dispute.\textsuperscript{234} Evidence had been withheld from the defence on grounds of public interest immunity in the first instance. Having observed ‘strong similarities’ to \textit{Rowe and Davis}, the ECtHR had to evaluate the decision-making procedure and decide whether or not sufficient information was disclosed before the applicant’s appeal started.\textsuperscript{235} Indeed, the prosecution disclosed some previously withheld material to the defence before the appeal but simultaneously notified that some evidence still remained undisclosed.\textsuperscript{236} Among other documents, there was one particular document (no. 580) which was subject to dispute as to whether it had been disclosed to the defence in time.\textsuperscript{237} Five days before the commencement of the appeal hearing, the document was removed from the list of withheld material although it had not been disclosed to the defence. As a matter of fact, the ECtHR determined that the document had unambiguously ‘not been disclosed’ to the defence by the evening of the appeal hearing.\textsuperscript{238} In addition, other documents ‘were not disclosed at this time on the basis […] of the prosecution’s assessment that public interest immunity was applicable to them.’\textsuperscript{239} The Government’s argument ‘that the applicant could himself have requested the Court of Appeal to review’ the withheld material was not regarded as an adequate safeguard by the ECtHR.\textsuperscript{240} Instead, the ECtHR reiterated the importance that relevant material to the defence had to be placed before the trial judge ‘at the time when it can serve most effectively to protect the rights of defence.’\textsuperscript{241} Since the defence had ‘not received most of the missing information,’ the appeal proceedings were ‘not adequate to remedy the defects of the first instance.’\textsuperscript{242} In

\begin{flushleft}
\footnotesize
\begin{itemize}
\item \textsuperscript{232} \textit{Ibid}, § 67.
\item \textsuperscript{233} \textit{Ibid}, § 66.
\item \textsuperscript{234} Dowsett v. UK, no. 39482/98, 24 June 2003.
\item \textsuperscript{235} \textit{Ibid}, §§ 44-45.
\item \textsuperscript{236} \textit{Ibid}, § 45.
\item \textsuperscript{237} \textit{Ibid}, § 47.
\item \textsuperscript{238} \textit{Ibid}.
\item \textsuperscript{239} \textit{Ibid}.
\item \textsuperscript{240} \textit{Ibid}. § 48.
\item \textsuperscript{241} \textit{Ibid}. § 50.
\item \textsuperscript{242} \textit{Ibid}.
\end{itemize}
\end{flushleft}
the light of the above, the ECtHR concluded that the applicant did not receive a fair trial and that there had been a violation of Article 6.

3.2 The general concept behind the ECtHR’s decisions at trial stage

The case law of the European Court of Human Rights confirms that the disclosure of evidence can be limited on the grounds of public security, witness or victim protection as well as in situations where police investigation methods need to be safeguarded. These competing interests, however, are required to be strictly necessary and at some point, the court procedure has to sufficiently counterbalance the facts that the evidence has to be withheld. This means, in particular, that national courts have to analyse whether or not the disclosure would be of assistance to the defence on the one hand, or whether the disclosure would harm any identifiable public interest on the other. Furthermore, the justification for the non-disclosure has to be based on the content of the material in question. The question about the admissibility of evidence, on the other hand, is subject to national law. What is scrutinised by the ECtHR in all cases is the decision making procedure to ensure that equality of arms and the right to adversarial proceedings have been respected in order to safeguard the rights of the accused. A crucial point is that only the judiciary can decide on the non-disclosure of evidence. Generally, it is acknowledged that the mere involvement of a judge does not suffice. However, if the judiciary carefully explores the material being subject to non-disclosure and if it weighs the applicant’s interest in disclosure against the public interest in concealment, the procedure can be regarded as fair—even if the defence did not have access to the material in question. The decisive point here rests on a constant assessment by judiciary for the need to disclose at all times. In Fitt and Jasper, judges took such a decision in an ex parte hearing in which the defence was left out. Although this was subject to criticism, it represents the results of two Grand Chamber judgments of the ECtHR.

The contrary is also applicable, insofar as the court procedure will definitively not be in conformity with the Convention if a public prosecutor undertakes the decision

\[\text{Ibid, § 52.}\]
\[\text{Mirilashvili v. Russia, no. 6293/04, 11 December 2008, § 206.}\]
\[\text{Ibid, § 206.}\]
\[\text{Natunen v. Finland, § 41.}\]
\[\text{Laska and Lika v. Albania, no. 12315/04, 17605/04, 20 April 2010, § 70.}\]
\[\text{Mirilashvili v. Russia, § 198.}\]
about non-disclosure alone, without the approval of the court.\textsuperscript{249} \textit{Rowe and Davis} clearly revealed this as a matter of fact:

During the applicant’s trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping information secret, cannot comply with the above-mentioned requirements of Article 6 (1).\textsuperscript{250}

Admittedly, some of these first instance flaws can be rectified at appeals level. The criteria for a remedy, however, are very strict. For example, even in situations where appeal judges oversee the question of the non-disclosure of evidence constantly during the appeal process—often by relying on transcripts of the first hearing evidence—the European Court of Human Rights believe that the appeal court would lack the necessary direct relationship with the witnesses in their evaluation of the non-disclosure of evidence. Thus, the element of ‘direct scrutiny’ has been denied. The only opportunity to heal a procedure that was flawed at first instance is, if at the appeal stage, the prosecution hands over all relevant documents before the start of the trial. In circumstances where the prosecution still wants to apply to withhold certain documents, it will need to address its intention in an \textit{inter partes} hearing prior to the appeal. Hence, an application \textit{ex parte} would not be sufficient at appeals level.

A further aspect which needs to be taken into consideration regarding \textit{ex parte} hearings is that the judiciary is only allowed to determine on the disclosure or non-disclosure of evidence. Any other evaluation, for instance, how the evidence is related to an issue of fact, must not be carried out in such hearings.\textsuperscript{251} In \textit{Edwards and Lewis}, the judge had to decide whether or not police officers overstepped their boundaries in their role of undercover agents. Hence, the judiciary examined the reason for the police operation and the nature and extent of the police participation in the crime.\textsuperscript{252} This evaluation included a determinative importance about inculpatory evidence of the case.\textsuperscript{253} Since the disclosure of the evidence was finally denied, the applicant was not able to counter the arguments of the prosecution, and this, in turn, was considered as a

\textsuperscript{249} In addition to Fitt and Jasper, also confirmed in Tinnelly & Sons Ltd and Others and McElduff and Others v. The UK, no. 62/1997/5846/1052-1053, 10 July 1998, §§ 77–79.
\textsuperscript{250} Rowe and Davis v. UK [GC], § 63.
\textsuperscript{251} Edwards and Lewis v. UK [GC], § 46.
\textsuperscript{252} Ibid, § 46.
\textsuperscript{253} Ibid.
breach of the Convention by the ECtHR. The result of this paragraph clearly shows that it is possible to decide about the non-disclosure of evidence in *ex parte* hearings in which the defence is not present. Nonetheless the latter has been subject to criticism.

### 3.3 Critical evaluation of *ex parte* hearings

The Grand Chamber did not conclude on the *Fitt* case with an overwhelming majority. Rather, its decision included eight dissenting opinions and the verdict has resulted in a considerable amount of criticism. Eight judges determined on a violation of Article 6; and six out of these eight held that the judiciary itself can never balance the absence of the defence whilst deciding on disclosure or non-disclosure.\(^{254}\) Even in circumstances where the impartiality was not open to question, a system in which a judge took over the role of defence counsel would be at the very least questionable. The Judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja expressed such a view in their dissenting opinion. Although the defence was present at a hearing *inter partes* which followed the first *ex parte* hearing, the judges declared:

> We do not agree that there was no violation of Article 6 (1). […] the defence were required to argue their case (in the 2nd hearing) in ignorance of the full nature of the evidence in question, never having seen it. It was purely a matter of chance whether they made any relevant points. […] The fact that the judge monitored the need for disclosure throughout the trial (at para 49) cannot remedy the unfairness created by the defence’s absence from the *ex parte* proceedings.\(^{255}\)

Judge Zupančič even went a step further and declared the non-disclosure obscured the real question; this question concerned whether or not the evidence was sufficient to intrude on the applicant’s right to be left alone in the first place.\(^{256}\) Judge Hedigan, on the other hand, suggested that the application of less restrictive measures whenever possible should be applied and pointed out the case of *Van Mechelen*.\(^{257}\) According to him, the UK government failed to apply less restrictive measures which had been available and adaptable.\(^{258}\)

Having scrutinised the principle of equality of arms and the right to adversarial proceedings earlier in this chapter, it appears obvious—when following the logical algorithm—that an *ex parte* hearing would violate the principle of equality of arms due

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\(^{254}\) *Fitt v. UK* [GC], Dissenting Opinion of Judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja.

\(^{255}\) Ibid.

\(^{256}\) Ibid, Dissenting Opinion of Judge Zupančič.

\(^{257}\) Ibid, Dissenting Opinion of Judge Hedigan.

\(^{258}\) Ibid.
to the presence of the prosecution and the absence of the defence. Furthermore, the right to adversarial proceedings would also be in breach, since the defence did not have any chance to counter the prosecution’s arguments. In addition, the ECtHR’s conclusion in *Van Mechelen* underlines the critique since it required a strict application of the adversarial procedure. The European Court of Human Rights regarded a questioning of an anonymous witness, in which the defence could only hear but not physically observe the witness’ reactions, as insufficient to guarantee the fair trial. Not being able to make a judgment about the demeanour and the reliability of the witness handicapped the defence.²⁵⁹

The absence of the defence in *ex parte* hearings also raises questions regarding legal certainty. If the defence is not present at such a hearing, it will never know the content which had been discussed. That, in turn, may be followed by speculations about so-called judicial deals between the judiciary and the prosecution. As a result, the public perception of the Court as a whole may be affected, especially with regards to its legitimacy. The International Criminal Court faced similar criticism during its first trial, that of Thomas Lubanga Dyilo. Thus, the thesis may pick up some of the critical points at a later stage and put them into the context of the International Criminal Court’s procedure.

### 3.4 Aspects of timing and disclosure

This sub-section will try to clarify whether human rights law sets out some clear deadlines appertaining to the time periods when a suspect has to be informed of the charges against him in order that he may ‘adequately prepare’ his or her defence. Since there is relatively little data on this topic, the interpretations of the HRC and the other human rights jurisdictions will also be included in this chapter.

The guarantee of adequate time and facilities for the preparation of the defence are embedded in Article 6 (3) (b) of the European Convention and Article 14 (3) (b) of the ICCPR respectively;²⁶⁰ and, although General Comment No. 32 on Article 14 of the ICCPR elaborates on the terminology of what is understood as ‘adequate facilities,’ it does not necessarily reveal any aspects of timing as to when all of that material has to be disclosed.²⁶¹ According to the HRC, “the determination of what constitutes ‘adequate

²⁶⁰ See also: Art. 8 (2) (c) ACHR and Art. 2 (e) i) of the AfComHPR’s Resolution ACHPR/RES.4(XI)1992.
²⁶¹ According to General Comment No. 32, ‘adequate facilities must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory
‘time’ requires an assessment of the circumstances of the case.” The ECtHR developed a similar approach when it came to the conclusion that

When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings. As a result, the amount of time that should be allocated to the defence for the preparation of the trial ‘cannot be defined in abstracto.’ Especially in cases where so-called ‘occurrences’ appear, it becomes more difficult to predict what represents adequate time for the preparation of the defence. As was noted in the case of Miminoshvili, occurrences can be changes in the indictment, the introduction of new evidence by the prosecution, or a sudden and drastic change in the opinion of an expert during the trial. A similar outcome was held in the decision as to the admissibility of the case Mattick v. Germany. In this decision, the ECtHR reiterated the difficulty in addressing the question of adequate time for the preparation of the defence ‘in abstracto’ and the fact that ‘trials cannot be fully charted in advance.’ Furthermore, the ‘preparatory time’ may also include time periods between hearings. In this context, the ECtHR pointed out that in the determination of what is understood under ‘preparatory time,’ it was necessary to consider the amount of time that was de facto or, in other words, ‘actually available’ to counsel.

As a general rule, defence counsels have to take the initiative and request an adjournment with the chamber if they deem such postponement necessary. In exceptional cases, however, a court or the chamber should adjourn the hearings in order to give the defence sufficient time. In these cases, no inference can be drawn from the

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material should be understood as including not only material establishing innocence but also other evidence that could assist the
defence. ‘ See: HRC, 90th Session, General Comment No. 32 (23 August 2007) UN Doc CCPR/C/GC/32, at para 33.
263 Gregačević v. Croatia, no. 58331/09, 10 July 2012, § 51.
265 Ibid.
268 Ibid, §§ 69, 70.
269 Mattick v. Germany (dec.), no. 62116/00, 31 March 2005.
fact that counsel did not file such a request. When deciding upon an adjournment, the judges have to take into consideration the usual workload of the counsel if he/she requires more time for the preparation of the defence. On the other hand, if there were a ‘special urgency’ in a particular case, one could expect the counsel to ‘arrange for at least some shift in the emphasis’ onto this case. Overall, states must ensure that everyone charged with a criminal offence has the benefit of the safeguards of Article 6 (3).

Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the “diligence” which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner.

In the light of the above, Figure 2.1 shows a compilation of examples of violations and non-violations concerning time aspects.

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276 Ibid.
<table>
<thead>
<tr>
<th>Jurisdiction, Case</th>
<th>Period of time</th>
<th>Sufficient ‘preparatory time’ (yes or no)</th>
</tr>
</thead>
<tbody>
<tr>
<td>HRC, <em>Smith v. Jamaica</em>, para 10.4</td>
<td>4 hours</td>
<td>‘Counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee’s opinion, is insufficient to prepare adequately the defence in a capital case.’</td>
</tr>
<tr>
<td>HRC, <em>Larrañaga v. The Philippines</em>, para 7.5</td>
<td>1 day</td>
<td>‘[…] the author's appointed counsel requested the court to allow him an adjournment, because he was unprepared to defend his client, since he had been appointed on 2 September 1998 and the trial resumed on 3 September 1998. […] The judge refused to grant the requests […]’</td>
</tr>
<tr>
<td>IACtHR, <em>Castillo-Petruzzi et al. v. Peru</em> (Merits, Reparations and Costs), para 141</td>
<td>1 day</td>
<td>‘[…] the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered.’</td>
</tr>
<tr>
<td>HRC, <em>Chan v. Guyana</em>, para 6.3</td>
<td>2 days</td>
<td>‘It should have been manifest to the judge in a capital case that counsel’s request for an adjournment of the trial for only two week days, during which he was engaged in another case, was not compatible with the interest of justice.’</td>
</tr>
<tr>
<td>HRC, <em>Phillip v. Trinidad and Tobago</em>, para 7.2</td>
<td>3 days</td>
<td>‘[…] the author's counsel requested the court to allow him an adjournment […] since he had been assigned the case on Friday 10 June 1988 and the trial began on Monday 13 June 1988. […] Mr. Phillip's counsel should have been granted an adjournment.’</td>
</tr>
<tr>
<td>HRC, <em>Larrañaga v. The Philippines</em>, para 7.5</td>
<td>6 days</td>
<td>‘[…] the author’s chosen counsel […] requested […] an adjournment, because he was unprepared to defend his client’ [first appearance in court on 24 September 1998 and trial resumed on 30 September 1998]. The judge refused to grant the requests […]’</td>
</tr>
<tr>
<td>ECtHR, <em>Öcalan v. Turkey</em>, §§ 142-144</td>
<td>20 days for a case file of 17,000 pages</td>
<td>‘It is thus reasonable to assume that, had he been permitted to study the prosecution evidence directly for a sufficient period, the applicant would have been able to identify arguments relevant to his defence other than those his lawyers advanced’</td>
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</tbody>
</table>
without the benefit of his instructions. The Court therefore holds that the fact that the applicant was not given proper access to any documents [...] encountered in the preparation of his defence.’

<table>
<thead>
<tr>
<th>Source</th>
<th>Time allowed</th>
<th>Access/sufficiency</th>
</tr>
</thead>
<tbody>
<tr>
<td>ECtHR, <em>Kremzov v. Austria</em>, 48-50</td>
<td>21 days for a case file of 49 pages</td>
<td>Yes. ‘The Court observes that [...] the croquis of forty-nine pages was served on counsel [...] some three weeks before the date fixed for the oral hearing. It considers that this period afforded the applicant and his lawyer sufficient opportunity to formulate their reply in time [...]’.</td>
</tr>
<tr>
<td>ECtHR, <em>Mattick v. Germany (dec.)</em>, page 7</td>
<td>1 month</td>
<td>Yes. ‘The applicant’s defence counsel had approximately one month at his disposal before the commencement of the trial. The period was sufficient for him to familiarise himself with those case files.’</td>
</tr>
<tr>
<td>HRC, <em>Harward v. Norway</em>, para 9.5</td>
<td>6 weeks</td>
<td>Yes. ‘If counsel would have deemed the time available to prepare the defence (just over six weeks) inadequate to familiarize himself with the entire file, he could have requested a postponement of the trial, which he did not do. The Committee concludes that [...] his right to have adequate facilities to prepare his defence, was not violated.’</td>
</tr>
</tbody>
</table>
4. Confrontation and the right to call defence witnesses

Article 6 (3) (d) of the ECHR provides for the applicant ‘to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.’ This right has been created in order that the defendant can ‘challenge his accusers’ and it is often referred to as the ‘right to confrontation.’ J.R. Spencer describes this as being related to the English hearsay rule; the professor points out, however, that there is a difference between the two. According to him, the hearsay rule required that disputed facts need to be proved by oral evidence at a trial, which basically affects both trial parties—prosecution and defence. The right to confrontation, on the other hand, was ‘purely one-sided right which belongs to the defendant only.’ As a result, he concludes that the hearsay rule traditionally protected the ‘defendant’s right to confrontation.’ Whilst the ECtHR examines cases of a possible breach of Article 6 (3) (d), it follows its approach by evaluating the procedures as a whole.

The ECtHR has developed its own jurisprudence with regards to the examination of witnesses and the Grand Chamber judgment in Al-Khawaja and Tahery reversed its own decisions of the past regarding the limitation of this right. The aim of this part of the thesis is to determine what may be the minimum standards germane to the area of confrontation. Consequently, it is necessary to catalogue the latest developments, review the new boundaries and try to understand the consequences arising from Al-Khawaja and Tahery [GC]. Prior to the Grand Chamber judgment, the indicators for a restriction of Article 6 (3) (d) seemed to be fairly clear. Whether this clarity can still be found after the judgment remains to be seen in the conclusions of this chapter. The Al-Khawaja and Tahery [GC] case has widened the threshold to acknowledge written statements as evidence in situations where this evidence cannot be challenged. The Court, however, did not specify the reasons why it believes that the right can be

279 Ibid (Spencer) 39.
280 Ibid.
281 Ibid.
282 Ibid.
284 Al-Khawaja and Tahery v. UK [GC], nos. 26766/05 and 22228/06, 15 December 2011, § 146: ‘It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. […] To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.’
restricted to such an extent. As a result, the thesis needs to explore the limitations of this right and tries to determine some visible parameters under which such a limitation can be justified. Later, these results will be compared with the jurisprudence of the ICC. Therefore, it is firstly necessary to provide some background information related to the evolution of the ECtHR’s case law, followed by an assessment of the current situation.

4.1 Background information

Confrontation has been described as one of the most complex issues addressed by Article 6 of the Convention. Located under the auspices of the fair trial, the case law of the ECtHR developed some minimum standards over the years. These standards have been superseded in the Grand Chamber judgment of Al-Khawaja and Tahery and there is a broad range of literature on the topic. Nonetheless, it will be necessary for this thesis to give an introduction to the crucial terminology related to confrontation and to explain the changes of its case-law doctrine.

One of the very first cases dealing with circumstances in which witnesses were not subject to challenge was Unterpertinger v. Austria. In the latter case, the applicant did not have the opportunity to examine the witnesses against him ‘at any stage’ of the proceedings. The origin of the dispute was an alleged case of bodily harm launched by the applicant against his wife and step-daughter. The two women gave statements to the police but refused to give evidence at trial. The Austrian courts, however, accepted these statements as evidence and ‘based the applicant’s conviction mainly’ on the statements of the women. This was regarded as a breach of the Convention by the ECtHR. Interestingly enough, the Court came to a different conclusion in a similar case. Although the facts were akin to the ones in Unterpertinger, in Asch v. Austria, the ECtHR left to the national courts the discretion on how to regard such a


289 Ibid. § 30; the Austrian Code of Criminal Procedure provides such a right in Article 152(1)(1).

290 Ibid.

291 Ibid. § 33.

292 SPENCER (n 278) 42.
The reason why both cases were distinct from each other—according to the ECtHR—was that in Unterpertinger the conviction relied mainly on the witnesses’ statements whereas in Asch the statements did not ‘constitute the only item of evidence.’ As one can see, the Court based its argument at a very early stage on what is now known as the ‘sole or decisive’ rule. Details about this rule are given at a later stage because the thesis firstly needs to clarify the term ‘witness.’

Rather than considering a witness as somebody ‘who comes to court’ in order to give evidence, the ECtHR decided in Asch v. Austria to take an ‘autonomous interpretation’ of the term. Hence, Professor Spencer suggests that a witness can be ‘anyone who has made a formal statement to the authorities which the prosecution then put in evidence at trial.’ If put at trial, it is not important whether or not such a witness statement has finally been read out in court; the decisive point is whether the statement was ‘in fact before the court and taken into account by it.’ Thus, the definition of the term witness at the European Court of Human Rights may deviate from the domestic definitions of its contracting states. Furthermore, so-called expert witnesses, who can of course be distinguished from eye-witnesses, are also covered by Article 6 (3) (d) of the Convention. Their function is to ‘assist the court in a particular technical or scientific field’ whereas eye-witnesses give ‘personal recollection of a particular event.’

Having clarified the term witness in the sense of the ECHR, it is now necessary to list the criteria under which the right to have witnesses examined may be limited. As a general rule, one could state that ‘all evidence must normally be produced in the presence of the accused in a public hearing with a view to adversarial argument.’ In particular, this means that witnesses should be present at the trial and that the accused

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294 Ibid, § 30.
295 In Al-Khawaja and Tahery v. UK [GC], § 128, the ECtHR held that the Unterpertinger case contained the seeds of the sole or decisive rule.
296 SPENCER (n 278) 43.
297 Asch v. Austria, § 25.
298 SPENCER (n 278) 43.
299 Delta v. France, § 34; Kostovski v. The Netherlands, § 40.
300 Ibid. To outline a completely different definition of the term ‘witness’, which is outside of the ECtHR’s jurisdiction, one could mention the U.S. Supreme Courts’ judgment Crawford v. Washington 541 U.S. 36 (2004).
301 Khodorkovsky and Lebedev v. Russia, § 711.
302 Ibid.
should have the right to confront those witnesses during the proceedings. There are, however, exceptions to this general principle.  

4.2 The necessity to restrict the right to confrontation—good reason for non-attendance

Generally speaking, there are two reasons why it may be allowed to restrict the right to confrontation, which may result in a disadvantage of the defendant. On the one hand, witnesses may be absent at trial, either at the pre-trial and/or trial stage; on the other hand, there may be cases in which witnesses remain anonymous. In *Al-Khawaja and Tahery* [GC], the Grand Chamber correctly pointed out that the problems inherent with these two types of testimony ‘are not identical,’ however ‘the two situations are not different in principle.’ As a result, it can be held that absent or anonymous witnesses are the two general reasons why the accused’s right to have witnesses examined may be restricted. The crucial question for the ECtHR, in case of an absent witness, is whether or not there was ‘a good reason for the non-attendance of the witness;’ whereas in cases of anonymous witnesses the Court would investigate whether or not it was necessary to take measures for the protection of a witness. In any case, this assessment on the legality of the restriction of the right to confrontation represents the first step of a now three-pronged test which is applied when the overall fairness of procedures are examined. The ECtHR described this first step as a ‘preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive.’ Consequently, the ECtHR can determine on a violation of Article 6 (1) and (3) (d) even if the evidence of an absent witness was not sole or decisive.

Practice has shown that there may be several reasons why witnesses cannot be present at a trial or, why it is necessary to keep their identity anonymous. Undeniably, in cases of absence, the death of a witness is probably the most obvious reason why the right to confrontation has to be restricted. Furthermore, there are

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304 *ibid.*
305 *Al-Khawaja and Tahery v. UK* [GC], § 127.
306 See e.g. *Colac v. Romania*, § 43; *Horncastle and Others v. UK*, no. 4184/10, 16 December 2014, § 132; *Fajrowicz v. Poland*, no. 43609/07, 17 April 2012, § 54; *Al-Khawaja and Tahery v. UK* [GC], § 120.
307 *Van Mechelen and Others v. The Netherlands*, §§ 58-60.
308 *Al-Khawaja and Tahery v. UK* [GC], § 120; confirmed in: *Aigner v. Austria*, no. 28328/03, 10 May 2012, § 38.
309 *Colac v. Romania*, § 43; *Tseber v. Czech Republic*, no. 46203/08, 22 November 2012, § 45; *Gabrielryan v. Armenia*, no. 8088/05, 10 April 2012, § 78.
311 *Al-Khawaja and Tahery v. UK* [GC], § 121; *Mika v. Sweden* (dec.), no. 31243/06, 26 July 2006, § 37. Du Bois-Pedain (n 285) provides a table of ‘factual’ and ‘legal impossibilities’ at pages 123, 124; death would be classified as a ‘factual impossibility.’
scenarios involving more complex situations whereby witnesses cannot attend a trial. A witness, for example, may have disappeared or is simply not available for trial since he or she lives abroad and his/her whereabouts cannot be determined.\footnote{See e.g. Schatschachwili v. Germany, no. 9154/10, 17 April 2014, §§ 67-69; Chmura v. Poland, no. 18475/05, 3 April 2012, §§ 22, 50; Blum v. Austria, no. 31655/02, 3 February 2005, §§ 31-34.} In addition, some witnesses may need special protection\footnote{In particular, cases concerning sexual offences often require measures to be taken for the protection of the victims, be it adults or juvenile victims. See e.g. Lučić v. Croatia, no. 56991/11, 27 February 2014, § 75; Rosin v. Estonia, no. 26540/08, 19 December 2013, § 55; Vronchenko v. Estonia, no. 59632/03, 18 July 2013, § 56; Gani v. Spain, no. 61800/08, 19 February 2013, § 45; Bocos-Cuesta v. The Netherlands, no. 54789/00, 10 November 2005, § 69.} or may refuse to testify.\footnote{See e.g. Colac v. Romania, § 43; Horncastle and Others v. UK, no. 4184/10, 16 December 2014, § 132; Fygrowicz v. Poland, no. 43609/07, 17 April 2012, § 54; Chmura v. Poland, 47.} In the end, whatever the circumstances may be, the ECtHR’s doctrine requires an examination as to whether the reason for the limitation was ‘serious and well-founded.’\footnote{In any case, the contracting states will always have to prove their efforts to bring about a confrontation when witnesses are not available for the trial.\footnote{They need to take ‘positive steps’ to enable the accused an examination of witnesses against him.\footnote{Only if states were able to prove the ‘diligence of their efforts to give the defendant an opportunity to examine the witnesses in question,’\footnote{may they continue the prosecution due to the Roman law principle \textit{impossibilium nulla es obligation}—meaning that there is no obligation to provide an impossible service.\footnote{113 See e.g. \textit{Schatschachwili v. Germany}, no. 9154/10, 17 April 2014, §§ 67-69; \textit{Chmura v. Poland}, no. 18475/05, 3 April 2012, §§ 22, 50; \textit{Blum v. Austria}, no. 31655/02, 3 February 2005, §§ 31-34.} the accused an examination of witnesses against him. In the end, however, cases in which the ECtHR did not consider the efforts of the contracting state as sufficient: Lučić v. Croatia, § 81; Chmura v. Poland § 50; Makuszewski v. Poland, § 42; Gossa v. Poland, § 58; Igrô v. Italy, no. 11339/85, 19 February 1991, §§ 32, 35. Cases in which the ECtHR did not consider any possible efforts as sufficient: Colac v. Romania, §§ 49, 50; Trampushevski v. The Former Yugoslav Republic of Macedonia, § 45; Gabrielyan v. Armenia, §§ 84-87; Makeyev v. Russia, §§ 43, 46.}}
4.3 Counterbalancing measures before Al-Khawaja and Tahery [GC]

Before Al-Khawaja and Tahery [GC], the ECtHR’s doctrine required a counterbalance check at the second level of the three-step assessment. For example, in cases in which anonymous or protected witnesses testified, the ECtHR required that any ‘handicaps under which the defence labours [need] to be sufficiently counterbalanced by the procedures followed by the judicial authorities.’ Such a counterbalancing measure could be that the accused needs to be given an opportunity to test the anonymous witnesses’ reliability. With regards to the absence of witnesses, the Court took into consideration whether or not it was possible to examine the witness at an earlier stage of the proceedings.

In Kostovski, for instance, the ECtHR concluded that ‘using evidence such as statements obtained at the pre-trial stage is not in itself inconsistent with Article 6, provided that the rights of the defence have been respected.’ Having concluded on a violation of Article 6 in Kostovski, the ECtHR even went a step further when restricting the right to confrontation in Melinkov. In this case, the Court decided that pre-trial confrontations would satisfy the requirements of Article 6 (3) (d) if the applicant’s lawyer was present and if the confrontations had been recorded. In such cases, it is implied that the identity of the witness is known to the trial parties. Finally, ‘a conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge.’ The fact that a witness cannot be confronted at the trial stage does not always necessarily lead to a violation of Article 6 (3) (d). Hence, the right to question a witness at the trial stage is not an absolute.

States, however, must not regard this as an invitation to dispense witnesses. National authorities and courts always have to take ‘positive steps’ to enable the accused an examination of witnesses against him. Therefore, it is only logical that the pre-trial examination of the witnesses in the case of Karpenko did not suffice for the fair

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324 Van Mechelen and Others, § 54; in the case of Krasniki, the ECtHR used a very similar terminology. Krasniki v. Czech Republic, no. 51277/99, 28 February 2006, § 76: ‘[Article 6 § 1, taken together with Article 6 § 3 (d), require that the handicaps under which the defence operates should be sufficiently counterbalanced by the procedures followed by the judicial authority[s];’ see also: Doorson v. The Netherlands, § 72.

325 In the more recent case of Dončev and Burgov, the ECtHR regarded the opportunity to put written questions to a protected witness as an appropriate counterbalancing measure, which permits a proper assessment of the reliability of a statement, even if such a statement was decisive for the conviction. If the applicant declines this opportunity, there will be no breach of the Convention, see Dončev and Burgov v. The Former Yugoslav Republic of Macedonia, no. 30265/09, 12 June 2014, §§ 57-61. It needs to be stressed that the defence needs to be given adequate time to prepare these kind of questions, an hour cannot be regarded as sufficient, see Papadakis v. The Former Yugoslav Republic of Macedonia, no. 50254/07, 26 February 2013, § 94.

326 Kostovski v. The Netherlands, § 41.

327 Kostovski v. Czech Republic, § 76; Slyusarev v. Russia (dec.), no. 60333/00, 9 November 2006, p. 23.

328 The delicate use of ‘anonymous statements’ was stressed in Kostovski at § 44.


330 Lučić v. Croatia, § 79; Karpenko v. Russia, § 75; Trofimov v. Russia, § 33.
trial requirements since the town court dispensed the appearance of the witnesses at trial stage with no good course.331 Regarding the content of a witness statement, the ECtHR decided in A.L. v. Finland that it was basically for the national courts to decide whether it was necessary or advisable to hear a witness.332

Having mentioned Kostovski previously, one needs to bear in mind that the conviction in this case was finally based ‘to a decisive extent’ on anonymous witness statements;333 thus the ECtHR still saw a violation of the applicants’ right to confrontation. In Isgrò v. Italy, on the other hand, the ECtHR specified the reasons for a limitation of Article 6 (3) (d). The case was considered to be different from Kostovski because the identity of the witness was known by all trial parties.334 Secondly, the applicant did in fact have the opportunity to question the witness directly at pre-trial stage.335 The problem arising at the trial stage in Isgro was that the witness had disappeared and his whereabouts could not be determined although the government authorities had conducted reliable searches.336 Finally, the Italian courts did not base ‘their decision solely on the statements’ of the absent witness and as a result, the ECtHR did not find a violation of the applicant’s rights.337 Even if the decision had been based solely or decisively on the witness statement, one could still assume a non-violation provided that the criteria established in Melinkov (presence of applicant’s lawyer, questioning recorded) are respected.

Returning to the crucial point, all of the aforementioned cases rested on the opportunity of the defence to challenge witnesses at some stage of the proceedings in one form or the other. But what if a witness cannot be challenged at all? How does the ECtHR deal with statements which have never been subject to any kind of confrontation? These two questions raised another issue, namely how this evidence—which is not subject to confrontation—should be evaluated by judges. According to the ECtHR, ‘a careful examination of the statements taken from the witnesses on commission […] can scarcely be regarded as a proper substitute for direct examination and attendance.’338 As a result, the Court concluded that evidence obtained from a

331 Ibid (Karpenko) § 77.
332 A.L. v. Finland, § 35; Khodorkovskiy and Lebedev v. Russia, § 718.
333 Kostovski v. The Netherlands, § 44.
335 Ibid.
336 Ibid, § 32.
338 Hulki Günes v. Turkey, no. 28490/95, 19 June 2003, § 95.
witness under conditions which restrict the right to confrontation entirely should ‘be treated with extreme care.’

Out of the latter, the ‘sole or decisive’ rule emerged.

### 4.4 The ‘classical’ sole or decisive rule

Although the seeds of the ‘sole or decisive’ rule may be found in the *Unterpertinger* case, it was in fact the *Lucà* judgment which established its patterns more explicitly.

In the first *Al-Khawaja and Tahery* judgment, the ECtHR considered *Lucà* as the ‘starting point’ for the assessment of the procedures as a whole. Various cases had explained that the principle of the fair trial required a balance of ‘the interests of the defence against those of witnesses and victims.’ It was exactly this balance which justified any necessary restrictions of the right to confrontation. *Lucà*, however, drew a line to the latter restrictions and created a threshold for the national courts which had not to be overstepped. In fact, *Lucà* determined that if it was necessary to limit the right to confrontation, the conviction must not be ‘based solely or to a decisive degree’ on the evidence which was given by persons ‘whom the accused had no opportunity to examine.’

This consequence was described as the ‘corollary’ of the restrictions.

In addition to treat untested statements with ‘extreme care,’ the ECtHR demanded an assessment as to whether there was further evidence to ‘corroborate’ the facts of the case. To repeat, the national court’s final decision was not allowed to rest solely or decisively on the uncross-examined statements. It is, however, not easy to determine whether the evidence was sole or decisive in the end. Indeed, the Grand Chamber reiterated this difficulty in its second *Al-Khawaja and Tahery* assessment.

It recommended an examination of ‘the background of the other evidence against the accused.’ This deductive method was applied in other cases before. It would not, however, work out for scenarios where the uncross-examined statement appears to be the only piece of evidence.

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341 *Al-Khawaja and Tahery* v. UK, nos. 26766/05 and 22228/06, 20 January 2009, § 36.

342 See e.g. *P.S. v. Germany*, § 22; later confirmed in *Al-Khawaja and Tahery v. UK [GC]*, § 118.

343 Lucà v. Italy, § 40.

344 Ibid.

345 Visser v. The Netherlands, § 44.


347 *Al-Khawaja and Tahery* v. UK [GC], § 131: Whereas the term ‘sole’ could be equated with “the only evidence against an accused”, ‘decisive’ should be “narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.”

348 Ibid, §§ 133, 134.

In its first assessment of *Al-Khawaja and Tahery*, the ECtHR retained the ‘sole or decisive’ rule. The Court generally doubted whether ‘any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant.’ The first applicant, Mr Imad Al-Khawaja, was ‘charged on two counts of indecent assault on two female patients’ whilst working as a consultant physician in rehabilitative medicine. One of the women, S.T., gave a statement to the police but committed suicide—for reasons not connected with the allegation—shortly after. Her statement was crucial for the prosecution and without it there would have been no case. Having been convicted in all judicial instances in the UK, the ECtHR still saw a violation of Article 6 (3) (d). According to the ECtHR, S.T.’s statement was the only evidence. The Government’s argument that there was a second witness statement which was not subject to collusion was rejected. The Chamber did not consider the absence of collusion ‘as a counterbalancing factor for the purposes’ of the European Convention, and regarded S.T.’s statement as the ‘only evidence against the applicant’ which could not be ‘effectively challenged.’

With regards to Mr Ali Tahery, who was ‘charged with wounding with intent and attempting to pervert the court of justice’ linked to a stabbing in London, the Court came to a similar conclusion. According to the ECtHR, the limitation of Mr Tahery’s right to confront the witness ‘was not sufficiently counterbalanced.’ In particular, the fact that Mr Tahery gave evidence in his role as the accused could not be regarded as a sufficient counterbalance, nor could the warning given to the jury about the dangers inherent in relying on uncontested evidence. This inflexible application of the ‘sole or decisive’ rule, however, became subject to criticism by the British Supreme Court in the *Horncastle* case. Thus, it was not a big surprise that *Al-Khawaja and Tahery* was finally referred to the ECtHR’s Grand Chamber.

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502 Ibid, § 42.
503 Ibid.
504 Ibid.
505 Ibid.
506 Ibid, § 18.
507 Ibid, § 46.
4.5 Al-Khawaja and Tahery [GC]—the post Al-Khawaja approach

Surrounded by political tensions, the highest British Court had declined to follow the outcome of the first *Al-Khawaja and Tahery* judgment. Judge Bratza of the European Court of Human Rights and scholars were talking of a ‘judicial dialogue’ between the ECtHR and the UK Supreme court judges.\(^{359}\) Indeed, looking at Lord Philipp’s words in the UK *Horncastle* case, one noticed that he addressed his words directly to the European Court of Human Rights. Reiterating that the UK judges had taken into account ECtHR’s jurisprudence, Lord Phillips stressed his hope that the ECtHR would similarly take account of the reasons why the UK Supreme court did finally ‘not apply the sole or decisive test.’\(^{360}\) As a result, the ECtHR’s Grand Chamber had to ‘tackle an implicit threat to the European Court’s authority as the ultimate arbiter on the application of the Convention’ when it decided *Al-Khawaja and Tahery* the second time.\(^{361}\)

To reiterate the facts of the case, Mr Al-Khawaja was convicted of ‘indecent assault on two female patients while they were allegedly under hypnosis.’ One of the complainants, S.T., committed suicide before the trial and her statement was read out to the jury. As a consequence, it was impossible for Mr. Al-Khawaja’s defence to question and examine S.T., whose suicide was unrelated to the assault. Mr Tahery was involved in a street fight in London, in which he allegedly stabbed his victim three times in the back. Having been accused of wounding with intent, the delicate issue in Tahery’s case was a statement given to the police two days after the incident. The witness, however, refused to testify in court fearing conceivable reactions from his Iranian community.

The outcome of the Grand Chamber was in fact different to the first judgment: this time, the conviction of Mr Al-Khawaja was regarded as lawful whereas Mr Tahery’s case was still regarded as a violation of Article 6.\(^{362}\) But what was the difference between these two similar cases and can one draw any conclusions for the future? Broadly speaking, it was the counterbalancing factors, particularly the reliability of the evidence which resulted in the difference between Mr Al-Khawaja’s and Mr Tahery’s case. In its general conclusion on the ‘sole or decisive’ rule, the ECtHR reversed its inflexible application of the rule and admitted that sole or decisive evidence

\(^{359}\) *Al-Khawaja and Tahery v. UK* [GC], Concurring Opinion of Judge Bratza, § 2; ELLIOTT-KELLY (n 287) 86.


\(^{361}\) HEFFERNAN (n 287) 132.

\(^{362}\) *Al-Khawaja and Tahery v. UK* [GC], §§ 158, 165.
against the defendant would ‘not automatically result in a breach of Article 6.’\textsuperscript{363} Furthermore, it stressed the importance of the counterbalancing factors for a fair and proper assessment in such cases.\textsuperscript{364} Finally, it concluded that in cases where evidence turned out to be ‘sufficiently reliable,’\textsuperscript{365} a court may deviate from the general principle of the right to confrontation in proceedings under the ‘most searching scrutiny.’\textsuperscript{366}

With regards to Imad Al-Khawaja, the Court saw itself still compelled to conclude that S.T.’s statement—the key witness who died before trial—was decisive.\textsuperscript{367} Nevertheless the flexible application still required a tension to be given to the balance of the ‘procedural safeguards’\textsuperscript{368} and ‘other counterbalancing factors.’\textsuperscript{369} A crucial distinction from the result of the Chamber’s Fourth Section was the fact that the strong corroborative evidence of S.T.’s friends, B.F. and S.H., who both gave evidence at the trial, was accepted as a counterbalancing factor this time.\textsuperscript{370} More importantly, there was a further statement of another complainant: V.U.—V.U. very similarly described the alleged assault and thus played a major role. Rejected in the first Chamber judgment as corroborative evidence, the Grand Chamber took V.U.’s statement into consideration as a counterbalancing factor. Moreover, V.U. was subject to cross-examination at the trial and there was ‘no evidence of any collusion.’\textsuperscript{371} The fact that the judges of the British Court of Appeal did not explicitly indicate the careful evaluation of the hearsay statement to the jury was interpreted as a minor defect by the ECtHR. The Grand Chamber implicitly assumed that the jury would have realised that S.T.’s statement carried ‘less weight’ due to the impossibility of seeing and hearing her.\textsuperscript{372} Finally, a vote of 15 to 2 decided on a non-violation of Article 6.

Regarding the second applicant, Ali Tahery, the Grand Chamber came to a different conclusion. As in Al-Khawaja, there was one key witness, T., who would not be subject to confrontation at the trial. T.’s reason for not testifying at court was on the grounds of fear and the Grand Chamber accepted T.’s ‘genuine fear of giving oral evidence.’\textsuperscript{373} T. was not prepared to testify ‘even if special measures were introduced in

\textsuperscript{363} Ibid, § 147. 
\textsuperscript{364} Ibid. 
\textsuperscript{365} Ibid. 
\textsuperscript{366} Ibid. 
\textsuperscript{367} Ibid, § 154. 
\textsuperscript{368} Ibid, § 155. 
\textsuperscript{369} Ibid. 
\textsuperscript{370} Ibid, § 156. 
\textsuperscript{371} Ibid. 
\textsuperscript{372} Ibid, § 157. 
\textsuperscript{373} Ibid, § 159.
the trial proceedings."\textsuperscript{374} This was regarded as sufficient justification for the admission of the hearsay statement and the Grand Chamber therefore affirmed the objective grounds of T.’s fear.\textsuperscript{375} The second step was to decide whether or not T.’s statement could be regarded as sole or decisive. The Court concluded it was decisive when it stated that ‘the evidence was of great weight and without it the chances of a conviction would have significantly receded.’\textsuperscript{376} As a consequence, everything rested on the factor of corroborative evidence. The main difference to Al-Khawaja was probably that there was no corroborative evidence which could counterbalance Mr Tahery’s restriction to confrontation. According to the Grand Chamber, the ‘defence was not able to call any other witness to contradict the testimony provided in the hearsay statement.’\textsuperscript{377} The Government’s argument that the applicant had the chance to give evidence himself or call other witnesses was rejected.\textsuperscript{378} Furthermore, other evidence, given by the victim S., only corroborated to some extent T.’s details. The victim’s evidence was hardly uncontested by the applicant. In addition, the victim had actually not seen who stabbed him and reversed his initial suspicion that it was Tahery. As a result the victim’s evidence ‘only provided at best indirect support’ for the hearsay statement.\textsuperscript{379} The correct warning of the judges on how perilous it can be for the jury to rely on such untested evidence was not regarded as a sufficient counterbalance.\textsuperscript{380} Finally, the court unanimously determined a violation of Article 6 (1) in conjunction with 6 (3) (d) in Mr Tahery’s case. The ECtHR’s new Al-Khawaja [GC] approach was, for example, confirmed in \textit{Balta and Demir v. Turkey},\textsuperscript{381} \textit{Colac v. Romania},\textsuperscript{382} \textit{Horncastle and Others v. UK},\textsuperscript{383} \textit{Sică v. Romania},\textsuperscript{384} or \textit{Hümmer v. Germany}.\textsuperscript{385}

\subsection*{4.6 Discussion}

The dissenting opinions of the Judges Sajó and Karakaş express the general conflict of the ‘sole or decisive’ rule’s new application in more detail. As they describe it, the issue at stake is ‘the relationship between the fundamental human rights of the accused and society’s legitimate interest in imposing punishment—after a fair trial.’\textsuperscript{386} The important question for them seems to be whether counterbalancing factors of the

\textsuperscript{374} Ibid.
\textsuperscript{375} Ibid.
\textsuperscript{376} Ibid.
\textsuperscript{377} Ibid. \textsection 162.
\textsuperscript{378} Ibid.
\textsuperscript{379} Ibid. \textsection 163.
\textsuperscript{380} Ibid. \textsection 164.
\textsuperscript{381} Balta and Demir v. Turkey, \textsection 36-39.
\textsuperscript{382} Colac v. Romania, \textsection 39-43.
\textsuperscript{383} Horncastle and Others v. UK, \textsection 130-135.
\textsuperscript{384} Sică v. Romania, no. 12036/05, 9 July 2013, \textsection 56-59.
\textsuperscript{385} Hümmer v. Germany, \textsection 37-53.
\textsuperscript{386} Al-Khawaja and Tahery v. UK [GC], joint partly dissenting and partly concurring opinion of Judges Sajó and Karakaş.
flexible ‘sole or decisive’ rule can ‘absorb or undermine specific individual rights which are defined in the Convention’. According to the judges, in the administration of justice, the right to confrontation was fundamental to guarantee the fair trial and balancing these rights, as had been done in *Al-Khawaja and Tahery* [GC], would give the prosecution ‘a clear advantage’. Furthermore, the judges criticise the absence of a clear explanation as to how ‘fairness can still be achieved if one of the fundamental rights is deprived of its essence’. Generally speaking, the author can indeed understand the concerns of the Judges Sajó and Karakaş as well as Richardson J’s warning words quoted by Lord Bingham.

While the judges plead for a clear line and vote in favour of an inflexible application of the ‘sole or decisive’ rule, the author is not necessarily against its flexible application. It would, however, be more than useful for the ECtHR to explain why such a flexible approach is regarded as helpful and, finally, why it can enhance the fairness of trial proceedings. Whilst the argument for excluding unreliable evidence appears to be stable, one must, on the other hand, also admit the argument for the exclusion of probative evidence in case the ‘sole or decisive’ rule is applied strictly. A hearsay statement may depict important and probative evidence which would automatically be excluded in cases where the witness had died before the trial and hence, could not be subject to confrontation. The most popular and dramatic example is the dying victim telling the police officer the name of the murderer in the very last moments before passing away.

Establishing the truth is a reasonable goal which should be, or at least try to be, achieved. However, establishing the truth at the expense of minimum human rights raises questions as to whether this is the recipe for reaching fairness in a trial. Whilst the legal rhetoric of whether or not a defendant should, under certain circumstances accept limitations to confrontation, one needs to be bear in mind what the purpose of minimum human rights is. In the dissenting opinions of the Judges Sajó and Karakaş, minimum rights are described as equalling the imbalance between the state and the citizen. Generally, everybody desires the principal objective of a criminal process to be the

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387 Ibid.
388 Ibid.
389 Ibid.
390 Al-Khawaja and Tahery v. UK [GC] (n 263) Joint partly dissenting and partly concurring opinion of Judges Sajó and Karakaş. Richardson J’s words are quoted in the dissenting opinion but can also be found in *R v Davis* [2008] UKHL 36. Original judgment: *R v Hughes* [1986] 2 NZLR 129.
391 It is agreed that there are epistemological difficulties to find out the exact truth in a trial; a more detailed explanation of this problem will be provided in Chapter 6.
392 Al-Khawaja and Tahery v. UK [GC], joint partly dissenting and partly concurring opinion of Judges Sajó and Karakaş.
acquittal of the innocent and the conviction of the guilty. Furthermore, minimum rights should protect citizens from arbitrary prosecutions initiated by the state; on the other hand, they should not be used by the guilty to escape a deserved penalty. In any case, the right to confrontation should serve as a definitive guarantor to protect against a defendant’s wrongful conviction. On the other hand, it should not bar the accused from a deserved penalty.

It is necessary to mention that the Grand Chamber judgment contains some inconsistencies which have not necessarily clarified the issues of restricting the right to confrontation. Having read the judgment, one still awaits the answer as to why the ECtHR deemed it necessary to allow a flexible application of the ‘sole or decisive’ rule. As Liz Heffernan describes, a breach of the so-called minimum right of Article 6 (3) (d) does now ‘not invariably undermine the [total] fairness of the trial’ anymore. But does the Court explain why such a limitation may be justified? Not necessarily. If it is necessary to restrict the applicant’s right to confrontation, and if the uncross-examined evidence is sole or decisive, the counterbalancing factors now have to be taken into consideration. The Grand Chamber, similarly to the UK Supreme Court, stresses the reliability of the evidence as the crucial counterbalancing factor, proved by corroborative evidence. Yet, there is no answer provided as to why a restriction of the right to confrontation may, in the light of fairness, trump the procedural safeguard which is guaranteed in the Convention. Jackson and Summers have summarised the situation quite accurately:

The problem here is that Strasbourg has not done enough to clearly explain its notion of procedural fairness as expressed in terms of the opportunity to contest evidence in an adversarial context. [...] Reliability is, of course, important but fairness in the sense of art.6 cannot be understood as being synonymous with reliability.

In fact, the Court posits vague explanations such as ‘exceptions to this principle are possible but must not infringe the rights of the defence’, however then avoids explaining the reader with its approach to what it believes is the normative framework for such a restriction.

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394 HEFFERNAN (n 287) 140.
395 JACKSON and SUMMERS (n 287) 124.
396 Al-Khawaja and Tahery v. UK [GC], § 118.
Whenever the ECtHR evaluated corroborative evidence in judgments held after *Al-Khawaja* [GC], it failed to explain what the parameters of ‘corroborative evidence’ are. For example, in the case of *Hümmer*, the Court considered the corroborative evidence to be at best indirectly supportive to prove the allegations against the accused. But what was the difference between the corroborative evidence in Al-Khawaja’s case and Hümmer’s? In fact, there is a crucial difference between the two cases however this difference refers to a breach of procedural law which affected the fairness of the proceedings. In *Hümmer*, there was a procedural error at the pre-trial stage. National law foresees the appointment of a defence counsel so that the suspect can cross-examine key witnesses at the pre-trial stage if need be. Yet, no counsel had been appointed. Thus, the applicant had clearly been deprived of the opportunity to question the key witnesses at pre-trial level. These key witnesses, who were the applicant’s relatives, then made use of their right not to testify at the trial stage. In *Al-Khawaja*, on the contrary, such an opportunity at the pre-trial stage was factually impossible.

The ECtHR had used a similar terminology in order to distinguish between corroborative evidence (direct and indirect support) in *Trampevski* when it held that the ‘evidence was circumstantial in nature and, at best, could only provide indirect support for the applicant’s guilt.’ Similar to *Hümmer*, however, the crucial point probably did not lie in the fact that the evidence was only partly corroborative. Rather, the crucial fact was that the decisive evidence of the two uncross-examined witnesses contained inconsistencies; and that the absence of the two main witnesses at the trial stage made it impossible to clarify these inconsistencies. In the case of *Lučič*, on the other hand, one can determine a rough concept in the ECtHR’s approach. Whereas in *Al-Khawaja* [GC], V.U.’s statement was not subject of ‘any collusion,’ the ECtHR considered the contradictory corroborative statements in *Lučič* as ‘not conclusive.’

Overall, however, it can only be confirmed that the way the Grand Chamber introduced the flexible application of the ‘sole or decisive’ rule must be considered as unfortunate. For example, was it correct to consider S.T.’s statement as being decisive, that means, was it of such significance that it is likely to be determinative of the

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397 *Hümmer v. Germany*, § 49.
398 Ibid, § 49.
399 Ibid.
400 *Trampevski v. The Former Yugoslav Republic of Macedonia*, § 47.
402 *Al-Khawaja and Tahery v. UK [GC]*, § 156.
403 *Lučič v. Croatia*, § 86.
outcome of the case? The reason why I believe this question to be legitimate is explained relatively easily: as soon as a national court evaluates a hearsay statement as decisive, the harder it will be to counterbalance the restriction of confrontation with other corroborative evidence. Using Liz Heffernan’s words, ‘the viability of a hearsay statement may depend upon the presence of the counterbalancing influence of corroborative evidence, but the existence of corroborative evidence may itself imply that the statement is not decisive.’ Jackson and Summers have concluded similarly, when holding

[If the counterbalancing safeguard is simply the existence of other evidence, this seems to put the focus back on the sole or decisive test. In the event that there is other strong evidence, then the evidence at issue is simply not decisive.]

As a result, it can be held that technically, the new doctrine of the ECtHR after Al-Khawaja [GC] shifted the ‘counterbalancing factors test’ from the second to the third level and created some undetermined flexibility. Meanwhile, this approach has been considered as

[A] clear failure on the part of the Strasbourg Court to come to terms with and clearly articulate a principled basis for its case law on the right to confront witnesses evidence and its own sole or decisive test.

Finally, it will be up to society to choose either to grant minimum standards of the right to confrontation and acknowledge misuse in certain cases or to aim at a strict and narrow procedure based on impartial and unbiased thinking, which needs to be given some flexibility in the most difficult cases. Yet, there should be a sound explanation as to why such flexibility is needed.

4.7 Interim results

Rather than applying the ‘sole or decisive’ rule inflexibly, the Court has overthrown its strict interpretation in 2011. The principle of evaluating the procedures as a whole or, as it was described in the Grand Chamber judgment, an overall assessment was the reason given by the ECtHR. In other words, the strict application of the ‘sole or decisive’ rule has been transformed into a more flexible rule and the so-called minimum standard of Article 6 (3) (d) is not an absolute anymore. While the Grand Chamber scrutinised the

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404 HEFFERNAN (n 287) 156.
405 JACKSON and SUMMERS (n 287) 124.
406 Ibid 125.
safeguards to ensure fairness in the light of the right to confrontation, it requires the application of the three key terms: a good reason for non-attendance, sole or decisive and counterbalance. This test has been confirmed in several other cases after Al-Khawaja and Tahery [GC] and will be the standard to compare and evaluate the situation at other courts within the thesis.

Regarding a good reason for non-attendance, the case law of the ECtHR has shown that only a very strict application can strengthen the rights of the accused—especially after the Al-Khawaja’s Grand Chamber judgement. It is still the general rule that ‘all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument.’ Hence, every evaluation to admit a witness statement which cannot be confronted at trial should be determined carefully. National courts are advised not to be tempted to grant these exceptions too easily. The justification for the non-attendance of a witness at trial requires a narrow interpretation based on the specific reason for the witness’ absence. An assessment as to the grounds of the absence such as death or fear, as explained previously, is thus indispensable. Since the author supports a strict application to justify a reason for non-attendance, the explanations given for a justification regarding financial loss should be observed carefully in the future.

The significance of the evidence, i.e. whether it is regarded as sole or decisive, represents the second step for the assessment of whether or not the restriction of the right to confrontation was lawful. The Grand Chamber still pleads for a procedure of the ‘most searching scrutiny where a conviction is based solely or decisively on the evidence of absent witnesses.’ As regards the definitions sole or decisive, it can be held that sole—according to the Court—should be regarded in the sense of the ‘only evidence against an accused,’ whereas decisive—in the context of the Convention—is to be understood as ‘evidence of such significance or importance as is likely to be determinative of the outcome of the case.’

If evidence has been considered as sole or decisive, the last question would be whether or not there are sufficient factors to counterbalance the detriment of the defence. Counterbalancing factors can be corroborative statements which are not subject to any collusion. Again, the dichotomy lies in the assessment of the uncontested

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407 Al-Khawaja and Tahery v. UK [GC], § 118.
408 Ibid, § 122.
409 Ibid, § 131.
statement and the supporting evidence. The final conclusion will qualify the uncross-examined statement as either decisive or non-decisive. If decisive, the supporting evidence still needs to be sufficient to counterbalance the restriction of the confrontation at the third level of the assessment. Not every case may be as clear cut as in *Al-Khawaja [GC]*. Hence, it is the counterbalancing factors, which are particularly referring to the reliability of statements which finally decides on whether or not the restriction of the right to confrontation was lawful. The judges’ obligation to warn the jury of the dangers when relying on such statements is probably a less significant factor in the test. As one could see in the Grand Chamber judgment, it was generously overlooked in Al-Khawaja’s case whereas in Mr Tahery’s, it did not serve as a sufficient counterbalance at all.

Defence counsels in the *métier* of criminal law may disagree with the Grand Chamber judgement. Still, the author thinks that a flexible interpretation of the ‘sole or decisive’ rule is a real opportunity to enhance the fairness of trials, if applied with discernment. In any case, the flexible application of the ‘sole or decisive’ rule must not give carte blanche to restrict the right to confrontation endlessly without serious reasons. If, however, applied correctly in specific cases, it may lead to a better comprehension by the public of the decisions of the ECtHR. Whether the case of *Al-Khawaja and Tahery [GC]* finally serves as a role model to the ICC remains to be seen.
necessity to restrict or good reason for non-attendance

Admissions of any witness statement which cannot be confronted at trial should be carried out with utmost care. Courts need make 'effort' to bring about witness examinations. On the other hand, restrictions of the right to have witnesses examined are not contrary to human rights law per se.

sole or decisive

'Sole evidence' is the only evidence against the accused whereas 'decisive evidence' is indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.

counterbalance

ECtHR: counterbalance includes an assessment on the reliability of the evidence (reliability, in turn, has been tested with corroborative evidence in Al-Khawaja & Tahery [GC])
Chapter 3: The UN Human Rights Committee, the Inter-American Court of HR and the African Court on Human and Peoples’ Rights

1. Observations of the HRC and Article 14 of the ICCPR

Article 14 ICCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

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 and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (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; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
The UN Human Rights Committee, established under Article 28 of the ICCPR, is the body of ‘independent experts that monitors the implementation of the ICCPR by its state parties.\(^1\) It is not to be confused with the UN Human Rights Council.\(^2\) The Committee is the principle institution that interprets the norms of the ICCPR and the two Optional Protocols thereof.\(^3\) It consists of eighteen expert members, who must be nationals of state parties to the ICCPR.\(^4\) Its four major duties consist of considering periodic reports of the state parties, establishing so-called general comments, managing the inter-state complaint procedure and dealing with individual communications under the First Optional Protocol.\(^5\) The Committee, however, is not a judicial institution and, therefore, its decisions do not have the same implications as the ones from regional human rights courts.\(^6\)

The American Convention on Human Rights, in turn, is, to a certain extent, modelled on UN human rights treaties as well as drawing from the ECHR, although one should not consider it as a simple replication of those treaties.\(^7\) As a result, whilst rendering its decisions, the Inter-American Commission, as well as the Inter-American Court, often cites the ICCPR and cases or reports of the UN Human Rights Committee.\(^8\) Hence, it is worth looking into the normative framework offered by the ICCPR and the cases of the HRC in order to determine some origins and sources of the disclosure of evidence as well as the right to confrontation. The legal framework of the African Charter on Human and People’s Rights, the African Court Protocol and the cases of the African Commission on Human and People’s Rights will complement this chapter.

1.1 Disclosure of evidence

In common with the European Convention, the wording of Article 14 of the ICCPR does not explicitly mention terms such as ‘equality of arms’ or ‘disclosure of evidence.’ The right to confrontation, on the other hand, is clearly embedded in Article 14 (3) (e).


\(^3\) Optional Protocol to the ICCPR; Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.


As a result, it can be held that the principle of equality of arms—‘the most important
criterion of a fair trial’—emerges from the term ‘fair hearing’ and the supplementary
right to equality before the courts and tribunals. In addition, Article 14 (1) is
considered as the broader ‘precept of fairness,’ accompanied by specified rights
contained in Article 14 (2) to (7). However, a trial may still be regarded as being
unfair even though the ‘minimum guarantees’ have been complied with; particularly if
the overall trial is in conflict with the broader precept of fairness, or, to use the ECtHR’s
words, with the fairness of the proceedings as a whole. As one can see, Article 14 of
the ICCPR contains a general duty to disclose evidence in its first subsection on the one
hand, and a special one in its third on the other.

With regards to the more specific disclosure obligations, the Human Rights
Committee considers Article 14 (3) (b) to be guarantor that the defence will be given
relevant material. This subsection ensures that somebody who is charged with a
criminal offence should have ‘adequate facilities for the preparation of his defence.’
Such facilities have been defined in the HRC’s General Comment No. 32 on Article 14:

Adequate facilities must include access to documents and other evidence; this access
must include all materials that the prosecution plans to offer in court against the accused
or that are exculpatory. Exculpatory material should be understood as including not only
material establishing innocence but also other evidence that could assist the defence.

The latter was confirmed in the Communication of Yassen and Thomas v. Guyana. In
this case, the HRC decided on a violation of Article 14 (3) (e) due to a non-disclosure of
police documents ‘which may have contained evidence in favour of the authors.’

Moreover, equality of arms in the sense of the ICCPR means that the ‘same
procedural rights are to be provided to all the parties unless distinctions are based on
law and can be justified on objective grounds, not entailing actual disadvantage or other
unfairness to the defendant.’ In Dudko v. Australia, the defendant was denied the

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10 Article 14 (1) ICCPR.
11 HRC, 90th Session, General Comment No. 32 (23 August 2007) UN Doc. CCPR/C/GC/32, paras 8 and 13.
12 NOWAK (n 9) 321.
13 Ibid.
14 HRC, UN Doc. CCPR/C/GC/32, para 33; the HRC stressed the importance of having ‘adequate time’ and ‘adequate facilities’
already in 1988 and 1991; it did, however, not elaborate on what is understood under the terms ‘adequate time’ and ‘adequate
facilities’ then. Yet, the HRC affirmed that adequate time and means were elements of the fair trial and an emanation or the
pars 13.6; Communication no. 283/1988, Little v. Jamaica, para 8.3.
16 HRC, UN Doc. CCPR/C/GC/32, at para 13 referring to Communication No. 1347/2005, Dudko v. Australia, para 7.4; see also:
(‘procedural equality’).
opportunity to participate in a hearing due to the fact that she was in detention. The government argued that if she had not been imprisoned, it would have been possible for her to attend the hearing. This, however, was obviously rejected by the HRC. According to the Committee, the state party could not bring forward any ‘plausible reason’ why a ‘defendant in detention should be treated more unfavourably’ than a defendant who was not. Equality of arms, as well as the right to adversarial proceedings was also mentioned in other cases of the HRC, inter alia, in Salvador Martínes Puertas v. Spain, when the Committee recalled

its case law to the effect that the concept of a fair trial within the meaning of Article 14, paragraph 1, of the Covenant also includes other elements, including respect for the principles of “equality of arms” and the right to adversarial proceedings.

Furthermore, equality of arms was considered as an ‘implicit guarantee’ of the right to equality of all persons before courts as enshrined in Article 14. As regards the right to adversarial proceedings, the Communications of the HRC reveal that every party should be given the opportunity to challenge the submissions of the opposing one. This was confirmed in Äärelä and Näkkäläjärvi v. Finland, when the Committee stressed the ‘fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.’ An interesting point is that the Human Rights Committee, as well as the ECtHR, uses the term equality of arms when it refers to the character of adversarial hearings. This, however, can be regarded as a minor blemish and plays an insignificant role as long as the outcomes of the cases are not influenced. Overall, one can determine theoretical similarities of equality of arms and the right to adversarial proceedings in comparison with the ECtHR’s case law.

According to Masha Fedorova, however, there may be a practical difference in the application of the principle of equality of arms related to the burden of proof. Fedorova alleges that both the ECtHR as well as the HRC follow a so-called two-step

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18 Ibid. 
19 The case of Lucy Dudko simultaneously violated the principle of adversarial proceedings since she could not make any comments to challenge the submissions of the prosecution. 
21 HRC, Communication No. 1159/2003, Sankara v. Burkina Faso, paras 12.4 and 12.5. The two other principles included in this guarantee are impartiality and fairness. 
22 HRC, Communication No. 289/1988, Dieter Wolf v. Panama, para 6.6; this includes the right to ‘personally attend the proceedings.’ 
24 Chapter 2, p. 36. 
First, the petitioner has to prove that he or she suffered from inequality to make the case admissible. Second, concerning the Committee, the state party then has to explain why the procedural inequality was justifiable and that it did not disadvantage the accused. At the ECtHR, on the other hand, the ‘effect of this inequality on the fairness of the proceedings’ is examined as a whole. Therefore, Fedorova concludes that at the ECtHR the onus of proof during the second step of the examination lies with the applicant who has ‘to show that […] the procedural inequality led to prejudice, and, thus to unfairness[s].’ The author of this thesis neither confirms nor denies the alleged difference in the application of the principle, which is described as the ‘onus of proof.’ Whereas the answer to the question seems to be clear as far as the HRC is concerned, the author hesitates to make a final judgment regarding the European Court.

As was explained, the applicants have to face a hurdle of admissibility at both institutions first and, hence, they need to set out—in a comprehensive way—that a breach of procedural imbalance might have occurred. As regards the second step of examination, in which the difference is alleged to be found, the ECtHR as well as the HRC evaluate the arguments of either side before a verdict is delivered. The fact that the procedure is evaluated as a whole at the ECtHR does not explicitly prove that the onus rests mostly on the applicant. In fact, it merely shows that the Human Rights Committee has clarified this issue in more detail than its counterpart. Moreover, it is hard to find any judgments of the ECtHR explicitly mentioning that the onus of proof was laid on the applicant. Finally, the difference of this practical application of equality of arms does not necessarily change the substance of this principle in general; and as long as the outcomes are not affected by such a different application, it plays a subordinate role for the purposes of comparison in this paper. Returning to the decisive point for this part

27 Art. 35 ECHR; Art. 5 of the First Optional Protocol to the ICCPR.
28 HRC, Communication No. 1347/2005, Dudko v. Australia, para 7.4: ‘[I]t is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author[s].’ See also: Communication No. 1758/2008, Jessop v. New Zealand, para 8.6.
29 FEDOROVA (25) 40.
30 Ibid.
31 Ibid.
33 Art. 35 ECHR; Art. 5 of the First Optional Protocol to the ICCPR.
35 HRC, UN Doc. CCPR/C/GC/52, paras 8 and 13. What can be regarded as a difference between the ECHR and ICCPR is the connection of the right to a fair trial and equality before the law, i.e. the aspect of non-discrimination. Whereas Prof. Trechsel denies a link in between procedural rights of Art. 6 ECHR and the principle of non-discrimination, the HRC confirmed such a connection in Communication No. 819/1998, Kavanagh v. Ireland, para 10.3. See TRECHSEL, S. 2005. Human Rights in Criminal Proceedings. OUP, p. 95.
of the thesis, namely that of searching for accepted restrictions on the disclosure of evidence; it remains to be seen whether or not the case law of the HRC offers such a detailed examination as in the cases of Fitt, Jasper or Rowe and Davis.

The disclosure of evidence at pre-trial stage is subject to the same basic safeguards that apply in the ICCPR and in the European Convention. Article 9 (4) can be regarded as the equivalent of Article 5 (4) ECHR and ensures that the accused has the right to ‘request a decision on the lawfulness of his or her detention by a competent judicial authority.’ This illustrates a crucial procedural right, including the requirement to be informed of the reasons for the arrest, as expressed in Article 9 (2). If the accused does not know the grounds for his or her arrest, it will not be possible to prepare the defence proceedings under Article 9 (4). The Human Rights Committee had to deal with a fair amount of cases in which the defendants were not informed of the reasons for their arrests. In some cases, there was, put bluntly, no information provided for several days; in others, the substance of the reasons for the arrest was missing. Finally, the HCR communications reveal a strict interpretation of the right to be informed promptly.

As a general rule, the detainee ‘shall be informed at the time of arrest of the reasons for the arrest and of any charges.’ However, the case McLawrence v. Jamaica made clear that there is a difference between ‘the reasons for the arrest,’ which needs to be conveyed by the authorities on the scene and ‘an information which explains these reasons’ that can be provided at a later stage after the detention. In the case of McLawrence, the HRC formulated such a distinction as the ‘reasons for the arrest’ under Article 9 (2) and the ‘understanding [of] the nature and cause of the charge’ in the sense of Article 14 (3) (a). As long as the suspect was brought before a judge promptly, the ‘details of the nature and the cause of the charge’ did not necessarily have to be provided to an accused person immediately upon arrest. This decision has been described as flawed since it did not provide any explanation as to why such an approach

37 HRC, Communication No. 597/1994, Grant v. Jamaica, para 8.1: the complainant was ‘[n]ot informed of the reasons for his arrest until seven days later’; Communication No. 1128/2002, Marques de Morais v. Angola, para 6.2: the complainant ‘[w]as not informed of the reasons for his arrest […] and charged […] only […] 40 days after his arrest.’
38 HRC, Communication No. 43/1979, Drescher Caldas v. Uruguay, para. 13.2; Communication No. 1177/2003, Wenga and Shandve v. DRC, para 6.2: The Committee observed ‘that it was not sufficient simply to inform the authors that they were being arrested for breach of State security, without any indication of the substance of the complaint against them.’
41 Ibid.
should be taken. In addition, the problem in the latter case was also that the accused was not even brought before a judge ‘promptly.’ Overall, it can be held that the outcomes of the HRC Communications have shown that a tight time scale is applied to ascertain the detainee’s right of information at pre-trial stage. As a result, applicants have to be provided with the reasons for their arrest at the point of detention. As Bondar v. Uzbekistan has shown, two days of non-information can be considered as a breach of the threshold, although in the worst cases, complainants have not been informed for weeks, months, or even years. Waiting some seven or eight hours until an interpreter can convey the content of the charges for the arrest into the detainee’s mother tongue, on the other hand, is not regarded as a breach of Article 9 (2).

As regards the disclosure of evidence at trial stage, it is a matter of fact that the volume of cases dealt with by the HRC is simply not commensurable with the volume of cases adjudicated by the ECtHR. Consequently, the detailed results regarding the disclosure of evidence and its restriction are likely to be limited, especially regarding the question of whether or not and under which circumstances ex parte hearings can be regarded as fair and thus lawful. One of the few cases of the HRC dealing with disclosure issues, and indeed far more fundamental questions in the sense of Article 14, is Aboussedra. This case clearly shows a violation of the disclosure of evidence but also a whole range of other fair trial elements. Besides the fact that the complainant was never shown a warrant, he ‘was not tried until 15 years after his arrest,’ he was never ‘given access to his criminal file, or to the charges against him’ and never had the opportunity to appoint a counsel to assist him. As one can see, this case essentially consists of black and white issues and its suitability and wider conclusions on the above mentioned questions on ex parte hearings are limited. Thus, it does not contribute to the jurisprudence in question.

43 CONTE and BURCHILL (n 5) 182.
45 HRC, Communication No. 1769/2008, Bondar v. Uzbekistan, para 7.2.
46 Ibid; in addition, any denial of access to a legal counsel must be regarded as a breach of Article 14 3 (b): Communication No. 770/1997, Gridin v. Russian Federation, para. 8.5.
47 HRC, Communication No. 1759/2008, Traoré v. Côte d’Ivoire, para 7.5
50 HRC, Communication No. 1769/2008, Hill and Hill v. Spain, para 12.2. The ECtHR, e.g., saw no violation of the right to be informed of the charges ‘promptly’ if the suspect is questioned within ‘intervals of a few hours’ after the arrest. See: Fox, Campell and Hartley v. UK, nos. 12244/86, 12245/86 and 12383/86, 30 August 1990, § 42; Murray v. UK, no. 14310/88, 28 October 1994, § 78.
52 Ibid. The ECtHR, e.g., saw no violation of the right to be informed of the charges ‘promptly’ if the suspect is questioned within ‘intervals of a few hours’ after the arrest. See: Fox, Campell and Hartley v. UK, nos. 12244/86, 12245/86 and 12383/86, 30 August 1990, § 42; Murray v. UK, no. 14310/88, 28 October 1994, § 78.
To this end, one can also mention Van Marcke v. Belgium. Without prejudging the results, this case has basically shown that complainants can only rely on the right to disclosure in a reasonable manner. The complainant, a former managing director of a shipping company, was accused of tax evasion and fiscal fraud. One of his allegations against the Belgium authorities was that the prosecution withheld exonerating evidence. In detail, he asserted that the prosecution withheld a report of the tax authorities which was produced before the investigations actually started. This report, however, did not constitute the basis of the Prosecutor’s case. Hence, the HRC found that the applicant had ‘access to all documents used in the criminal case against him’ and that it was not necessary for the prosecution to ‘bring before the court all information reviewed in preparation of a criminal case,’ unless the information depicted ‘exonerating evidence.’ In this case, the report of the tax authorities was certainly not exculpatory and, secondly, it would have been accessible if the defence had wished to access the document.

Generally speaking, if there is a limitation of the disclosure of evidence which may contain exculpatory evidence there must be a strict scrutiny for justifying such grounds. Moreover, the non-disclosure must not ‘impede’ the accused in the preparation of his or her defence. Comparing the aforementioned cases with some ECtHR decisions, one can determine that it confirms the case law of the ECtHR. As regards the disclosure of evidence in ex parte hearings at trial stage, however, there are no new results. Thus, there is no comparable data available being as explicit as the cases of the European Court of Human Rights.

1.2 Confrontation and the right to call defence witnesses

The right to confrontation, embedded in Article 14 (3) (e) of the ICCPR, is worded similarly to that of the European Convention. The Human Rights Committee considers it as an ‘application of the principle of equality of arms [...] for ensuring an effective defence.’ At the same time, however, it does not provide an ‘unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right

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55 The HRC Communication of Yassen and Thomas v. Republic of Guyana is probably not an adequate case to compare with the case law of the ECtHR since Mr Thomas asserted that his confession was obtained by the physical abuse of the police ‘who used pliers on his genitals’ in order to receive a confession, ibid, para 2.4. Furthermore, the restrictions of disclosure in the Communication of Harward v. Norway concerned the translation of all documents into the mother tongue of the accused in preparation of the trial. This cannot be expected according to the HRC, in particular since the accused was represented by a lawyer who had access to all files and who understood the language used in the court, Communication No. 451/1991, Harward v. Norway, paras 9.4 and 9.5.
56 HRC, UN Doc. CCPR/C/GC/32, para 39.
to have witnesses admitted that are relevant for the defence.\textsuperscript{57} Furthermore, it is ‘primarily for the domestic legislatures of state parties to determine the admissibility of evidence and how their courts assess it.’\textsuperscript{58} As in the developing jurisprudence of the ECtHR, the Human Rights Committee also faced questions regarding the ‘necessity’ to restrict the right to confrontation, particularly when witnesses were absent. Furthermore, the HRC also saw the need to place an obligation on state parties to prove their efforts in providing defendants with an opportunity to confront witnesses. In addition to the cases in which grave violations against the right to confrontation and other fair trial requirements took place, as for example in \textit{Toshev v. Tajikistan}, the Committee also dealt with Communications from which one can draw parallels with the ECtHR cases.\textsuperscript{59} 

What is understood as the so-called ‘necessity’ or ‘good reason for non-attendance’ at the ECtHR played a major role in \textit{Dugin v. Russian Federation}. In this Communication, the national courts gave a ‘very considerable weight to the statement’ of a key witness who was not subject to examination at trial.\textsuperscript{60} The state party, however, could not prove its efforts to summon this witness for the trial.\textsuperscript{61} As a result, the HRC was not provided with a plausible explanation as to why it was necessary to restrict the accused’s right to examine witnesses and thus concluded on a violation.\textsuperscript{62} Interestingly, even if the Human Rights Committee did not mention the term ‘necessity’ explicitly, there are some visible similarities in comparison to the jurisprudence of the ECtHR concerning the efforts of state parties that are required to guarantee the right to confrontation.

A further case in which the state party did not give the Human Rights Committee adequate information and thus did not prove a necessary restriction as to why the complainant was not allowed to question a key witness is \textit{Koreba v. Belarus}. In this case, the applicant was not allowed to be present at the proceedings whilst one of the prosecution’s main witnesses was testifying. The HRC decided on a clear breach of equality of arms in the sense of Art. 14 (3) (e), stressing the importance of ‘ensuring an effective defence’ in guaranteeing the accused and his counsel to cross-examine the

\textsuperscript{57} Ibid.  
\textsuperscript{58} Ibid.  
\textsuperscript{59} HRC, Communication No. 1499/2006, \textit{Toshev v. Tajikistan}, para 6.6: ‘[t]he court has failed to ensure the presence and the questioning of important witnesses; […] Mr. Iskandarov was kept unlawfully isolated at the Premises of the Ministry of Security and confessed guilt under threats of physical reprisals there, in the absence of a lawyer, and that his complaints on this subject were disregarded[.]’  
\textsuperscript{61} Ibid: ‘[W]hile efforts to locate Chikin [the witness] proved to be ineffective for reasons not explained by the State part[yl]’.  
\textsuperscript{62} Ibid.
prosecution’s witnesses. Furthermore, the HRC held that the defence should be given ‘the same legal power of compelling the attendance of witnesses’ relevant for the defence as are available to the prosecution. The latter was confirmed in Litvin v. Ukraine, a case in which the complainant’s son was denied the opportunity ‘to call and examine several important witnesses that testified during the preliminary investigation and confirmed, inter alia, his alibi.’ By using the exact wording as in Koreba, the HRC determined a violation of the principle of equality of arms and saw no necessity as to why the right to confrontation should have been restricted.

The case Khuseynova and Butaeva confirmed the aforementioned cases of Litvin and Koreba. The HRC again referred to Article 14 (3) (e) of the ICCPR and its General Comment No. 32, paragraph 39, in which the application of the principle of equality of arms was stressed. This time, however, the Committee pointed out that the right to confrontation was not ‘unlimited.’ The defence could not require the attendance of any witness but only of those who ‘are relevant for the defence.’ Since the witnesses who were requested in this case ‘could have provided relevant information’ to discharge the complainant, and since the judge gave no reasons for denying the request to have them examined, the HRC concluded that there had been a violation. Whether or not the evidence was admissible, on the other hand, was generally subject to the national courts and domestic legislature, unless the national court’s ‘choice of admissible evidence was clearly arbitrary or amounted to a denial of justice.’

The possibility of restricting the right to confrontation was reaffirmed in Larrañaga v. The Philippines. However, with regard to the admissibility of witnesses, any justification for the denial of calling defence witnesses must include more than a simple statement that the evidence was ‘irrelevant and immaterial’—if serious charges were involved. Moreover, explanations such as ‘time constraints did not allow for the examination of defence witnesses’ whilst the ‘number of witnesses for the prosecution was not similarly restricted’ appear to be weak arguments, and have been thus rejected by the HRC. In addition, the judge in the Larrañaga case ‘cut short the [defence’s] cross-examination of the main prosecution witness’ and refused to hear the remaining witnesses.

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64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.
defence witnesses. As one could have expected, the Committee finally concluded on a violation of Article 14 (3) (e).

The Communication *Rouse v. The Philippines* raised questions about the arbitrariness of admitting evidence within national courts but also touched upon the issue of restricting the right to confrontation, particularly related to the ECtHR’s ‘sole or decisive’ rule. In this case, the applicant was accused of alleged sexual relations with an under-aged male referred to in the case as G.D. The alleged victim, who was the sole eyewitness of the alleged crime, did not testify in court. Therefore, the HRC finally saw a violation of the applicant’s right to confrontation because ‘considerable weight was given to that witness’ out of court statement’ and the accused had no opportunity to cross-examine the alleged victim.

Interestingly, if one follows the ECtHR’s current doctrine, which was decided in *Al-Khawaja and Tahery* [GC], and compares it with the HRC case of 2002, there will be various reasons why one could reach the same conclusion. Considering the fact that the evidence in this case was sole or decisive and following the flexible interpretation of the post *Al-Khawaja* [GC] approach, one might even think that a lawful conviction could have been possible on first sight. Indeed, there are similarities between *Al-Khawaja* [GC] and *Rouse*; for example, in both cases the key witnesses were not subject to cross-examination, neither at pre-trial nor at the trial stage. Furthermore, supporting statements of other witnesses were available in both cases. Yet, there are differences related to the so-called necessity and counterbalance between the two cases. Firstly, there could be concern as to the diligence of the state party in securing the alleged victim’s appearance at court in the case of *Rouse*. Admittedly, there are cases in which witnesses cannot be located. In the present case, however, the government did not give any explanations as to how it tried to locate the alleged victim or his parents. Hence, one of the questions could be: Were the grounds for the non-appearance of the witness really unavoidable? In the example of *Al-Khawaja* [GC], this question was needless: The witness had died before the trial started, thus her appearance was factually impossible. Even if the state party’s efforts were considered to be sufficient, there would still have been further doubts.

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73 Ibid.
75 The UK Criminal Justice Act of 2003, for example, requires such element in Section 116 (2) (d).
Secondly, in *Rouse* as in *Al-Khawaja*, a third party gave a witness statement alleging a similar criminal allegation concerning the accused as to the present one. In the case of *Rouse*, it was a young adult who affirmed that he had engaged in sexual activities with the accused one day before the accused’s arrest. The difference, however, rests on what has been confirmed in the two cases: In *Rouse*, the third party giving the statement could not shed any light on the accusations against the applicant. The accused was charged with child abuse but the witness giving the statement was an adult. The prosecution’s argument that the third party witness ‘looked like a minor’ may be an indication but cannot be regarded as a fact. On the other hand, in the case of *Al-Khawaja*, the witness V.U. made descriptions of another alleged assault with strong similarities. Hence, the strength of the corroborative evidence in *Al-Khawaja* was far more applicable to support the accusation than in the case of *Rouse*. In addition, all of the persons providing supportive evidence were subject to cross-examination in *Al-Khawaja* which was, on the contrary, not the case in *Rouse*. Notwithstanding the turmoil regarding the admissibility of evidence which may be considered peripheral to the body of the trial in *Rouse*, one can see that the current doctrine applied by the ECtHR would have led to the same outcome in *Rouse*, even though at the time the HRC’s reasoning was more focussed on ‘the weight of the out of court statement.’

1.3 Discussion

Looking at the HRC’s General Comment No. 32, there is a general obligation to disclose evidence which can be compared with that of the ECtHR judgment in *Edwards*. This general obligation, however, may be subject to restrictions in certain cases. Furthermore, the definition of equality of arms appears to be similar. None of the parties should face a so-called disadvantage—a term which is familiar from the definitions of the European Court of Human Rights. One interesting aspect is that the definition of the Human Rights Committee explicitly refers to the defendant. This may imply that the rights of the defendant were meant to be highlighted.

Regarding the depth of argument of the HRC Communications, one must admit that due to the limited volume of cases, the limitations of procedural rights were not discussed as explicitly in the HRC Communications as is the case in the judgments of the ECtHR. For example, the *Dudko* case does not offer the same amount of detail as

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77 Ibid, para 7.5.
does the European case of *Fitt*. Thus, it is hard to draw any conclusions as to the circumstances under which the procedural right of disclosure of evidence can be restricted in the sense of the ICCPR. In addition, the case law of the ECtHR contains more doctrinal nuances than do Communications from the HRC. This became evident when the disclosure of evidence at pre-trial stage was assessed. All of the HRC Communications primarily concerned violations based bluntly on applicants not being informed of the reasons for their arrest rather than discussing details under which certain pieces of evidence can be withheld. As regards the disclosure of evidence at trial stage, it has to be mentioned that the few cases of the HRC cannot be compared with the vast number of decisions made by the ECtHR. Hence, the Communications of the HRC do not provide for results as explicit as the ones from the ECtHR. On the other hand, none of the HRC’s decisions related to the disclosure of evidence contradict any of the fundamental principles found in the case law of the ECtHR. As a result, the basic framework regarding disclosure rests in the same intersection of the two institutions.

Concerning the right to confrontation and its limitations, there are various parallels to be drawn between the HRC and the ECtHR. First, both institutions stressed the need for diligence on behalf of state parties to ensure the presence of key witnesses at trial. In cases of impossibility, whether factual or legal, both institutions tried to measure the influence of hearsay statements with the outcome. Whereas the ECtHR named it the ‘sole or decisive’ rule, the HRC described it as ‘considerable weight which was given to an out of court statement.’\(^79\) The interesting point is that the HRC’s approach as well as ECtHR’s do not contradict each other—irrespective whether or not the ‘sole or decisive’ rule is applied flexibly or inflexibly. As the comparative example of *Al-Khawaja and Tahery [GC]* with *Rouse* has shown, the conclusion would be identical. As a result, it can be held that there is an element of conformity between the two institutions in the in the area of the right to confrontation and its limits.

2. The Inter-American Court of Human Rights

Article 8 ACHR

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
   a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
   b. prior notification in detail to the accused of the charges against him;
   c. adequate time and means for the preparation of his defense;
   d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
   e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
   f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
   g. the right not to be compelled to be a witness against himself or to plead guilty; and
   h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.
The Organization of American States established the Court in 1979 to interpret and apply the provisions of the American Convention of Human Rights. The Court can only exercise its jurisdiction over states that have accepted the Convention as binding or when a state party accepts its jurisdiction temporarily for a particular case. Currently, twenty OAS member states have accepted the compulsory jurisdiction (competencia contenciosa) of the Court. Compared to the European Court of Human Rights, the Inter-American Commission on Human Rights still plays a decisive role if an applicant intends to lodge a complaint before the Court. Although the Commission’s influence may have decreased with an amendment of the Commission’s Rules and Procedure in 2001, it can still block a referral of a case to the Court, provided that there is ‘a reasoned decision by an absolute majority of the members of the Commission.’ Admittedly, the decisive criteria whether or not the Commission will finally refer a case to the ACtHR include, inter alia, the opinion and evaluation of the petitioner him- or herself. To repeat, however, the final decision still rests with the Commission and not the individual. Once the Commission has agreed to refer the case to the Court, the applicant is allowed to present his or her case ‘autonomously.’ In addition, the Commission appears as a party in all contentious cases. There is hardly any doubt that the judgments and decisions of the Court and the Commission have significantly shaped the development of international human rights law over the years.

2.1 The right to a fair trial—Article 8 ACHR

The American Convention on Human Rights, also known as the Pact of San José, anchors the right to a fair trial in Article 8. The first paragraph of Article 8 refers to all kinds of proceedings, such as ‘criminal […], civil, labor, fiscal and [proceedings of] any other nature.’ In addition, there is a more specific supposition ‘only for the accused’ in criminal cases, expressed by the so-called minimum guarantees of Article 8 (2) (a)-(h).
Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those minimum guarantees. Furthermore, the minimum guarantees listed from Article 8 (2) (a) to (h) are not exhaustive, meaning that other additional guarantees may be applied under specific circumstances. Prima facie, one would think that—due to the wording of Article 8—there was a distinction between criminal cases and cases of a different nature; in other words, that there was a broader relevance to the fair trial regarding the procedure of all cases and a narrower one only related to criminal cases. This, however, was denied by the Inter-American Court.

The Court held that Article 8 (1), which provides for due guarantees, could justify an application of the minimum guarantees listed in paragraph 2, even if the nature of the proceedings had no criminal background. Hence, the decisions of the Inter-American Court prove that the minimum guarantees of paragraph 2 can be applied in any type of proceedings whereas the doctrine of the ECtHR only guarantees the minimum rights of Article 6 (3) in criminal cases. As a result, the Inter-American Court does not distinguish between fair trial requirements in criminal cases and others, as strictly as does, for example, its pendant the ECtHR. Furthermore, the ECtHR applies a doctrine to evaluate the proceedings as a whole, which means that it does not solely focus on the minimum guarantees in criminal cases. As one can see, the ECtHR clearly distinguishes criminal proceedings from civil or administrative proceedings. Yet, the evaluation of criminal proceedings does not only depend on an assessment of the minimum guarantees but also on the proceedings as a whole.

An interesting point regarding the temporary suspension of certain rights within the American Convention is addressed under Article 27. This article allows state parties to derogate from some of the Convention’s rights in times of ‘war, public danger, or other emergency that threatens the independence or security of a State Party.’ Paragraph 2, on the other hand, then lists some absolute rights from which the state parties can never deviate. Yet, the right to a fair trial is not included in this catalogue. Consequently, it seems that under exceptional circumstances, states may be allowed to

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92 IACtHR, Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2) (a) and 46 (2)(b) of the ACHR), para 24.
93 Ibid.
94 IACtHR, Advisory Opinion OC-11/90, para 28; MEDINA QUIROGA (n 90) 290. A further interesting aspect is that, in criminal cases, the minimum guarantees are not exclusively applied to the accused but also for victims: In the so-called ‘White Van case’, the IACtHR determined a violation of the ‘reasonable time’ prerequisite with regard to the victims. “White Van” (Paniagua-Morales et al.) v. Guatemala, 8 March 1998 (Merits), paras 147-156.
95 The ECtHR established a definition of the term ‘criminal charge’ in: Engel and Others v. The Netherlands, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, §§ 80-85.
96 Equality of arms or the right to adversarial proceedings are still guaranteed in civil cases, however, the legal right finds its origins in Article 6 (1) rather than (3). ECtHR, Wierzbicki v. Poland, no. 24541/94, 18 June 2002, §§ 39-46.
97 Art. 27 (1) ACHR.
restrict the right to a fair trial. However, this was contradicted by the Inter-American Commission in its Report on Terrorism and Human Rights. In the latter report, the Commission held that ‘the inter-American human rights organs have long emphasized the importance of maintaining due process safeguards at all times,’ particularly to minimise the potential risk of states abusing their so-called exceptional powers. The idea behind it was to protect other rights of the Convention, which are not listed in Article 27 (2), but are still considered as having a high significance. Finally, the Commission stated:

Due process rights form an integral part of the judicial guarantees essential for the protection of non-derogable rights and may therefore be considered non-derogable under the express terms of Article 27 (2) of the American Convention.  

Hence, the Commission concluded that the ‘basic components of the right to a fair trial cannot be justifiably suspended.’ This includes the disclosure of evidence, which can be traced back to the right to have ‘adequate facilities to prepare the defence,’ as well as the ‘right to [the] attendance of witnesses.’ As a result, it can be held that the right to a fair trial has been given a significant value within the context of the American Convention and thus it can be regarded as one of the ‘indispensable rights’ within the meaning of Article 27 (2).

As regards equality of arms, the terms ‘equality’ and ‘disclosure’ are, similar to the wording of the European Convention and the ICCPR, not explicitly mentioned in the Convention; rather they are found in advisory opinions or the case law of the Court which is, in turn, linked to other human rights documents. Furthermore, scholarship affirms a dynamic interpretation of the American Convention which might have been an additional factor contributing to the evolvement of the term equality of arms. This


98 Ibid (Report on Terrorism and Human Rights).

99 Ibid, para 247.

100 Ibid; Art. 8 (2) (c) ACHR; the Inter-American Commission cites here, amongst other reports, the HRC’s General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 31 August 2001 para 16: ‘[T]he Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency[.]’


principle is often mentioned in conjunction with the so-called due process requirements. 105

Concerning the application of equality of arms, Fedorova correctly pointed out that the Inter-American Court often focuses on the application within its own court procedure rather than assessing the domestic systems of its state parties. 106 In addition, some of the cases would not be specifically related to criminal matters. 107 In order to obtain an insight of how the IACtHR defines this principle in the overall context, it is nonetheless necessary to take notice of what the Court has decided. In fact, looking at how the Inter-American Court has interpreted equality of arms may reveal new results whilst comparing it to the ICC. Hence, it is worth scrutinizing the case law of the Inter-American Court. In the case of Castillo Petruzzi v. Peru, the American Court acknowledged that equality of arms played a major role for its own court procedure, announcing that

[T]he right of access to justice at international level ought in fact to be accompanied by the guarantee of procedural equality (equality of arms/égalité des armes) in the proceedings before the judicial organ, an element essential to any jurisdictional mechanism of protection of human rights, without which such mechanism will be irremediably mitigated. 108

The Court stressed the importance of avoiding any ‘imbalance among the parties’ in a further case since this ‘would jeopardize the realization of justice.’ 109

As regards the right to adversarial proceedings, the Court mentioned the notion in The Plan de Sánchez Massacre, a case concerning matters of evidence and again, related to its own procedure. According to the IACtHR, the ‘adversary principle’ respected the right of each party to defend itself. 110 Furthermore, the Court highlighted that it may apply different formalities regarding evidence in comparison to national courts; especially when limitations concerned the ‘legal certainty and the procedural equality of the parties.’ 111 As a result, the IACtHR enhances the opportunity to respond to evidence or written statements and thus strengthens the right to adversarial proceedings in its own court procedure.

105 MEDINA QUIROGA (n 90) 303 ff; FEDOROVA (n 25) 38.
106 Ibid (Fedorova).
107 Ibid.
108 IACtHR, Castillo-Petruzzi et al v. Peru, 4 September 1998 (Preliminary Objections), para 44.
111 Ibid, para 28.
Pursuant to a domestic case in Peru, the Court determined a grave violation of the adversarial process in *Elena Loayza-Tamayo*.\(^{112}\) In this case the applicant, who had first been heard in front of a military tribunal, was denied the opportunity to ‘challenge or examine the evidence’ which was brought against her.\(^{113}\) Having been acquitted by the military court, she was convicted in a civilian court of a lesser charge on exactly the same, untested evidence.\(^{114}\) In conclusion, as far as the cases of the Inter-American Court are concerned, there are no significant differences between the understanding of the right to adversarial proceedings of this Court and the European Court of Human Rights. In much the same way as the scholastic literature on the ECtHR sees the argument of challenging the allegations of the opposing party as being fundamental to the right to adversarial proceedings, so too does the American Convention on Human Rights.\(^{115}\)

However, one difference regarding equality of arms remains: Whereas the American Convention sees a connection between equality of arms and the fundamental right of equality before the law—which includes the prohibition of discrimination—scholarship has different approaches concerning the European Convention.\(^{116}\) Professor Trechsel, for example, regards the right to equality of arms as a procedural one, which is not necessarily linked to the prohibition of discrimination expressed in Article 14 of the ECHR.\(^{117}\) The Inter-American Court, on the other hand, considered Article 8 and Article 24 in conjunction, in order to address the question of whether or not someone’s rights to participate in the proceedings have been violated. This became clear in the case of *Genie-Lacayo*, in which the father of the victim claimed that his rights to participate in the proceedings had been violated.\(^{118}\)

### 2.2 Disclosure of evidence at pre-trial and trial stage

For the assessment of the disclosure of evidence at pre-trial stage, it is necessary to look into Article 7 of the Pact of San José—the right to personal liberty. This constitutes a

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\(^{113}\) *Ibid*, para 62.

\(^{114}\) *Ibid*, paras 3e and 62.

\(^{115}\) MEDINA QUIROGA (n 90) 304: ‘[e]n que el tribunal debe comportarse de manera similar frente a todas las partes del mismo y en que las partes deben tener los mismos derechos, tanto para presentar peticiones, argumentos y pruebas para objectar las peticiones y las pruebas que el otro presente[.]’

\(^{116}\) *Ibid*, p. 304; NASH ROJAS and MUIJCA TORRES (n 104) 65, 66. Interestingly, the ICCPR confirms such a connection between non-discrimination and equality of arms in Article 14: ‘The right to equality before courts and tribunals, in general terms, […] ensures that the parties to the proceedings in question are treated without any discrimination’; *see also*: HRC, UN Doc. CCPR/C/GC/52, at paras 8 and 13: ‘The right to equality before the courts guarantees and ensures equality of arms.’

\(^{117}\) TRECHSEL, *Human Rights in Criminal Proceedings* (n 35) 95: ‘Some authors in fact link equality of arms to the general guarantee of non-discrimination, but, in my view, such a connection is incorrect.’ A different approach can be found in GRABENWARTER, C. and PABEL, K. 2012. *Europäische Menschenrechtskonvention*, 5th ed. C.H. Beck, p. 523.

\(^{118}\) Genie-Lacayo v. Nicaragua, 29 January 1997 (Merits, Reparations and Costs), para 88; the Court even considered the principles of equal protection and non-discrimination as *ius cogens* norms of international law: IACtHR, Advisory Opinion OC-18/03, 17 September 2003, *Juridical Condition and Rights of the Undocumented Migrants*, p. 80.
significant legal apparatus with which to challenge detentions before a competent judicial authority that could, if deemed necessary, order the release of a person in custody. In detail, Article 7 (6) entitles ‘anyone who is deprived of his liberty’ to have ‘recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention.’ Not infrequently, the Inter-American Court had to decide on cases in which people had unnaturally disappeared and thus were clearly deprived of their right to challenge their arbitrary arrest.\textsuperscript{119}

In order to prepare an adequate defence at pre-trial level, it is a matter of common sense that the authorities inform the detainee of the reasons for the arrest, \textit{i.e.} the charges against him or her.\textsuperscript{120} Without this information, the detainees would not even know why they had been arrested. The mere knowledge of the alleged accusations, on the other hand, can only be regarded as a first step and still does not justify any actions of withholding evidence to the defence—at least not within the jurisprudence of the ECtHR.\textsuperscript{121} Since the volume of cases at the Inter-American Court dealing with the restriction of the disclosure of evidence is rather limited, it is hard to give a final statement regarding under which circumstances the Inter-American authorities would allow restrictions for the disclosure of evidence. Nonetheless, there are indications that the Inter-American Commission as well as ECtHR requires a strict application of the right to personal liberty.

In its report on Ecuador, for instance, the Commission reiterated the importance of bringing any detained person ‘promptly before a judge,’\textsuperscript{122} namely ‘as soon as possible,’\textsuperscript{123} and without unacceptable delay.\textsuperscript{124} More importantly, the IAComHR expressed doubts \textit{vis-a-vis} the so-called \textit{incommunicado} detentions, during which the accused would be cut off from contact with the outside world. Any such detention lasting more than 24 hours would represent a clear breach of the American Convention.\textsuperscript{125} In this context, the Commissioners also established a link to Article 8 mentioning that such detentions raised issues ‘of the right to legal defense generally.’\textsuperscript{126} As a result, there seems to be a high conformity regarding the structure of the basic legal framework between the ECtHR and the IAComHR. In addition, there is reason to

\begin{footnotes}
\item[119] IACtHR, \textit{Heliodoro Portugal v. Panama}, 12 August 2008 (Preliminary objections, Merits, Reparations and Costs), paras 113-117. So-called ‘forced disappearances’.
\item[120] Art. 7 (4) ACHR.
\item[121] \textit{Ibid.}
\item[122] Art. 7 (5) ACHR. A violation has been determined in: IACtHR, \textit{Hilaire, Constantine and Benjamin et. al. v. Trinidad and Tobago}, 21 June 2002 (Merits, Reparations and Costs), para 152.
\item[124] \textit{Ibid.}
\item[125] \textit{Ibid.}
\item[126] \textit{Ibid.}
\end{footnotes}
believe that the American Convention might require a strict application of the disclosure of evidence at pre-trial stage, tentatively confirmed by the Commission’s report on Ecuador.

As regards the trial stage, the Inter-American Commission stressed the importance of the disclosure of evidence in its Report on Terrorism and Human Rights when it repeatedly expressed that ‘adequate time and facilities’ for the preparation of the defence were ‘basic components’ of the right to a fair trial.\(^{127}\) Interestingly, the Commission cited, \textit{inter alia}, General Comment no. 32 of the UN Human Rights Committee, which specified the terms ‘adequate facilities’ to prepare the defence.\(^{128}\) As a consequence, there is an inclination that the terms ‘adequate facilities to prepare the defence’ include ‘access to documents and other evidence.’\(^{129}\) The fact that the accused must be informed of the charges against him is a previous significant step and guaranteed in Article 8 (2) (b). Any statement of an accused without such a notification is a clear breach to the ‘inherent purpose’ of the right to an adequate defence.\(^{130}\) Hence, the guarantee to be informed of the charges is the first essential step ‘for the effective exercise of the right to a defense.’\(^{131}\)

After having been informed of the charges, the defence lawyers should have access to documents or the case files. In the case of \textit{Castillo Petruzzi et al.}, the Inter-American Court reiterated the UN Basic Principles for Lawyers asking for ‘adequate opportunities, time and facilities’\(^{132}\) for imprisoned persons to communicate with and consult lawyers in full confidentiality.\(^{133}\) Adequate time and facilities was certainly not given when the defence lawyers only had access to the case files one day before the judgment was delivered.\(^{134}\) Under such circumstances, it would be obvious that the work of the defence attorneys was ‘shackled’\(^{135}\) when having little opportunity to ‘introduce any evidence for the defense.’\(^{136}\) Furthermore, in one of the applicants’ convictions, the judgement of the court of last instance was based on new evidence that the defence ‘had not seen and consequently could not rebut.’\(^{137}\)

\(^{128}\) HRC, UN Doc. CCPR/C/GC/32, at para 33.
\(^{129}\) Ibid.
\(^{130}\) Ibid.\(^{19}\)
\(^{131}\) Ibid.
\(^{133}\) Ibid.
\(^{134}\) Ibid, \textit{Castillo-Petruzzi et al. v. Peru}, 30 May 1999 (Merits, Reparations and Costs), para 139.
\(^{135}\) UN, Basic Principles on the Role of Lawyers, 8\textsuperscript{th} Congress on the Prevention of Crime and the Treatment of Offenders (7 September 1990).
\(^{137}\) Ibid.
The aforementioned clearly reveals that there is a general obligation to disclose evidence at the trial-stage within the framework of the American Convention of Human Rights. Sometimes, however, it may be necessary to derogate from this general rule under exceptional circumstances, for example, when the disclosure of evidence conflicts with other fundamental rights of the Convention.\textsuperscript{138} These may be ‘matters of security, public order, the interests of juveniles, or where publicity might prejudice the interests of justice.’\textsuperscript{139} Especially when the lives or the integrity of witnesses and members of the judiciary are at stake, limitations of the disclosure of evidence do become necessary measures.\textsuperscript{140} At the same time, the Inter-American Commission suggested that any such suspensions must strictly ‘comply with the principles of necessity, proportionality and non-discrimination.’\textsuperscript{141} Furthermore, they need to be evaluated ‘on a case by case basis and be subject to on-going judicial supervision.’\textsuperscript{142} As one can see, both the Inter-American Commission as well as the ECtHR affirm the possibility of restricting the disclosure of evidence, however, under strict conditions. First, both institutions require the restriction to be ‘necessary.’ Second, there must be an ‘on-going judicial supervision,’ or accordingly, the decision of non-disclosure is ‘required to be under the constant assessment of a trial judge.’

Since there are no cases available similar to the European examples of \textit{Fitt}, \textit{Jasper} or \textit{Rowe and Davis}, it is hard to demonstrate further similarities of possible limitations of the disclosure of evidence established by the Inter-American Court. Chapter 2 portrayed the term ‘necessity’ with regard to the disclosure of evidence in a case by case assessment. In \textit{Edwards and Lewis}, for example, the ECtHR determined that grounds of public interest ‘cannot justify the use of evidence obtained as a result of police incitement.’\textsuperscript{143} If evidence has to be withheld on grounds of national security, witness protection or when police investigation methods need to be kept secret, the ECtHR highlighted the importance of a constant assessment of a trial judge in order to monitor and, hence, to safeguard the fairness throughout the trial.\textsuperscript{144} As concerns the right to confrontation, ‘necessity’ represented an examination as to whether the non-appearance of a witness could be justified at the pre-trial or trial proceedings. To this end, states have to prove their effort to bring about a confrontation and to realize, as far

\textsuperscript{139} Ibid, para 250.
\textsuperscript{142} Ibid, para 250.
\textsuperscript{144} ECtHR, \textit{Jasper v. UK [GC]}, no 27052/95, 16 February 2000, § 56.
as possible, opportunities to counterbalance the restriction. In cases when witnesses were anonymous to the defence, the ECtHR required, *inter alia*, the adequate ‘choice of means by the authorities in handling’ such evidence or, as one remembers from *Van Mechelen*: ‘if a less restrictive measure can suffice then that measure should be applied.’

In any case, a similar structure on disclosure issues can be definitively determined after the assessment of the ECtHR, the IACtHR and the IAComHR. Moreover, Judge Sergio García-Ramírez—whilst referring to the case law of the ECtHR—appreciated mentioning that ‘the experience of other national and international jurisdictions runs in the same direction.’ Thus, it can be held that this latent conformity finally proves the intersections between the ECtHR and its Inter-American pendant. Hence, both regional human rights courts bear similarities regarding the disclosure of evidence and its limitation.

2.3 Confrontation and the right to call defence witnesses

The right to confrontation, closely linked to the disclosure of evidence, can be found in Article 8 (2) (f) of the Convention. It is regarded as one of the due guarantees of the right to a fair trial and ensures the examination of ‘witnesses present in court.’ It is, however, not an absolute and may be subject to restrictions, similar to the disclosure of evidence. As mentioned earlier, there are situations in which the lives of witnesses or the judiciary may be endangered, and consequently there may be limitations to the right of confrontation. One of the most widespread examples is when the defendant himself, or those acting on his behalf, intimidate witnesses in order to escape conviction. In such a situation, his or her rights to confrontation should be waived, as was confirmed in ECtHR’s case of *Al-Khawaja and Tahery* [GC].

To this end, the Inter-American Commission determined some ‘ineffectiveness in criminal proceedings’ when ‘those responsible for human rights abuses ensure impunity by threatening or attacking those who might contribute to a sanction against them.’ Nonetheless, the latter should not automatically lead to ‘faceless justice

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145 Chapter 2, pp. 72-81.
147 ECtHR, *Van Mechelen and Others v. the Netherlands*, nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, § 59.
150 Ibid, para 251.
151 ECtHR, *Al-Khawaja and Tahery v. UK* [GC], nos. 26766/05, 22228/06, 15 December 2011, § 123.
153 Ibid.
systems or secret witnesses, which would, in turn threaten the basic idea of ‘adequate due process guarantees.’ In its report on the domestic situation in Colombia, the Commission had to deal with exactly such a situation and ‘expressed its most serious concern regarding the lack of due process rights for defendants’ if Colombia did not ‘take the measures necessary to ensure the safety of witnesses.’ In some cases, for instance, one witness provided incriminating evidence under several code names which led judges to believe that different witnesses had testified similar facts and, as a result, corroborated one another’s testimony. Such a development is, of course, unacceptable.

Returning to the crucial point of this section, namely the need to assess whether there are any similarities regarding the restriction of the right to confrontation between the ECtHR and the Inter-American institutions, it can be held that there is a general agreement to restrict the right, especially when the interests of witnesses or victims are at stake. The Inter-American Commission pointed out that it was important to grant the witnesses’ anonymity in such cases ‘without compromising a defendant’s fair trial rights.’ As the paragraph on the disclosure of evidence has shown, the Commission established similar prerequisites such as ‘necessity’ and ‘counterbalance.’ Regarding anonymous witnesses, for example, one could interpret the Inter-American Commission’s description of necessity as the ‘sufficiency of the grounds for maintaining a particular witness’s anonymity,’ including the reliability of their statements. Furthermore, the Inter-American Commission referred to the European case of Doorson which concerned the ‘sole or decisive’ rule in cases where witnesses testified anonymously. In this case, the ECtHR stressed the importance of judges being aware of the identity of those anonymous witnesses and that it was crucial for the defence to challenge the evidence of these witnesses, even if the applicants did not know their identity. The most significant similarity, however, is that the Inter-American Commission used a similar wording to underline what has been called the ‘sole or decisive’ rule at the ECtHR and which had been rigorously applied until Al-Khawaja and Tahery [GC]. In detail, the IAComHR stated:

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154 Ibid, para 121.
155 Ibid.
156 Ibid, para 127.
157 Ibid, E Recommendations no 5.
158 Ibid, para 125.
160 Ibid.
161 Ibid.
163 Ibid.
[a]nd the significance of the evidence in the case against the defendant, in particular whether a conviction may be based solely or to a decisive extent on that evidence.\textsuperscript{164}

The lack of recent case-law within the terrain of the Inter-American Court may leave a little gap with regard to the latest interpretation of the ‘sole or decisive’ rule which is applied more flexible at the ECtHR now. On the other hand, the Commission Report on Terrorism clearly shows a basic conformity of the application of the right to confrontation. As a result, one can determine that the ECtHR’s case law may be more explicit. The fundamental structures of the two jurisdictions, however, remain similar.

2.4 Evaluation

The general obligation to disclose evidence has been affirmed by all three acting human rights bodies so far: ECtHR, HRC and the Inter-American institutions. In addition, there is common agreement that, in some cases, a restriction of the disclosure or the right to confrontation is not incompatible with the right to a fair trial per se. However, due to the lesser volume of cases held by the Inter-American institutions, one must admit that the explanations for the eventual limitations of the right to disclosure and confrontation were, at the IACtHR and the IAComHR, not debated as thoroughly as in the jurisdiction of the ECtHR. As a consequence, it is a matter of fact that the case law of the European Court of Human Rights contains more details than the Inter-American data which became evident in all three categories: disclosure of evidence at pre-trial stage, trial stage and the right to confrontation.

Nonetheless, there is an inclination that the Inter-American Commission is in favour of a strict application of the disclosure of evidence at pre-trial stage, especially since it established a link to the right of the legal defence generally. Regarding the disclosure of evidence at trial-stage, the similarities of the ECtHR and the Inter-American jurisprudence became clearly visible when a constant assessment of a judicial institution was required. Whether or not the Inter-American Court would allow for \textit{ex parte} hearings in which a judge decides on the non-disclosure—in the absence of the defence—however, cannot be answered. The assessment of the right to confrontation has revealed that the fundamental principles, in particular the ‘sole or decisive’ rule, do not contradict the cases of the ECtHR, at least not until the relatively recent judgment of \textit{Al-Khawaja and Tahery [GC]} was delivered. As a result, the basic framework of the ECtHR, the IACtHR and the IAComHR regarding the disclosure of evidence as well as

the right to confrontation rest in the same intersection. Hence, there is an element of a mirror image between the two regional human rights institutions which was confirmed by Judge Sergio García-Ramírez.

3. The African Court on Human and People’s Rights—AfCtHPR

Article 7 ACHPR

1. Every individual shall have the right to have his cause heard. This comprises:
   a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
   c) The right to defence, including the right to be defended by counsel of his choice;
   d) The right to be tried within a reasonable time by an impartial court or tribunal.
   2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

The African Court was established by a protocol to the African Charter in 1998. Its major role is to ‘complement the protective mandate of the Commission’ and have jurisdiction over all cases and disputes ‘concerning the interpretation and application of the Charter.’ After the Commission had encouraged the member states to ratify the African Court Protocol in 2002, it finally went into force in 2004. Currently, twenty-six member states have ratified the Protocol and, thus, accepted the Court’s jurisdiction. Access to the Court is reserved to the African Commission on Human and Peoples’ Rights, state parties and African intergovernmental organizations. The Court may, however, entitle individuals or non-governmental organizations to directly hear their cases provided that a state party has, on the one hand, ratified the African Court Protocol and, on the other, given an extra declaration to accept the Court’s competence for the admission of individual claims. The Court is seated in Arusha and

165 African Court Protocol.
166 Art. 2 African Court Protocol; Rule 114 of the RP of the AfComHPR. According to Arts. 30 and 45 of the ACHPR, the Commission’s main mandate is to ‘promote human and peoples’ rights.’
167 Art. 3 African Court Protocol; Rule 26 (1) (a) of the Rules of Court.
168 ACHPR/RES.60(XXXI)2002; in the Dakar Declaration and Recommendations, states were encouraged to ‘ratify all treaties relevant to the fair trial’, including the African Court Protocol.
170 Art. 5 (1) and (2) African Court Protocol.
171 Art. 5 (3) in conjunction with Article 34 (6) African Court Protocol. So far, only Ghana, Tanzania, Mali and Burkina Faso have made such a declaration.
its judges are elected for a period of six years.\textsuperscript{172} A difference in comparison with the two other regional human rights courts is that within the African jurisdiction judges who are nationals of a state party which submitted a case would not be allowed to hear the latter.\textsuperscript{173} Precisely as a result of that rule, Judge El Hadj Guissé recused himself in the African Court’s very first judgment of \textit{Michelot Yogogombaye v. The Republic of Senegal} in which the claim has finally been declared inadmissible.\textsuperscript{174}

Since the Court has not decided on issues of disclosure or confrontation yet, the relevant data for the thesis will be taken from decisions made by the African Commission on Human and Peoples’ Rights.\textsuperscript{175} The decisions of the Commission are not legally binding, nonetheless they should be addressed. In 2008, the African Union decided to merge the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union. The ‘Protocol on the Statute of the African Court of Justice and Human Rights’ sets out an establishment of a single Court in Article 2. This Protocol, however, has only been ratified by five states to date.\textsuperscript{176} As a result, it has not entered into force and, thus, the African Court Protocol remains the main source of law regarding the Court.

3.1 The right to a fair trial—Article 7 of the Banjul Charter

The primary source of the right to a fair trial can be found in Article 7 of the African Charter. It ensures that ‘every individual shall have the right to have his cause heard.’\textsuperscript{177} Furthermore, it enables individuals to ‘appeal to national organs’ if there is a violation of their ‘fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.’\textsuperscript{178} In addition, Article 7 is supported by secondary legislation.\textsuperscript{179} For example, the African Commission adopted the ‘Resolution on the Right to Recourse and Fair Trial’ in order to specify the rights of due process.\textsuperscript{180} Furthermore, the Commission decided to create so-called general guidelines on the right to a fair trial whilst it adopted another resolution in 1999, namely the ‘Resolution on the

\footnotesize{\textsuperscript{172} Arts. 15 and 25 African Court Protocol.\textsuperscript{173} Art. 22 African Court Protocol; Rule 8 (2) of the Rules of Court.\textsuperscript{174} AfCHPR, Michelot Yogogombaye v. The Republic of Senegal, no. 001/2008, 15 December 2009, §§ 2, 46.\textsuperscript{175} Art. 55 ACHPR in conjunction with Rule 83 of the Rules of Procedure of the AfComHPR.\textsuperscript{176} The five states are: Libya, Mali, Burkina Faso, DRC, Benin. See Coalition for an Effective AfCtHPR.\textsuperscript{177} ACHPR/RES.4(XI)1992.}
Right to a Fair Trial and Legal Aid in Africa.\textsuperscript{181} Similarly to the European and the American Convention, these guidelines contain a general supposition inherent to the right to a fair trial referring to all kinds of legal proceedings: civil, criminal or administrative matters.\textsuperscript{182} On the other hand, some of the guarantees mentioned in the Principles and Guidelines are only applicable for criminal proceedings.\textsuperscript{183} This implies that there is a general supposition of the right to a fair trial for all matters and a more specific one only applicable to criminal cases. As shown in Chapter 2, the ECtHR affirms such a distinction, whereas the Inter-American Court approved the application of the minimum rights in all types of proceedings.

Also noteworthy in comparison with the two other conventions is the different structure of the legal frame in the African Charter. Whereas the ECHR and ACHR directly list a catalogue of the so-called minimum rights in their Conventions, the African Charter does not contain such a catalogue. However, the relevant counterpart of such a list can be found in the Commission’s ‘Resolution on the Right to Recourse and Fair Trial’.\textsuperscript{184} Here, a catalogue of minimum rights is provided from Section 2 (a) to (e). In addition, the Principles and Guidelines of 2003 describe these rights in even more detail. According to Fatsah Ouguergouz, Article 7 is ‘wholly compatible with Article 14 (1) of the ICCPR,’ although the drafters of the African Charter have not particularly specified the terms ‘fundamental rights’ or the minimum guarantees of the accused.\textsuperscript{185}

Similar to the European and the American Conventions, Article 7 of the African Charter does not explicitly contain terminology such as equality of arms or disclosure of evidence. Whereas the ECtHR, the HRC, the IACtHR and the IAComHR have implemented these terms through their case law, the African system is fitted with secondary legislation that specifies the idea of equality of arms:

In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor. (i) The prosecution and defence shall be allowed equal time to present evidence. (ii) Prosecution and defence witnesses shall be given equal treatment in all procedural matters.\textsuperscript{186}

\begin{footnotes}
\item[181] ACHPR/RES.4(1XXVI)1999: The AfComHPR ‘decides to establish a Working Group on Fair Trial’ and ‘requests the Working Group to prepare a draft of general principles and guidelines.’
\item[182] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003. Lit A refers to ‘all legal proceedings.’
\item[183] ibid, lit A and N.
\item[186] Littera N 6 (a) of the Guidelines. Furthermore, equality of arms applies to all kinds of proceedings in the general sense, mentioned in letter A of Article 2 (a) of the Guidelines.
\end{footnotes}
The latter definition takes us, once again, back to the discussion about the connection of equality of arms and the human right to equality before the law or non-discrimination.\(^{187}\) Looking at the wording of the definition in the Guidelines, one could conclude that Professor Trechsel’s interpretation—which considers equality of arms to be of a procedural nature—is affirmed.\(^{189}\) Letter N 6 (a) of the Guidelines refers to equality between the prosecution and the accused in all procedural matters. Hence, it can be held that the principle of equality of arms within the African Charter is orientated towards procedural equality.

As regards the right to adversarial proceedings, these words cannot be found within the African Charter or the Principles and Guidelines on the Right to a Fair Trial. Letter N 6 (c) of the Guidelines, however, guarantees the accused to be present and participate during his or her trial. Although this does not explicitly state that the accused has a right to comment and challenge the submissions of the prosecution, the guarantee to be present at least implies that the accused and his counsel are involved in the procedures.\(^{190}\) A more detailed guarantee of the right to adversarial proceedings was decided in the Communication of *Avocats Sans Frontières v. Burundi*, where the Commission clearly highlighted the accused’s right to ‘present their pleas and indictment during trial’ as well as the ability to ‘reply to the indictment of the public prosecutor.’\(^{191}\) As a result, the African Charter provides the accused with a right to comment and challenge the submissions of the prosecution, even if the wording of adversarial proceedings has not been used by the Commission or the Court to date.

### 3.2 Disclosure of evidence at pre-trial and trial stage

The fundamental source of any disclosure claim at pre-trial stage is Article 6 of the African Charter. Similar to other human rights conventions, it provides the right to liberty and security for every individual. In order to deduce a concrete claim for the disclosure of evidence, however, it is necessary to have a deeper look into the legislative apparatus of the Banjul Charter, *i.e.* the Principles and Guidelines of the African Commission. These provisions refer to arrest and detention under letter M, and 2 (h) entitles any person who has been arrested or detained to be ‘subject to the effective control of a judicial authority.’ Furthermore, police authorities are required to inform

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\(^{187}\) Art. 3 ACHPR.
\(^{188}\) Art. 2 ACHPR.
\(^{189}\) Ouguergouz, referring to Communication 71/92 (a case concerning mass expulsion) highlights the connection of the right to equality before the law and the right to a fair trial. Whether or not this provides an answer as to the question of the nature of equality of arms’ remains questionable. OUGUERGOUZ (n 185) 88.
\(^{190}\) Litera N 6 (b) of the Guidelines.
the judiciary of arrests and detentions in order to prevent so-called arbitrary arrests or disappearances.\textsuperscript{192} In the Communication of \textit{Liesbeth Zegveld}, the Commission stressed that the ‘lawfulness and necessity of holding someone in custody must be determined by a court or [by any] other appropriate judicial authority.’\textsuperscript{193} As a result, the detainee’s rights to have his or her case heard at pre-trial stage can definitively be affirmed. To what extent the disclosure of evidence is guaranteed will be assessed in the following paragraphs.

In order to prepare an appropriate defence at pre-trial level, it is first of all necessary for the authorities to inform the detainee of the charges against him in a language that he is able to understand.\textsuperscript{194} Implicit in this thesis is the assumption that so-called \textit{incommunicado} detentions are a clear breach of the right to a fair trial. This refers especially to the Communication of \textit{Article 19 v. Eritrea}, where journalists had been detained for more than three years without having had the opportunity of recourse to a trial.\textsuperscript{195} In the latter case, the African Commission specifically reiterated a decision made by the UN Human Rights Committee which held that ‘a state party to the Covenant, regardless of its level of development, must meet certain minimum standards regarding conditions of detention.’\textsuperscript{196} Furthermore, national laws which allow detentions up to three months without bringing a charge have been declared illegal by the African Commission.\textsuperscript{197}

Returning to the disclosure of evidence at pre-trial stage, it needs to be mentioned that the information of the charges is only a first step for the preparation of the defence, and that it still does not engage in the limitation debate of the disclosure of evidence at the pre-trial stage. The previous assessment of the ICCPR has shown that the right to defence includes having ‘adequate facilities for the preparation of his defence,’ \textit{i.e.} access to documents and other evidence.\textsuperscript{198} A similar right is embedded in letter N 3 (c) of the African Commission’s Principles and Guidelines. It ensures the accused a right ‘to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case.’ This was confirmed in the Commission’s Communication of \textit{William A. Courson}, in which the African Commission of Human Rights fleshed out the right to disclosure. According to

\begin{itemize}
\item \textsuperscript{192} \textit{Littera M} 2 (h) of the Guidelines.
\item \textsuperscript{193} \textit{AfComHPR}, Communication No. 250/02, \textit{Liesbeth Zegveld and Mussie Ephrem v. Eritrea}, para 56.
\item \textsuperscript{194} \textit{Littera M} (2) (a) of the Guidelines.
\item \textsuperscript{195} \textit{AfComHPR}, Communication No. 275/2003, \textit{Article 19 v. Eritrea}, para 76.
\item \textsuperscript{196} \textit{Ibid}, para 90; \textit{HRC Communication No. 458/1991, Womah Mukong v. Cameroon}, para. 9.3.
\item \textsuperscript{197} \textit{AfComHPR}, Communication nos. 137/94, 139/94, 154/96 and 161/97, \textit{International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria}, paras 83, 118.
\item \textsuperscript{198} \textit{HRC}, UN Doc. CCPR/C/62, at para 33.
\end{itemize}
the Commission, the right to defence included the right to be informed of the charges on
the one hand, and to obtain the evidence of the mentioned charges on the other.\textsuperscript{199} In
addition, the Commission recalled that the right to defence was not only exercised
during the trial stage but also during detention.\textsuperscript{200} As a result, one can determine that the
obligation to disclose evidence does not only apply at the trial stage related to Article 7
of the African Charter, but also at the pre-trial level under the auspices of Article 6.
Similar to the case law of the European Court of Human Rights, which required
conformity of fair trial rights at pre-trial as well as trial stage ‘to the largest extent
possible,’\textsuperscript{201} the African Convention guarantees the disclosure of evidence at the pre-
trial level. Due to the limited volume of Communications, however, it is hard to provide
a final conclusion on how strict these disclosure issues would finally be dealt with in
practise.

Having clarified the issue of disclosure at the pre-trial level, it is now time to
scrutinize the conditions and restrictions for the disclosure of evidence at the trial stage.
As mentioned in the previous paragraphs, a relatively solid legal base for the disclosure
of evidence can be found in the Letters I (d) and N 3 (c) of the Fair Trial Guidelines.
The first provision requires the independence of lawyers and mentions the duty of the
competent authorities to ensure the lawyer’s ‘access to appropriate information, files
and documents.’\textsuperscript{202} The second one, letter N 3 (c), guarantees the accused ‘adequate
time for the preparation of a defence appropriate to the nature of the proceedings and
the factual circumstances of the case.’\textsuperscript{203} Furthermore, the question of whether or not a
defendant had adequate time to prepare his or her case depends, \textit{inter alia}, on the
defendant’s access to evidence.\textsuperscript{204} As one can see, the legal framework of the African
Human Rights jurisdiction provides a right to disclosure of evidence. This has been
confirmed in the Communication of \textit{William A. Courson} in which the Commission
reiterated that it was necessary to provide the defence with the ‘evidence of the
charges.’\textsuperscript{205} It needs to be stressed that any actions such as intimidating lawyers or any
refusal of the assistance of a lawyer represent clear breaches of the rights of the
accused.\textsuperscript{206}

\textsuperscript{199} AfComHPR, Communication No. 144/95, \textit{William A. Courson v. Equatorial Guinea}, para 21.
\textsuperscript{200} \textit{Ibid}, para 22.
\textsuperscript{201} See Chapter 2, p. 38.
\textsuperscript{202} \textit{Littera} I (d) of the Guidelines.
\textsuperscript{203} \textit{Littera} N 3 (c) of the Guidelines.
\textsuperscript{204} \textit{Ibid}.
\textsuperscript{205} AfComHPR, Communication No. 144/95, \textit{William A. Courson v. Equatorial Guinea}, para 21.
\textsuperscript{206} AfComHPR, Communication No. 87/93, The Constitutional Rights Project (on behalf of Zamani Lakwot and Others) \textit{v. Nigeria},
para 12; Communication Nos. 222/98 and 229/99, Law Office of Ghazi Suleiman \textit{v. Sudan} (I), paras 49, 60.
The obligation to disclose evidence, however, may be subject to restrictions under exceptional circumstances. Interestingly, the Principles and Guidelines do not mention any such exemptions under the section which refers to ‘adequate time and facilities.’ Rather, they are addressed under the ‘rights during the trial,’ especially where the right to confrontation is explained. Since there are no cases available similar to the European examples of Fitt, Jasper or Rowe and Davis, it is problematic to demonstrate any possible restrictions to the disclosure of evidence decided by the African Court or the African Commission. Thus, it is difficult to draw any conclusions as to the circumstances under which the right to disclosure of evidence can be restricted due to a lack of relevant data. On the other hand, the assessment of the African Charter, including its secondary legislation and the decisions of the African Commission, did not reveal anything which was contrary to the disclosure requirements applied by other regional human rights bodies. As a result, the basic framework regarding the disclosure of evidence of the African Court rests in the same intersection as the framework of the ECtHR, the HRC, the IACtHR and the IACOMHR.

### 3.3 Confrontation and the right to call defence witnesses

Similar to the disclosure of evidence, the right to confrontation is not explicitly mentioned in Article 7 of the Banjul Charter. However, it can be found in Article 2 (e) (iii) of the ‘Resolution on the Right to Recourse and Fair Trial’ and in the Principles and Guidelines under letter N 6 (f). The wording is almost identical as in other regional human rights conventions and guarantees the accused a right to ‘examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.’ In conformity with the legal apparatus of the other regional human rights bodies, the African legal frame acknowledges a limitation of the right to confrontation in certain cases. For example, Letter N 6 (f) (ii) of the Guidelines suggests that the ‘accused’s right to examine witnesses’ is not unlimited. It enables the restriction of the right to confrontation ‘to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth.’ This is known from the HRC’s Communication of Khuseynova and Tutaeva, where the Committee highlighted the importance of the witness to be of relevance for the defence by providing relevant information.

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207 Littera N 3 of the Guidelines.
208 Littera N 6 of the Guidelines.
209 Littera N 6 (f) of the Guidelines.
210 Littera N 6 (f) (ii) of the Guidelines.
Whether or not the evidence finally was admissible, however, was generally subject to the national courts, unless the choice of witnesses was clearly arbitrary.212 Similar decisions were held by the ECtHR.213

As previously mentioned, there may be several reasons why a witness cannot be present at trial. Therefore, the case law of the ECtHR has developed a doctrinal approach evaluating a ‘good reason’ for the non-attendance or the ‘necessity’ of the restriction by taking into account counterbalancing factors. To this end, it is now useful to compare the African legal apparatus with the respective case law of its human rights counterparts. What cannot be found in letter N 6 (f) of the Guidelines, for instance, is the obligation of a state party to prove their efforts to bring about a confrontation if a witness is not available for the trial. On the other hand, letter N 6 (f) (iii) leaves the opportunity to limit the right to confrontation if a witness ‘fears reprisal by the defendant.’ Looking at the case law of the ECtHR, it can be held that there is common agreement to restrict the right to confrontation in such cases.214 The latter issue was also familiar with the Inter-American Commission, which dealt with threats to witnesses in their reports on Colombia.215 As a result, there is common agreement that the right to confrontation should be waived when the lives of witnesses are endangered by the accused or those acting on his behalf.

Furthermore, it appears interesting that the European Court of Human Rights saw no violation of the right to confrontation in cases where the witness was subject to confrontation at the pre-trial, but not at the trial stage.216 The Principles and Guidelines of the African Commission, on the other hand, reassure the defendant the right to cross-examine witnesses exactly the other way round: They guarantee to examine the witness at the trial stage, ‘if national law does not permit for this opportunity at the pre-trial stage.’217 In any case, the latter may imply that the African jurisdiction, similar to the European, affirms a distinction between whether confrontation was able at some stage of the proceedings or whether no confrontation took place at all. In addition, Letter N 6 (f) (v) allows restrictions to the right to confrontation if ‘victims of sexual violence’ or ‘child witnesses’ are concerned. At the same time, the provision requires that the defendant’s right to a fair trial needs to be taken into consideration. Looking at this

212 Ibid.
213 See e.g. ECtHR, A.L. v. Finland, no. 23220/04, 27 January 2009, § 37.
214 ECtHR, Al-Khawaja and Tahery v. UK [GC], nos. 26766/05, 22228/06, 15 December 2011, § 123.
216 ECtHR, Melinkov v. Russia, no. 23610/03, 14 January 2010, § 69.
217 Littera N 6 (f) (v) of the Guidelines.
structure, it reminds of the issues concerned in the European cases of *Biritus and Others* or *Van Mechelen*, which concerned the correct choice of means taken by the authorities. As the thesis has revealed in Chapter 2, an important element for the defence is to observe the ‘demeanour of the witness’ during his or her examination and, thus, a communication via sound link was considered as a violation in *Van Mechelen*. Moreover, the provisions of Letter 6 (f) (v) and (vi) seem to be strongly linked. The latter contains an opportunity to allow for ‘anonymous witnesses’ in exceptional circumstances during the trial and requires the ‘consideration of the nature of the offence’ on the one hand, and the ‘protection of the witness’ on the other. Finally, the outcome should serve the ‘interest of justice.’ Again, this reflects strongly on issues of necessity and counterbalance, but only in cases where the witness is or was present at the trial—irrespective whether or not anonymous.

What the Principles and Guidelines do not touch upon, however, are abstract scenarios in which the witness is not be able to testify at any stage of the proceedings. This has led to the ‘sole or decisive’ rule at the ECtHR and, in the Grand Chamber judgment of *Al-Khawaja and Tahery*, to its more flexible application. As regards the African jurisdiction, there is no data available due to a lack of Communications or cases. Therefore, it can be held that there are basic elements of conformity between the African legal provisions and the other regional human rights institutions scrutinized in Chapters 2 and 3. The amount of cases, however, is not commensurable with the amount of cases of the European Court of Human Rights.

**3.4 Discussion**

With regards to the disclosure of evidence, a general obligation for disclosure has been affirmed by all four acting human rights bodies so far: ECtHR, HRC, the Inter-American and the African human rights institutions. In addition, there is common agreement that, in some cases, a restriction of the disclosure or the right to confrontation is not incompatible with the right to a fair trial *per se*. Regarding the depth of argument, however, one must admit that due to the lesser volume of cases, the explanations for eventual limitations on the right to disclosure and confrontation were, in the African jurisdiction as well as in the Inter-American jurisdiction, not discussed as explicitly as at the European Court of Human Rights. As a consequence, it is a matter of fact that the

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case law of the European Court of Human Rights contains more doctrinal nuances than the African or the Inter-American data. This became evident in all three categories: disclosure of evidence at the pre-trial stage, trial stage and the right to confrontation. Therefore, it is reasonable to take the decisions of the European Court of Human Rights as the major benchmark for the comparison with the ICC.

On the other hand, the data researched shows no inclination that the African Court could vote against a strict application of the disclosure of evidence at pre-trial stage, especially due to the Commission’s Communication of William A. Coursen. The latter communication clearly affirmed an obligation for the state parties to disclose evidence to the accused during detention. Regarding the disclosure of evidence at trial stage, it is difficult to draw any concrete conclusions due to a lack of relevant data. As a result, it is hard to predict whether or not the African Court or the African Commission would allow for ex parte hearings, in which a judge decides on the non-disclosure in the absence of the defence.

The assessment of the right to have witnesses examined has revealed that there are similarities under which the right to confrontation can be limited, especially in the area of sexual offences or offences in which children or adolescents are concerned. Furthermore, the African Guidelines may waive the right to confrontation in cases where the accused threatens witnesses. What will become an interesting part in the future is to see whether or not the African doctrine will distinguish between the possibility of confrontation at some stage of the proceedings or no confrontation. Regarding the ‘sole or decisive’ rule, there is no data available which can be commensurated with the ECtHR or the Inter-American Court. As a result, it can be held that the basic framework regarding the right to confrontation of the ECtHR, the Inter-American jurisdiction and the African jurisdiction rest in the same intersection and depict some kind of mirror image. Doctrinal nuances, on the other hand, are unfortunately not available at present. As a result, the major setting for the comparison with the International Criminal Court will be taken from case law of the European Court of Human Rights.
Figure 3.1: Primary and partly secondary legislation of the human rights conventions

<table>
<thead>
<tr>
<th>Conventions</th>
<th>ECHR</th>
<th>ICCPR</th>
<th>ACHR</th>
<th>AfCHPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>• disclosure of evidence (pre-trial stage)</td>
<td>Art. 5 (4) “[…] to take proceedings by which the lawfulness of his detention shall be decided […]” Right to information: Art. 5 (2)</td>
<td>Art. 9 (4) “[…] request a decision on the lawfulness of his or her detention.” Right to information: Art. 9 (2)</td>
<td>Art. 7 (6) “[…] in order that the court may decide […] on the lawfulness of his arrest or detention.” Right to information: Art. 7 (4)</td>
<td>Art. 6 “[…] No one may be deprived of his freedom except for reasons and conditions laid down by law […].” 250/02 Liesbeth Zegveld: “the right to defense is exercised not only during trial but also during detention.”</td>
</tr>
<tr>
<td>• equality of arms</td>
<td>Equality of arms not explicitly mentioned, emerged out of the case-law, e.g. Bulut v. Austria</td>
<td>Equality of arms not explicitly mentioned, emerged out of the case-law and out of Art. 14(1) “fair hearing” and equality before the courts.</td>
<td>Equality of arms not explicitly mentioned, emerged out of the case-law.</td>
<td>Equality of arms not explicitly mentioned in Charter but equality of arms is specified in the Guidelines Art. 7 (1) - para (1) comprises guarantees from (a) to (d)</td>
</tr>
<tr>
<td>• disclosure of evidence (trial stage)</td>
<td>Art. 6 (1) and (3) – para (3) contains so-called ‘minimum rights.’ Disclosure of evidence is derived from Art. 6 (3) (b) “adequate facilities for the preparation of the defence” Distinction of minimum rights between criminal cases and cases of other nature</td>
<td>Art. 14 (1) and (3) – para (3) contains so-called ‘minimum guarantees’ Disclosure of evidence is derived from Art. 14 (3) (b) “adequate facilities for the preparation of the defence”</td>
<td>Art. 8 (1) and (2) – para (2) contains the so-called ‘minimum guarantees’ Disclosure of evidence is derived from Art. 8 (2) (c) “adequate time and means for the preparation of his defence” Minimum guarantees can be applied in cases of any other nature as well</td>
<td>Disclosure of evidence is derived from Commission Resolution ACHPR/RES.4(XI)1992 Art. 2 (e) i) “adequate time and facilities for the preparation of their defence” Guidelines lit N 3 (c)</td>
</tr>
<tr>
<td>The right to confrontation</td>
<td>Art. 6 (3) (d) “[…] to examine or have examined witnesses […]”</td>
<td>Art. 14 (3) (e) “[…] to examine or have examined witnesses […]”</td>
<td>Art. 8 (2) (f) “[…] to examine witnesses present in court […]”</td>
<td>Art. 7 (1) in conjunction with the Guidelines lit N 6 (f) “[…] to examine witnesses present in court […]”</td>
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### Figure 3.2: Fundamental cases and Committee/Commission decisions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>ECtHR</th>
<th>HRC</th>
<th>IACtHR and IACHR</th>
<th>AfCtHPR and AfCHPR</th>
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<tr>
<td></td>
<td>Bulut v. Austria [1996] (criminal)</td>
<td>-</td>
<td>19 Merchants v. Colombia [2002]</td>
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<td></td>
<td>Gorraiz Lizarra and Others v. Spain [2004] (administrative)</td>
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<td><strong>right to adversarial proceedings</strong></td>
<td>Sanchez-Reisse v. Switzerland [1986]</td>
<td>-</td>
<td>Heliodoro Portugal v. Panama, 12 August [2008]</td>
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<td>Brandstetter v. Austria [1991]</td>
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<td>Belziak v. Poland [1998]</td>
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<td>General obligation to disclose:</td>
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<td>Limitation:</td>
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<td>Fitt v. UK [GC] [2000]</td>
<td>Abuessedra v. Lybia [2010]</td>
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<td>Jasper v. UK [GC] [2000]</td>
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<td>Rowe and Davis v. UK [GC] [2000]</td>
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<td>Natunen v. Finland [2009]</td>
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<td><strong>disclosure of evidence (trial stage)</strong></td>
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<td></td>
<td>Lucà v. Italy [2001]</td>
<td>Abuessedra v. Lybia [2010]</td>
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<td>Al-Khawaja and Tahery v. UK [GC] [2011]</td>
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<td><strong>confrontation</strong></td>
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<td>Litvin v. Ukraine [2011]</td>
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<td><strong>information</strong></td>
<td>Limitation:</td>
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<td>General obligation to disclose:</td>
<td>General obligation to disclose:</td>
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<td>Liesbeth Zegveld and Mussie Ephrem v. Eritrea [2003]</td>
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<td>William A. Courson v. Equatorial Guinea [1997]</td>
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<td>‘Adequate time and facilities’:</td>
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<td>Littera N 6 (i) of the Guidelines</td>
<td>Littera N 6 (i) of the Guidelines</td>
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Figure 3.3: Quantitative side information providing an indication on doctrinal nuances

![Bar chart showing disclosure, witness examination, and no contradiction across ECtHR, HRC, IACtHR and IAComHR, and AfCTHPR and AfComHPR.](image)
Chapter 4: Fair trial guarantees at the two UN *ad hoc* tribunals

**Article 21 ICTY Statute (Rights of the Accused)**

All persons shall be equal before the International Tribunal.  
1. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.  
2. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.  
3. 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:  
   (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 and to communicate with counsel of his own choosing;  
   (c) to be tried without undue delay;  
   (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;  
   (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;  
   (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;  
   (g) not to be compelled to testify against himself or to confess guilt.

**Article 20 ICTR Statute (Rights of the Accused)**

1. All persons shall be equal before the International Tribunal for Rwanda.  
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.  
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.  
4. 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:  
   (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;  
   (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;  
   (c) To be tried without undue delay;  
   (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does
not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
(g) Not to be compelled to testify against himself or herself or to confess guilt.

1. Introduction

Chapter 4 will scrutinize the two UN ad hoc tribunals and their case law germane to the disclosure of evidence and the right to have witnesses examined. I also intend to address a further issue relating to the principle of equality of arms which often bears some ambiguity in its application to the case law at the ad hoc tribunals. Both courts offer a significant amount of jurisprudence and other relevant data which is useful for the thesis’ argument at a later stage. As a result, Chapter 4 represents an important complement for the assessment of the question of fairness. This chapter endeavours not to depict all of the technical details listed in the RPE of the respective statutes; this has been done previously by a large number of scholars.1 Rather, Chapter 4 explores the proposition that equality of arms may not be the solution required to solve the crucial question of fairness in international criminal courts. Consequently, this chapter will examine an alternative proposition that the disclosure of evidence and the investigative procedures are crucial parts in establishing the concept of fairness. At first glance, it may seem strange to suggest that investigative procedures have a crucial role in determining fairness, but I would contend that even the best regime on disclosure can fall short if there is no obligation for the Prosecutor to actively search exonerating evidence. Therefore, at least to some extent, the disclosure regime and the investigative procedure can be said to be complementary. As a general rule, and because of administrative restriction, this research cannot particularly focus on the STL and the Special Court of Sierra Leone. However, if references to these special courts may be of benefit, they will be addressed within the constraints of this chapter.

1.1 Equality of arms

Neither the statutes of the two ad hoc tribunals nor their RPE explicitly mention the principle of equality of arms. Similar to the regional human rights conventions, the principle emerged through case law over the years. One could say that the UN tribunals imported this principle from regional human rights courts and finally implemented it into their own court procedures. The Appeals Chamber of the ICTR saw the roots of equality of arms in Article 20 of its Statute; it especially referred to section 2, where a ‘fair and public hearing’ is required. Furthermore, it stated section 4, which provides ‘minimum guarantees in full equality’ for the accused. The ICTY incorporated the rights of the accused in Article 21 of its Statute and due to the same wording, the respective sections concerning equality of arms can be found in section (2) and (4). With regard to the adoption of the principle from regional human rights courts, the Tadić case clearly shows that the ICTY cited cases from the European Court of Human Rights in order to decide on the scope of the application of equality of arms. To this end, the Appeals Chamber came to the conclusion that equality of arms ‘obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.’ At the same time, the Appeals Chamber pointed to the dependence on state cooperation of international criminal tribunals with regard to the collection of evidence on the one hand and the lack of means of enforcement in international criminal law on the other. This is why it finally suggested a ‘more liberal interpretation’ of the principle of equality of arms ‘than that normally upheld with regard to proceedings before domestic courts.’ Whatever the definition of such a ‘liberal interpretation’ may be, the approach itself has been considered as ‘dangerous’ by Caroline Buisman.

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2 According to Prof. Schabas, ‘equality of arms is an expression taken from the European human rights law that has been adopted and endorsed by the tribunals to refer to a range of fair trial right[s].’ See: SCHABAS, W.A. 2006. The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone. CUP, p. 513. See also: ICTY, Prosecutor v. Delalić et al., IT-96-21, TC, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” through to “M”, 28 April 1997, para 27. The Trial Chamber’s one-off view in the so-called ‘Tadić protective measures decision’ has been superseded; see: ZAHAR, A. and SLUITER, G. 2008. International Criminal Law – A Critical Introduction. OUP, pp. 278-279.


4 Ibid.


8 Ibid. In fact, the Trial Chamber stated in one of its decisions that ‘the International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.’ ICTY, Prosecutor v. Tadić, IT-94-1, TC, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para 28.

9 An idea of what is implied into this so-called ‘liberal approach’ regarding equality of arms and the inadequate preparation of the trial was established in FEDOROVA (n 1) 445.
because ‘it may justify unacceptable restrictions on the principle of equality of arms.’

The scope of the principle has been of much scholarly debate and Fedorova concluded that the “possibility of a more ‘liberal’ interpretation” of equality of arms “has provided an open-ended notion to incorporate the contextual peculiarities of the ad hoc tribunals.”

Nonetheless, the ad hoc tribunals have set up some clear lines where a violation of the equality of arms principle can be invoked. One of these thresholds is the utilisation of financial resources which are put at the disposal of each trial party. In the Kayishema and Ruzindana case, for example, the defence complained that the Prosecutor visited sites in Rwanda and adduced evidence, whereas the defence counsel did not—at least not in person—have this opportunity. The Appeals Chamber, confirming the judgment of the Trial Chamber, rejected the alleged violation by stating that

[[the mere fact of not being able to [personally] travel to Rwanda is not sufficient to establish inequality of arms between the Prosecution and the Defence. Investigators, paid by the Tribunal, were put at the disposal of the Defence and the Trial Chamber was satisfied that “all the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case.”]

As a result, the utilisation of the resources was not a matter of the Trial Chamber. As one can see, equality of arms cannot be invoked in cases where the ‘necessary provisions for the preparation of a comprehensive defence were available and were afforded’ to the Defence Counsel of the case. There remains, however, a bitter taste in this judgment: the Appeals Chamber simultaneously held that ‘equality of arms between the defence and the prosecution does not necessarily amount to the material equality possessing the same financial and/or personal resources.’ Whereas the author agrees with the Appeals Chamber that the adequate usage of financial resources is the responsibility of each trial party, the fact that an inherent inequality with regards to

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12 FEDOROVA (n 1) 441. Regarding the interpretation of equality of arms in International Criminal Courts: pp. 440-444.
14 Ibid.
16 Ibid.
financial resources is pre-supposed by the *ad hoc* tribunals may raise questions concerning the overall fairness of the procedures at a later stage.

A further threshold for invoking the principle of equality of arms was held in *Kordić and Čerkez*, a case in which Mario Čerkez sought an order to extend his time for a reply to the prosecution. His argument was that he was entitled to such an extension not only because he needed it, but also due to the principle of equality of arms *per se*.18 The Appeals Chamber, on the other hand, was of the opinion that the accused had ‘wholly misconceived’ the application of the principle in this context.19 Confirming that the notion of equality of arms enjoys a liberal interpretation, it stressed that it is meant ‘to give each party equal access to the process of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.’20 Hence, even if the Rules enabled both parties to apply for such a relief,21 the wording ‘needed’ implied that it was necessary to show ‘good cause’ by the applying party in order to be granted such a relief.22 This latter obligation of showing ‘good cause’ was, in turn, placed upon both trial parties equally—prosecution and defence.23 As a result, the mere fact that the prosecution had been granted a relief under Rule 127 did not automatically result in a similar extension for the defence. Rather, it would have been necessary for the defence to show ‘good cause’ and argue why it needed such an extension.24 Therefore, Čerkez’s claim was finally rejected.25

At first glance, it seems that the *ad hoc* tribunals applied the principle of equality of arms with determination and consistency. However, the years between 1996 and 1999 have shown that there were some differences concerning the balance of equality of arms. For example, in 1996, the Trial Chamber rejected a motion from the prosecution aimed at the disclosure of certain defence witness statements.26 According to Judge Vohrah—reiterating that the Court was ‘not bound by [any] national rules of evidence’—the Trial Chamber had conducted the proceedings of the trial ‘largely in [an] adversarial nature’ so far.27 In order to maintain consistency he finally accepted the

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21 ICTY, Rule 127 of the RPE requires a motion to show ‘good cause.’
23 *Ibid*.
24 *Ibid*, para 8; see also Rule 127.
defence’s argument of relying on the adversarial nature of the trial proceedings, especially regarding the question of which witnesses were to be called by the defence. The defence argued that if it had been ‘intimated in advance that prior witness statements of its witnesses would have to be disclosed, it would have taken this requirement into consideration in deciding which witnesses to call.’

In the end, the Judges Stephen and Vohrah voted for a non-disclosure of these witness statements to the prosecution. This decision, however, was not followed by future Trial Chamber decisions, especially in the cases of Delalić et al. and Aleksovski.

In the case of Delalić et al., the prosecution sought the submission of a list containing names of defence witnesses, who were ‘intended to be called at the trial.’

Due to a lacuna in the RPE, i.e. since there were no clear instructions on how the issue of reciprocal disclosure had to be dealt with after the trial had commenced, the Trial Chamber scrutinized the principle of equality of arms. The Chamber did not agree with the argument of the defence that granting the application would assist the prosecution. Rather, it stated that

[procedural equality means what it says, equality between the Prosecution and the Defence. […] 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.]

Consequently, the Trial Chamber ordered the defence to provide the prosecution with the names of the witnesses. A similar decision was held in Aleksovski where the Appeals Chamber concluded that it was ‘difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution.’

As a result, the application of the principle was neither in favour of one side or the

28 Ibid.
29 Judge Vohrah proffered further arguments to strengthen his decision.
32 ICTY, The Prosecutor v. Delalić et al., TC, Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para 47.
33 Regarding a far more general discussion about gaps in international law see: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 6 July 1996, Dissenting Opinion of Judge Shahabuddeen, p. 167 ‘there is no non liquet’; cited in: SAFFERLING et al. (n 1) 113.
34 ICTY, The Prosecutor v. Delalić et al., TC, Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para 47.
35 Ibid, para 49.
36 Ibid, para 50.
other, revealing that the actual practise reflected the notion in its original meaning.\textsuperscript{38} This does not mean, however, that the author agrees with the proposition that there should be something like a prosecutorial notion of a right to a fair trial—a kind of \textit{primus inter pares} approach. In other words, it needs to be stressed that the equal application of the principle of equality of arms depicts one thing, whereas the right to a fair trial for the Prosecutor is to be regarded as something different.\textsuperscript{39}

In the meantime, the ICTR had to interpret equality of arms within its Statute and its RPE in the case of \textit{Bagosora et al}. In this litigation, the prosecution sought to appeal the dismissal of an indictment which was ordered by the designated judge.\textsuperscript{40} The decisive question was whether or not the dismissal of an indictment under Rule 47 would allow for an appeal in the meaning of Article 24 of the ICTR Statute, guaranteeing appellate proceedings under certain circumstances.\textsuperscript{41} Basically, an appeal for accused people in terms of Article 24 is only possible if they have already been convicted; hence the accused does not have any opportunity to appeal his or her indictment. Therefore, the Appeals Chamber saw a disadvantage for the defence if the prosecution were granted an appeal at a stage, where the accused would have no such opportunity.\textsuperscript{42} The judges described it as an ‘unfettered right of appeal’ for the Prosecutor ‘while that of the accused is limited,’ which would finally lead to a violation of the principle of equality of arms.\textsuperscript{43} Therefore, the Appeals Chamber rejected the Prosecutor’s proposition of a broad interpretation of Article 24.\textsuperscript{44} The author can definitively see the point of the Appeals Chamber in rendering this decision. In addition, it is suggested that the origins of the dispute in this case probably resulted from an ambiguous wording of Article 24.

Due to the large amount of cases concerning equality of arms at the \textit{ad hoc} tribunals, it is impossible to address each and every single decision within the

\textsuperscript{38} Original meaning refers to the definitions provided by regional human rights courts such as the ECHR, where it was explicitly mentioned that ‘each party must be afforded a reasonable opportunity to present his case […]’. See e.g.: Bulut v. Austria, no. 17358/90, 22 February 1996, § 46.

\textsuperscript{39} In the case of \textit{Karemera et al.}, TC III confirmed that ‘the right to a fair trial applies both to the Defence and the Prosecution.’ See: ICTR, \textit{Prosecutor v. Karemera et al.}, ICTR-98-44-PT, TC III, Decision on Severance of André Rwamakara and Amendments to the Indictment, 7 December 2004, para 26; \textit{see also: ICTY, Prosecutor v. Aleksovski, IT-95-14/1, AC, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para 25. On the other hand, McDermott argues that the accused ‘ought to be regarded as the only actor that holds enforceable rights’ and forewarns of the risks to guarantee the prosecutor a fair trial. See: McDERMOTT, Y. 2013. Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law. In: Schabas, W.A., McDermott, Y. and Hayes, N. (eds.) \textit{The Ashgate Research Companion to International Criminal Law}. Ashgate Publishing Ltd., pp. 165-172.


\textsuperscript{41} Article 24 states ‘the Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor if there is (a) An error on a question of law invalidating the decision; or (b) An error of fact which has occasioned a miscarriage of justice. Furthermore, the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.’


\textsuperscript{43} \textit{Ibid}.

\textsuperscript{44} \textit{Ibid}, para 42.
framework of this thesis. The selected ones, however, can shed light on the question whether equality of arms has been applied in accordance with the results established in Chapters 2 and 3. In addition, it will be interesting to find out whether or not the ICTY and the ICTR have drawn a clearer line between certain elements which are specifically associated with equality of arms or with the right to a fair trial in general. Within this context, it is necessary to mention one of the Appeals Chamber’s decisions held in the case of Naser Orić. Here, the question at stake concerned the extent to which the number of witnesses to be called by the defence could be restricted and how much time should be allocated to the defence in order to present its evidence.\textsuperscript{45} Determining that procedural equity does not necessarily entitle the accused to have ‘precisely the same amount of time or the same number of witnesses as the Prosecution,’\textsuperscript{46} the Appeals Chamber concluded that a principle of basic proportionality, which is not a strict principle of mathematical equality, ‘generally governs the relationship between the time and witnesses allocated to the two sides.’\textsuperscript{47} In addition, the Appeals Chamber encouraged the Trial Chamber to also ‘consider whether the amount of time is objectively adequate to permit the Accused’ a continuation of his case ‘in a manner consistent with his rights.’\textsuperscript{48} Interestingly, the Appeals Chamber nonetheless carried out a calculation and hence used mathematics in order to evaluate whether the relationship between the time and the witnesses allocated to the defence was proportionate. Finally, a rough approximation decided that the defence had disproportionally been disadvantaged and therefore, the decision of the Trial Chamber was reversed.\textsuperscript{49} The implications of this Appeals Chamber decision will be discussed under point 1.3 because the Orić decision seems to have triggered different ways of interpretation of the principle of equality of arms.

1.2 The practical application of equality of arms at the early stages

Looking at the aforementioned, one might reach the conclusion that there have been practical inconsistencies in the application of equality of arms. If one, however, scrutinizes the circumstances of the quite different cases, one might even come to the conclusion that the latter was actually not the case. Was the practical application of the notion of equality of arms really that inconsistent? The answer is no. Starting with the concurring opinion of Judge Vohrah, there were good reasons why he provided such a

\textsuperscript{46} Ibid, para 7.
\textsuperscript{47} Ibid, para 8.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid, para 11.
Most likely, the motive behind his decision in the very specific case was the intention to ascertain consistency in the trial proceedings. As explained, the defence—and probably he himself—proceeded from the assumption that the ICTY would follow an adversarial model of trial procedures. This, however, turned out to be a misconception and, finally, the Trial Chamber rejected this approach in later cases. But even if Judge Vohrah’s decision did turn out to be a misinterpretation of which model of trial procedures would be followed at the ICTY, it is clear from his reasoning why he voted for a non-disclosure for the prosecution. In 1996, the procedural details of the ICTY Statute and its RPE were neither as clear cut as they are today, nor was the case law as developed. Hence, the judiciary needed to become inured to a court procedure which was different from their domestic ones. Some scholars even alleged that Judge Vohrah’s opinion was simply misinterpreted.50

At a later stage, the cases of Delalić et al. and Aleksovski have shown that equality of arms should not be applied in favour of one or the other party which is in accordance with the findings of Chapters 2 and 3, namely that ‘each trial party must be afforded a reasonable opportunity to present his cas[e].’ 51 The HRC came to a similar conclusion by using the wording ‘all the parties’ 52 whereas the Inter-American Court stressed the need to avoid any ‘imbalance among the parties.’ 53 In addition, the secondary legislation of the African Court of Human and Peoples’ Rights suggests a ‘procedural equality between the accused and the public prosecutor.’ 54 To return to the jurisdiction of the ad hoc tribunals, the ICTY answered the question one more time in the case of the Prosecutor v. Prlić et al., when the Appeals Chamber held

Indeed, the principle of equality of arms, falling within the fair trial guarantee under the Statute, applies to the Prosecution as well as the Defence. 55

This does not mean that equality of arms cannot have a protective function for the accused in the criminal process as suggested by the scholars May and Wierda. 56 Even if the notion of equality of arms performs with a protective function in one way or the

50 ACKERMAN, J.E. and O’SULLIVAN, E. 2000. Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia. Kluwer Law International, p. 136; see also: BUISMAN in Haveman et al. (n 11) 220. It was alleged that Vohrah said that ‘the principle should be interpreted to favour the defence and the prosecution being equal before the Trial Chamber, not that the principle favours the defence.’
51 ECtHR, Bulat v. Austria, no. 17358/90, 22 February 1996, § 47 (emphasis added).
52 HRC, 90th Session, General Comment No. 32 (23 August 2007) UN Doc. CCPR/C/GC/32, at para 13 referring to Communication No. 1347/2005, Dudko v. Australia, para. 7.4.
53 IACtHR, 19 Merchants v. Colombia, 12 June 2002 (Preliminary Objection), para 28.
54 Littera N 6 (a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.
56 MAY, R. and Wierda, M. (n 1) 753.
other, in the end it applies to both trial parties, prosecution and defence. Looking at the case of Bagosora et al., it can be held that the circumstances appeared to be fairly clear in terms of procedural inequality. If the ICTR’s RPE would have allowed the suspect to appeal an indictment, a similar appeal could have been made by the prosecution in this case. However, since there was no such opportunity for the indicted persons, the Appeals Chamber had to reject the prosecution’s motion in order to maintain the balance of procedural rights. The Human Rights Committee reached a similar conclusion when it stated that ‘there is no equality of arms if, for instance, only the Prosecutor, but not the defendant, is allowed to appeal a certain decision.’

1.3 An authoritative test of proportionality? The ECtHR and the ICTY

Until this point, the practical application of equality of arms did not seem to cause any difficulties. The cases of Kayishema and Ruzindana and Tadić, however, left open questions with regard to the overall fairness of the trial procedure. In the Appeals Chamber judgment of Kayishema and Ruzindana, for example, it was stressed that an imbalance of financial means between the prosecution and the defence would not be contrary to the principle of equality of arms per se. Furthermore, the Appeals Chamber judgment of Tadić is well known for its suggestion of a ‘liberal’ interpretation of equality of arms. Therefore, concerns about the overall fairness of the trial procedures at the ad hoc tribunals will be raised under 1.4 of this chapter. First of all, however, it is necessary to discuss the implications of the Orić decision. The latter seems to have triggered a discussion about so-called authoritative prerequisites for the application of equality of arms. To this end, it will be interesting to scrutinize to what extent the Appeals Chamber in Orić has really suggested such an authoritative, two-folded, test; and does the test explicitly refer to the principle of equality of arms or to the wider concept of the right to a fair trial?

Karnavas and Fedorova have pointed out that the interpretation of equality of arms had been advanced in the Orić case. In detail, Fedorova mentions that the Appeals Chamber of the ICTY added two prerequisites for the interpretation of equality of arms, namely ‘basic proportionality’ and ‘objective adequacy.’ Furthermore, it is alleged that these elements are in line with the definition provided by the ECtHR.

58 FEDOROVA (n 1) 441.
60 FEDOROVA (n 1) 441.
Whereas the author of this thesis does not deny that such a definition has been provided by the ECtHR, it is at least questionable whether the ECtHR formulated such a definition explicitly with regard to equality of arms. Again, it is not denied that a proportionality test with regard to the right to a fair trial has been carried out by the ECtHR, but has it been done whilst scrutinizing the principle of equality of arms? The reason why this question is raised is the fact the ECtHR has never used the term ‘proportionality’ whilst assessing the principle of equality of arms. Indeed, the case law of the European Court of Human Rights clearly revealed that the so-called ‘classic proportionality’ test has only been applied by the ECtHR when rights were concerned; for example, the right of access to a court in the case of Osman v. UK. Whenever the ECtHR scrutinised the principle of equality of arms, on the other hand, it has used a different terminology.

This became clear in a range of cases, in which terms such as ‘limitation,’ ‘necessity’ and ‘counterbalance’ were used instead of ‘proportionality.’ It can only be assumed that the ECtHR, perhaps, distinguished between rights, which are concretely mentioned in Article 6, and the procedural principle of equality of arms. Be that as it may, it is a fact that the European Court of Human Rights offers no cases regarding equality of arms in criminal matters where the term ‘proportionality’ has been mentioned by the Court. As has been set out in Chapter 2, equality of arms has never been considered as a right in the sense of the European Convention, and it has not been mentioned as one of the rights of the accused in the Statutes of the ad hoc tribunals either. Rather, in terms of the ECHR, it has been described as a concept, a principle or a requirement. Trechsel and Summers, for example, do not necessarily consider the principle of equality of arms as a right. Moreover, they deny a connection between

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62 The test requires elements such as a ‘legitimate aim for the restriction’ of a right as well as a reasonable proportionality between the ‘means employed and the aim sought to be achieved.’ ECtHR, Osman v. United Kingdom [GC], no. 87/1997/871/1083, 28 October 1998, § 147.
63 Ibid.
64 See e.g.: ECtHR, Natunen v. Finland, no. 21022/04, 31 March 2009, §§ 39, 40; Edwards and Lewis v. UK [GC], nos. 39647/98 and 40461/98, 27 October 2004, §§ 47, 48; Rowe and Davis v. UK [GC], no. 28901/95, 16 February 2000, §§ 60-62; Jasper v. United Kingdom [GC], no 27052/95, 16 February 2000, §§ 51-53; Al-Khawaja and Tahery v. UK [GC], nos. 26766/05 and 22228/06, 15 December 2011, § 152.
65 Ibid; there was one occasion in the case of Fitt, where the applicant used the words ‘strictly proportionate’ in his submission. This terminology, however, was not overtaken by the Grand Chamber. ECtHR, Fitt v. United Kingdom [GC], no. 29777/96, 15 July 2003, § 38.
66 Chapter 2, p. 43.
67 TRECHSEL, S. 2005. Human Rights in Criminal Proceedings. OUP, p. 97: ‘The Court has not formulated a right to equality of arms, but has used such terms as principle, requirement or concept, or says that there should be equality of arms.’ (quotation marks omitted); SUMMERS, S.J. 2007. Fair Trials – The European Criminal Procedural Tradition and the European Court of Human Rights. Hart Publishing, p. 104: ‘Equality of arms does not guarantee specific rights, such as the right to be heard, but instead it seeks to ensure that these rights are fairly applied.’
equality of arms and the right to non-discrimination. In a similar vein, William Schabas recommends a distinction between equality of arms and equality before the law. As a result, whereas the ECtHR did not use the term ‘proportionality,’ at least not for an assessment of equality of arms, the ICTY mentioned ‘proportionality’ in connection to the ‘relationship between the time and witnesses allocated’ to the prosecution and defence, a matter which the Appeals Chamber also reviewed in connection with equality of arms.

In conclusion, there is a difference between the terminology of the ECtHR and the ICTY with regard to equality of arms. Professor Safferling even goes a step further and considers the principle of equality of arms as being ‘unclear.’ He alleges that the jurisprudence of the ICTY is a ‘good example for the unsuitability of the principle of equal arms for criminal trials’ because it could be used ‘against the interests of the accused in order to enhance the efficiency of the proceeding for the prosecutor.’ Due to the aforementioned vagueness in interpreting the principle of equality of arms, the thesis will scrutinize whether or not there are more solid components in the disclosure of evidence, which can finally be attributed to the term fairness in order to draw a conclusion on procedure in general at a later stage.

1.4 Procedural implications
Having mentioned a bitter taste in the Appeals Chamber judgment of Kayishema and Ruzindana earlier in this Chapter, it is now time to explain where this bitter taste stems from. One aspect raises the question of whether or not equality of arms, which implies procedural equality, should also include a so-called ‘material equality,’ i.e. equal support of financial and/or personal resources. Although there are good reasons for supporting such an argument, and although the two elements are somehow interlinked, this sub-chapter would like to avoid the latter debate. Scholarship has elaborated on this topic for years now, and slightly different conclusions can be found in various academic works. To summarise the problem of equality of arms and the component of financial means very briefly, it can be held that the ICTY was not always coherent in its

68 Ibid (Trechsel) 95; (Summers) 104.
69 SCHABAS (n 2) 511.
71 SAFFERLING et al. (n 1) 414.
72 Ibid.
reasoning why, or why not, equality of arms should include material equality. Therefore, it is hard to find a clear explanation of how the ICTY understands its vague definition of equality of arms, i.e. that ‘nobody should be disadvantaged when presenting its case.’ On the one hand, for example, it was held that equality of arms does not ‘necessarily reflect equality of resources between the prosecution and the defence,’ and on the other, the Trial Chamber argued in Karadžić, in order to prove that equality of arms was generally secured, with a ‘fully funded flexible scheme for the provision of legal aid through counsel and associated staff for indigent accused.’

Leaving the latter dispute open, the thesis wants to explain why this bitter taste could find its roots not only within the principle of equality of arms. Chapters 2 and 3 have revealed that equality of arms is only one feature of the wider concept of a fair trial, irrespective of its importance. As a result, one could also emphasize the term fairness as applied to the overall structure of the trial. The overall structure of the trial plays, inter alia, a role when facts and evidence are adduced and distributed. Furthermore at this stage, it would be interesting to know whether or not the Prosecutor of the ICTY has an obligation to actively search exculpatory evidence. If he or she does not, the next question would be: How does the defence gather its material? Indeed, the hybrid model of the ad hoc tribunals differs from a purely common or civil law system, but looking at it from the human rights perspective, one can still raise the question how the defence can access its exculpatory material. Admittedly, the main focus of this thesis does not lie in the procedures of the ad hoc tribunals. Nonetheless, the alleged structural imbalances may reflect why there is a certain feeling of perceived unfairness. In addition, this short paragraph may portray the improvement regarding procedural safeguards at other international criminal courts, especially at the ICC.

Generally speaking, the problem of the structural differences between prosecution and defence in international criminal proceedings is a well-known phenomenon and it is somehow unavoidable that the prosecution is the first party that starts running in this competition. What one would look for, however, is a mechanism which evens out the delayed start of the defence, reassuring that the general right to a

74 ICTR, Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-A, AC, Judgment, 1 June 2001, para 72. Fedorova correctly pointed out that the ECtHR case of Henrich v. France did not really explain why the Appeals Chamber came to such a conclusion. See: ECtHR, Henrich v. France, no. 13616/88, 22 September 1994, § 56; FEDOROVA (n 1) 308.
76 ZAPPAŁA, S. 2010. The Rights of the Victims v the Rights of the Accused. 8 Journal of International Criminal Justice 137-164, at 149: ‘To consider that equality implies that all parties to the trial must be treated on an equal footing is to misinterpret the requirements of fairness and equality.’
fair trial is still guaranteed. However, the fact that international criminal procedure represents some sort of amalgam between the adversarial and inquisitorial systems makes this, at least theoretically, far from easy. On top of that, the enforcement measures of the international criminal courts are limited by comparison to the ones in national jurisdictions. If that was not enough, Professor Ambos additionally pointed out that, hitherto, this is only the convergence of western legal traditions. Non-western traditions have not even been taken into consideration at this stage. But let us return to the question of the bitter taste and from where it stems.

If one thinks of an imbalance of resources which are related to the financial means for the exploration of evidence, one might end up with two questions. The first one is how the trial parties obtain their evidence within the structural margins of the ad hoc tribunals, and the second evaluates whether or not this how can be considered as fair? Regarding the first question, it can be held that the trial parties are responsible for adducing their evidence on their own and they are equally responsible for building up a case. For instance, there is no such figure as an investigative judge who would compile a so-called dossier for both trial parties. This practice stems from the civil law tradition and, even if not every civil law country interacts with an investigative judge, the Prosecutor has an obligation to investigate for the truth in civil law countries. Since it is not totally clear whether or not the ICTY Prosecutor has such an obligation, the structural distribution of financial resources may play a role in drawing a conclusion as to whether or not the overall trial can be regarded as fair. Therefore, it is worth looking at the decisions dealing with the controversial matter of whether or not the ICTY Prosecutor has an obligation to actively search exculpatory evidence.

If one looks into Article 18 of the ICTY Statute, there is no such explicit obligation for the Prosecutor to seek exculpatory evidence as it can be found in Article

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77 The author stresses the fact that there is no obligation to actively seek exculpatory evidence for the Prosecutor (which is the case in the civil law model). At the same time, the distribution of financial means does not necessarily have to be equal. This can in fact raise questions on the overall fairness of the proceedings.


79 ICTY, Prosecutor v. Blagojević et al., IT-02-60-PT, TC, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para 26: ‘[R]ule 68 is not intended to serve as means through which the Prosecution is forced to replace the Defence in conducting investigations or gathering material that may assist the Defence.’ See also: KARNAVAS in Bohlander (n 59) 79.

80 For example, Germany as a civil law country acts without so-called investigative judges however, the court (i.e. the judges) have an obligation to extend the taking of evidence to all facts in order to establish the truth (so-called Amtsaufklärungspflicht). France, on the other hand, operates with so-called juges d’instruction; under Article 81 of the French Code de Procédure Pénale, these judges have to gather all of the information which may be useful to establish the truth.

81 Gillian Higgins, for example, suggests that there ‘is currently no obligation upon the prosecutor at the ICTY, ICTR or the Special Court to collect exculpatory evidence on behalf of the accused.’ See HIGGINS, G. 2007. Fair and Expeditious Pre-Trial Proceedings. 5 Journal of International Criminal Justice 394-401, at 395.
54 (1) (a) of the Rome Statute.\textsuperscript{82} Admittedly, Rule 68 of the RPE deals with matters of disclosure, especially with exculpatory evidence and other relevant material. However, there is still a difference between whether the prosecution is obliged to seek such evidence by law, and whether Rule 68 is, for instance, only applicable if the Prosecutor has discovered exonerating material coincidentally.\textsuperscript{83} As Karnavas has pointed out

In reality, unless the prosecution at the ICTY or ICTR happens to come by exculpatory evidence, that is, it falls in its lap, it generally makes no effort to search for such evidence – even if it were to become aware of its existence and its value to the fair determination of an issue at trial.\textsuperscript{84}

The latter problem has beleaguered the \textit{ad hoc} tribunals for years and seeking a clear answer may prove futile. In fact, Judge Shahabuddeen has tried to prove the opposite in his partly dissenting opinion in \textit{Milosević}. He highlighted the prosecution’s role of being a ‘minister of justice,’ acting in the interest of the international community.\textsuperscript{85} Moreover, according to the judge, the prosecution should not secure convictions at all costs—and the rules relating to disclosure of exculpatory evidence would show that.\textsuperscript{86}

Similar words were addressed by the Trial Chamber in the case of \textit{Kupreskić},\textsuperscript{87} however, Megan Fairlie considered these words to be no more than an \textit{obiter dictum} which does ‘not reflect the responsibilities of the office of the Prosecutor as delineated in the Tribunal’s rules.’\textsuperscript{88} Her words were supported by Professor Zappalà, who suggested that ‘no appropriate legal framework supported this aspiration,’\textsuperscript{89} meaning that there was no obligation for the Prosecutor to seek exculpatory evidence.\textsuperscript{90}

If one now proceeds from the assumption that there is no obligation for the Prosecutor to seek exculpatory material, and if one accepts the material imbalance between the parties established in the cases of \textit{Kayishema and Ruzinada},\textsuperscript{91} \textit{Nahimana}\textsuperscript{92}

\textsuperscript{82}Article 18 ICTY Statute: ‘The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigation[s].’

\textsuperscript{83}Rules 66 to 70 of the ICTY’s RPE deal with the disclosure obligations of the prosecution.

\textsuperscript{84}KARNAVAS in Bohlander (n 59) 81.

\textsuperscript{85}ICTY, Prosecutor v. Milosević, IT-02-54-AR.73.02, AC, Decision on Admissibility of Prosecution Investigator’s Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, 30 September 2002, para 18. See also: ICTY, Prosecutor v. Blažković, IT-95-14, AC, Decision on the Appellant’s Motions for the Prosecution of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para 32.

\textsuperscript{86}Ibid.

\textsuperscript{87}ICTY, Prosecutor v. Kupreskić et al., IT-95-16-T, TC, Decision on Communications Between the Parties And Their Witnesses, 21 September 1998, para (ii).


\textsuperscript{90}Judge Liu Dacun of the ICTY explained in a hearing to defence counsel Karnavas: ‘Well, Mr Karnavas, you have to understand that the Prosecution has the obligation to disclose any documents which might be favouring to your client. This is what the Rules say. But, on the other hand, [the] Prosecution is \textit{not} the investigators of your team. You have to understand that.’ See: Prosecutor v. Blagojević and Jokić, IT-02-60-T, Court Transcripts, 29 October 2003, Transcript pages 3637-3704, at 3641, lines 9-13.

\textsuperscript{91}ICTR, Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, TC II, Judgment, 21 May 1999, para 69.
or Milutinović,\textsuperscript{93} one might raise the question how it is actually possible for the defence to counter the accusations of the prosecution. Therefore, questions with regard to the overall fairness—whether or not such questions include the issue of equality of arms—could arise.\textsuperscript{94} The reason why this matter has been addressed is not to start a critical debate on the procedures of the \textit{ad hoc} tribunals.\textsuperscript{95} Rather, it is to explain that this bitter taste seems to have disappeared in the court procedure of the ICC on first sight. As mentioned above, Article 54 (1) (a) of the Rome Statute requires the Prosecutor to investigate ‘incriminating and exonerating circumstances equally.’ Whether or not this obligation finally resolved all of the controversies with regard to adducing and disclosing evidence at the ICC remains to be seen. At this stage, however, one could at least state that the drafters of the Rome Statute have taken into account some of the difficulties from predecessor international tribunals.\textsuperscript{96} Before embarking on the ICC’s procedure, it is first necessary to reveal interesting decisions related to the disclosure of evidence held by the \textit{ad hoc} tribunals, and establish a connection between disclosure and fairness.

2. Disclosure obligations and their relationship to fairness

Earlier in this chapter, I proposed that it was not the aim of this thesis to portray the entire range of technical details on disclosure which can be found in the RPE of the \textit{ad hoc} tribunals. Rather, it is more important to establish that the disclosure of exculpatory evidence—be it at the pre-trial or at the trial stage—has been addressed as an important element which is linked to the term fairness. Later, this thesis will seek to contend that the wider implications associated with the disclosure of evidence within the procedural system should not only be confined to the pre-trial or trial stage but should form an integral part of the investigative process. This thesis will further contend, by way of explanation, that even the best disclosure regime may fall short of acceptable standards if the accused is not able to obtain exculpatory evidence, either as it has not been searched for or because the Prosecutor is unwilling to make it available. Firstly, it is


\textsuperscript{94}A critical view towards the legal framework of the ad hoc tribunals and their practice has been taken by KIRSCH, S. 2008. \textit{Die Tätigkeit der beiden ad hoc-Tribunale für das ehemalige Jugoslawien und Ruanda – Versuch einer Bilanz}. 21 \textit{Journal of International Law of Peace and Armed Conflict} 66–72.

\textsuperscript{95}In fact, in the case of \textit{Naletiči v. Croatia} (dec.), the ECtHR held that the Statute and RPE of the ICTY ‘offers all the necessary guarantees including those of impartiality and independence.’ \textit{See: ECtHR, Naletiči v. Croatia} (dec.), no. 51891/99, 4 May 2000.

\textsuperscript{96}Some people may consider the structure of the STL even more as a role model because it is the only International Criminal Tribunal that regards the ‘Defence Office’ as an official organ of the Court (Art. 7 (d) STL Statute). At the ICC, the Defence Section is included into the Registry.
necessary to take a brief look at the RPEs of the ad hoc tribunals and their pre-trial proceedings.  

As outlined by Ambos, the line between the investigative phase and the pre-trial phase could be drawn ‘with the presentation of the indictment’ by the Prosecutor.\(^{97}\) After having prepared the indictment, the Prosecutor has to present the ‘facts and the crime or crimes’ to a judge or the Trial Chamber.\(^{99}\) Only if judges confirm the indictment can an arrest warrant be issued.\(^{100}\) Clearly, the factors which determine the process of detention in the case of an international criminal tribunal differ from those of the more familiar process associated with domestic jurisdictions. On the one hand, this difference stems from a lack of an international law enforcement body such as an international police force that has the right to detain people within the signatory states and, on the other hand, the suspects need to be transferred to the locations where the ad hoc tribunals are seated.\(^{101}\) The provisions of the ICTY and the ICTR require that international suspects need to be shown an arrest warrant in order to justify their detainment.\(^{102}\) States, in turn, have an obligation to execute these warrants upon receipt.\(^{103}\) The suspects need to be informed of the alleged charges ‘immediately.’\(^{104}\) This includes a ‘copy of the indictment’ and a ‘statement of the rights of the accused,’ accompanied by a translation in the language that he or she understands, if need be.\(^{105}\)

Regarding the right to be brought before a judge, the RPEs of the ad hoc tribunals require a so-called initial appearance to confirm the formal charges as soon as the accused has been transferred to the location where the tribunal is seated.\(^{106}\) This appearance somehow implies that the accused is present at the hearing and underlines the idea that generally there should be no trials in absentia before the ad hoc tribunals.\(^{107}\) Whilst confirming the charges, the judges need to be convinced that the fundamental rights of the accused have been respected. Two of the most important

\(^{97}\) ICTY and ICTR, RPE Rule 47 ff.  
\(^{98}\) AMBOS in Bohlander (n 78) 453. The professor also indicates that there is no formal distinction.  
\(^{99}\) Art. 18 (4) ICTY Statute; Art. 17 (4) ICTR Statute.  
\(^{100}\) Art. 19 ICTY Statute; Art. 18 ICTR Statute; also: ICTY and ICTR, RPE Rule 55 ff.  
\(^{101}\) ICTY, RPE Rule 40 \(\text{bis} \) (Transfer and Provisional Detention of Suspects) and Rule 61 (Procedure in Case of Failure to Execute a Warrant); ICTR, RPE Rules 40 \(\text{bis} \) and 55 ff.  
\(^{102}\) ICTY and ICTR, RPE Rule 54 ff.  
\(^{103}\) Art. 29 (2) (d) ICTY Statute, RPE Rule 58; Art. 28 (2) (d) ICTR Statute, RPE Rule 58.  
\(^{104}\) Art. 20 (2) ICTY Statute; Art. 19 (2) ICTR Statute. For further details on ‘information upon arrest’ see: TRECHSEL in Swart, Zahar and Shuter (n 1) 160-161.  
\(^{105}\) ICTY RPE Rule 55 (C).  
\(^{106}\) ICTY and ICTR, RPE Rule 62.  
\(^{107}\) The wording of Rule 62 reads: ‘[s]hall be brought before that Trial Chamber or a Judge thereof.’ Generally, both Statutes of the ad hoc tribunals require the presence of the accused at the pre-trial as well as the trial stage, see Articles 20 and 21 (4) (d) ICTY Statute and Articles 19 and 20 (4) (d) ICTR Statute. An exemption would be, for example, if the accused gives his or her written consent to remain absent or cases in which the accused has been removed from court due to inappropriate behaviour. See: ICTR, Prosecutor v. Nahimana et al., ICTR-99-52-A, AC, Judgment, 28 November 2007, paras 99-107; ICTY, Prosecutor v. Milošević, IT-02-54AR73.7, AC, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para 13.
rights are the right to be assisted by a defence counsel and the right to be informed of the charges in a language that the accused understands.\textsuperscript{108} Furthermore, the initial appearance needs to be carried out without ‘undue delay’ after the accused has arrived at the seat of the tribunal.\textsuperscript{109} The latter ‘undue delay’ requirement mirrors what has been described as ‘shall be brought promptly before a judge’ by the ECHR, the ICCPR and the ACHR.\textsuperscript{110} Whereas the European Court of Human Rights requires four days as a general rule,\textsuperscript{111} the Inter-American Commission speaks out for 24 hours after the time of detention.\textsuperscript{112}

In his comparison of rights in criminal proceedings, Trechsel explains the difficulties which can include the delay between the arrest of suspect and appearance of that suspect at the seat of the \textit{ad hoc} tribunals. He recalls that in the case of \textit{Tadić}, this delay amounted to ‘338 days’ until he finally arrived in The Hague, whereas the ICTR had a case in which it took more than a year.\textsuperscript{113} As a result, the professor suggests that the arresting state should be requested to bring the accused ‘promptly’ before a domestic judge in order to address this problem of practicability.\textsuperscript{114} To conclude, there has been a ‘considerable number of cases’ in which the protection of the rights of the accused fell ‘short of the requirements of the ECHR,’ demonstrated by the fact that the average time to bring an accused before a trial judge exceeded four-and-a-half days at the ICTY.\textsuperscript{115} Only after the initial appearance has taken place, the Trial Chamber can provisionally release the suspect on bail.\textsuperscript{116} Therefore, it is of little comfort to note that the rules governing the detention of persons at the \textit{ad hoc} tribunals provide good standards of accommodation, food, physical exercise and recreational opportunities as well as the restraint of the use of force.\textsuperscript{117}

\begin{footnotesize}
\begin{enumerate}
\item[108] ICTY and ICTR, RPE Rule 62 (A) (i) and (ii).
\item[109] \textit{iibid}, Rule 62 (A).
\item[110] ECHR, Art. 5 (3); ICCPR, Art. 9 (2); ACHR, Art. 7 (5).
\item[111] The ECHR elaborated on the term ‘promptly’ in the case of \textit{Soysal v. Turkey} where it was held that ‘aussitôt’ or ‘promptly’ means that the time limit to be brought before a judge should not overstep four days after the arrest was carried out. See: \textit{Soysal v. Turkey}, no. 50091/99, 3 May 2007, § 73; see also: TRECHSEL in Swart, Zahar and Sluiter (n 1) 156-157. Regarding the information of the reasons for an arrest in the sense of Art. 5 (2), the Grand Chamber held that a “delay of seventy-six hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given ‘promptly’.” See: \textit{Saadi v. UK [GC]}, no. 13229/03, 29 January 2008, § 84.
\item[112] In its \textit{Report on the Situation of Human Rights in Ecuador} of 24 April 1997, Chapter VII, the Commission held that prompt in this case means ‘as soon as practicable, and in any case, prior to 24 hours from the detention.’
\item[113] TRECHSEL in Swart, Zahar and Sluiter (n 1) 162-163. Dusko Tadić was arrested in February 1994. His initial appearance, however, took place on 26 April 1995. It is not known from which dates the professor derived the result of his calculation of 338 days; see cases: ICTY, \textit{Prosecutor v. Tadić}, IT-94-1-T, TC, Judgment, 7 May 1997, paras 6-10; ICTR, \textit{Barayagwiza v. The Prosecutor}, ICTR-97-19-AR73, AC, Decision, 3 November 1999.
\item[114] \textit{iibid} (Trechsel) 163.
\item[115] \textit{iibid}.
\item[116] ICTY and ICTR, RPE Rule 65. In such a case, the suspect can be released until the start of the trial, see ICTY and ICTR, RPE Rule 65 (C).
\item[117] See e.g., Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (ICTY), Doc. IT/38/Rev. 9.
\end{enumerate}
\end{footnotesize}
As regards the disclosure of evidence, the RPE of the *ad hoc* tribunals contain many obligations for the Prosecutor to disclose certain material evidence. For example, the disclosure obligations of Rule 66 require the Prosecutor to provide the defence with ‘copies of the supporting material which accompanied the indictment within thirty days of the initial appearance of the accused.’\(^1\) If one regards the so-called initial appearance as the first appearance before a judge, the RPEs might slightly collide with the case law of the ECtHR, specifically if the court has to evaluate the lawfulness of the detention. As one has seen in the case of *Lamy v. Belgium*, it is important for the defence to inspect files and documents within the first 30 days of custody in order to ‘effectively challenge’ the charges of the prosecution.\(^2\) In a sense, this is a matter only marginally important to this thesis because the main yardstick regarding the comparison with human rights decisions is the International Criminal Court’s procedure.

Returning to the disclosure obligations of the Prosecutor, Rule 66 (A) (ii) requires that the Trial Chamber, or the appointed pre-trial judge, establishes a time scale which determines when the prosecution has to provide the defence with ‘copies of statements of all witnesses whom the Prosecutor intends to call and testify at trial.’\(^3\) Furthermore, if deemed necessary, the defence can make a request to the prosecution for permission to inspect ‘any books, documents, photographs and tangible objects in the Prosecutor’s custody or control.’\(^4\) Finally, Rule 66 of both *ad hoc* tribunals concludes with an exemption under which the Prosecutor may apply to the Trial Chamber to ‘be relieved from an obligation […] to disclose information’ in the event that it ‘may prejudice further or ongoing investigations.’\(^5\)

However, not only the prosecution has to comply with certain obligations—the defence also needs to provide certain material in return. The obligations in Rule 67 can be regarded as the counterpart of the prosecution’s obligation in Rule 66 (B) and (A) (ii). For instance, the defence needs to permit the Prosecutor ‘to inspect and copy any

\(^1\) ICTY and ICTR, RPE Rule 66 (A) (i). ‘Supporting material’ has been described as ‘the material upon which the charges are based.’ For example, this ‘does not include other material that may be submitted to the confirming Judge, such as a brief of argument or statement of facts.’ See: ICTY, Prosecutor v. Kordič and Čerkez, IT-95-14/PT, TC, Order on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68, 26 February 1999, p. 3.


\(^3\) ICTY and ICTR, RPE Rule 66 (A) (ii).

\(^4\) ICTY and ICTR, RPE Rule 66 (B). The ICTR’s Appeals Chamber suggested to interpret Rule 66 (B) broadly, and therefore decided that the material does not necessarily have to be ‘related to the Prosecution’s case-in-chief.’ Rather, any ‘material to the preparation of the defence case’ would suffice. See: Prosecutor v. Bagosora et al., ICTR-98-41-AR73, AC, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal’s Rules of Procedure and Evidence, 23 September 2006, para 8. See also: ICTR, Prosecutor v. Karemera et al., ICTR-98-44AR73, AC, Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para 14; ICTR, Prosecutor v. Karemera et al., ICTR-98-44AR73, AC, Decision on Jospeh Ntizore’s Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, paras 12-13; ICTY, Prosecutor v. Karadžić, IT-95-5/18-T, TC, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012, paras 6-9; STL, Prosecutor v. Ayyash et al., STL-11-01/PT/TC, TC, Decision on Call Data Records and Disclosure to Defence (on Remand from Appeals Chamber), 4 December 2013, paras 16-17.

\(^5\) ICTY and ICTR, RPE Rule 66 (C).
books, documents, photographs, and tangible objects in the Defence’s custody or control’ which the defence intends to use as evidence at trial,\textsuperscript{123} and the same applies to statements of witnesses that the defence would like to present.\textsuperscript{124} The question of what can be understood as witness statement has been discussed in various cases. In the case of Blaškić, for instance, the Appeals Chamber of the ICTY held that ‘the usual meaning of 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.’\textsuperscript{125}

Two further very important rules with regard to the disclosure of evidence are Rule 68 and 70. Whereas Rule 68 deals with the disclosure of exculpatory evidence, Rule 70 governs evidence which is not subject to disclosure. This is why Rule 68 is subject to the provisions of Rule 70. Rule 68, for example, requires that the Prosecutor ‘shall […] disclose to the Defence any material which […] may suggest the innocence or mitigate the guilt of the accused.’\textsuperscript{126} This implies that there is no strict prerequisite that the evidence should increase the objective probability of innocence. It is sufficient that it could be reasonably interpreted as doing so.\textsuperscript{127} Furthermore, evidence is considered as exculpatory either ‘if there is any possibility […] that the information could be relevant to the defence of the accused’\textsuperscript{128} or ‘if it tends to disprove a material fact alleged against the accused.’\textsuperscript{129} It is the prosecution’s responsibility to anticipate whether or not a piece of evidence is regarded as ‘exculpatory,’ and hence, subject to disclosure.\textsuperscript{130} On the other hand, not every violation of Rule 68 automatically leads to unfair proceedings.\textsuperscript{131} A more crucial point is that the prosecution can only hand over the evidence which is in its possession.\textsuperscript{132} This appears to be logical because one can only give what one has. But why would the prosecution have exculpatory material at hand if there is no obligation to search for it? Rule 70 leaves the Prosecutor with opportunities for legitimate non-disclosure but only, for example, if it has the ‘purpose

\textsuperscript{123} ICTY and ICTR, RPE Rule 67 (A) (i).
\textsuperscript{124} ICTY and ICTR, RPE Rule 67 (A) (ii).
\textsuperscript{125} ICTY, \textit{Prosecutor v. Blaškić}, IT-95-14-A, AC, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para 15.

\textsuperscript{126} ICTY and ICTR, RPE Rule 68 (i) and 68 (A).
\textsuperscript{127} See e.g.: TOCHILOVSKY (n 1) 121: ‘For material to fall within the ambit of Rule 68 (i), it is not required that it in fact suggests the innocence of an accused; if is sufficient that if \textit{may} so suggest.’


\textsuperscript{130} ICTR, \textit{Prosecutor v. Karemera et al.}, ICTR-98-44-AR73.6, AC, Decision on Joseph Nzirorera’s Interlocutory Appeal, 28 April 2006, para 16.

\textsuperscript{131} AMBOS in Bohlander (n 78) 465.

of generating new evidence.'\textsuperscript{133} This matter will be discussed more explicitly in Chapter 5 because it was one of the major arguments at the ICC in the case of \textit{Lubanga}.

As regards the role of judges at the \textit{ad hoc} tribunals during the pre-trial stage, it can be held that the RPE are not exactly the same but at least similar. Whereas the ICTY acts with pre-trial judges, whose task it is to coordinate the communication between the parties,\textsuperscript{134} the ICTR does not have an equivalent to the ICTY Rule 65\textit{ter}.\textsuperscript{135} Nonetheless, the ‘judges’ mentioned in the ICTR Rules 65\textit{bis} or 73\textit{bis} have actually the same duties as their colleagues at the ICTY. They may convene a status conference with the aim of expediting the trial proceedings and they shall ‘hold a Pre-Trial Conference prior to the commencement of the trial.’ This is why pre-trial judges can somehow be regarded as ‘trial managers’ who carefully watch the preparation of the trial with the aim to expedite the proceedings.\textsuperscript{136}

A crucial difference between the pre-trial judges of the \textit{ad hoc} tribunals and the ones of the ICC is, however, that the pre-trial judges at the ICTY have no investigative function.\textsuperscript{137} This duty is left to the parties, as was explained earlier in this chapter. The pre-trial stage accumulates after one hundred and twenty days from the initial appearance when the status conferences are required to foster the preparation of the trial.\textsuperscript{138} Hence, the purpose of the status conferences is to organise the ‘exchange between the parties in order to ensure an expeditious preparation of the trial.’\textsuperscript{139} Prior to the commencement of the trial, a pre-trial conference is held and—based on the submission of the pre-trial judge—the Trial Chamber will decide upon issues such as the specification of the number of witnesses or the time allocated to the prosecution to present evidence.\textsuperscript{140} Similar to the pre-trial conference, the Trial Chamber may also hold a pre-defence conference which would clarify similar issues.\textsuperscript{141} Once significant

\textsuperscript{133} ICTY, RPE Rule 70 (B).
\textsuperscript{134} ICTY, RPE Rule 65\textit{ter}.
\textsuperscript{135} The RPE of the Special Court of Sierra Leone are similar to the ones of the ICTR. They also do not include a pre-trial judge as mentioned in ICTY Rule 65\textit{ter} but they require the judges to convene status and pre-trial conferences. See SCSL RPE Rules 65\textit{bis} and 73\textit{bis}.
\textsuperscript{138} ICTY and ICTR, RPE Rule 65 \textit{bis} (A) (i) and 65 \textit{bis} (A).
\textsuperscript{139} Ibid. More detailed thoughts on the role of pre-trial judges to ensure fair and effective trials are provided in: Harmon, M. 2007. The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials. 5 Journal of International Criminal Justice, 377-393.
\textsuperscript{140} ICTY and ICTR, RPE Rule 73\textit{bis}.
\textsuperscript{141} ICTY and ICTR, RPE Rule 73\textit{ter}.
amounts of information have been filtered and an anticipated time frame is set, the trial can begin.

Similar to the human rights conventions, the right to disclosure of evidence cannot be found directly in the Statutes of the ad hoc tribunals. Rather, it is more the wording of Article 21 (4) (b) of the ICTY Statute, and Article 20 (4) (b) of the ICTR Statute respectively, that provides the accused with the right to have ‘adequate time and facilities for the preparation of his defence.’

Having scrutinised the HRC and the regional human rights jurisdictions in Chapters 2 and 3, one is familiar with this wording now. In its General Comment No. 13, which has been replaced by General Comment No. 32, the Human Rights Committee already suggested in 1984 that ‘adequate facilities must include access to documents and other evidence.’ Moreover, the latest version specifies this idea more explicitly and requires that ‘this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory.’ One of the most known judgments of the ad hoc tribunals dealing with adequate facilities was probably Tadić, and reference to this case has been made earlier in the chapter.

The aim of the following paragraphs will be to demonstrate that there is a connection between the term disclosure of evidence and the term fairness. At a later stage, it will become apparent that in reality this relationship is somewhat futile unless there is an obligation to seek such exculpatory material. A suitable place to begin is by exploring a compilation of cases which suggest that there is a correlation between the two terms. One of the most crucial decisions which stresses the importance of the disclosure of exculpatory evidence for procedural fairness was established in the case of Krstić when the ICTY’s Appeals Chamber held 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.

After this very significant judgment in 2004, in 2005 the Trial Chamber concluded similarly when it held that the disclosure of exculpatory evidence was ‘of paramount

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142 See also: SCSL Statute Art. 17 (4) (b).
143 HRC, 21st Session, General Comment No. 13 (13 April 1984) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), para 9.
144 HRC, 90th Session, General Comment No. 32 (23 August 2007) UN Doc. CCPR/C/GC/32, paras 8 and 13.
importance to ensure the fairness of the proceedings.\textsuperscript{147} Undoubtedly, the disclosure of exculpatory evidence and \textit{fairness} correlated closely and the latter was proved yet again in 2006, when the Appeals Chamber highlighted the fundamental importance of the disclosure of exculpatory evidence. In particular, the Appeals Chamber stated:

> The disclosure of Rule 68 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.\textsuperscript{148}

As one can see, there is a clear and visible link between the disclosure of exculpatory evidence and the term \textit{fairness}, which has been confirmed by the case law of the ICTY; but the judges at the ICTY were not alone insofar as the case law had an equally beaguerating effect on their colleagues at the sister tribunal, the ICTR. In the case of \textit{Bagosora et al.}, for instance, the Trial Chamber supported the decision established in the case of \textit{Kristić} by advancing the view that the obligation to disclose exculpatory material was ‘fundamental to the fairness of proceedings before the Tribunal.’\textsuperscript{149} A similar view was taken in \textit{Karemera et al.;} in this decision, the importance of the disclosure of exculpatory information to the fairness of the trial was highlighted, in particular, since any non-disclosure ‘on un-enumerated grounds’ would be ‘contrary to the interests of justice.’\textsuperscript{150}

Having determined a conspicuous relationship between the disclosure of exculpatory evidence and \textit{fairness}, one also needs to highlight the importance of the investigation stage, which is essential to gather any such exculpatory material in the first place. As mentioned earlier in this chapter, a categorical obligation to disclose evidence does not suffice the fair trial of the accused if there is no obligation for the Prosecutor to search for such exculpatory material.\textsuperscript{151} The European Court of Human Rights’ case of \textit{Salduz} highlighted how important exonerating evidence may become whilst the offence is considered at the trial stage.\textsuperscript{152} As a result, the rules that govern the investigation stage are inevitably related to the disclosure of evidence and therefore,

\begin{itemize}
\item \textsuperscript{148} ICTY, \textit{Prosecutor v.Stačić}, IT-97-24-A, AC, Judgment, 22 March 2006, para 188.
\item \textsuperscript{150} ICTR, \textit{The Prosecution v. Karemera et al.}, ICTR-98-44-T, TC, Decision on Prosecutor’s Rule 68(D) Application and Joseph Nzirorera’s 12\textsuperscript{th} Notice of Rule 68 Violation, 26 March 2009, para 7: ‘Permitting the Prosecution to withhold exculpatory information on un-enumerated grounds undermines the scope of rule 68 (A) and would be contrary to the interests of justice, given the importance of exculpatory information to trial fairness.’
\item \textsuperscript{151} The ICTR mentioned such a categorical obligation to disclose in: \textit{Prosecutor v. Karemera et al.}, ICTR-98-44-AR73.13, AC, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion”, 14 May 2008, para 12.
\item \textsuperscript{152} ECtHR, \textit{Salduz v. Turkey} [GC], no. 36391/02, 27 November 2008, § 54; \textit{Murray v. UK} [GC], no. 18731/91, 8 February 1996, § 62.
\end{itemize}
they also have an impact on the overall fairness of the trial. Whether or not the Rome Statute and its obligation for the Prosecutor to investigate exculpatory evidence resolved all of these friction points regarding the disclosure of evidence and finally, regarding the fairness of the proceedings at the ICC, remains to be seen in the following chapters.

3. Confrontation and the right to call defence witnesses

Articles 21 (4) (e) and 20 (4) (e) of the Statutes of the ad hoc tribunals provide for the applicant to ‘examine, or have examined witnesses against him.’ The wording is the same as that contained in the ECHR and the ICCPR and analogous to the ACHR and the ACHPR.153 Having particularly focussed on the ‘sole or decisive’ rule in the previous chapters, the aim of the following paragraphs is to reveal the extent to which the right to confrontation can be limited at the ad hoc tribunals. In addition, an Appeals Chamber judgment of the Special Court of Sierra Leone will be examined with respect to its significance in shedding further light on the ‘sole or decisive’ rule. It will be of interest to determine how these international courts have applied the ‘sole or decisive’ rule in their case law and whether their requirements go beyond human rights law. At a later stage, there will be a comparison with the case law of the ICC, followed by a conclusion. First of all, however, it is necessary to frame the right to witness examination, especially with regards to its application, which stems from the historical divide of common and civil law procedures.

Like the duck takes to water, it was only a matter of time until these questions arose at the ICTY and the ICTR.154 However, the issue itself was no extraordinary news in the areas of war crimes tribunals, as Nuremberg and Tokyo had shown previously.155 Consequently, questions of hearsay statements and whether or not they should be admissible have beleaguered the ad hoc tribunals over the years.156 Moreover, it soon became clear that the evidence of witnesses would play a more salient role in the ad hoc tribunals than had been the case in, for example, the Trials at Nuremberg or Tokyo. This can be attributed to the fact that both Nazi Germany and Japan kept detailed documentation of their war activities, which were available to the Allied prosecution.157

153 See Chapters 2 and 3 or figure 3.1.
154 Máximo Langer described it as a ‘competition between the adversarial and the inquisitorial systems.’ See: LANGER (n 136) 848.
155 WALD (n 136) 1573.
156 The word hearsay, however, does not appear anywhere within the RPE of the ICTY, nor does it appear in the RPE of the ICTR. See also: WHITING in Swart, Zahar and Sluiter (n 136) 92-93.
Such documentation was nevertheless rather the exception than the norm in the former Yugoslavia or Rwanda.

When queries as to the admissibility of hearsay statements finally appeared before the ICTY’s Trial Chamber, the judges determined that the procedure of the ad hoc tribunals could only portray a convergence of elements of common and civil law, a so-called ‘unique mixture of common and civil law features.’ Furthermore, the judges held in Blaskić that the Tribunal was ‘in fact, a sui generis institution’ which was not bound by any national procedural requirements. Metaphorically, the gate opener for the admission of hearsay evidence was Rule 89 (C) of the RPE which allows the Chambers to ‘admit any relevant evidence which it deems to have probative value.’ This can, according to the judges, include hearsay evidence ‘since the proceedings are conducted before professional judges who possess the necessary ability’ to evaluate such evidence as to its ‘relevance and probative value.’ The definition of what is considered to be hearsay evidence, in turn, has been provided in the case of Aleksovski, when the Appeals Chamber held that hearsay was defined as

The statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what the person says.

In other words, hearsay evidence can be a written or an oral statement of a person who does not testify during the court proceedings—and is, therefore, not subject to cross-examination.

As mentioned before, the RPEs of the ad hoc tribunals allow for the admissibility of such untested statements through Rule 89 (C). Furthermore, especially the ICTY changed, whether deliberately or not, its Rules in accordance with the

156 On the convergence of common and civil law traditions, see e.g. JACKSON, J. and SUMMERS, S. 2012. The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions. CUP, p. 367 ff.
157 ICTY, Prosecutor v. Tadić, IT-94-1-T, TC, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para 18.
158 Prosecutor v. Blaskić, IT-95-14-T, TC, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 21 January 1998, para 5.
160 Ibid, para 10.
161 ICTY, Prosecutor v. Aleksovski, IT-95-14/1, AC, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para 14; confirmed in Prosecutor v. Kordić and Ćerkez, IT-95-14/2-A, AC, Judgement, 17 December 2004, para 282. According to Rule 801 (c) of the US Federal Rules of Evidence, ‘hearsay means a statement that: 1) the declarant does not make while testifying at the current trial or hearing; and 2) a party offers in evidence to prove the truth of the matter asserted in the statement.’
162 There are, on the contrary, more ‘official’ statements that are referred to as ‘testimonial hearsay’ in the domestic jurisdiction of the United States, see Crawford v. Washington, 541 U.S. 36 (2004). To repeat, the author is aware of the fact that international criminal courts are not bound by any national jurisdictions. Such an explanation, however, can help to categorize certain pieces of evidence.
ECtHR’s ‘good reason for non-attendance’ or ‘necessity’ requirements over the years. For example, Rule 92*quater* refers to situations in which a confrontation would be factually impossible due to the death of a witness who had provided a written statement before passing away. In addition, Rule 92*quinquies* deals with improper interference of the accused, including the threats or intimidation of witnesses. The latter two points have frequently been addressed in the case law of the ECtHR whenever the so-called ‘necessity’ or ‘good reason’ to limit the right to examine witnesses was scrutinised. A further aspect is the distinction between a confrontation at some stage of the proceedings and no confrontation; or the possibility of a confrontation if need be and no confrontation. Rules 92*ter* stresses such a distinction. Rule 92*bis*, on the other hand, is probably more a tool for the acceleration of the proceedings. As a result, it is reasonable to say that the formal frame of the Rules of Procedure of Evidence shows the ability to adapt to case law from the human rights courts. In conclusion, it can be held that the Statutes of the ad hoc tribunals guarantee the accused the right to witness examination. On the other hand, a limitation of the right to examine witnesses is not a breach of procedural standards per se.

Concerning the issue of anonymous witnesses and whether or not a conviction can be based solely or to a decisive extent on such evidence, the ICTY set up some protecting guidelines for the accused in one of the innumerable decisions in the case of Tadić. Interestingly, the judges of the ICTY endorsed the terminology of observing the ‘demeanour’ of an anonymous witness even before the European Court of Human Rights did so in its famous judgments of Doorson and Van Mechelen et al. Furthermore, the ICTY judges deemed it important that, if a witness remained anonymous, the bench had to be aware of his or her identity. Another well-known issue is the so-called element of ‘counterbalance,’ which is often associated with the corroboration of evidence, and it is probably safe to say that as long as the ‘testimony of a single witness on a material fact’ is subject to confrontation, there would not be any

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165 A more detailed outline on the RPE of the ICTY can be found in: WHITING in Swart, Zahar and Sluiter (n 136) 83-107.
166 See Chapter 2, pp. 65-80.
167 Whether or not Rule 92bis has really met this intention in practice is questionable. See e.g.: ZAHAR and SLUITER, (n 2) 394: “It is also a fallacy to expect miraculous ‘solutions’ for obscure rules, such as Rule 92 bis. which tend only to give rise to more (defence) motions, that further delay trials. Furthermore, the solutions advanced to expedite trials have to our knowledge far from produced that result.”
168 ICTY, Prosecutor v. Tadić, IT-94-1-T, TC, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para 71.
169 The judgments of the ECtHR cases of Doorson were held in March 1996, Van Mechelen et al. in April 1997.
170 ICTY, Prosecutor v. Tadić, IT-94-1-T, TC, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para 71. It needs to be reiterated that in all of these cases, the witness had been subject to confrontation, at least in one way or the other.
problem regarding its acceptance. The same may even apply if the evidence given by two witnesses is only similar but not identical, as long as the judges do not draw any ‘unreasonable conclusion’ from this kind of evidence. Returning to the crucial aspects of Chapters 2 and 3, the important question of this thesis has been whether or not it should be possible to reduce the right to witness examination to such an extent that an accused can be found guilty, even if the conviction was based on an uncross-examined witness statement which has solely, or to a decisive extent, lead to such a decision. How much weight should be given to these statements and do they need to be corroborated?

The ICTY’s Appeals Chamber elaborated on this question in Prlić et al., and simultaneously, it had to clarify the difference between the admissibility of evidence and the determination as to the weight which should be given to a certain piece of evidence. The procedural history of this decision concerned a transcript of Jadranko Prlić, which he [Prlić] had given to the prosecution of his own volition, when he was a suspect in 2001. Since the prosecution’s request for the admission of this transcript in 2007 had been successful before the Trial Chamber, both Mr Prlić as well as the so-called Joint Defence appealed the decision. Whereas Mr Prlić sought a dismissal due to an alleged conflict of interest between him and his then counsel Salahović, the remaining Joint Defence tried to invoke the right to have witnesses examined, particularly because Mr Prlić was not expected to testify as a witness in his own case. As a consequence, his statement would not have been subject to cross-examination. However, the Appeals Chamber rejected the arguments of the defence. With regards to the right to cross-examination, the Appeals Chamber held that the right to cross-examination was ‘not an absolute.’ In addition, the Appeals Chamber confirmed the Trial Chamber’s opinion that “a transcript of a questioning taken pursuant to Rules 42 and 43 is not a ‘statement’ according to Rule 92bis.” Hence, there was a difference in the nature of the relevant piece of evidence according to the RPE.


\[173\] ICTY, Prosecutor v. Prlić et al., IT-04-74-AR73.6, AC, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, paras 2-7. 

\[174\] *Ibid.* The Joint Defence represented the interests of Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorcić and Berislav Pušić.


\[178\] *Ibid.*, para 44.
Concerning the admissibility and the weight of evidence, and regarding the principle of fairness, the Appeals Chamber concluded the following:

[T]he principle of fairness, expressed by the ECtHR and adopted by the Tribunal, [stating] that a conviction may not be based solely or in a decisive manner on the deposition of an individual whom the accused has had no opportunity to examine is not equivalent to the restriction that the material related to the acts and conduct of the accused is inadmissible except through “live” testimony. The former principle is both wider and narrower in scope. On the one hand, “acts of conduct” of the accused have been interpreted extensively in the jurisprudence of the Tribunal. The scope of the principle expressed above, however, appears to cover more than just this material: it clearly applies to any “critical element” of the Prosecution case, that is, to any fact which is indispensable for a conviction (including those used as an aggravating circumstance in sentencing). These are, in fact, the findings that a trier of fact has to reach beyond reasonable doubt. It would run counter to the principles of fairness discussed above to allow a conviction based on evidence of this kind without sufficient corroboration. In other words, the scope of the rule that sufficient corroboration is necessary has to be expanded to cover evidence beyond that relating to the acts and conduct of the accused stricto sensu.\(^{179}\)

As a result, the Appeals Chamber of the ICTY suggested that untested statements had to be corroborated with further evidence in order to meet the beyond reasonable doubt standard. Furthermore, the Appeals Chamber clarified that there was a distinction between the admission of transcripts on the one hand and their evaluation on the other; after all, not every statement which had been admitted did relate to the allegations and therefore formed the basis of a conviction.\(^{180}\)

The aforementioned was confirmed in *Haradinaj et al.* where the Trial Chamber admitted two statements of deceased witnesses in order to prove acts and conduct of one of the accused. The Chamber, however, decided to ‘only admit them if it was satisfied that they [the statements] were reliable. In its assessment, the Trial Chamber considered whether the statements were corroborated by other evidence and whether the statements were internally consistent.’\(^{181}\) A similar approach was taken in *Gotovina et al.*,\(^{182}\) and in

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\(^{179}\) Ibid, paras 58 and 59 (footnotes omitted).

\(^{180}\) Ibid, paras 60 and 61; see also: ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, AC, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para 24: ‘[t]he reliability of a hearsay statement is relevant to its admissibility, and not just to its weight.’ The Appeals Chamber referred to the case of *Prosecutor v. Aleksovski*, IT-95-14/1-AR.73, AC, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para 15.


Popovic et al., the ICTY yet again stressed that ‘a decision on admissibility must be distinguished from a determination as to the weight to be given to any piece of evidence.’

The debate of untested hearsay statements in the context of admissibility had also been subject to discussion in the case of Galić, where the Appeals Chamber of the ICTY affirmed the admissibility of such hearsay testimony if the provisions of Rule 92bis were ‘satisfied, and where the material has probative value within the meaning of Rule 89(C).’ Yet, under reference to various judgments of the ECtHR, the Appeals Chamber described in a footnote

The admission into evidence of written statements made by a witness in lieu of their oral evidence in chief is not inconsistent with Article 21.4(e) of the Tribunal’s Statute. […] But, where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborated the statement.

The ICTR came to a similar conclusion in the case of Kajelijeli, when Trial Chamber II found that ‘in the absence of corroborating testimony, the Chamber finds hearsay evidence insufficient to base a finding that the Accused distributed weapon[s].’

However, the jurisprudence of the ad hoc tribunals on this question was not always that clear. According to the Appeals Chamber of the ICTY, ‘corroboration of evidence is not a legal requirement but rather concerns the weight to be attached to evidence.’ Hence, as long as the Trial Chamber concluded that the ‘hearsay evidence was reliable for the purpose of proving the truth of its contents, in the sense of being voluntary, truthful and trustworthy,’ the admission and the reliance on hearsay evidence was not erroneous. Generally speaking, it needs to be reiterated that, as was confirmed in the case of Limaj et al.,

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185 Ibid, footnote 34.
186 ICTR, Prosecutor v. Kajelijeli, ICTR-98-44A-T, TC II, Judgment and Sentence, 1 December 2003, para 401. In the case of Karemera and Ngirumpatse, the corroborative pattern with regards to witness BLX was questionable, however, the ICTR confirmed that there was some sort of corroboration; see: Prosecutor v. Karemera and Ngirumpatse, ICTR-98-44-T, TC III, Judgement and Sentence, 2 February 2012, paras 1411 and 1412.
188 Ibid, paras 283 and 284.
Corroboration of testimonies, even by many witnesses, does not establish automatically the credibility, reliability or weight of those testimonies. Corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence. As a result, reliability as to the weight of evidence does not necessarily depend on corroboration. But how can one then determine on reliability? This question will be scrutinised in Chapter 5. Thus far, the jurisprudence of the ad hoc tribunals on the question of whether or not it is possible to reduce the right to witness examination to such an extent that an uncross-examined and uncorroborated hearsay statement may be sufficient for a conviction remains unsolved. In some cases, corroborative evidence was required, whereas in others the reliability of such a hearsay statement would serve the interest of justice. Furthermore, there seems to be a distinction between reliability concerning the admissibility of evidence and reliability in the context of determining the weight of a trier of fact.

The debate of the ECtHR’s relatively new flexible ‘sole or decisive’ rule and its application at international criminal tribunals emerged another time in the SCSL’s appeal proceedings of Charles Ghankay Taylor, and interpreting the three-step test of Al-Khawaja and Tahery [GC] surely must have represented a delicate issue for the Appeals Chamber. Returning to the conclusions of the Al-Khawaja and Tahery [GC] case, the ECtHR held that counterbalance represented the third element included into the three-step approach when the right to examine witnesses had to be reduced. As we have seen in Chapter 2, in the case of Imad Al-Khawaja there was enough ‘counterbalance’ due to the reliability of the statement and the fact that there was corroborative evidence. But would the mere reliability on the hearsay statement also have sufficed to bring about a conviction for Imad Al-Khawaja if there had not been any corroborative evidence? In the case of Mr Tahery, for example, the absence of such corroborative evidence meant that the jury ‘were unable to conduct a fair and proper assessment of the reliability of T’s evidence.’

The Appeals Chamber of the SCSL, however, answered this question in the case of Charles Taylor differently. The defence had complained about the unreliability of uncorroborated hearsay evidence and contended that it would be an error of law if such

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190 The ECtHR confirmed this three-step test in the more recent judgments of, e.g., Horncastle and Others v. UK, no. 4184/10, 16 December 2014, §§ 130-135; Colac v. Romania, no. 26504/06, 10 February 2015, §§ 43-56.
191 ECtHR, Al-Khawaja and Tahery [GC], nos. 26766/05 and 22228/06, 15 December 2011, §§ 163, 165.
uncorroborated hearsay evidence were relied upon ‘in a decisive manner.’ Yet, the Appeals Chamber, pertaining to the weight to be ascribed to such evidence, interpreted *Al-Khawaja and Tahery* [GC] in a way that ‘reliance on an uncorroborated hearsay statement as the sole or decisive basis for a conviction [was] not precluded as a matter of law and [did] not per se violate the accused’s right to a fair trial.’ Thus, it considered corroboration to be one of the possible factors for the test of the reliability of a statement but it did not regard it as an imperative element for a conviction. Consequently, and hypothesising the decision of the Special Court of Sierra Leone, Mr Al-Khawaja could have been convicted even if there had not been any corroborative evidence.

Yet, until today nobody can say how the European Court of Human Rights would finally have decided this case if there had not been any corroborative statements at hand and it remains unclear whether or not the reliance on an uncorroborated hearsay statement as the sole or decisive basis for a conviction is precluded as a matter of law at the ECtHR. In fact, the wording of the ECtHR used terms such as ‘counterbalance.’ The Appeals Chamber of the ICTY clearly voted in favour of the requirement of corroborative evidence in an Appeals Chamber decision in the case of *Prlić et al.* In any case, the SCSL has taken a different approach when interpreting the jurisprudence of *Al-Khawaja and Tahery* [GC] in the case of Charles Taylor. Technically, the crucial point is whether one interprets the ‘counterbalancing factors’ of reliability and corroboration either as cumulative factors, as the ECtHR probably did, or whether one follows the approach of the Special Court of Sierra Leone and deems the reliability of an uncorroborated hearsay evidence as a sufficient basis for a conviction. Be it as it may, the author recommends refraining from the usage of terminology such as fragmentation since this question relates more to a matter of interpretation. Whether or not the ECtHR is willing to follow the approach of the Special Court of Sierra Leone—that is that counterbalance, as a matter of law, is sufficed merely by the reliability of an untested statement—remains to be seen.

193 Ibid, para 85.
194 Ibid, paras 86-91.
196 Footnote 195 in the Charles Taylor Appeals Chamber judgment (n 192) reads: ‘As the Appeals Chamber held, corroboration is simply one of many potential factors in the Trial Chamber’s assessment.’
4. Analysis

This chapter has revealed that the principle of equality of arms is somewhat incapable of solving the question of the overall fairness of the trial proceedings. In particular, the case law of the ad hoc tribunals has not always been coherent as to whether or not the principle of equality of arms includes a so-called material equality of the trial parties. Furthermore, as pointed out by Safferling, there is a certain risk that equality of arms may be used against the interests of the accused in order to enhance the efficiency of the proceedings for the Prosecutor. Moreover, although the principle of equality of arms is an important feature of the wider concept of a fair trial, it is not the only one. This is why this thesis suggests a doctrinal relationship between the disclosure of exculpatory evidence and fairness, confirmed by the ad hoc tribunals. In addition, it was equally important to portray the relationship of the investigative stage and the disclosure of exculpatory material since the evidence obtained during this stage may be decisive in a conviction. The remaining question is whether or not the mere obligation on the Prosecutor to search exonerating evidence guarantees a fair trial for the accused at the International Criminal Court or whether fairness requires an organ that controls the activities of the Prosecutor, particularly during the investigative phase.

As regards the right to have witnesses examined, it can be held that the ad hoc tribunals have not clarified the application of the ‘sole or decisive’ rule uniformly. Particularly the question of corroboration and whether it is required as a counterbalancing factor was not clearly solved by the ad hoc tribunals. As a result, the change of approach at the ECtHR in 2011 has still left open some questions on the practical application at other international criminal tribunals. The SCSL, for example, decided that it was not corroboration but the reliability of a hearsay statement that could limit the accused’s right to have witnesses examined in cases where there was no cross-examination. Whether or not the ECtHR will follow the approach of the SCSL to identify counterbalance merely with the reliability of an untested statement remains to be seen.

To conclude on this Chapter, I would like to quote the words of Theodor Meron, who stated in 2014:

Whatever different perceptions and expectations there may be about what it is that courts like the ICTY should achieve […] I believe that all will agree that as a court, our mandate is to apply the law to the facts in a neutral manner, thereby ensuring the
fair trials […] And I believe […] that the establishment of the ICTY more than two decades ago demonstrated a profound commitment by [the Security Council], acting on behalf of the international community, to ensuring accountability for widespread and flagrant violations of international humanitarian law through procedures […] that reflect an abiding respect for fairness and due process of law—that reflect, in essence, a commitment to the rule of law.197

The author does not question the accuracy of this statement and clearly the intention of the *ad hoc* tribunals to abide by and respect principles of fairness can definitively not be denied. Nevertheless, it would be remiss if academic discourse did not try to highlight the issues inherent in the term *fairness* and the due process of law for future occasions. Since the nature of international criminal law is such a delicate one, we should not rest on our laurels but should continue to seek innovative and best practice, particularly in the remit of the fair trial.

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ECtHR: the *reliability* test has, in fact, been based on corroborative statements in *Al-Khawaja and Tahery [GC]* (confirmed in *Horncastle*; the ICTY affirmed corroboration in *Prlić et al.*)

SCSL: Whilst testing the *reliability* of hearsay evidence, corroboration is only *one* potential factor (*Taylor*, Appeals Chamber Judgment; similar approach in *ICTY Kordić and Čerkez*, Appeals Chamber Judgment)
Chapter 5: The International Criminal Court

Having scrutinized from a human rights perspective the two main component sections of the fair trial, i.e. the disclosure of evidence and the right to have witnesses examined, Chapter 5 will now compare these results against the procedural framework of the ICC. The outcome will provide answers as to the first part of the hypothesis, namely whether or not the Rome Statute and its Rules of Procedure and Evidence comply with empirical human rights law. Furthermore, Chapter 5 will revisit one of the important questions raised in Chapter 4, that is, whether Articles 54 (1) (a) and 67 (2) of the Rome Statute and the Prosecutor’s obligation not only to actively search for incriminating but also exonerating evidence resolved the friction of how the defence gathers its exculpatory material. The strife about the disclosure of evidence raised serious concerns as to whether a fair trial was guaranteed in the ICC’s first case of Lubanga and until today, it is not a hundred percent clear regarding what has to be disclosed to the Pre-Trial Chambers before the confirmation of charges hearing takes place. In the case of Lubanga, for example, Trial Chamber I considered the approach of the prosecution with regards to the disclosure of evidence as a ‘wholesale and serious abuse,’\(^1\) and in the case of Katanga and Ngudjolo, Single Judge Steiner described the prosecution’s methods as ‘reckless investigative techniques.’\(^2\)

For the sake of coherence with previous chapters, the second part of this chapter will consider the views of the International Criminal Court appertaining to the question of the extent to which the accused’s right to have witnesses examined can be limited. Chapters 2 and 4 have demonstrated how the right to confrontation has been differently interpreted at international and human rights tribunals, for example in cases such as Al-Khawaja and Tahery [GC], Prlić et al. and Charles Taylor. Therefore, it will be interesting to see the ICC’s view on the right to have witnesses examined. Finally, the last part of Chapter 5 will try to develop an assumption of what fairness may be.

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1 *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, TC I, 13 June 2008, 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, para 73.
1. Prosecution disclosure in the light of the fair trial

The Rome Statute sets out the rights of the accused in Article 67, which is structured similarly to Article 14 of the ICCPR. Yet, there are some major distinctions between the ICCPR and the Rome Statute. In addition, the Rome Statute contains further features for the protection of the accused than the ones anchored in Article 67. For example, Article 66 requires the presumption of innocence and Article 55 deals with rights of persons during an investigation. Further principles for the protection of the accused can be found in part III of the Statute (general principles of criminal law). Whereas Article 20, for instance, points out that no person shall be tried for crimes of which he or she had already been convicted or acquitted (ne bis in idem), Article 22 postulates that persons can only be held responsible if the conduct of a crime was also defined as a crime within the Statute at the time when it took place (nullum crimen sine lege). Moreover, persons who have been convicted by the ICC can only be punished in accordance with the Rome Statue (nulla poena sine lege) and, finally, nobody should be held criminally responsible ‘for a conduct prior to the entry into force’ of the treaty (non-retroactivity ratione personae).

Regarding the requirements of human rights law at the pre-confirmation stage, it seems that the drafters of the Rome Statute have learned from the difficulties occurring at the ad hoc tribunals. For example, the issue of bringing an arrestee ‘promptly’ before a judge after his or her detention has especially been resolved smoothly in the Rome Statue. Namely, arrested persons are brought ‘promptly before the competent judicial authority’ of the state in which the suspect has been arrested. As a result, there are no huge time intervals between the arrest of the suspects and their preliminary appearance in front of a national jurisdiction. As one remembers from the previous chapters, ‘promptly’ implies a time limit of not more than four days after the arrest or alternatively, 24 hours after the time of detention. As a result, the accused will always be brought before a national judge prior to his or her initial appearance in The Hague.

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4 Ibid. The ICCPR, for example, applies to civil, administrative and criminal proceedings. Furthermore, Art. 14 of the ICCPR deals with juvenile offenders, which is not the case in the RS.
5 See also: Art. 59 (Arrest proceedings in the custodial State); Art. 60 (Initial proceedings before the Court, including the right to apply for interim release); Art. 63 (Trial in presence of the accused).
6 Art. 23 RS.
7 Art. 24 RS.
9 The foundations from human rights law can be found in Arts. 5 (3) ECHR, 9 (2) ICCPR and 7 (5) ACHR.
10 Art. 59 (2) RS.
11 See Chapter 4.
In addition, the accused has a further opportunity to question his arrest by either challenging the jurisdiction of the court or the admissibility of the case even before the trial starts.  

1.1 General rights and disclosure at pre-confirmation stage—an overview

There are various aspects which need to be clarified before the Office of the Prosecutor launches an investigation. Whenever the OTP has received information of an alleged crime or crimes, it has to clarify whether or not there is ‘a reasonable basis’ to proceed under the Statute. In addition, the Prosecutor can also initiate investigations proprio motu—that means on his own initiative. This thesis, however, cannot particularly analyse questions of jurisdiction and admissibility. It is also not the task of the present chapter to mention all of the technical details that are listed in the Rome Statute or its RPE. Rather, it is important to depict comparable procedural requirements from the human rights jurisdictions and measure them against the Rome Statute, its RPE and the ICC’s case law. To this end, it is necessary to recall some of the crucial findings of Chapters 2 and 3 in the present chapter in order to reach a formal assessment of the hypothesis.

The assessment of the procedural requirements in Chapters 2 and 3 have revealed that certain rights under the auspices of the fair trial are also applicable to the early stages of ongoing investigations. The counterpart to the human rights case law is probably Article 55 of the Rome Statute; it provides certain rights for persons during an on-going investigation. For example, no suspect needs to incriminate him- or herself and should not be subject to any form of ‘coercion, duress or threat, torture or any other

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12 Art. 19 (2) RS; for cases in which the admissibility was challenged, see e.g.: ICC, Prosecutor v. Mbarushimana, ICC-01/04-01/10, PTC I, 27 January 2011, Decision on the Defence Request for Disclosure, paras 12-13; Prosecutor v. Bemba, ICC-01/05-01/08-632, TC III, 2 December 2009, Decision on the Defence Application for Additional Disclosure Relating to a Challenge on Admissibility, Prosecutor v. Kony et al., PTC II, 31 October 2008, Decision on Defence Counsel’s ‘Request for Conditional Stay of Proceedings’.

13 Art. 53 (1) RS. The standard of a ‘reasonable basis to believe’ has been discussed in the Situation in the Republic of Kenya, and PTC II concluded that it must “be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed.’ […]” See: Situation in the Republic of Kenya, ICC-01/09-19-Corr, PTC II, 31 March 2010, Decision Pursuant Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para 35.

14 Art. 15 RS.


17 See e.g. ECtHR cases Salduz v. Turkey [GC], no. 36391/02, 27 November 2008, §§ 54-56; Panovits v. Cyprus, no. 4268/04, 11 December 2008, §§ 64-66. With regards to the ICC, Prof. Safferling avers that ‘there is no provision, either in the Statute or in the Rules, which determines the end of the investigation stage.’ See: SAFFERLING (n 15) 216.
form of cruel, inhuman or degrading treatment.\textsuperscript{18} Furthermore, suspects have to be questioned in a language that they fully understand.\textsuperscript{19} In addition, Article 56 (2) (d), Rule 47 (2) and Regulations 76 in conjunction with 77 leave room to appoint an \textit{ad hoc} counsel, who can represent the interests of the defence at the initial stages of an investigation, that is, when no arrest warrant has been issued, no one has been formally charged and no one has been arrested yet.\textsuperscript{20} If there is reason to believe that a person has committed a crime within the jurisdiction of the ICC and if the person is subject to be questioned, either by the Prosecutor or by national authorities, he or she needs to be informed of these grounds before the questioning starts.\textsuperscript{21} Moreover, the person may remain silent and has free legal assistance of his or her own choosing.\textsuperscript{22} During the questioning, counsel shall be present at all times unless the person has voluntarily waived this right.\textsuperscript{23} As one can see, the Rome Statute provides suspects or persons with rights even before an arrest warrant has been launched. However, there are no rules providing explicit information on the disclosure of evidence at the initial stages of an investigation.\textsuperscript{24}

Having decided to apply for a warrant of arrest, the Rome Statue clearly sets out the requirements for the Prosecutor and his/her application in Article 58 (2) and the requirements of what information the warrant ‘shall contain’ in Article 58 (3). Once the Pre-Trial Chamber is satisfied that there are ‘reasonable grounds to believe’ that a ‘person has committed a crime within the jurisdiction of the Court,’ it has to issue a warrant of arrest or a summons to appear.\textsuperscript{25} In addition, the Pre-Trial Chamber sends a request for a provisional arrest and surrender to the state party where the suspect is deemed to reside.\textsuperscript{26} After the arrest, the detained person has to be brought ‘promptly before the competent judicial authority’ of the state in which he or she has been arrested—the ‘custodial State.’\textsuperscript{27} Therefore, the human rights standard of being brought in front of a judicial authority promptly—which implies the presence of the accused—can be regarded as safeguarded.

\textsuperscript{18} Art. 55 (1) (a) and (b) RS.
\textsuperscript{19} Art. 55 (1) (c) RS.
\textsuperscript{21} Art. 55 (2) (a) RS.
\textsuperscript{22} Art. 55 (2) (b) RS.
\textsuperscript{23} Art. 55 (2) (c) RS.
\textsuperscript{25} Art. 58 (1) and (7) RS.
\textsuperscript{26} Art. 59 (1) RS.
\textsuperscript{27} Art. 59 (2) RS.
As soon as a suspect has arrived at the detention facilities in The Hague, the initial proceedings before the ICC start. Among other duties, the Pre-Trial Chamber has to ‘satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed’ and that he or she has a right to apply for interim release.\(^28\)

One particularity of the Rome Statute is that there are in fact two different stages concerning the disclosure of evidence at pre-trial level. On the one hand, there are issues that apply strictly to the procedure before the confirmation hearing starts.\(^29\) and, on the other, there can be disclosure issues arising after the confirmation hearing has been held but before the trial has started.\(^30\) For reasons of clarity, this thesis will adopt the terminology used by other scholars, who have labelled the two different phases as pre-confirmation and post-confirmation disclosure.\(^31\) The pre-confirmation period culminates in the confirmation of charges hearings, where the charged person has the right to be present, unless he or she waives the latter, has ‘fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court.’\(^32\)

As we recall from Chapters 2 and 3, it is crucial for the charged and/or his counsel to be present at the hearings in order to respond to the allegations.\(^33\) Furthermore, waiving the right of being present at a hearing is, under certain circumstances, possible in human rights law.\(^34\) Therefore, it is obvious that the ICC Statute complies with the human rights requirements concerning the appearance of the charged person.

What is of more interest is the question of the disclosure of evidence and to what extent the Rome Statute, its RPE and the case law of the ICC allow for restrictions of the disclosure at pre-confirmation level; and whether or not there is a clear line as to the extent of these restrictions. What are the reasons for a limitation of the disclosure of evidence in the Rome Statute and does the Statute allow ex parte hearings to decide on limitations of disclosure or even non-disclosure? Returning to previous chapters, instances or reasons for the non-disclosure of evidence have been national security, public interest immunity, witness protection and cases in which the disclosure would

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\(^{28}\) Art. 60 (1) and (2) RS.


\(^{30}\) Rules 76-84 RPE; see also: KLAMBERG, M. 2013. Evidence in International Criminal Trials. Martinus Nijhoff Publishers, p. 280 ff; Safferling et al. (n 15) 353.


\(^{32}\) Art. 61 (1) and (2) RS.

\(^{33}\) Regarding the obligation to notify the accused of the hearings, see e.g.: ECtHR, Koroleva v. Russia, no. 1600/09, 13 November 2012; Psyatkov v. Russia, no. 61767/08, 13 November 2012. Regarding the assistance of a counsel, see: ECtHR, Solovyev v. Russia, no. 918/02, 24 April 2012. In addition, see Chapter 3 for the remaining human rights jurisdictions.

\(^{34}\) See e.g.: ECtHR, Psyatkov v. Russia, no. 61767/08, 13 November 2012, §§ 130-133; Idalov v. Russia, no. 5826/03, 22 May 2012, §§169-174.
endanger the course of the investigations. Similar reasons are listed in the Rome Statute. Article 72 RS in conjunction with Rule 81, for example, provide for the protection of national security information; Article 68 RS and Rule 81 for the protection of victims and witnesses, and Article 54 (3) (e) RS in conjunction with Rule 81 of the RPE enables the Prosecutor not to disclose evidence if the material is confidential and ‘solely for the purpose of generating new evidence.’ The fact that the Rome Statute and its RPE contain provisions allowing for the Prosecutor to limit the disclosure of exculpatory evidence supports the idea that the defence ‘has no general and unlimited right to inspect documents that are in the possession of the Prosecutor.’ This has also been confirmed in the case law of the regional human rights courts, however, and, as we recall from Chapters 2 and 3, any restriction of access to documents must not be ‘pursued at the expense of substantial restrictions on the rights of the defence.’ Moreover, it is necessary to check whether or not the required information is ‘essential’ to challenge the ‘lawfulness of a person’s detention.’

The basic norms of the Rome Statute related to disclosure of evidence can be found in Articles 54, 61, 67, 68 and 72. Furthermore, the RPE stipulate in a more detailed way under what circumstances evidence can be withheld or has to be disclosed. Rules 76 to 84 are especially relevant for the disclosure of evidence and the inspection of material, and there are disclosure obligations for both the prosecution and the defence; however, the Prosecutor’s disclosure obligations are far more comprehensive. The two main obligations for the Prosecutor to actively search exculpatory evidence can be found in Articles 54 (1) (a) and 67 (2). Nonetheless, neither the RS nor its RPE can provide a general solution for each and every case dealing with matters of the disclosure of evidence and its scope in specific situations. Hence, there have been plenty of instances at the ICC where the judges had to determine whether or not the Prosecutor complied with his or her disclosure obligations. In addition, the standard for the disclosure of evidence may ‘differ according to the stage of proceedings.’ For example, it may be the case that the Prosecutor complies with his or

35 In the case of Lietzow v. Germany, e.g., it was held that efficiently conducted criminal investigations may imply that ‘part of the information collected […] is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice.’ ECtHR, Lietzow v. Germany, no. 24479/94, 15 February 2001, § 47.
37 SHIBAHARA and SCHABAS in Triffterer (n 29) 1176.
38 See e.g.: ECtHR, Ovsjannikov v. Estonia [GC], no. 1346/12, 20 February 2014, § 77; Chruściński v. Poland, no. 22755/04, 6 November 2007, § 56. See also: Chapter 2, p. 48.
39 Ibid.
40 Rules 76-84;121 RPE.
41 AMBOS (n 16) 547. Concerning the different standards of proof, see e.g. SLUITER et al. (eds.) 2013. International Criminal Procedure. Principles and Rules. OUP, p. 1128-1148. On the more recent debate involving issues on how high the standard at pre-
her duties—before the pre-confirmation hearing—if evidence is disclosed in form of a summary or in form of redacted versions.\textsuperscript{42} Furthermore, the Court developed different approaches as to whether the prosecution had sufficiently complied with its disclosure obligations. Here, the two most important key words are ‘bulk rule’ and ‘totality rule.’ In other words, there was a controversy as to the extent of potentially exculpatory material that had to be disclosed before the confirmation hearing—but one by one from the start.

1.1.1 Bulk rule v. totality rule

Before the confirmation of charges hearing takes place, the charged person has to be provided with ‘a copy of the document containing the charges […]’.\textsuperscript{43} In addition, he or she shall ‘be informed of the evidence on which the Prosecutor intends to rely at the hearing.’\textsuperscript{44} Generally speaking, the disclosure of evidence of potentially exculpatory material is organised between the parties themselves, which is known as \textit{inter partes} disclosure. To repeat, the Prosecutor has an obligation to disclose potentially exculpatory material under Article 67 (2). Moreover, the defence has the right to inspect evidence and material pursuant to Rule 77. An additional disclosure obligation stems from Rule 121 (2) (c); it contains the obligation to communicate to the Pre-Trial Chamber ‘all evidence [that has been] disclosed between the Prosecutor and the [charged] person for the purposes of the confirmation hearing.’\textsuperscript{45} As a consequence, one of the very first questions posed to the Pre-Trial Chamber was when the Prosecutor had to disclose potentially exculpatory material (before or after the confirmation hearing).

Secondly, there was a further controversy concerning the amount of evidence that had to be disclosed \textit{inter partes} before the evidence finally had to be communicated to the Pre-Trial Chamber.

With regards to the question as to when the evidence had to be disclosed (before or after the confirmation hearing), it can be held that the prosecution tried to shirk its disclosure obligations in the early days of the ICC’s proceedings. The Prosecutor claimed that he or she would only be in a position to identify potentially exculpatory

\textsuperscript{42} See e.g.: \textit{Prosecutor v. Lubanga}, ICC-01/04-01/06-773, AC, 14 December 2006, 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,’ para 40; \textit{Prosecutor v. Lubanga}, ICC-01/04-01/06-2190-Red, TC I, 10 December 2009, Redacted Decision on the Application to Disclose the Identity of Intermediary 143, para 20.

\textsuperscript{43} Art. 61 (3) (a) RS; Regulation 52 of the Regulations of the Court.

\textsuperscript{44} Art. 61 (3) (b) RS.

\textsuperscript{45} Rule 121 (2) (c) RPE.
evidence after the defence had revealed the strategy that it intended to use; and, according to the Prosecutor, he would only know about the defence’s strategy at the confirmation hearing. As a result, the Prosecutor regarded it as sufficient to disclose potentially exculpatory evidence after the confirmation hearing. This, however, was rejected by the Pre-Trial Chamber. Single Judge Steiner stressed the ‘literal interpretation of Article 67 (2),’ which required the prosecution to disclose the material ‘as soon as practicable.’ According to the Single Judge, the identification issue explained by the prosecution had to be regarded as an ‘exception’ rather than ‘the general rule.’ Hence, Judge Steiner disagreed with the Prosecutor and ordered the disclosure of potentially exculpatory material before the confirmation hearing. This approach was upheld in the case of Mbarushimana, when PTC I concluded that there was no ‘discretion as to the selection of material’ which the prosecution ‘would disclose only after the confirmation hearing.’

Yet, there was still a controversy as to the extent of what evidence and how this evidence had to be communicated inter partes and finally to the Pre-Trial Chamber. The crucial point in the debate was whether or not it was sufficient to file a bulk of evidence (bulk rule) or, whether or not all evidence, regardless of whether the parties intended to rely on such evidence needed to be submitted (totality rule). On several occasions, the Pre-Trial Chamber reiterated the ‘limited scope and purpose’ of confirmation hearings; and due to such a limited scope, the parties were not ‘requested to communicate to the Chamber those materials subject to disclosure on which they do not intend to rely at the confirmation hearing.’

A further question involved in the bulk rule was the scope of the inter partes disclosure pursuant to Article 67 (2) and Rule 77. In a decision concerning the case of Lubanga, PTC I recalled the bulk rule, reiterating ‘that, prior to the confirmation hearing, the Prosecution’s obligation was solely to disclose to the Defence the bulk of potentially exculpatory evidence or evidence which could be material to the preparation of the Defence.’ See: Prosecutor v. Lubanga, ICC-01/04-01/06-803-IE, PTC I, 29 January 2007, Decision on the Confirmation of Charges, para 154. This implied that not all of the potentially exculpatory evidence had to be disclosed.

hearing, the Prosecution’s obligation was solely to disclose to the Defence the bulk of potentially exculpatory evidence [...]. This was confirmed by Single Judge Steiner in 2008 in *Katanga and Chui*, when the judge regarded it as sufficient if the Prosecutor handed over a bulk of information of exculpatory evidence, but not necessarily ‘all potentially exonerating evidence, including confidential’ material. In the *Katanga and Ngudjolo* decision, the Prosecutor’s possibility to restrict confidential information under Article 54 (3) (e) was at the heart of the problem. In order to find an adequate solution, the Single Judge discussed alternative disclosure measures and concluded that the Prosecutor’s disclosure obligations can be met if the prosecution provided the defence with summaries containing information that was ‘analogous to exculpatory evidence.’ This is why earlier in this thesis, it was alleged that the standard of disclosure obligations may differ depending on the different stages of the proceedings (pre-confirmation or post-confirmation).

In 2011, it seemed that the bulk rule had been superseded by the totality rule. Single Judge Trendafilova took a different approach as to what material had to be communicated to the Pre-Trial Chamber in the sense of Rule 121 (2) (c). Having confirmed that the disclosure of evidence was in principle an *inter partes* process amongst the trial parties with the help of the Registry, the Single Judge alleged what, according to her, ensured an ‘effective disclosure process:’

In this context, the Single Judge considers that ensuring an effective disclosure process, which ultimately aims at reaching a proper decision as to whether or not to send the cases to trial, requires that *all* evidence disclosed between the parties shall be communicated to the Chamber, regardless of whether the parties intend to rely on or present the said evidence at the confirmation hearing. This reading is compatible with a literal as well as contextual interpretation of the Statute and the Rules thereto and in particular, the last sentence of rule 121(2) (c) of the Rules, which requires that “all evidence disclosed [...] be communicated to the Pre-Trial Chamber.”

As a result, the communication duties of the Prosecutor to disclose evidence became firmer. In the same decision, the Prosecutor was required to disclose ‘*all* evidence’ in

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55 *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-621, PTC I, 20 June 2008, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, para 10; (emphasis added).
57 *Ibid*, para 123. The present case was still considered to be ‘a borderline one.’
58 See also: KLAMBERG (n 30) 280 ff.
59 International Bar Association’s Report (n 24) 22.
60 *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-44, PTC II, 6 April 2011, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, para 6; (emphasis added).
his or her possession or control pursuant to Article 67 (2), ‘all names of witnesses and copies of their prior statements on which the Prosecutor intents to rely’ pursuant to Rule 76, and ‘all rule 77 material in possession or control of the Prosecutor (incriminatory, exculpatory, or mixed in nature), which is material to the preparation of the defence’. Nonetheless, the change of approach from the bulk rule to the totality rule was certainly not without controversy.

When PTC I announced their first ‘Decision on Issues Relating to Disclosure’ in the case of Mbarushimana, it decided to apply the bulk rule with regards to the disclosure duties. Regarding Rule 121 (2) (c) of the RPE, PTC I followed a decision which was held in the case of Abu Garda, that was, that the Pre-Trial Chamber only required the parties to communicate that kind of material on which they intended to rely at the confirmation hearing—Judge Tarfusser dissenting from this approach. On the contrary, there were three further decisions favouring the so-called totality approach, namely in the cases of Ruto et al., Muthaura et al. and Ntaganda. Pre-Trial Chamber II refrained from the usage of the wording ‘totality rule’ though. Hence, one would not find the wording totality rule in these decisions.

Until today, it cannot be definitively determined what disclosure regime applies at the pre-confirmation level. For example, a more recent decision delivered by Single Judge Fernández de Gurmendi (PTC I) took the bulk rule approach yet again; and the parties would—according to her—only have to communicate that kind of evidence to the Pre-Trial Chamber on that which they intended to rely at the confirmation hearing—Judge Tarfusser dissenting from this approach. In other words, the judge concluded that under ‘evidence that has to be disclosed for the purposes of the confirmation hearing must be understood [only that] evidence on which the parties intended to rely at the confirmation of charges hearing.’ As a result, it is not entirely obvious which approach has to be applied for the disclosure of evidence at pre-confirmation level. A uniform application of these matters, however, could be

61 Ibid.
64 Ibid, Partly Dissenting Opinion of Judge Tarfusser.
67 Ibid.
68 This was confirmed by PTC I stating that ‘The imposition of different standards pertaining to the scope of the Prosecution’s disclosure and inspection duties prior to the confirmation hearing is a troubling development, adversely affecting the legal certainty of the Court’s criminal process. What must be disclosed by the Prosecution at the pre-confirmation stage is a fundamental question
useful in terms of practicability and might therefore be a worthwhile goal which the ICC should aim for. The controversial debate on the purpose of confirmation of charges hearings, including the height of the substantial grounds to believe standard in the sense of Article 61 (5) and (7) as well as its implications will briefly be addressed in Chapter 7, when the thesis discusses control mechanisms of the prosecution in order to raise the level of fairness.

1.1.2 Time frame and format of the Prosecutor’s disclosure obligations

The Rules of Procedure and Evidence are fairly clear as to when the Prosecutor has to disclose first, a ‘detailed description of the charges’ and second, ‘a list of evidence which he or she intends to present at the hearing,’ which is 30 days before the date of the confirmation hearing. In case the Prosecutor intends to amend the charges, she/he has to notify the Pre-Trial Chamber no later than 15 days before the date of the hearing. The same applies if the Prosecutor intends to present new evidence. In such case, she/he has to provide the Pre-Trial Chamber and the defence, or the charged person, with a list of the new evidence. The time period of 30 days at pre-confirmation level seems to represent a minimum standard of what is described as ‘adequate time’ in the sense of Article 67 (1) (b) of the Statute or, what is considered to be a ‘reasonable time’ pursuant to Article 61 (3). However, the Prosecutor is encouraged ‘to fulfil his disclosure obligations as soon as practicable without waiting for the statutory deadlines to expire.’ As soon as practicable, in turn, has been described as ‘being the earliest opportunity possible after the evidence comes into the Prosecutor’s possession.’

Generally speaking, the Pre-Trial Chambers concur that ‘the deadlines referred to in rule 121 of the Rules are only indicative of the minimum time limits a party can avail itself to comply with its disclosure obligations.’ Consequently, the sooner the evidence is disclosed to the other party, the better.
As regards the analysis of the evidence that has to be disclosed, Rule 121 (3) requires the Prosecutor to provide a detailed description of the charges (DCC) and a list of evidence (LoE) to the Pre-Trial Chamber as well as to the charged person.\(^78\) According to the Pre-Trial Chambers, the disclosure of relevant evidence also presupposes an in-depth analysis by the Prosecutor of each piece of evidence. Such an in-depth analysis consists of a summary table ‘which shows the relevance of the evidence presented in relation to the elements of the crimes,’\(^79\) as well as the ‘mode of participation in the offence.’\(^80\) The in-depth analysis charts (IDAC) have to be updated from time to time, ‘taking into account the analysis of the new evidence exchanged between the parties’ and the Chamber.\(^81\) It has not been explicitly clarified whether or not the Prosecutor would have a theoretical obligation to provide an in-depth analysis chart with regards to exculpatory material. In the case of Bemba, for example, it was unequivocally clear that Pre-Trial Chamber III referred to an in-depth analysis chart that was related to incriminating evidence.\(^82\) In the case of Ruto et al., on the other hand, this topic seemed to become more relevant—at least in the Prosecutor’s view. The prosecution had filed an appeal against what he/she considered to be a duty to explain to the defence the potential relevance of non-incriminatory evidence.\(^83\) However, Single Judge Trendafilova mentioned that she had not required the Prosecutor to provide such an in-depth chart regarding exculpatory evidence, and, therefore, the matter was not a subject that required a decision.\(^84\) She concluded that

Since the Single Judge did not order the in-depth analysis chart to include a detailed analysis of exculpatory evidence (but that of all incriminating evidence), the Single Judge considers that the argument presented by the Prosecutor is based on a misconception, and thus does not constitute a subject that requires a decision.\(^85\)

Consequently, the question of whether or not the Prosecutor could have a theoretical obligation to provide an IDAC for exculpatory evidence at pre-confirmation level, if

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78 According to PTC I, this can best be achieved by organising the DCC (or the amended DCC) and the LoE so that ‘(i) each item of evidence is linked to the factual statement it intends to prove, and (ii) each factual statement is linked to the specific element of the crime or mode of liability, or both, […]’. See: Prosecutor v. Lubanga, ICC-01/04-01/06-102, PTC I, 15 May 2006, Decision on the Final System of Disclosure and the Establishment of a Timetable, Annex I, para 59.


80 Ibid.

81 Ibid.


83 Prosecutor v. Ruto et al., ICC-01/09-01/11-74, PTC II, 2 May 2011, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision Setting the regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-01/11-44)”, para 11.

84 Ibid, paras 16-18.

85 Ibid, para 18.
requested, cannot be answered in this thesis.\textsuperscript{86} Be that as it may, practice has revealed that IDACs have only been required for the disclosure of incriminatory evidence,\textsuperscript{87} whereas the analysis by the Prosecutor of whether or not evidence is ‘truly relevant’ relates to both, incriminating as well as exculpatory evidence.\textsuperscript{88}

Overall, it can be held that an ‘organised and systematic’ presentation of incriminatory evidence by the prosecution has also been confirmed at post-notification level, indicating that the charts are not only appreciated at the pre-notification stage.\textsuperscript{89} Hence, there is a certain degree of significance with regards to the presentation of evidence in the context of the fair trial, especially with regards to the ‘efficiency and expeditiousness of the proceedings.’\textsuperscript{90} Returning to the pivotal question of this thesis, that is, whether or not the Rome Statute complies with human rights standards, it can be held that, so far, there are no human rights violations visible. As a next step, the thesis will pursue a comparison of the terminology used by the ICC judges and its human rights jurisdictions counterparts.

1.1.3 Comparison of terminology
As we recall from Chapters 2 and 3, the European Convention on Human Rights provides certain procedural rights for detained persons at the pre-trial stage. For example, the ECHR suggests that an arrested person ‘shall be entitled to take proceedings by which the lawfulness of detention shall be decided speedily by a court and that his [or her] release [is] ordered if the detention is not lawful.’\textsuperscript{91} With regards to interim release, the Rome Statute contains a similar provision in Article 60, meaning that the Pre-Trial Chamber has to satisfy itself that the charged person has been informed about ‘the right to apply for interim release.’\textsuperscript{92} In addition, paragraph two of Article 60 stipulates that ‘a person subject to a warrant of arrest may apply for interim

\textsuperscript{86} Trial Chamber II raised the same question on pre-trial level in: \textit{Prosecutor v. Katanga and Ngudjolo}, ICC-01/04-01/07-788-ENG, TC II, 10 December 2008, Order Instructing the Participants and the Registry to File Additional Documents, para 8. In practice, however, TC II only decided on the presentation of incriminating evidence. \textit{See: Prosecutor v. Katanga and Ngudjolo}, ICC-01/04-01/07-1088, TC II, 1 May 2009, 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’”, para 36.

\textsuperscript{87} Expert Initiative on Promoting Effectiveness at the ICC (n 16) 107.


\textsuperscript{89} KLAMBERG (n 30) 282.


\textsuperscript{91} Art. 5 (4) ECHR.

\textsuperscript{92} Art. 60 (1) RS.
release pending trial.  

Hence, the thesis will now look for cases where the judges of the ICC had to decide on issues concerning the lawfulness of the detention.

In the *Prosecutor v. Mbarushimana*, for example, PTC I clarified some questions with regards to the scope of the disclosure of evidence.  

To this end, the Pre-Trial Chamber relied upon a previous Appeals Chamber decision, reiterating that

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\text{[i]n order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case.}\]

Based on this assumption, the Pre-Trial Chamber then identified three purposes for which the defence sought disclosure of evidence in the current application. These were: first, disclosure to challenge the validity of the arrest warrant; second, challenging the lawfulness of the detention and applying for interim release and, third, challenging the admissibility of the case.  

Having identified some of the purposes for disclosure of evidence at pre-confirmation stage, the crucial question now was to determine to what extent the disclosure of evidence could be limited after the suspect had been detained. To repeat, the important task of this example is to find out exactly where the line of disclosure or non-disclosure has been drawn by the ICC in the light of human rights law.

Returning to the *Mbarushimana* decision, the defence intended to challenge intercept conversations that were mentioned by the Prosecutor by virtue of Article 69 (7) of the Statute. As a result, PTC I firstly clarified whether or not it was ‘empowered to rule on the relevance and admissibility of the evidence’ at all, before it decided on the scope of the disclosure.  

Having determined that a decision on the relevance and admissibility of evidence can be carried out by the Pre-Trial Chamber, PTC I concluded that the defence needed the evidence—in this case intercept communications—in order to challenge its legality. It was therefore ‘essential’ for the preparation of the defence to obtain the latter evidence, also in a sense to prove whether or not the detention was finally lawful. As a consequence, the prosecution was ordered to disclose the intercept

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93 Art. 60 (2) RS.
As one can see, the ICC’s Pre-Trial Chamber came to a similar conclusion as the ECtHR in *Lietzow v. Germany* or, more recently, in *Ovsjannikov v. Estonia*. If evidence is considered as ‘essential,’ either to challenge the legality of the evidence or the lawfulness of the detention, it has to be disclosed. With regards to the scope of the wording ‘essential,’ it can be held that the defence is not entitled to request ‘any material formulated or retained by the OTP.’ In the case of *Mbarushimana*, for instance, the defence requested access to material which the prosecution regarded as ‘insufficient material’ to prove the allegations. Here, the Pre-Trial Chamber cited Rule 81 (1) and concluded that ‘reports, memoranda or other internal documents prepared by a party […] in connection with the investigation or preparation of the case are not subject to disclosure.’ Hence, the prosecution did not have to disclose this material.

The more difficult question in this *Mbarushimana* decision related to supporting documentation which accompanied the state referral of the DRC to the ICC Prosecutor and whether or not such material should be disclosed to the defence if national security interests pursuant to Article 72 of the Statute were at stake. As a general rule, PTC I held that ‘the Defence should, in principle, be entitled to such documents’ but ‘regard must be had to protect national security interests of the State from which the documents originated.’ This may imply consultations with the respective states in order to determine whether or not the disclosure would ‘prejudice that State’s national security.’ Nonetheless, PTC I concluded that any documentation which was ‘essential for the preparation of a challenge’ as to the admissibility of a case had to be disclosed to the defence. Furthermore, the Prosecutor had to apply to the Chamber the material that needed redactions due to the Prosecutor’s confidentiality obligations.

Looking at this decision, one can see parallels with regards to the wording used by both courts, the ECtHR and the ICC. First, whenever material or information is considered to be ‘essential for the preparation’ of the defence, it needs to be disclosed. Second, whenever the Prosecutor deems some evidence to be confidential, she or he has to apply for redactions with the Chamber. Hence, any decision concerning redactions of

98 Ibid.
100 Instead of ‘essential’, the ECtHR also used the terminology ‘crucial’ in the case of *Svipsta v. Latvia*, no. 66820/01, 9 March 2006, § 138 or ‘key role’ in *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, § 41.
102 Ibid, para 18.
103 Ibid.
104 Ibid, closing order 1 (b).
105 Ibid, closing order (2).
evidence or non-disclosure needs to be issued by the judiciary (Pre-Trial or Trial Chamber) but not by the Prosecutor. As a result, and regardless of the different application of the bulk or the totality rule, the wording used by the ECtHR and ICC is similar. Whenever evidence is essential in order to challenge the lawfulness of the detention, it has to be disclosed to the maximum extent possible. To repeat, there may be circumstances under which the disclosure of evidence can be limited; the extent itself, however, has to be decided by the judges.

This result confirms an introductory statement made by the International Bar Association in 2011 when monitoring the ICC’s proceedings: ‘While the normative provisions governing the fairness of the proceedings at the ICC are clear, the practical interpretation and implementation of these provisions is less so.’ But where exactly does one draw this line of essential disclosure in practice? This question constantly beleaguered the judges of the ICC and looking back at a decision from 2008, the Appeals Chamber—after having scrutinized human rights law—came to the conclusion that cases could only be solved individually by considering ‘the circumstances of the case.’ Whether or not the practical interpretation of human rights law rendered by the Appeals Chamber has always been successful, however, may be subject to debate. In detail, the Appeals Chamber had to determine whether or not a decision on interim release held by PTC III ‘should be reversed as a result of the lack of full disclosure to the Appellant.’ In other words, did Pre-Trial Chamber III err when it decided on an application for interim release at a point of time ‘when the Appellant had not yet received all documents and evidence relating to the grounds for his detention’?

The answer was no because—according to the Appeals Chamber—the appellant would have had the right to apply for interim release another time after having received full disclosure. This may sound cogent in the first place. Yet, looking at the Appeals Chamber’s judgment in a little more detail, one could have addressed two questions about fairness whilst deciding on the issue at stake. First, was the non-disclosed material ‘essential’ in order to effectively challenge the lawfulness of the detention? And second, as pointed out by Judge Pikis, how can a person effectively contest the lawfulness of his/her detention without having the knowledge of the facts that the Prosecutor ‘relied

110. Ibid, para 40.
111. Ibid, para 39.
upon in order to justify the restriction of [one’s] liberty?\textsuperscript{112} The Appeals Chamber explained that the right to immediate disclosure was not an absolute,\textsuperscript{113} reiterating the Pre-Trial Chamber’s obligation to also involve the interests of witnesses and victims, and, due to this obligation, it appeared that the PTC had ensured the provision of the material that ‘underpinned the Warrant of Arrest in as timely a manner as possible on the facts of the present case.’\textsuperscript{114} Nonetheless, it is at least debatable whether the questions that lead to the conclusions were the right ones; and the dissenting opinion of Judge Pikis reflects this doubt.

As a result, the hypothesis of the International Bar Association seems to be correct: ‘While the normative provisions governing the fairness of the proceedings at the ICC are clear, the practical interpretation and implementation of these provisions is less so.’\textsuperscript{115} Therefore, the challenge of this thesis will be to suggest solutions which may create an enhanced legal apparatus providing for a better practical application of human rights law. In the interim, it can be held that the Rome Statute, its RPE and the decisions of the ICC at pre-confirmation stage comply with human rights law. Thus far, it can be held that the terminology used at the ECtHR and the ICC has acquired similar characteristics and procedural norms. However, in the matter of a full application of the ECtHR’s terminology in The Hague, the jury is still out.

1.2 Disclosure at trial stage, restrictions and ex parte hearings

1.2.1 Aspects of timing and presentation of the inculpatory evidence

As Chapter 2 has revealed, the human rights jurisdictions concluded that it was hard to predict the exact amount of time that should be allocated to the defence in order to ‘adequately’ prepare trial.\textsuperscript{116} However, if one wanted to answer the question of adequate time for the preparation of the defence, aspects such as the circumstances of the case, its complexity, the nature and the stage of the proceedings would have to be taken into account.\textsuperscript{117} A similar approach has been adopted by the Trial Chambers of the ICC. Whenever a decision as to adequate time has been rendered at post-confirmation level, it seems that the ICC judges especially put emphasis on the human rights aspect of what time is ‘actually available’ to counsel. For example, Trial Chamber III deemed five months as adequate for preparation of the defence if counsel had to investigate ‘16

\textsuperscript{112} \textit{Ibid.}, Dissenting Opinion of Judge Georgios M. Pikis, para 33.
\textsuperscript{113} \textit{Ibid.}, para 34.
\textsuperscript{114} \textit{Ibid.}, para 38.
\textsuperscript{115} International Bar Association’s Report (n 24) 21.
\textsuperscript{116} Chapter 2, pp. 58-62.
\textsuperscript{117} \textit{Ibid.}
witnesses *de novo* and to prepare 21 witnesses for trial, who were disclosed in advance of the confirmation hearing.\(^{118}\) In a more general determination, Trial Chamber V(a) assumed that ‘three months between the full disclosure of the prosecution case and the beginning of trial’ would be sufficient [or ‘necessary’] to guarantee an adequate preparation for the defence.\(^{119}\) Furthermore, evidence or material always has to be ‘effectively’ disclosed to the other party, that is, in one of the two ‘working languages’ of the Court (English or French) or, in cases where a document or material is in another language, a translation into one of the two working languages has to be provided.\(^{120}\)

In the case of *Banda and Jerbo*, the defence asserted that in order to question incriminatory witnesses, it would need to carry out more investigatory work for the preparation of its case—and that this may take up to one year after the final disclosure.\(^{121}\) Trial Chamber IV agreed on the fact that ‘some significant preparatory work can only be completed once there has been full disclosure on the part of the prosecution.’\(^{122}\) However, the Chamber did not accept “that the setting of the date for trial may not be done until the defence has ‘identified with sufficient certainty the witnesses it intends to call at trial’.”\(^{123}\) Nor was the Chamber ‘persuaded that it would be reasonable to postpone the commencement of the trial until the defence has had an opportunity to request the relocation of all defence witnesses.’\(^{124}\) Therefore, it is questionable whether a Chamber would always grant a one year preparation for trial. In *Banda and Jerbo*, nonetheless, the Chamber required the prosecution to hand over all Article 67 (2) evidence and Rule 77 material on 2 May 2013, although the trial was set to commence on 5 May 2014.\(^{125}\) Hence, the adequate time to prepare trial was set to be about one year.

Aspects of timing may also include situations in which the prosecution requests to join two or more cases. In the case of *Blé Goudé*, for instance, the prosecution filed such a joinder request. Having submitted the matter to the Trial Chamber,\(^{126}\) the defence counsels of Mr Blé Goudé asked for additional time to adequately prepare the response

\(^{118}\) *Prosecutor v. Bemba*, ICC-01/05-01/08-598, TC III, 5 November 2009, Decision on the Date of Trial, para 5.

\(^{119}\) *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-807, TC V(a), 9 July 2013, Decision on Request for Additional Time to Disclose Translations, para 6. However, Trial Chamber V(a) also stressed that the consideration of 3 months as being necessary to adequately prepare for trial was only one or ‘a’ factor relevant for the Chamber’s determination of a suitable trial date.

\(^{120}\) *Ibid*, para 7; *see also*: Art. 50 (2) RS.

\(^{121}\) *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-455, TC IV, 6 March 2013, Decision Concerning the Trial Commencement Date, the Date for Final Prosecution Disclosure, and Summonses to Appear for Trial and further Hearings, para 13.

\(^{122}\) *Ibid*, para 14.

\(^{123}\) *Ibid*.

\(^{124}\) *Ibid*.

\(^{125}\) *Ibid*, para 25 (ii) – (iv).


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of this joinder request. Such a situation may be regarded as a specific circumstance of the case. In the instant case, drawing from their obligation from human rights law, counsel did comply with their duty and requested such adjournment. In detail, counsel sought an additional 30 days of ‘study period’ in order to file a response to the joinder request; yet, the request was rejected. Instead, the Chamber granted the defence seven extra days, reiterating that good cause had to be shown for such an application. The change in the status from pro bono counsel to lead counsel or from legal assistant to co-counsel could not be considered as good cause to grant 30 extra days. The Chamber held both counsels were not prevented from attending and actively participating in the proceedings, especially with regards to the confirmation of charges hearing. Therefore, there are visible parallels to the jurisprudence of human rights law, which requires the consideration of how much time counsel ‘actually’ had for preparation of a case. In conclusion, and generally speaking, it is hard to figure out the exact time frame for an adequate preparation of the defence in the abstract. On the other hand, rough guidelines of what may be considered as adequate do exist, always bearing in mind the workload of defence counsel.

Similar to the aspects of timing, there is also no uniform rule as to how the disclosure of incriminating evidence has to be presented, especially with regards to tables or in-depth analysis charts. Whereas the purpose of the creation of such tables seems to be fairly clear, the details of what exactly they should contain do vary. In any case, in Katanga and Ngudjolo, Trial Chamber II held that there should be a ‘clear and comprehensive overview of all incriminating evidence’ outlining ‘how each item of evidence relates to the charges.’ Such an analytical table would be referred to as ‘Table of Incriminating Evidence’ and it needed to ‘break down each charge into its constituent elements as prescribed by the Elements of crimes.’ Hence, ‘the Prosecution may be required to create and provide to the Chamber and the Defence a detailed element-by-element analytical chart for all the evidence it intends to use during

128 Regulation 35 (2).
130 Expert Initiative on Promoting Effectiveness at the ICC (n 16) 108.
131 First, a table should exclude any ‘ambiguity whatsoever in the alleged facts’ that underpin the charges confirmed by the Pre-Trial Chamber; and second, a table is necessary to guarantee ‘a fair and effective presentation of the evidence on which the Prosecution intends to rely at trial.’ See: Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-956, TC II, 13 March 2009, Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol, para 5.
133 Ibid, para 13.
In a different decision, Trial Chamber III left open the question as to whether or not a ‘Table of Incriminating Evidence’ would broadly correspond to the equivalent of what is called an in-depth analysis chart. On the other hand, TC III was entirely persuaded by the approach that TC II held in the case of *Kantanga and Ngudjolo* and, therefore, affirmed the Prosecutor’s obligation to provide an IDAC as a ‘necessary ingredient of the fair trial.’ In addition, it stressed that it was ‘essential, in order to make the document complete, that the witness statements are included.’

The *Expert Initiative on Promoting Effectiveness at the ICC* correctly postulated that the existence of different approaches as to the presentation of evidence ‘leads to unpredictability’ and may ‘give rise to delays in the proceedings due to ensuing litigation.’ At this stage of the thesis, however, it equally needs to be pointed out that the different approaches do not represent a violation of human rights law. This is why the problems inherent in the Rome Statute will be resumed at a later stage.

### 1.2.2 Restrictions of disclosure and *ex parte* hearings

As addressed earlier in this thesis, the right to full disclosure of evidence may be restricted due to national security, public interest immunity, witness protection and cases in which the disclosure would endanger the course of the investigations. Similar reasons are listed in the Rome Statute. In fact, some of these reasons have caused serious debates about the fairness in international criminal procedure. Amongst them has been the question of the disclosure of information related to national security interests, and balancing these national security interests and the right to a fair trial appears to be an interesting debate, indeed. The methodology of this thesis, however, uses the data from human rights jurisdictions and measures this data against the decision-making procedure of the ICC. Therefore, to conclude on national security issues, one would need a concrete definition or, at least, some concrete reference points as to what human rights law has decided on the circumstances under which evidence can be withheld due to national security grounds. Which procedure should be followed

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134 *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1088, TC II, 1 May 2009, 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’”, paras 11 and 36.


136 Ibid., para 28.

137 Expert Initiative on Promoting Effectiveness at the ICC (n 16) 109.

in such a case and have human rights jurisdictions elaborated on national security grounds? The answer is not in detail. By way of an example, in the case of *Fitt v. UK*, the ECtHR held

In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. [...] In any event, in many cases, such as the present one, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirement to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect interest of the accused.  

As a result, this thesis can only compare the decision-making procedure for restrictions of disclosure from human rights law with that of the ICC. In fact, the Rome Statute also leaves it for its signatory states to decide whether or not a document is subject to national security interests and only in ‘exceptional cases’ may a signatory state be obliged to comply with a request from the ICC. Hence, elaborating on the case law of the *ad hoc* Tribunals and debating under which circumstances a witness, state officials or the state itself may be compelled to cooperate if national security interests were at stake, would overstep the boundaries of this thesis. Rather, and to repeat, the purpose of this thesis is to juxtapose the ICC’s decision-making procedure relating to disclosure restrictions against the overall standards set by human rights law. Therefore, it is important to explore ICC decisions that reveal procedural parameters governing the restriction of disclosure of evidence. What does the process of *ex parte* hearings look like at the ICC? And are there any visible contours as to the scope of *ex parte* hearings?

As one recalls from Chapters 2 and 3, it is possible to decide about non-disclosure of evidence in *ex parte* hearings in which the defence is not present, though

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140 ECtHR, *Fitt v. UK* [GC], no. 29777/96, 16 February 2000, § 46 (emphasis added); see also: *Leus v. Estonia*, no. 59577/08, 6 March 2012, § 79.


142 KLIP (n139) 654.

143 In the case of *Blaskić*, the Appeals Chamber of the ICTY held that, if national security issues were at stake, state officials cannot be subject to binding orders by the ICTY and therefore, the Court had to turn to the relevant state itself. A blanket right for states to withhold documents due to security purposes might, however, jeopardise the function of the ICTY and ‘defeat its essential object and purpose.’ See: ICTY, *Prosecutor v. Blaškić*, IT-95-14, AC, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, paras 43 and 65.
the latter has been subject to criticism. Similarly, the Rome Statute enables restrictions of the disclosure of evidence in its Articles 54 (3) (e), 68 and 72 in conjunction with Rules 81 and 134 (1) of the RPE. If the confidentiality of certain documents needs to be ensured, it is for the Chambers to guarantee the required concealment. This is why Single Judge Steiner established general principles governing the applications to restrict disclosure pursuant to Rule 81 (2) and (4) of the RPE in 2006.\footnote{Prosecutor v. Lubanga, ICC-01/04-01/06-08-Corr, PTC I, 19 May 2006, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence.} Generally, the judge reiterated that \textit{ex parte} proceedings ‘are the exception and not the general rule’ with regards to the disclosure of evidence.\footnote{Ibid, para 12.} As a consequence, restrictions under Rule 81 (4) would only be allowed if they first served a ‘sufficiently important objective’ and, second, if it was ‘necessary in the sense that no lesser measure could suffice to achieve a similar result.’\footnote{Ibid, para 13 (i) and (ii).} Although the judge referred to a different human rights case in her decision,\footnote{The judge referred to a judgment concerning Art. 8 (Right to Respect for Private and Family Life) of the ECHR, \textit{Silver v. UK}, nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25 March 1983.} the keyword ‘necessity’ is definitively familiar from human rights law.\footnote{See Chapters 2 and 3.} The third aspect for an \textit{ex parte} application under Rule 81 (4) of the RPE was proportionality, meaning that ‘the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.’\footnote{Prosecutor v. Lubanga, ICC-01/04-01/06-08-Corr, PTC I, 19 May 2006, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, para 13 (iii).} Here, the Single Judge established a pre-requisite that is not necessarily required by human rights law, at least not when the ECtHR evaluates competing interests such as national security or the need to protect witnesses at risk with the right to a fair trial. As explained in Chapter 4, a so-called ‘classic proportionality’ test exists in the ECtHR’s doctrine. However it has neither been applied for an assessment of equality of arms, nor for an assessment of the right to adversarial proceedings.\footnote{See Chapters 2 and 4.} As a result, the ICC’s ‘proportionality test’ goes beyond what is required by human rights law. Nonetheless, it does not contradict human rights standards.

In addition to the pre-conditions that need to be respected for the application of \textit{ex parte} hearings, the judge pointed out two different types of \textit{ex parte} proceedings that are stipulated in Regulation 24 of the ICC’s Regulations of the Registry. That is, on the one hand, \textit{ex parte} hearings in which one or more of the participants are unaware of the fact that such an application has been made and, on the other, proceedings in which the defence is aware of such an application but has no opportunity to voice their
arguments.\textsuperscript{151} As one can see, the Regulations of the Registry left a discretion as to whether a party (especially the defence) should be informed of such hearings at all. Pre-Trial Chamber I did not agree with the latter approach and ordered that in future cases, the defence had always to be informed of the existence and the legal basis of any \textit{ex parte} application filed by the prosecution.\textsuperscript{152} However, the prosecution appealed this decision. In the end, the Appeals Chamber regarded the decision of the Pre-Trial Chamber as erroneous ‘to the extent that it does not provide for any exception.’\textsuperscript{153} According to the Appeals Chamber, the main reason was that the decision of the Pre-Trial Chamber did not provide for any flexibility. In particular, the Appeals Chamber stated

The Pre-Trial Chamber’s approach that the other participant has to be informed of the fact that an application for ex parte proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.\textsuperscript{154}

In other words, the Appeals Chamber maintained a certain leeway for not informing the defence of an \textit{ex parte} hearing in exceptional cases.

\textit{Ex parte} hearings have been controversial in human rights law as well. Nonetheless, the general concept behind human rights law revealed that they are in conformity with the European Convention of Human Rights if they are under the constant assessment of the judiciary, regardless of whether or not the defence has been informed. In the cases of \textit{Fitt} and \textit{Jasper}, for example, the defence were notified that an \textit{ex parte} application by the Prosecutor was to be made.\textsuperscript{155} In \textit{Rowe and Davis}, on the contrary, the prosecution handed to the court a document which was not shown to the defence counsel.\textsuperscript{156} In addition to the constant assessment of the judiciary, the judges shall only decide on the disclosure or non-disclosure. Any decision as to the relation of

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  \item Regulation 24 (4) of the Regulations of the Registry; see also: \textit{Prosecutor v. Lubanga}, ICC-01/04-01/06-08-Corr, PTC I, 19 May 2006, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, para 14.
  \item \textit{Ibid}, para 17.
  \item \textit{Ibid}, para 67.
  \item ECtHR, \textit{Fitt v. UK [GC]}, no. 29777/96, 15 July 2003, § 9; \textit{Jasper v. UK [GC]}, no. 27052/95, 16 February 2000, § 10.
  \item ECtHR, \textit{Rowe and Davis v. UK [GC]}, no. 28901/95, 16 February 2000, § 24.
\end{itemize}
facts may not be rendered in *ex parte* hearings. Moreover, the prosecution may not undertake any decision as to disclosure alone without the approval of the court. Overall, it can be held that human rights law enables the procedural possibility of *ex parte* hearings in which the defence is not present, and, in extraordinary cases, in which the defence is not even be informed. Hence, the Rome Statute and its decisions comply with the standards set by human rights law even if this matter is of a controversial nature in both jurisdictions.

2. The right to have witnesses examined

Article 67 (1) (e) of the Rome Statute stipulates that the accused has the right

> To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defence and to present other evidence admissible under this Statute;

Hence, the Rome Statute contains similar wording to the human rights conventions or the Statutes of the *ad hoc* tribunals. What will be crucial for the next paragraphs is to depict how hearsay evidence is evaluated at the ICC and whether or not one can draw any conclusions as to whether the legal framework and the jurisprudence of the International Criminal Court complies with the doctrine of the human rights courts, especially with the relatively new and flexible application of the ‘sole or decisive’ rule of the ECtHR. As one has seen at the end of Chapter 4, there is no uniform approach at other international criminal courts with regards to the element of counterbalance and corroboration. Whereas the *ad hoc* tribunals in some cases confirmed that corroboration is required to counterbalance a sole or decisive hearsay statement of a witness who has not been cross-examined, the Special Court of Sierra Leone held that such a statement was contingent on its reliability, which can, but does not necessarily have to imply corroboration.

Before the case law of the ICC is scrutinized, one difference between the ICC’s procedure and human rights law needs to be highlighted. At the ECtHR, the question of admissibility of evidence is not at stake since it is for the national courts to decide on admissibility, whereas at the ICC (and other international criminal tribunals), it plays an important role during the entire procedure. Consequently, one could raise the question as to whether there are different standards of reliability, namely reliability in the context of the admissibility of evidence on the one hand, and reliability for the evaluation of a
piece of evidence on the other. In other words, does the reliability for the admissibility of evidence require a different level (or standard) than the reliability that is needed to counterbalance a sole or decisive, uncross-examined hearsay statement? This question has already been addressed in Chapter 4 and Klamberg rightly concluded that there may be a difference between the reliability in the context of admissibility of evidence and reliability for the evaluation of evidence, even if both are closely linked.  

As a general rule with regards to hearsay statements, it can be held that the International Criminal Court—as well as its human rights counterparts—favors the physical attendance of witnesses at trial, ‘except to the extent provided by the measures set forth in article 68 or the Rules of Procedure and Evidence.’  

These measures include that the ‘Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts,’ provided that the latter are not ‘prejudicial or inconsistent with the rights of the defence.’ In conjunction with the possibility of admitting written transcripts, the technical gate openers for the admissibility of hearsay statements are found in Article 64 (9) (a), ensuring that ‘the Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to rule on admissibility or relevance of evidence.’ Furthermore, Rule 63 (2) posits that a Chamber has the authority ‘to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.’

That means that basically every piece of evidence is admissible, ‘unless it is expressly ruled inadmissible by the Chamber upon a challenge’ of a party. Pre-Trial Chamber rulings on the admissibility are, however, not binding for the Trial Chamber. Therefore, the admissibility of evidence can be subject to a reassessment at a later stage of the proceedings. If evidence is challenged, Trial Chamber I deemed it logical ‘that the burden rests with the party seeking to introduce the evidence.’

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157 KLAMBERG (n 30) 181, 353; see also: Chapter 4, pp. 140-149.
158 Art. 69 (2) RS; see also: Prosecutor v. Mathaura and Kenyatta, ICC-01/09-02/11-588, TC V, 2 January 2013, Decision on Witness Preparation, para 35; ‘It goes without saying that relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial. The need for clear and focused testimony is especially significant at this Court, where Article 69(2) establishes the principle of the primacy of oral evidence.’
159 Art. 69 (2) RS. In addition, the Pre-Trial Chamber has unique investigative opportunities under Art. 56 of the Rome Statute.
160 Prosecutor v. Lubanga, ICC-01/04-01/06-678, PTC I, 7 November 2006, Decision on the Schedule and Conduct of the Confirmation Hearing. As “party” in the sense of the Rome Statute may also be considered the representatives of the victims, as confirmed in Prosecutor v. Lubanga, ICC-01/04-01/06-1432, AC, 11 July 2008, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, para 97.
162 Ibid, paras 32 and 68.
The hurdle that hearsay evidence has to jump in order to be admissible is to be, *prima facie*, relevant and to have probative value.\(^{164}\) According to Klamberg,

Relevance concerns the logical fit between the fact in issue and the tendered evidence [whereas] probative value indicates the actual strength of the tendered evidence in terms of reliability and/or credibility.\(^{165}\)

At the ICC, relevant evidence has been described as that which relates to ‘matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims.’\(^{166}\) In addition, in the case of *Ruto et al.*, PTC II held that ‘relevance requires a nexus between the specific piece of evidence and a charge or a fact of the case to be proven,’ and that it was therefore necessary for the Chamber to ‘establish the extent to which this evidence is rationally linked to the fact that it tends to prove or to disprove.’\(^{167}\)

The definition of what constitutes probative value\(^{168}\) includes ‘innumerable factors which may be relevant,’ and some of them had been identified by the ICTY in the case of *Aleksovski*.\(^{169}\) With regards to the probative value of a hearsay statement, ICTY Judge Stephen outlined in a concurring opinion in the case of *Tadić* that the probative value ‘will depend upon the context and character of the evidence in question.’\(^{170}\) Furthermore, the ICTY mentioned the term ‘reliable’ in the context of evaluating the admissibility of evidence and concluded that ‘indications of reliability’ in the sense of admissibility included whether the evidence was ‘voluntary, truthful and trustworthy.’\(^{171}\) In short, one could say that the ‘determination of the probative value of a piece of evidence requires a qualitative assessment,’ *i.e.* that ‘the Chamber shall give each piece of evidence the weight that it considers appropriate.’\(^{172}\)

Pre-Trial Chamber II concluded that it was not the amount of evidence presented but its probative value that


\(^{165}\) KLAMBERG in (30) 345.

\(^{166}\) *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399, TC I, 13 June 2008, Decision on the Admissibility of Four Documents, para 27.

\(^{167}\) *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, PTC II, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, para 66; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, para 80; see also: *Prosecutor v. Bemba*, ICC-01/05-01/08-423, PTC II, 15 June 2009, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para 41.

\(^{167}\) A detailed composition of probative value, the weight of evidence as well as the difference between reliability and credibility can be found in: KLAMBERG (n 30) 171-179; 351-357.


\(^{169}\) *Ibid* (Aleksovski); see also: *Prosecutor v. Tadić*, IT-94-1-T, TC, Decision on Defence Motion on Hearsay, 5 August 1996, Concurring opinion of Judge Stephen.


\(^{171}\) *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, PTC II, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, para 67; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, para 80.
was ‘essential for the Chamber’s final determination on the charges presented by the Prosecutor.’\textsuperscript{173} With regards to hearsay evidence, PTC I held that any challenges ‘may affect its probative value, but not its admissibility.’\textsuperscript{174}

Due to these broad and abstract definitions, one can conclude that there is a wide range of evidence that may be considered as relevant and have probative value, or, in other words, both definitions leave room for interpretation. It is therefore obvious that the technical rules concerning the admissibility in the Rome Statute are quite flexible. In addition, although the admissibility of hearsay evidence is not one of the crucial topics of this thesis, it will be necessary to elaborate on the term ‘reliability’ at a later stage. Reliability, in turn, is related to probative value and, hence, some data coming from admissibility questions will be scrutinized. Still, the pivotal aspect of this sub-chapter is to clarify whether the ICC Statute allows for the limitation of the right to witness examination to such an extent that an accused can be found guilty, even if the conviction is based on an uncross-examined hearsay statement which has solely, or to a decisive extent, led to such a decision. This, in turn, leads to the question whether such a hearsay statement would require corroboration as a counterbalancing factor or whether the reliability of the uncross-examined witness statement would suffice to limit the right to have witnesses examined. Ultimately, how is reliability determined?

Before the thesis can explore this question, the comparison with human rights law requires one last short assessment concerning a special kind of hearsay testimony, namely anonymous hearsay evidence. The case of \textit{Van Mechelen} has clearly shown that by no means can a conviction be based ‘solely or to a decisive extent on anonymous [witness] statements.’\textsuperscript{175} The judges of the International Criminal Court have also commented on this issue. PTC I, for example, held that, ‘as a general rule,’ anonymous hearsay will be used ‘only to corroborate other evidence.’\textsuperscript{176} In addition, PTC II explained that ‘the probative value of anonymous witness statements and summaries is lower than the probative value attached to the statements of witnesses whose identity is known.’\textsuperscript{177} This totally complies with human rights law. The only question one could raise is whether there may be circumstances allowing for the ICC to deviate from this ‘general rule’ to use anonymous hearsay only to corroborate other evidence in the

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\footnote{Ibid Ruto et al., para 88; ibid Muthaura et al., para 81.}
\footnote{Prosecutor v. Katanga and Chui, ICC-01/04-01/07-717, PTC I, 30 September 2008, Decision on the Confirmation of Charges, para 137.}
\footnote{ECtHR, \textit{Van Mechelen and Others v. The Netherlands}, § 55.}
\footnote{Prosecutor v. Katanga and Chui, ICC-01/04-01/07-717, PTC I, 30 September 2008, Decision on the Confirmation of Charges, para 138; Prosecutor v. Ruto et al., ICC-01/09-01/11-373, PTC II, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 78.}
\footnote{Prosecutor v. Bemba, ICC-01/05-01/08-424, PTC II, 15 June 2009, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para 50.}
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future. Overall, it can be held that the treatment of anonymous hearsay at the ICC so far rests in the same intersection as human rights law.

Returning to our crucial questions and looking at the outcomes of Chapters 2 and 3, it can be reiterated that human rights law distinguishes between confrontation of a witness at some stage of the proceedings and no confrontation at all.¹⁷⁸ Yet, the case of *Al-Khawaja and Tahery* [GC] enabled to apply the ‘sole or decisive’ rule in a flexible way. Hence, under certain circumstances, an uncross-examined hearsay statement, which is the sole or decisive evidence against the accused, can bring about a conviction if the restriction of the right to have witnesses examined is sufficiently counterbalanced.¹⁷⁹ Although hearsay statements can definitively be admissible at the ICC, Professor Sluiter suggested that the judges of the ICC would have ‘no discretion’ if they had to decide on a case such as *Al-Khawaja and Tahery* [GC] due to Rule 68.¹⁸⁰ Rule 68 allows the Trial Chamber to introduce so-called ‘prior recorded testimony;’ and such prior recorded testimony includes, amongst others, written transcripts and other documented evidence. However, this rule also requires that if a witness who, for example, gave a written statement is not present at trial—both the Prosecutor and the defence must have had the opportunity to examine the witness at an earlier stage.¹⁸¹ This is why the Professor suggested that Rule 68 ‘offers no discretion for the judges in this area.’¹⁸²

In such a case, the question of whether or not a hearsay statement were to be the sole or decisive piece of evidence would probably play a subordinate role, since Rule 68 requires the opportunity to challenge such statements. Sluiter explains this stricter net of norms with the absence of a subpoena power at the ICC which provides witnesses with the right to refuse to testify at trial.¹⁸³ Simultaneously, he also hints at Article 21 (3) which refers to the consistent application of the Rome Statute with recognized human rights standards. Interestingly, human rights law has lowered the standard in this specific area. The result that can be drawn from the aforementioned is that the ICC requires a higher standard with regards to the ‘sole or decisive’ rule than international human rights law and, hence, there can be no violation by the ICC in this area.

As a matter of fact, it is also not surprising that there will be no answers as to what elements other than corroboration could confirm reliability when evaluating such a

¹⁷⁸ See Chapters 2 and 3.
¹⁸⁰ SLUITER in Stahn and Sluiter (n 8) 463.
¹⁸¹ Rule 68 (a) RPE.
¹⁸² SLUITER in Stahn and Sluiter (n 8) 463.
sole or decisive and uncross-examined statement. The cases of the ECtHR suggest that corroborative evidence could counterbalance a restriction of the right to have witnesses examined; and, although the general issue of whether or not evidence needs to be corroborated is different from the question of whether a restriction of the right to have witnesses examined requires corroboration as a counterbalancing factor, the thesis will still address the general question of corroboration.

Broadly speaking, corroborative evidence can be regarded as evidence that ‘strengthens or confirms a proposition of initial evidence,’ especially when this initial evidence needs support. The ICTY added that ‘there are no defined degrees of corroboration; evidence is either sufficiently corrobated or it is not.’ When corroboration was discussed at the ICTY in the case of Tadić, the judges rejected the argument of the defence that the accused should not be found guilty on the basis on only one single witness testimony. At the International Criminal Court, the issue of corroboration seems to be fairly clear as well. Rule 63 (4) stipulates

[A] Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

This has been confirmed by various international criminal tribunals, all stating that corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to the evidence.' According to the latter, Klamberg concluded that ‘corroboration of evidence is not an admissibility rule, but rather concerns [the] evaluation of evidence.’ If a Chamber nonetheless, and for whatever reason, deems it necessary to require corroboration in a particular case, it may still do so. This is why it can be held that ICC Rule 63 (4) is merely a clarification for a certain standard if a crime needs to be proved. What is clear so far is that the Trial Chamber has discretion of whether or not to consider corroborative evidence.

The ICC’s jurisprudence clearly affirms the general principle of Rule 64 (4). For example, in the case of Bemba, it was held that a Chamber ‘may […] rely on a
single piece […] to a decisive extent by reason of its relevance and high probative value. Trial Chamber I came to a similar conclusion by announcing that ‘the extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence.’ This was also confirmed by the Appeals Chamber reiterating that ‘depending on the circumstances, a single piece of evidence […] may suffice to establish a specific fact. However, […] this does not mean that any piece of evidence provides a sufficient evidentiary basis for a factual finding.’

Only in cases of indirect evidence, which could be an anonymous hearsay statement, can it be assumed that corroboration is required:

The Chamber is aware of rule 63(4) of the Rules which provides that the “Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence”, but finds that more than one piece of indirect evidence having low probative value is required to prove an allegation made.

According to the proposition of Sluiter, it seems unrealistic that the ICC has to decide on counterbalancing measures for the loss of opportunity to cross-examine a witness in a case where a hearsay statement is the sole or decisive evidence. Nonetheless, the thesis shall at least elaborate on the following question. If corroboration is not necessarily needed to counterbalance an uncross-examined and sole or decisive hearsay statement, which other indicators could prove the reliability of such a statement and hence justify a conviction?

In the context of the case of Al-Khawaja and Tahery [GC], Tony Ward suggests that “the closer the evidence comes to being the ‘sole or decisive’ evidence against a defendant, the more important it is that the evidence is either ‘demonstrably reliable’ or [that] its reliability can be effectively tested in court.” If one engages the question of reliability now, one of our first thoughts should be whether or not cross-examination itself does contribute to reliability. If evidence has withstood testing by cross-examination, it could be a reason to rely on it, and hence confrontation would contribute

190 Prosecutor v. Bemba, ICC-01/05-01/08-424, PTC II, 15 June 2009, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para 49.
191 Prosecutor v. Lubanga, ICC-01/04-01/06-2842, TC I, 14 March 2012, Judgment Pursuant to Article 74 of the Statute, para 110.
192 Prosecutor v. Lubanga, ICC-01/04-01/06-312-Red, AC, 1 December 2014, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against His Conviction, para 218.
193 Prosecutor v. Bemba, ICC-01/05-01/08-424, PTC II, 15 June 2009, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para 53 (footnotes omitted).
to reliability. Certainly, and especially in the case of *Al-Khawaja and Tahery* [GC], it was factually impossible to cross-examine the victim/witness. Now, if the loss of opportunity to test a witness has to be counterbalanced, there has to be some kind of other indication in order to prove that the evidence is reliable. As a result, the notion of ‘counterbalance’ only makes sense, if there is another element proving that the sole or decisive hearsay evidence can be as reliable without cross-examination as oral evidence which has withstood cross-examination.

In the UK case of *R v. Riat*, the judges highlighted the terminology that was used in the national case of *Horncastle* and held uncross-examined hearsay evidence could be counterbalanced if the evidence was ‘demonstrably reliable’ or ‘capable of proper testing.’ In detail, the language of the court said:

> Where the absence before the court is that of an identified but absent witness, we can see no reason for a further absolute rule that no counterbalancing measures can be sufficient where the statement of the absent witness is the sole or decisive evidence against the defendant. That would include cases where the hearsay evidence was demonstrably reliable or its reliability was capable of proper testing and assessment, thus protecting the rights of the defence and providing sufficient counterbalancing measures.

However, there are two grains of salt in the aforementioned. First, the case concerned admissibility issues rather than the mere evaluation of evidence and secondly, it was a case of national scope. The reason why the thesis has mentioned *R v. Riat* was to illustrate and introduce a solution with regards to the term reliability rendered by the UK national courts. Yet, there are no clear guidelines as to when evidence can be considered as being ‘demonstrably reliable’ or ‘capable of proper testing.’

Generally speaking, the entire concept of reliability appears to be rather complex and a more philosophical approach by Ho suggests that we should consider reliability from an ‘internal perspective of the factfinder as a moral agent.’ For black letter lawyers, however, this consideration may appear vague and too subjective. Therefore, the thesis is looking for something more tangible. It is still not clear at this stage whether or not reliability in the context of admissibility differs from the reliability that evaluates a certain piece of evidence at the end of the trial. Moreover, there is another issue that leads to confusion. It is the issue of the concepts of reliability and credibility,

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197 KLAMBERG (n 30) 351.
which have not been defined in a coherent manner by the *ad hoc* tribunals yet.\textsuperscript{198} For example, Professor Schabas suggests a separation of the principle of reliability (and credibility) from issues of admissibility.\textsuperscript{199} On the other hand, the case law of the *ad hoc* tribunals gives reason to believe that there is a nexus between admissibility and reliability;\textsuperscript{200} and reliability has been described as evidence that is ‘voluntary, truthful and trustworthy.’\textsuperscript{201} A detailed summary on the matter of reliability and the ICC’s view has been provided by Klamberg.\textsuperscript{202} As a consequence, it is probably useful to re-cite the ICC’s alternative approach at this stage in order to confirm that there is a nexus between reliability and admissibility:

Despite the controversies which have arisen at the international tribunals, in particular at the International Criminal Tribunal for Former Yugoslavia (“the ICTY”), as to whether reliability is a separate or inherent component of the admissibility of a particular item of evidence, the Chamber prefers to adopt “[t]he alternative approach”, that is, “to consider reliability as a component of the evidence when determining its weight.” This approach is the most consistent with rule 63(2) of the Rules, according to which "[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance and admissibility in accordance with article 69."\textsuperscript{203}

Having briefly confirmed that one can assume a certain relationship between admissibility and reliability, there remains the second issue on the different usage of the concepts of credibility and reliability. The two concepts were used interchangeably at the ICTY in the cases of *Naletilić and Martinović*\textsuperscript{204} and *Delalić et al.*,\textsuperscript{205} whereas the Appeals Chamber of the ICTR clarified the usage in the case of *Karemura* by stating that

The Appeals Chamber notes that the large majority of the appeal decisions on the issue of admissibility of evidence at trial only refer to the requirement of “reliability”, without explicitly mentioning the requirement of “credibility”. Given the large meaning of the term “reliability”, the Appeals Chamber considers that the requirement

\textsuperscript{198} Ibid.


\textsuperscript{202} Klamberg (n 30) 351 ff.

\textsuperscript{203} Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-717, PTC I, 30 September 2008, Decision on the Confirmation of Charges, para 78.


of prima facie reliability indisputably encompasses the requirement of prima facie credibility.\textsuperscript{206} Based on this approach, Klamberg contends that reliability is a wider concept than that of credibility.\textsuperscript{207} He describes credibility as something which is related to the truthfulness of a witness and to the question of ‘whether the witness testifies according to or against his/her beliefs’.\textsuperscript{208} Reliability, on the other hand, was a wider concept encompassing credibility but also other indicators such as the senses: ‘vision, hearing, touch, smell, and taste’.\textsuperscript{209}

As mentioned before, the thesis is looking for concrete indicators that may affirm the reliability of a piece of evidence other than corroboration in the context of the Al-Khawaja and Tahery [GC] circumstances. Therefore, one could also look at indicators that determine the credibility of evidence, since the concept of credibility is included in the wider concept of reliability. In the case of Nahimana et al., for example, the Appeals Chamber of the ICTR established a non-exhaustive list of such indicators. The list includes:

- the witness’s demeanour in court,
- his [or her] role in the events in question,
- the plausibility and clarity of his testimony
- whether there are contradictions or inconsistencies in his [or her] successive statements or between his [or her] testimony and other evidence
- any prior examples of false testimony
- any motivation to lie,
- and the witness’s responses during cross-examination.\textsuperscript{210}

Returning to the Al-Khawaja [GC] scenario, we assume a situation in which the witness cannot be present at trial and is, therefore, not subject to cross-examination. As a result, the observation of the witness’s demeanour would not be possible, as well as any evaluation of his or her responses during the cross-examination. If there had not been any successive statements, this indicator would also drop. Assuming that there were no prior examples of false testimony, one would end up with three indicators for the
evaluation of the evidence. These are the role of the witness in the events in question, the plausibility and clarity of his testimony and his/her motivation to lie.

Hence, there are indicators that incline to a tendency of what might be regarded as reliable though these are far away from representing a sound explanation. Whether or not judges will use these indicators at a later stage remains to be seen. Admittedly, one could criticise that the established ‘calculation’ includes issues of admissibility, and if these had to be strictly separated from the evaluation of evidence, the variables of this calculation would be wrong. On the other hand, the author of this thesis cannot determine a strict separation between the terms of admissibility and cases that concern the evaluation of evidence. The purpose of this example was nothing more than to reflect on this question and to see whether the jurisprudence of international criminal tribunals provides indicators that might prove reliability. Since the concept of reliability is allegedly wider than that of credibility, it should be legitimate to seek the answers in cases that touch upon credibility matters.

When discussing the matter of credibility at the ICC, the judges have not provided a clear answer so far. The Appeals Chamber, for example, held that, when determining whether or not to confirm charges, ‘the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. Hence, one could use terms such as ambiguities, inconsistencies and contradictions as an indication of whether evidence is reliable. Whether they counterbalance the right to have witnesses examined in an Al-Khawaja [GC] scenario, however, is not clear at this stage.

To conclude and in order to determine on whether evidence is reliable enough to counterbalance the restriction of the right to have witnesses examined, one could use the credibility-indicators from the ICTR, that is the role of the witness in the events in question, the plausibility and clarity of his testimony and his/her motivation to lie. In addition, one could consider indicators such as evaluating ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. In any case, the situation remains open and the crucial indicators to confirm reliability have to be determined yet, especially when an uncontested and uncorroborated hearsay statement is the sole or decisive evidence for a conviction. So far, and even if there are no comparable cases with regards to the ‘sole or decisive’ rule at the ICC, only a

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preliminary conclusion can be drawn. What is clear, on the other hand, is that the Rome Statute and its case law are not at variance with the doctrine of the ECtHR.

3. Synopsis

The comparison of human rights law with the norms and jurisprudence of the International Criminal Court has shown that the Rome Statute and its RPE have been interpreted ‘consistent with internationally recognized human rights’ standards. Concerning the requirements for a warrant of arrest, for example, it can be affirmed that the Rome Statute respects all of the prerequisites from human rights law, that is, that the Prosecutor provides the bill of indictment and that the applicant is aware of the alleged crimes against him. Furthermore, the Pre-Trial Chamber of the ICC followed the line of a strict application of the disclosure of evidence in favour of the detainee, provided that the evidence is ‘essential’ or ‘crucial’ to challenge the lawfulness of the detention, the validity of the arrest warrant or to challenge the admissibility of the case. It is also in line with human rights law that some restrictions of the disclosure of evidence are not incompatible with the right to a fair trial per se. As a result, there may be reasons to limit the disclosure of evidence.

However, any limitation requires a clear legal base in the Rome Statute, its RPE or in any other norm belonging to the ICC’s legal apparatus. If a less restrictive measure than non-disclosure can suffice, it has to be applied. In addition, any limitation must never lead to ‘substantial restrictions’ of the rights of the accused. Especially at the pre-confirmation level, the ICC adopted the terminology of the human rights jurisdictions. Hence, the decisions of the two jurisdictions—ICC and its human rights counterparts—rest in the same intersection. Admittedly, there are practical inconsistencies in the management and the application of the Rome Statute and its RPE both at pre-confirmation (bulk rule v. totality rule disclosure) as well as at pre-trial level (inclusion of incriminating tables or IDACs). However, these inconsistencies cannot be measured against the yardstick of human rights law since it is for the national courts to apply their codes of conduct independently. Therefore, it can be held that the decisions of the ICC and the case law of the regional human rights courts do not contradict each other. However, practical difficulties in the application of the Statute and its RPE are obvious.

212 Art. 21 (3) RS.
Concerning corroboration, there is no legal requirement that a single testimony has to be corroborated at the International Criminal Court. Such testimony, however, should be subject to cross-examination. Regarding the ‘sole or decisive’ rule, the Rome Statute and its RPE enable the admissibility of hearsay statements which might, at least theoretically, lead to situations similar to the circumstances as in Al-Khawaja and Tahery [GC]. Yet, as suggested by Professor Sluiter, Rule 68 leaves ‘no discretion’ for the ICC judges to bring about a conviction based on a sole or decisive and uncross-examined testimony, since both the Prosecutor and the defence need to have the opportunity to examine the witness. As a consequence, the standard of the right to have witnesses examined at the ICC is higher than the current doctrine from human rights law. Furthermore, the decisions of the ICC’s Chambers have commented on anonymous hearsay statements and the latter are treated in much the same way as in human rights law. As a result, there was no data available from the ICC which could answer the question of whether or not an uncross-examined and sole or decisive witness statement needs to be corroborated. Other international criminal tribunals do not necessarily require corroborative evidence in such cases as long as the evidence is reliable. Reliability, in turn, remains a relatively vague term in the interim. Yes, there is indicating guidance for the determination of reliability, for example, the role of the witness in the events in question, the plausibility and clarity of his testimony and his/her motivation to lie; but whether this guidance is meaningful and convincing is at least questionable. So far, however, it can be held that the Rome Statute and its case law are not, at least not to date, in breach with the ECtHR’s ‘sole or decisive’ rule.

As a result, the norms of the Rome Statute and its Rules of Procedure and Evidence as well as its case law do not contradict the case law established by the regional human rights courts or the HRC. This rather positive result is attributable to two reasons. First, it seems that the ICC requires a higher standard with regards to the right to have witnesses examined and, second, concerning the disclosure of evidence, the ICC has assigned an open-ended scope to the right to a fair trial, which encompasses the minimum guarantees of the accused whilst not being limited thereto. In fact, the term fairness in the context of international criminal procedure is still lacking clarification of what it consists of. According to Croquet,

214 Rule 68 (a) RPE; SLUITER in Stahn and Sluiter (n 8) 463.
Absent of any further clarification by the ECtHR or the ICC of what fairness consists of, there will continue to be uncertainty as to the way in which it relates to defence rights. Unlike the ICTY, which has implicitly alluded to the jus cogens nature of defence rights in general, both the ECtHR and the ICC have refrained from assigning such a status to fair trial rights.\(^\text{216}\)

It would be hard to suggest that the Rome Statute violates human rights law due to the procedural turmoil in the case of *Lubanga* simply because of the fact that the Trial Chamber constantly assessed the circumstances of the case and intervened whenever necessary. Certainly, the procedural confusion has been far from perfect. This thesis, however, has scrutinized violations from a human rights perspective. Therefore, it needs to be reiterated that the breach of the right to a fair trial, that is, to disclose evidence to the defence, was due to an incorrect usage of Article 54 (3) (e) by the prosecution, who entered confidentiality agreements with information providers to an extent that it improperly inhibited ‘the opportunities for the accused to prepare his defence.’\(^\text{217}\) The constant assessment of the Trial Chamber, as stated above, prevented the proceedings from further serious damage. Yet, the case of *Thomas Lubanga Dyilo* has justifiably been subject to criticism in scholarly literature.\(^\text{218}\) Chapter 2 revealed that any decision not to disclose evidence needs judicial assessment and, therefore, the Prosecutor had overstepped his/her boundaries—irrespective of the agreement by the prosecution and the UN.

The Prosecutor’s agreement with the UN brought up three further insights with regards to the fairness of trial proceedings. First, it has shown that the investigative phase and the measures for how evidence is obtained play a major role in the trial proceedings and, therefore, maybe a neutral body should overlook the actions of the prosecution. Secondly, could a more powerful Pre-Trial Chamber have guided the Prosecutor and his investigative actions in order to prevent the debacle at an earlier stage? Thirdly, are there any problems arising as to the standard of proof if the Pre-Trial Chamber became more powerful? Even if the Rome Statute and its RPE are not in conflict with human rights law, the initial appraisal of this thesis is that a mechanism

\(^{216}\) Ibid, at 100 and 101.


that overlooks the Prosecutor’s actions at an earlier stage of the proceedings may be an appropriate innovation for the future. If a neutral body had reminded the Prosecutor of the non-disclosure of evidence, the lengthy and tiring proceedings in the case of Lubanga could perhaps have been avoided. Therefore, the thesis will further elaborate on the term fairness in the context of trial proceedings.

4. Fairness, disclosure and investigative procedures

4.1 Developing an assumption of fairness

Having tested the first part of the hypothesis, the thesis will now develop an approach for fairness in the context of international criminal proceedings. Fairness plays a decisive role in the legitimacy of international criminal tribunals and, particularly, for the ICC as a permanent institution. After the Prosecutor had applied for warrants of arrest in the Situation in Uganda, Pre-Trial Chamber II elaborated on the term fairness and, by referring to an Appeals Chamber decision from the ICTY, it concluded that

Fairness is closely linked to the concept of “equality of arms”, or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.219

As one can see, PTC II linked fairness closely to the concept of equality of arms. However, Chapter 4 of this thesis has revealed a difference between the terminology of the ECtHR and the ICTY with regards to equality of arms. In addition, the concept had been considered as being ‘unclear’220 and, therefore, the thesis is looking for more solid components that may be linked to the term fairness.

In the context of international criminal proceedings, the Trial Chamber of the ICTY described fairness as the ‘overarching requirement of criminal proceedings’ in the case of Milošević.221 Furthermore, Ambos suggests that ‘justice concerns the outcome of a process, [whereas] fairness refers to the way this outcome is achieved.’222 Based on such a premise, one should try to identify the component sections of the term fairness. In Chapter 4, for example, it was confirmed that the disclosure of evidence, especially the disclosure of exculpatory material, was fundamental to the fairness of the

219 Situation in Uganda, PTC II, 19 August 2005, Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58, para 30.
220 Safferling et al. (n 15) 414.
221 Prosecutor v. Milošević, IT-01-54-T, TC, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, para. 29.
proceedings.\textsuperscript{223} Put differently, the disclosure of exculpatory evidence is of ‘paramount importance to ensure the fairness of the proceedings.’\textsuperscript{224} As a result, it can be held that the disclosure of evidence and fairness correlate closely and, hence, the disclosure of evidence has to be regarded as a principal component section which is included in the term \textit{fairness}.\textsuperscript{225}

Furthermore, human rights law suggests that the investigative procedure forms part of the right to a fair trial. In the case of \textit{Murray v. UK}, for example, the ECtHR came to the conclusion that

The Court observes that it has not been disputed by the Government that Article 6 (art. 6) applies even at the stage of the preliminary investigation into an offence by the police.\textsuperscript{226}

As one can see, the fair trial applies at the earliest stages of a preliminary investigation and in the case of \textit{Salduz v. Turkey}, the ECtHR underlined ‘the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.’\textsuperscript{227} The latter leads to a further assumption, namely that if the investigation stage is crucial for obtaining evidence, it also affects \textit{what} kind of evidence—inculpatory or exculpatory—can be disclosed at a later stage of the proceedings. As one remembers, the disclosure of evidence is linked to fairness. Therefore, one could apply the following syllogism: the disclosure of evidence is paramount to the fairness of the proceedings and, since the investigative stage affects the disclosure of evidence, it may also affect the fairness of the proceedings. The latter has also been stressed by Judge Pikis in a separate opinion, stating that

\textsuperscript{225} The author agrees to the fact that there may be differences in the understanding of term ‘fairness’ in the common and civil law systems and therefore, there may be problems ‘of adjusting legal language.’ See: GRANDE, E. 2008. Dances of Criminal Justice: Thoughts on Systemic Differences and the Search of the Truth. In: Jackson, J., Langer, M. and Tillers, P. (eds.) \textit{Crime, Procedure and Evidence in a Comparative and International Context}. Hart Publishing, pp. 145-164. This is why the author has tried to choose definitions of term ‘fairness’ from international criminal tribunal. It is admitted that Fletcher’s definition of ‘fairness’ in footnote 233 goes back to the common law system.
\textsuperscript{226} ECtHR, \textit{Murray v. UK} [GC], no. 18731/91, 8 February 1996, § 62.
\textsuperscript{227} ECtHR, \textit{Salduz v. Turkey} [GC], no. 36391/02, 27 November 2008, § 54; confirmed in: \textit{Nechto v. Russia}, no. 24893/05, 24 January 2012, § 103.
The guarantee of a fair trial is not confined to the trial itself but extends to the preparatory processes preceding the trial, indeed to every aspect of the proceedings.228

So far so good; yet one might still wonder what kind of point the author would like to make with all of the aforementioned.

The point is that fairness has also been regarded as ‘offering an equal chance of success,’229 and George Fletcher elaborated on this equal chance in common law jurisdictions a little further:

The particular attachment of Anglo-American legal culture to the concept of ‘fairness’ derives from the emphasis in the common law on procedural regularity as a value in itself, a value worth respecting apart from justice in the individual case. Our notions of fairness and fair play draw heavily on the analogies from competitive sports and games, which pervade idiomatic English. Fair procedures are those in which both sides have an equal chance of winning. The playing field is level. Neither side hides the ball. Regardless of the sport or game, no one seeks an ‘unfair’ advantage by hitting below the belt, stacking the deck, or loading the dice.230

The idea of an equal chance or an equilibrium (or balance) between the two parties was confirmed by Pre-Trial Chamber I in a decision concerning the situation in the DRC.231

Now, and returning to our syllogism which assumed that the investigative procedure affects the disclosure of evidence and, hence, that it can also affect the fairness of the proceedings, the decisive question is whether or not there is a mechanism that ensures the fairness throughout the match which is called procedure. If the prosecution and the defence shall have an equal chance of a successful (or winning) trial, the question of who is searching for the evidence and who is controlling the search is legitimate.

According to Fletcher

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231 Situation in the Democratic Republic of the Congo, ICC-01/04-135-tEN, PTC I, 31 March 2006, Decision on the Prosecutor’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, para 38: ‘The term “fairness” (équité), from the Latin “equus”, means equilibrium, or balance. As a legal concept, equity, or fairness, “is a direct emanation of the idea of justice”. Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings).’
Games assume the good faith of all participants. But the law assumes rather that litigants are motivated by self-interest. To secure their ends, they might well act in bad faith. For this reason, the procedures for settling disputes are as important as the rules that determine, in principle, who should win and who should lose.\textsuperscript{232}

Article 54 of the Rome Statute stipulates that it is the Prosecutor who, ‘in order to establish the truth, […] investigates incriminating and exonerating circumstances equally.’\textsuperscript{233} In addition, Article 67 (2) posits the Prosecutor’s obligation to disclose, as soon as practicable, the evidence in her/his possession that shows or tends to show the innocence of the accused. Since the Prosecutor, however, simultaneously becomes a party at some stage of the proceedings,\textsuperscript{234} the second question of whether there is a referee becomes more relevant. In other words, is there a neutral body overlooking the Prosecutor’s actions?

Admittedly, the Rome Statute and its procedure represent a merger of the common and civil law systems, a so-called \textit{sui generis} procedure. In every civil law system, however, there is a body that controls the Prosecutor’s actions. In France, for example, the investigations are carried out by neutral \textit{juges d’instruction},\textsuperscript{235} and, even if not every civil law system is fitted with investigative judges, there are other mechanisms of control. The German system might appear even closer to the Rome Statute on first sight.\textsuperscript{236} Yet, there is one major difference. As Kirsch has pointed out several times, the Rome Statute does not contain any obligation for the judges to overlook \textit{all} facts and pieces of evidence to establish the truth,\textsuperscript{237} an obligation which is called \textit{Amtsaufklärungspflicht} in Germany.\textsuperscript{238} This is a crucial difference to the Rome Statute, since Article 64 (6) (d) stipulates that

\textit{In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.}\textsuperscript{239}

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\footnotesize
\textsuperscript{233} Art. 54 (1) (a) RS.  \\
\textsuperscript{234} Prosecutor v. Lubanga, ICC-01/04-01/06-1432, AC, 11 July 2008, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims and Participation of 18 January 2008, para 93: ‘The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence.’  \\
\textsuperscript{235} Article 81 of the French \textit{Code de Procédure Pénale}.  \\
\textsuperscript{236} In Germany, the prosecution can apply for a court investigation if it deems it necessary. These investigations would be overseen by a so-called ‘Ermittlungsrichter’; Section 162 of the German Code of Criminal Procedure (\textit{Strafprozessordnung}).  \\
\textsuperscript{237} KIRCH, S. 2006. The Trial Proceedings Before the ICC. 6 International Criminal Law Review 275-292.  \\
\textsuperscript{238} Section 244 (1) of the German Code of Criminal Procedure requires that ‘In order to establish the truth, the court shall, proprio mota, extend the taking of evidence to \textit{all} facts and means of proof relevant to the decision.’  \\
\textsuperscript{239} Art. 64 (6) (d) RS (emphasis added).
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As one can see, the wording ‘may’ implies that the Trial Chamber can order the production of further evidence if it deems it necessary, but does not necessarily have to. Contrary to the German Code of Criminal Procedure, there is no obligation for the ICC judges to establish the truth *proprio motu*, or as Kirsch describes it:

With regard to the sparse guidelines for the conduct of the proceedings and the hearing of evidence in the legal framework of the ICC, it is fair to state that the procedure before the ICC is characterized by the absence of any binding obligation on the part of the pre-trial judges as well as the trial judges to extend the taking of evidence to include *all* facts and piece of evidence that are relevant for the decision, i.e. establish the truth, *proprio motu* ("Amtsaufklärungspflicht"). Therefore, absent any such obligation it is the role of the parties to the proceeding – the Prosecution and the Defendant and / or the Defence – to investigate their case, collect evidence and present this evidence during trial.²⁴⁰

Concededly, the collection of evidence in international criminal law differs from that used in national systems and, due to the overwhelming amount of evidence that judges then would have to assess, one can understand why the drafters of the Rome Statute left it for the judges to decide upon whether or not additional evidence is needed. Indeed, establishing *all* facts and evidence might, in practice, appear as a Herculean task. In addition, the realization of the task to collect evidence in international criminal law remains a difficult one, not least because of the volatile situations in crisis-hit regions and inter-cultural differences.²⁴¹ Nonetheless, there seems to be consensus among scholarship that the ICC’s procedure would not suffer from changes that ‘maximize the volume of relevant evidence and ensure that it is properly tested.’²⁴²

What this thesis tries to illustrate is that the ICC Statute does not include any control mechanism for the Prosecutor and her/his investigative tasks. In theory, such a control mechanism would not be necessary since the Prosecutor is obliged to establish the truth according to Article 54.²⁴³ Yet, during the first case of the ICC, reality has shown that the Office of the Prosecutor had obtained exculpatory evidence which could


²⁴¹ As Pizzi describes: ‘In many of these cases demanding international attention, investigators cannot rely on a strong local police presence to out the investigation. This often means that investigators come from other countries and may thus face linguistic and cross-cultural problems as they attempt to work in a country about whose history and culture they may know very little.’ PIZZI, W. 2006. Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals. 4 (1) International Commentary on Evidence, Article 4. See also: COMBS, N.A. 2010. Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions. CUP.


²⁴³ Art. 54 (1) RS.
not be disclosed due to confidentiality agreements, which finally ‘ruptured’ the proceedings to such a degree that the fair trial was not guaranteed anymore.244 A senior representative of the prosecution even admitted that the evidence used under Article 54 (3) (e) was not only used for lead purposes,245 that is to generate new evidence, although exactly the generating of new evidence is the original purpose of that Article. Due to such procedural turmoil, the fairness of the International Criminal Court was questioned.246 Scholarship has criticised the blending of the different legal systems and warned that this mixture may lead to a compromise in values of human rights.247 For example, as Bibas and Burke-White have pointed out, their argument was not that ‘a pure adversarial or inquisitorial system is preferable.’248 Rather, their fear was that ‘the mishmash of the two systems has abandoned some distinctive checks on which each system depends.’249 Similar allegations have been made by Professor Daška who suggested that a blending or, as he describes it, a legal pastiche of two procedural systems ‘can produce a far less satisfactory factfinding result in practise than under either continental or Anglo-American evidentiary arrangements in their unadulterated form.’250

To repeat, this thesis does neither promote nor discourage the common or the civil law system. Rather, the crucial point is that, if one wants to have a functioning sui generis system, one also needs to make sure that the mechanisms on which both systems are based upon do function, too. This is exactly what has been described by De Smet when he elaborated on the two different models (common and civil law) and put...
these into the context of the role of the ICC’s Pre-Trial Chamber. In other words, if the Prosecutor is responsible for searching for incriminating and exculpatory evidence equally, there needs to be a control mechanism to overlook the investigations. If, on the other hand, the parties are responsible for searching for their evidence independently, they need to be equipped with the necessary tools to do so, including ‘legal, financial and logistical’ ones.

There is a fair amount of academic literature elaborating on the different procedural systems, above all, Damaska’s work *The Faces of Justice and State Authority*; and, although it is not the aim of this thesis to portray and summarize the different characteristics of the common and civil law model, it is crucial to illustrate what shift the Rome Statute might need in order to enhance its operational excellence in practice. The problem of a too powerful Prosecutor was already addressed in the preparatory work of the Rome Statute when Mr Kam, a representative of Burkina Faso, addressed the dichotomy of a strong Prosecutor who should be fitted with *ex officio* powers and a mechanism that should control her/him

Mr Kam […] said that he, too, favoured empowering the Prosecutor to initiate proceedings as provided for in article 6 (first version), paragraph 1 (c), and in article 12. That would enable an independent Prosecutor with a purely judicial role to act in cases where States or the Security Council might block investigations because of the political interests at stake. The Prosecutor’s powers should nevertheless be subject to control by the Pre-Trial Chamber.

The author agrees with the aforementioned and adds that the basic problem is not that the Prosecutor is fitted with the power to initiate investigations *ex officio* but that the problem lies more in the control of these investigations. A representative from Nigeria even went a step further by warning that the ‘vast Powers of the Prosecutor would invite complaints and ultimately would make the Prosecutor ineffective.’ To repeat,

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252 Ibid 439. See also: ‘When parties are given the task to drive the litigation forward, especially from a fact-finding perspective, they must be given the procedural tools to do so.’ Ibid 410.  
according to the author, it is not the problem that the Prosecutor has such *ex officio* powers. Rather, the issue is that there is no body which is obliged to overlook the Prosecutor’s actions.

The ambivalent role of the Prosecutor does not necessarily represent a novelty in the area of international criminal proceedings. According to De Hemptinne, the role of the Prosecutor was ‘torn between his theoretical position as the impartial seeker of truth, and his practical position as a party to the legal contest.’ Therefore, he pointed out that

The best means of overcoming this difficulty would be to authorize impartial judges to participate in the collection of both incriminating and exonerating evidence to oversee judicial investigations.

Whereas this could be an answer for the problem and represents one of the reasons why this thesis is looking at the Cambodian model in Chapter 7, another option could be, as suggested by De Smet, to ‘allow the defence to conduct its own investigations, with all the legal, financial and logistical consequences that entails.’ Whereas the former would be a shift to the civil law model, the latter option could be regarded as a move towards the common law system implying that the financial means would be distributed equally amongst the parties, and that the parties would exercise their search for incriminating and exculpatory evidence independently. Whether or not two independent investigative teams would be the most practicable solution in a crisis-hit region is questionable but the task of the thesis at this stage is to establish an assumption of fairness in the first place and, hence, issues of practicability cannot be discussed yet.

What can be affirmed in any case is that, due to the Prosecutor’s obligation to establish the truth, the distribution of financial resources concerning investigations is unequal and has been subject to criticism by the defence teams. What is also obvious

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258 Ibid.
259 DE SMET (n 251) 439.
is that the current disclosure regime which is applied at the ICC, even if drafted with best intentions and knowledge, was stuttering in practice. As Vogler mentioned

Initial hopes that the scientific deliberation of the world’s leading jurists, followed by a period of rigorous testing in practice, would lead us rapidly to the holy grail of a procedure which was both efficient and rights-respecting, have been dashed.261

As a result, the thesis will briefly address some open questions with regards to fairness in the context of the Rome Statute.

4.2 Open questions to the Rome Statute

One of the crucial questions which could be addressed whilst looking at the Rome Statute was raised by De Hemptinne. It is the question of whether or not ‘it [is] reasonable to expect a Prosecutor who indicts and prosecutes alleged perpetrators of war crimes and crimes against humanity to conduct investigations and participate in proceedings objectively and impartially.’262 Until today, it is not entirely clear at what stage of the procedures the Prosecutor abandons her/his role as impartial investigator, and when exactly the Prosecutor becomes a party of the trial. As has been pointed out by the Appeals Chamber in the case of Lubanga, it is for the parties to lead their evidence independently.263

In the context of the assumption of fairness, the author would like to raise another crucial question, that is, that if fairness means an equal chance to success, who guarantees this equal chance if there is no obligation for the Pre-Trial Chamber to overlook the Prosecutor’s investigations? The Appeals Chamber of the ICTY stated in Kunarac et al. that it had the ‘obligation to ensure that the accused receives a fair trial.’264 But how can the ICC Chambers possibly do so, if the Pre-Trial Chamber has not overlooked the Prosecutor’s investigations? It is not refuted that the ICC’s Pre-Trial Chamber can intervene; the crucial point is that it does not have to. Every sports competition needs a referee because inherent in a competition is that both sides aim at winning. Since the Pre-Trial Chamber, however, has no obligation to overlook the Prosecutor’s investigative actions, it is hard to recognize a mechanism that ensures fairness or, in other words, this equal chance to succeed. Just imagine a sports

262 DE HEMPTINNE (n 257) 410.
competition in which the referee can blow the whistle if he sees a foul but does not have to. Previous paragraphs have alleged that the disclosure of evidence is one of the most important component sections of fairness and, if one accepts the assumption that the investigative stage is linked to the disclosure of evidence, it is legitimate to raise the question of who guarantees fairness in the competition. To repeat, the disclosure of evidence, especially of exculpatory material, was regarded as being fundamental to the fairness of the proceedings.

It is certainly not the case that the Rome Statute is in breach of human rights law. However, if fairness implies offering an equal chance of success, somebody has to control the investigations of the Prosecutor so that the defence can rely on the fact that exculpatory material is firstly sought, and secondly disclosed to the defence. Generally speaking, the normative standards from human rights law represent something like a minimum standard for the ICC. Yet, there is no guarantee that the fairness of the proceedings is at its best when the ICC’s procedure complies with these minimum standards. In addition, if there were less debate on disclosure issues at both stages, pre-confirmation as well as at the pre-trial stage, the procedures would become more expeditious.265 One should not forget that expeditiousness is another important component of criminal procedure and in fact, ‘expeditiousness secures the fairness of the proceedings.’266

In conclusion, and re-stating the second part of this thesis’ hypothesis, there is room to improve the Rome Statute with regards to the disclosure of evidence, and, hence, with regards to fairness. Concerning the right to have witnesses examined, it can be held that the ICC’s level is set higher than the standard coming from human rights law. The thesis will now scrutinise whether or not there are any theoretical reasons that prove the allegation why an improvement of the overall fairness of the proceedings would enhance the legitimacy of the International Criminal Court.

265 See Expert Initiative on Promoting Effectiveness at the ICC (n 16) 109.
Figure 5.1: Reasons for the limitation of disclosure

<table>
<thead>
<tr>
<th>Reason</th>
<th>Courts or human rights body</th>
<th>ECtHR</th>
<th>HRC, IACHR, AfCtHPR</th>
<th>ICC</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Reason</td>
<td>Matters of security, public order, the interests of juveniles, or where publicity might prejudice the interest of justice</td>
<td>Protection of national security information</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(can apply at pre-trial as well as trial stage)</td>
<td>IACHR, Report on Terrorism and Human Rights, para 247.</td>
<td>Art. 72 RS in conjunction with Rule 81 RPE</td>
</tr>
<tr>
<td></td>
<td>ECtHR</td>
<td>National security</td>
<td>• Jasper v. UK [GC], § 52</td>
<td>• Protection of the victims and witnesses and their participation in the proceedings</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Fitt v. UK [GC], § 45</td>
<td>- Moiseyev v. Russia, § 216</td>
<td>Art. 68 RS in conjunction with Rule 81 RPE; Art. 68 (5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Leas v. Estonia, § 78</td>
<td>- Cevat Soysal v. Turkey, § 65</td>
<td>‘prior to the commencement of the trial’</td>
</tr>
<tr>
<td></td>
<td>HRC, IACHR, AfCtHPR</td>
<td>Public interest immunity</td>
<td>• Matters of security, public order, the interests of juveniles, or where publicity might prejudice the interest of justice</td>
<td>Protection of the victims and witnesses and their participation in the proceedings</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>IACHR, Report on Terrorism and Human Rights, para 247.</td>
<td>Art. 68 RS in conjunction with Rule 81 RPE; Art. 68 (5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>‘prior to the commencement of the trial’</td>
</tr>
<tr>
<td></td>
<td>ICC</td>
<td>Witness protection</td>
<td>• Witness protection Especially when the lives or the integrity of witnesses [and members of the judiciary] are at stake, limitations of the disclosure do become necessary measures. IACHR, Report on Terrorism and Human Rights, para 247.</td>
<td>Protection of the victims and witnesses and their participation in the proceedings</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Fitt v. UK [GC], § 45</td>
<td>• Witness protection Especially when the lives or the integrity of witnesses [and members of the judiciary] are at stake, limitations of the disclosure do become necessary measures.</td>
<td>Art. 68 RS in conjunction with Rule 81 RPE; Art. 68 (5)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Jasper v. UK [GC], § 52</td>
<td>- Doorson v. Netherlands, § 70</td>
<td>‘prior to the commencement of the trial’</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Van Mechelen et al v. Netherlands, § 56</td>
<td>- Al-Khawaja and Tahery v. UK [GC], § 118</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICC</td>
<td>Disclosure is ‘endangering the course of the investigations’</td>
<td>• Disclosure is ‘endangering the course of the investigations’</td>
<td>Documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence […]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(can apply at pre-trial as well as trial stage)</td>
<td>Schüps v. Germany, no. 25116/94, 13 February 2001</td>
<td>Art. 54 (3) (e) in conjunction with Rule 81 RPE</td>
</tr>
<tr>
<td></td>
<td></td>
<td>See also: ‘tampering of evidence or undermining the course of justice’</td>
<td></td>
<td>‘disclosure may prejudice further ongoing investigations’</td>
</tr>
</tbody>
</table>
**Figure 5.2: Ex parte hearings in the context of the limitation of disclosure**

<table>
<thead>
<tr>
<th>Form</th>
<th>Human Rights Jurisdictions</th>
<th>ICC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ex parte hearings</strong></td>
<td>(can occur at pre-trial as well as trial stage)</td>
<td>Definition of ex parte proceedings</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor’s application to withhold evidence can be confirmed in a hearing ex parte if</td>
<td>- Prosecutor v. Lubanga, ICC-01-04-01-06-108-Corr, PTC I, 19 May 2006, para 14</td>
</tr>
<tr>
<td></td>
<td>⇨ the defence is informed of such meetings</td>
<td>(i) and (ii)</td>
</tr>
<tr>
<td></td>
<td>⇨ a judge assesses the need for disclosure at all times</td>
<td>If a less restrictive measure produces a similar result, it is to be preferred.</td>
</tr>
<tr>
<td></td>
<td><strong>However, there may be cases in which the defence has not been informed of an ex parte hearing.</strong></td>
<td>Generally speaking, the defence must</td>
</tr>
<tr>
<td></td>
<td>⇨ <strong>Rowe and Davis v. UK [GC], no. 28901/95, 16 February 2000</strong></td>
<td>- be informed of the existence and legal basis of any Prosecution ex parte application</td>
</tr>
<tr>
<td></td>
<td><strong>In any case, an ex parte hearing always requires</strong></td>
<td>under rule 81 (2) or (4) of the Rules;</td>
</tr>
<tr>
<td></td>
<td>⇨ <strong>the constant assessment of a judge</strong></td>
<td>- be allowed the opportunity to present submissions on (i) the general scope of the</td>
</tr>
<tr>
<td></td>
<td><strong>Fitt v. UK [GC], no. 29777/96, 15 July 2003</strong></td>
<td>provisions that constitute the legal basis of the Prosecution’s ex parte application;</td>
</tr>
<tr>
<td></td>
<td><strong>Jasper v. UK [GC], no. 27052/95, 16 February 2000</strong></td>
<td>(ii) any other general matter which in the view of the defence could have an impact on</td>
</tr>
<tr>
<td></td>
<td><strong>Without explicitly referring to ex parte hearings, the IACHR held that any non-disclosure</strong></td>
<td>the disposition of the Prosecution application</td>
</tr>
<tr>
<td></td>
<td>⇨ must be ‘strictly necessary’</td>
<td>- be provided, at the very least, with a redacted version of any decision taken by the</td>
</tr>
<tr>
<td></td>
<td>⇨ and that there must be an ‘on-going judicial supervision,’ that is, that the non-disclosure is ‘required to be under the constant assessment of a trial judge.’</td>
<td>Chamber in any ex parte proceedings under rule 81 (2) or (4) of the Rules held in the</td>
</tr>
<tr>
<td></td>
<td><strong>IACHR, Report on Terrorism and Human Rights, para 250</strong></td>
<td>absence of the defence.</td>
</tr>
<tr>
<td></td>
<td><strong>However, in exceptional cases, the AC required a degree of flexibility, which means that there may be cases in which the defence has not been informed of an ex parte hearing:</strong></td>
<td><strong>Prosecutor v. Lubanga, ICC-01-04-01-06-568, AC, 13 October 2006, para 65.</strong></td>
</tr>
<tr>
<td><strong>Definitive violation if...</strong></td>
<td>(can occur at pre-trial as well as trial stage)</td>
<td>The Prosecutor makes the decision whether or not evidence shall be disclosed</td>
</tr>
<tr>
<td></td>
<td><strong>Fitt v. UK [GC], § 45: ‘preserve the fundamental rights of another individual’</strong></td>
<td>- <strong>Prosecutor v. Lubanga, ICC-01-04-01-06-1401, TC I, 13 June 2008, para 84: ‘It follows that under international jurisprudence it is clear that it is the judges and not the prosecution who were solely competent to decide upon this issue.’</strong></td>
</tr>
</tbody>
</table>
Chapter 6: Parameters of Procedure

Having developed an assumption of fairness, the thesis will now explain—from a socio-legal perspective—that there is a nexus between the level of fairness and the legitimacy of the ICC and its court procedure.\(^1\) The author agrees to the fact that the nature between comparative law and sociology is a topic that would not be on the agenda on a day-to-day legal comparison\(^2\) but ‘this does not mean that [such a] communication or comparison is impossible.’\(^3\) As Chapter 1 has alleged, the thesis is looking for a fresh and coherent approach that first, contributes to the question of fairness in international criminal proceedings and second, explains why the level of fairness should be raised at the ICC. The references made to common and civil law traditions at the end of Chapter 5 were not meant to differentiate the two traditions from one another. Rather, the explanations tried to locate flaws in the ICC’s procedure and the thesis now has to explain why such flaws may be detrimental for the ICC. The idea is to overcome diversities and to create an ideal that strengthens the ICC’s role in the world of international criminal justice.\(^4\)

Professor Luhmann has examined procedure as a social institution and provided answers as to how procedure itself can be a legitimizing mechanism. To this end, he mentions two important parameters that are crucial to establish legitimacy through the procedures of the Court. On the one hand, there is an internal variable of the procedure which generates a decision and, on the other hand, there is an external variable called general acceptance.\(^5\) This chapter will particularly link the level of fairness to the external parameter of legitimacy, that is, general acceptance.\(^6\) At a later stage, this thesis will, by building upon Dworkin, create a new middle ground theory and evaluate the

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1 With regards to the thoughts of Professor Luhmann, this thesis merely relates on one of his earlier works, i.e. Legitimation durch Verfahren and in this realm, the thesis will only address the section which concerns court proceedings. LUHMANN, N. 1983. Legitimität durch Verfahren. 3rd ed. Suhrkamp, pp. 11-135.
2 COTTERRELL, R. 2003. Comparatists and Sociology. In: Legrand, P. and Munday, R. (eds.) Comparative Legal Studies: Traditions and Transitions. CUP, p. 131: ‘The nature of this relationship has rarely been examined in detail. In general, the need to explore it rigorously has been avoided by both comparatists and legal sociologists.’
3 Ibid 151.
5 LUHMANN (n 1) 27-37; Luhmann calls this external variable ‘a general acceptance of decisions by modern society’ or, to use the German term ‘Generalisierung.’
chances of a general acceptance with regards to the disclosure of evidence and the right to have witnesses examined.

If we go back to the term fairness, we remember Zappalà’s statement in Chapter 1, who alleged that fairness was a standard ‘for assessing the behaviour of public authorities towards the individual against whom criminal charges are laid.’ Furthermore, Machura has highlighted that it would be hard to accept decisions which are rendered by public authorities or, in the case of this thesis, decisions which are rendered by the ICC, if they did not correspond to societal values. In this context, Max Weber’s interpretation of legitimacy, based on the premise that the majority of people will accept the legality of enacted rules (or enacted procedural law) just because of the fact that there is a ‘belief in the duty to follow the regulations,’ seems to be outdated. Here, the thesis would like to agree with Lübbe’s approach, who suggests that legitimacy earns its status due to a ‘belief that the content of a regulation deserves acknowledgement,’ and not like Weber, that there is a certain belief in the duty of following a rule per se. However, what the two approaches do not consider is the mechanism that produces a so-called legitimate outcome. Therefore, Luhmann’s explanations may prove why an enhanced level of fairness could also enhance the legitimacy of the ICC. According to Machura,

There is an importance of how people evaluate what happens in a procedure before a decision is made. These evaluations influence people’s judgements about outcome fairness and procedural justice. They also influence trust in institutions and their personnel as well as their legitimacy. A similar observation has been made by Tyler, who describes

This discussion of legitimacy has been framed by the perspective of legal authorities, highlighting the balance that they must strike between controlling the public and being sensitive to the public’s views.

As a result, an increased level of fairness will thus enhance the general acceptance of the ICC and therefore, its legitimacy will be strengthened. Fairness has been described

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11 Ibid (Machura) 198-199.
as the ‘overarching requirement for criminal proceedings;’\textsuperscript{13} and, simultaneously, fairness refers to the way in which the outcome of a process (justice) is achieved.\textsuperscript{14} As mentioned in Chapter 1, the aim of this thesis is to provide answers as to \textit{how} and \textit{why} the ICC’s court procedure may and should be improved. Having established the how at the end of Chapter 5, this chapter will now explore \textit{why} a broad acceptance of the ICC’s procedure is vital. In other words, with an established assumption of what fairness includes, this chapter explains through a socio-legal lens the wider implications of court procedure and ultimately, why publicly perceived ‘unfair procedures’ could have a detrimental effect on the legitimacy of the ICC.

1. Legitimacy and court procedure

1.1 Parameters of legitimacy

Whenever the interests of individuals are affected, as a matter of course, ‘the cry of procedural unfairness is heard.’\textsuperscript{15} Based on the premise that if fairness provides an equal chance of success, it also implies the creation of a body that overlooks the Prosecutor’s actions during the investigative phase (inquisitorial shift or hierarchical ideal); or, alternatively, that the defence must be allowed to conduct its own investigations (adversarial shift or towards coordinate ideal). The following paragraphs will contend that a successful and legitimate procedure depends, \textit{inter alia}, on the social acceptance of the public. But what do we attribute to court procedure?

Stollberg-Rilinger generally describes procedures to be sequences of acts that are mostly regulated in written form with the purpose to create binding decisions.\textsuperscript{16} Hence, court procedure can be described as a decision making process. In order to reach a broad public acceptance through such a decision making process, any disruptive factors leading to a perceived unfairness of the procedure need to be eliminated. If ‘a fair trial is the only means to do justice,’\textsuperscript{17} one needs to shape the procedure towards justice as fair as possible. The author agrees with Derrida’s claim that justice may be something that cannot be calculated,\textsuperscript{18} but this thesis does not try to establish a way to

\textsuperscript{13}ICTY, Prosecutor v. Milošević, IT-01-54-T, TC, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, para. 29.
\textsuperscript{17}ICC, Prosecutor v. Lubanga, ICC-01/04-01/06-772, AC, 14 December 2006, 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, para 37.

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reach justice. Rather, it conveys the message that an enhanced level of fairness of the ICC’s procedure may raise the legitimacy of the Court. Legitimacy, in turn, is not merely achieved by a consistent and correct application of the law and the facts. Rather, legitimacy implies, *inter alia*, an external component which must not be underestimated. In this context, Luhmann points out that in order to reach legitimacy the outcome of a criminal trial needs to be open at the beginning of the trial; and that it has to develop through the ongoing procedure. In addition, he suggests that neither the pure perspective of procedural law, nor strict accuracy would help in determining the real purpose of procedure. Pure procedural law, in a nutshell, would only evaluate the empiric actions of the parties during the procedure and measure them against the yardstick of the established positive procedural law. Yet, aspects such as how the procedure of the Court is perceived in public would not be considered. The ICC’s *sui generis* procedure has been established by human beings, and Solum claims that ‘human ingenuity’ inevitably makes mistakes. As a result, procedure in practice can only be imperfect. A socio-legal perspective, however, offers an assessment of trial procedure with more tools, namely sociological tools.

The same applies for accuracy. Certainly, truth finding, or strict accuracy, is one of the crucial elements of the classic doctrine of criminal procedure. Yet, it is not an exclusive one. In reality, the necessity to render a decision may be in conflict with the truth finding aspect. In other words, court procedure needs to produce ‘accurate outcomes at a reasonable cost.’

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19 The author is aware that some scholars claim that Derrida’s thoughts of deconstruction are not compatible with Luhmann’s thoughts of role theory and the concept of social expectations. See e.g. BELVISI, F. 2014. Legal Argumentation and Justice in Luhmann’s System Theory of Law. 27 International Journal for the Semiotics of Law 341-357, at 351-352. However, this thesis does not intend to illustrate a competition of epistemological approaches. Rather, it aims for the establishment of a nexus between the terms ‘legitimacy’ and ‘fairness.’ In fact, there have been scholars who tried to transcend the approaches of the Derrida and Luhmann. See e.g. LADEUR, K. 2012. Recht und Gerechtigkeit bei Derrida und Luhmann. 43 Rechtstheorie 271-323; TEUBNER, G. 2008. Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts? 29 Zeitschrift für Rechtssoziologie 9-36.


21 Ibid 13.

22 SOLUM (n 1) 320.

23 LIND and TYLER (n 6) 19. There is a distinction between objective and subjective justice and ‘there are two major difficulties in evaluating procedures in terms of the objective criteria. First, one must find some way to establish a standard for measuring the extent to which a procedure meets a given objective criterion. Second, one must decide which objective criteria are important and what trade-offs should be made among various desiderata of procedures. The first difficulty is illustrated by the problem of measuring accuracy: how is one to know which defendants are truly guilty or innocent?’ (footnotes omitted).


25 Prof. Weigend, e.g., alleges that “the existence of practical as well as normative limits to determining the ‘true’ facts by the means available in the criminal process indicates that truth-finding is unlikely to be the ultimate goal of that process.” WEIGEND, T. 1973. Is the Criminal Process About Truth? A German Perspective. 26 Harvard Journal of Law & Public Policy 157-173, at 168. See also: DENNIS, I.H. 2007. *The Law of Evidence*. 3rd ed. Sweet & Maxwell, p. 49: ‘Legitimacy of decision is not the same concept as (factual) rectitude of decision, although the two are closely related.’

26 LUHMANN (1) 21.

27 SOLUM (n 15) 183.
procedure anyway. Hence, truth *per se* cannot be regarded as the single component for a procedure and therefore, criminal procedure should not try to reconstruct the truth at any cost. Paradoxically, truth should be regarded as a social mechanism that can be compared with others. As a result, looking at the ICC’s procedure from a socio-legal lens includes an assessment of truth, however, the ICC’s procedure must not, *a priori*, presume that it merely serves for an establishment of the truth. Nonetheless, reverting to the truth may serve as a good starting point. Furthermore, court procedure includes different features, and one of the most crucial ones is the development of a legitimate authority in order to render decisions. But how can we determine whether or not the International Criminal Court and its procedure can be regarded as a legitimate decision maker? And how is legitimacy defined?

Legitimacy in the realm of international criminal justice certainly involves questions of what we expect from international tribunals. Very often, the expectations are simply just too high and there is collusion between what these tribunals can achieve in reality and what they are expected to achieve. Expectations such as reconciliation or creating peace and stability are just two examples which could be mentioned in this context; and they would not play a role for the legitimacy of a national court. The primary task of international tribunals, however, is to determine whether or not an accused is guilty beyond reasonable doubt. If the process to reach such a decision would entail flagrant miscarriages of justice due to other expectations, the legitimacy of international tribunals would be undermined. The latter also involves questions of transparency, especially with regards to the disclosure of evidence.

In the realm of international law, Boyle and Chinkin have suggested that legitimacy can be understood as the ‘normative belief that a rule or institution ought to be obeyed.’ Yet, the latter definition reminds us very much of what Max Weber has proposed. Can a general acceptance—in the age of the internet and permanent access to information—really be achieved by a normative belief suggesting that there is a duty to obey a rule? Perhaps nowadays, in complex societies, people need to be convinced by the quality of a certain procedure, which, in turn, depends on the level of fairness. The crucial question is whether or not we can accept the procedure of the International Criminal Court. This is why the thesis would like to call attention to an external factor,

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30 LUHMANN (n 1) 25.
that is, general acceptance, which contributes to legitimacy—not only in the context of national procedures but also in the context of international criminal procedures.

Generally speaking, ‘something that is legitimate is acceptable according to the law.’ Hence, legitimacy includes a certain level of acceptance of an institution, a person or norms. It has been explained previously that this acceptance is based on an internal as well as an external parameter. If an institution or a court would like to reach more general acceptance, it needs to raise the level of fairness. An enhanced level of fairness may generate a certain belief in an institution and such a belief can only develop over the course of time among the people of states or, concerning the ICC, among the people of the signatory states. A study by Friedland and others has revealed that ‘the noncompliance effect of unfair procedures was magnified when the rules were used exploitatively by those in power.’

Yet, general acceptance does not depend on the acceptance of an individual of the outcome itself. Rather, it implies that the majority of the people of a society are convinced that the procedure leading to an outcome is fair. Luhmann points out that there is a distinction between an ‘acceptance based on the procedure that leads to an outcome’ and an ‘acceptance of the outcome itself.’ Since it would be overambitious, however, to believe that human being can create a procedure which is able to convince each and every single accused person of their alleged wrongdoing in the course of trial, legitimacy can only be based on a broad acceptance among the societies of the signatory states. It is this ‘generalisation’ of the acceptance that is decisive for legitimacy. Hence, legitimacy does not depend on the voluntary acceptance or belief of an individual or the accused. Rather, society has to accept a judgement as the corollary of an authorised institution. The expectations of society, nonetheless, may be subject to change and therefore, legitimacy also has to be understood as a learning process of an institution which kind of accompanies the decision making process. If the level of fairness of procedures at the ICC, however, is not raised—though expected by the public—a broad acceptance of the Court’s procedure may be at stake.

32 DENNIS (n 26) 49: ‘If official adjudications are to succeed in gaining acceptance and respect as authoritative decisions, it is essential that they are, and are seen to be, legitimate.’ (footnotes omitted).
34 LUHMANN (n 1) 30 citing BOURRICAUD, F. 1961. Esquisse d’une Théorie de l’Autorité, Plon, p. 7:’[u]n pouvoir qui accepte ou même qui institue son propre procès de légitimation.’
36 LUHMANN (n 1) 31.
37 Ibid 32.
38 Ibid 32; see also: MACHURA in Röhl and Machura (n 10) 191-192.
As a result, a socio-legal perspective shows that there is an external aspect to trial procedure, *i.e.* public acceptance, which has been described as a bipolar process, confirmed by Hoyano:

The integrity of the verdict depends not just on the fairness of procedures which generated it, but also on the accountability of the criminal justice system to the public, from which springs the principle of open justice.

Therefore, one can clearly determine that legitimacy does not only depend on the fairness that internally generated a judgment but also on the level of fairness that is perceived by the public. To conclude, a theory of procedure needs a more abstract focal point than merely searching for the truth since questions on the law and truth leave us with uncertainty. The search for the truth must always be supported by the legitimate power to render a decision, which can only be reached if the institution (ICC) questions itself in a learning process according to the changing expectations from the public. ‘Law can only be institutionalised as variable if the variation of law is subject to learning processes.’

Therefore, and specifically with regards to the disclosure regime at the ICC, any contemplations of shifting the ICC’s model into either the common or civil law direction might not be the worst idea. To formulate it very plainly

If we take people’s belief in legitimacy as a starting point, we may sometimes observe that a procedure which is seen as ‘fair’ enhances the legitimacy of the superior system.

Realistically, of course, it needs to be mentioned that it is a rather small section of civil society, namely practitioners and academics, who would be the first instance to take a close interest in the work of international courts. These people form, nonetheless, part of ‘the public’ and hence, their views are likely to reflect the broad consensus observable across different international tribunals. If the International Criminal Court, in turn, attracts too much criticism within this section of civil society—especially in cases of some apparent miscarriage of justice—it seems reasonable to predict that this may affect the legitimacy of the Court in the eyes of a wider public. The author does not know whether or not the former Chief Prosecutor of the ICTY, Richard Goldstone,

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42 MACHURA in Röhl and Machura (n 10) 189.
explicitly aimed at the aspect of ‘general acceptance’ when he mentioned a similar statement back in 1996, but in any case its content were more than accurate:

Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.  

1.2 Legitimate procedure

Luhmann’s idea of legitimacy and general acceptance will now be linked to Dworkin’s thoughts on fairness, evidence and procedure. According to Dworkin, procedural questions on fairness in a criminal trial need to be “decided by striking ‘the right balance’ between the interest of the individual and the interest of the community as a whole.” The interest of the community as a whole and the maze of state structures, however, imply that it is impossible for any criminal procedure to be considered as the ‘most accurate possible procedure for testing the charges against an accused.’ No criminal procedure can ever be perfect due to the epistemological problem of establishing the ultimate truth in a trial—without knowing all previous actions or the thoughts of the parties involved. Nonetheless, if a procedure leads to a conviction of the innocent and an acquittal of the guilty, the individual will suffer from what Dworkin calls ‘moral harm.’

In order to avoid this moral harm, which is to be distinguished from bare harm, the accused is said to have two genuine rights: First, he or she is entitled to the right that a majority of the society establishes a trial procedure which puts a ‘proper valuation on moral harm in the calculations that fix the risk of injustice.’ In other words, there must be a high level of protection for the individuals against whom criminal charges are laid. Second, however high this level may be, it needs to be applied equally. Dworkin describes it as a procedure which holds the community to a ‘consistent enforcement of its theory of moral harm’ or the ‘equal treatment with respect to that evaluation.’ Each of the latter two rights may act as a trump over the balance between the gains of

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46 KÜHNE (n 29) 1.

47 DWORKIN (n 44) 80. Dworkin regards moral harm also as the ‘injustice factor.’

48 Ibid, ‘bare harm’ is the harm ‘a person suffers through punishment, whether that punishment is just or unjust—for example, the suffering or frustration or pain or dissatisfaction of desires that he suffers just because he loses his liberty or is beaten or killed—and the further injury that he might be said to suffer whenever his punishment is unjust, just in virtue of that injustice.’

49 Ibid 92.

50 Ibid 90.

51 Ibid 92.
society or the individual and, hence, a middle ground emerges. This middle ground—which has been described as the level—is the *terrain* between two radical edges, namely ‘the denial of all procedural rights and the acceptance of a grand right to supreme accuracy.’

The fact that Dworkin merely focusses on this grand right to supreme accuracy, however, excludes other rights such as the privilege against self-incrimination that do not seem to be primarily concerned with accuracy, but rather with respecting the autonomy and dignity of the accused. The right to confrontation itself seems to be partly an accuracy-promoting right but is, on the other hand, also concerned with securing the accused’s participation on equal terms, whether or not this helps reach an accurate verdict. In this context, the ‘radical’ positions seem to be not supreme accuracy versus no-rights, but rather a right to accuracy versus a full range of rights that must be upheld regardless of their effects on accuracy.

Hence, with regards to the question of fairness and legitimacy in this thesis, there seems to be a different dilemma of two radical edges; a dilemma, which could also be portrayed in a middle ground. In this new middle ground, the question would not be whether there should be a complete denial of procedural rights. Rather, the decisive question would be to what extent are we willing to accept the limitation of such procedural rights? Regarding the disclosure of evidence, the limitation of this right is expressed by the fact that no institutional body at the ICC is obliged to overlook the Prosecutor’s actions, *i.e.* a limitation in the sense that the enforceability or effectiveness of the disclosure of evidence is restricted. Concerning the right to have witnesses examined, the decisive question would be whether or not we should limit the right to have witnesses examined to the extent that an untested, and sole or decisive witness statement may lead to a conviction—even if a verdict then may become more accurate. As a result, this thesis follows Dworkin in arguing that the search for the middle ground is constrained by the requirement of equal respect for every accused’s right not to be convicted if innocent. However, the thesis has a different view of what the two radical edges are.

In 2011, Damaška indicated that ‘the accuracy of factual determinations’ was no longer a high priority, at least not in legal scholarship on the European continent.

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52 Ibid 90.
According to him, procedural justice had gained at the expense of its antipode ‘accuracy.’ If one considers procedural rights as a road, and accuracy as the destination, Damaška described the situation as follows:

The road to the destination seems to be becoming more important than the increasingly uncertain destination itself.54

The Grand Chamber judgement of Al-Khawaja and Tahery [GC], however, reversed this trend and the flexible ‘sole or decisive’ rule brings accuracy back into play. Interestingly, this judgment was a concession to English law which has not gone down the road mentioned by Damaška. Yet, it is finally up to society to choose either to grant minimum standards and acknowledge misuse in certain cases or, to aim at a strict and narrow procedure based on impartial and unbiased thinking, which needs to be given some flexibility in the most difficult cases.55 Currently, it can be held that the standard for the protection of the right to have witnesses examined at the ICC is sufficiently high. As a consequence, and seen through a socio-legal lens, it seems to be high enough to serve the purposes of a general acceptance. Regarding the disclosure of evidence, however, the level of fairness in this middle ground should be raised.

2. Conclusion

The aforementioned procedural parameters have revealed that legitimacy includes two crucial bipolar variables, an internal and an external one. If the public cannot generally accept the ICC’s procedure anymore, the Court’s overall credibility may be at stake. In the worst case scenario, this may lead to a loss of legitimacy resulting in the failure of the Court. Hence, the ICC should aim at the highest procedural standards in terms of fairness. Particularly with regards to the disclosure of evidence, the Court’s procedure needs to improve since practice has shown that the actions of the Prosecutor and her/his investigations have been subject to criticism. The lack of a body overlooking the Prosecutor’s investigative actions raises questions as to the overall fairness of the proceedings. Generally speaking, the ICC should aim at finding as many facts as possible during the investigations but also guarantee a mechanism that ensures full disclosure for all parties, prosecution, defence and, as far as concerned, the Victims and

Witnesses Unit. Judge Kirk McDonald from the ICTY formulated a ‘modern approach’ to disclosure back in 1996 when suggesting

The modern approach […] 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 ECHR.56

Perhaps a mechanism overlooking the Prosecutor may guarantee that more exculpatory material is disclosed and, as a consequence, the level of the general acceptance of the ICC’s procedure in the public may be raised. Yet, this would require minor changes in the Rome Statute.

Consequently, it seems that for an enhancement of the disclosure of evidence, including the investigative procedures, the Rome Statute is in need of repair. Whether this should be done in the form of so-called Co-Investigating Judges, who form part in the procedure at the ECCC, remains to be seen. With regards to the right to have witnesses examined, one can state that the case law of human rights jurisdictions definitively moved towards more accuracy rather than promoting procedural rights. However, the ICC’s hurdle still remains higher than the standard of human rights law due to Rule 68. Therefore, the ICC’s procedural middle ground concerning the right to have witnesses examined in the context of the new example of middle ground theory can be regarded as sufficiently high to serve the purposes of general acceptance.

Figure 6: The new *middle ground* between two edges: the right to accuracy vs. a full range of other procedural rights. The blue graph portrays the ideal balance of fairness between the two edges in order to reach legitimacy. According to the argumentation of this thesis, the ICC’s standard of disclosure is below the ideal balance (red graph) whereas the standard of confrontation is above (green graph).
Chapter 7: The court procedure at the ECCC

With a clear idea that the ICC’s legitimacy depends, *inter alia*, on general acceptance and having concluded that the ICC’s level of fairness in the area of disclosure of evidence needs to be raised, the thesis will now look into the investigative model of the ECCC. This last assessment will answer the question whether or not an investigating judge could, in principle, be an appropriate means to enhance the level of fairness at the ICC and, whether or not the thesis recommends the introduction of such a body. Generally speaking, the ECCC’s model is completely different from the Rome Statute.¹ The ECCC is a so-called hybrid tribunal and forms part of the national judiciary. It has been established to try the ‘senior leaders of Democratic Kampuchea and those who were most responsible for the crimes’ and serious violations of Cambodian penal law between 17 April 1975 and 6 January 1979.² The rights of the accused, including the right to a fair trial, represent a firm part of the UN-RGC Agreement and the ECCC Law.³ Furthermore are the Extraordinary Chambers required to apply internationally recognised standards of fairness as set out in Articles 14 and 15 of the ICCPR.⁴ In fact, since Cambodia ratified the ICCPR, it is obliged to comply with all of the provisions of the Covenant anyway. The procedures before the ECCC are principally governed by the Cambodian Code of Criminal Procedure,⁵ however if the existing code does not deal with a particular matter, guidance may also be drawn from procedural rules at the international level.⁶ In addition, the ECCC have adopted Internal Rules, which consolidate the applicable Cambodian procedure.⁷ It is perhaps useful to mention in

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² [Art. 2 UN-RGC Agreement; Art. 1 ECCC Law. Select the term ‘senior leaders’ and ‘most responsible’ are not jurisdictional requirements of the ECCC, but operate exclusively as investigatorial and prosecutorial policy to guide the independent discretion of the Co-Investigating Judges and Co-Prosecutors as to how best to target their finite resources in order to achieve the purpose behind the establishment of the ECCC. Whether an accused is a ‘senior leader’ or ‘most responsible’ is therefore a nonjusticiable issue before the Trial Chamber.” See: Co-Prosecutors v. Kaing Guek Eav alias Duch, 001/18-07-2007-ECCC/SCC, (F 28), SCC, 3 February 2012, Appeal Judgement, para 79.]

³ Art. 13 UN-RGC Agreement; Art. 24new, 33new and 35new ECCC Law.

⁴ Art. 12 (2) UN-RGC Agreement; Art. 33new ECCC Law.


⁷ Preamble of the IR; see *ibid* (Case 002/01 Judgement, para 21).
passing that Cambodia has signed and ratified the Rome Statute and is hence a state party to the ICC Statute.\(^8\)

1. The ECCC’s different model in comparison to the ICC

The ECCC’s model differs from the Rome Statute insofar as the investigations are carried out by two Co-Investigating Judges.\(^9\) This does not mean that the Office of the Co-Prosecutors in Phnom Penh represents an organ of less significance.\(^10\) In fact, it is only the Co-Prosecutors who can initiate a prosecution within the jurisdiction of the ECCC,\(^11\) and the Co-Investigating Judges shall only investigate what the CP set out in their ‘introductory submission.’\(^12\) Hence, the work carried out by the Office of the Co-Prosecutors is important. Yet, the investigative powers of the Co-Prosecutors in Phnom Penh are limited, and their role certainly differs from the one of their ICC counterpart in The Hague.

A preliminary investigation at the ECCC can be triggered under similar circumstances as preliminary examinations at the ICC. The Co-Prosecutors can initiate preliminary investigations on their own discretion or on the basis of a complaint.\(^13\) For example, any person, organisation, lawyers of victims or a victim’s association may refer a written complaint to the OCP.\(^14\) It is then for the Co-Prosecutors to decide how to proceed with such a complaint.\(^15\) In the event that the OCP deems a preliminary investigation necessary, such conduct has the aim of determining whether or not there is evidence indicating that ‘crimes within the jurisdiction of the ECCC have been committed;’ and whether there are suspects and potential witnesses who can be identified.\(^16\) If the Co-Prosecutors, after such an inquiry, ‘have reason to believe that crimes within the jurisdiction of the ECCC have been committed,’ they open the stage of the judicial investigations by sending an ‘introductory submission’ to the Co-Investigating Judges.\(^17\) Such a submission needs to be accompanied by all evidence, including exculpatory material.\(^18\) Significantly, it is this stage of the proceedings where

\(^9\) Art. 5 UN-RGC Agreement; Art. 23 new ECCC Law; Rule 55 ff. IR.
\(^10\) E.g., the Prosecutors are responsible for the conduct of the prosecutions, see: Art. 6 UN-RGC Agreement; Art. 20 new ECCC Law; Rules 49-54 IR.
\(^11\) Rule 49 (1) IR.
\(^12\) Rule 55 (2) IR.
\(^13\) Rule 49 (1) IR.
\(^14\) Rule 49 (2) and (3) IR.
\(^15\) Rule 49 (4) IR.
\(^16\) Rule 50 (1) IR.
\(^17\) Rule 53 (1) IR. According to the glossary of the IR, the introductory submission represents a ‘written submission by the Co-Prosecutors requesting the Co-Investigating Judges to open an investigation into a crime and proposing charges.’ IR, p. 81.
\(^18\) Rule 53 (2) IR. If the CP would like the CIJ to expand the scope of the investigations at a later stage, they can file a so-called ‘Supplementary Submission’, Rule 54.
the Cambodian model offers an interesting example of how the investigative stage has been put into the hands of the judiciary, that is, the Co-Investigating Judges. In other words, while the Co-Prosecutors preliminary identify suspects, it is the Co-Investigating Judges ‘who undertake the bulk of investigative work to determine whether the evidence meets the requirements of an indictment.’

The UN-RGC Agreement as well as ECCC Law clearly states that it is the Co-Investigating Judges who ‘shall be responsible for the conduct of [the] investigations.’ However, the CIJ only scrutinize the facts which were set out in the Co-Prosecutors’ introductory submission. If new facts come to the knowledge of the Co-Investigating Judges, they are only allowed to investigate these new facts after having received a ‘supplementary submission’ from the CP. During the conduct of judicial investigations, the Co-Investigating Judges ‘may take any investigative action conducive to ascertaining the truth.’ This may include summoning and questioning suspects, seizing physical evidence, interviewing witnesses, record their statements and provide appropriate measures to ensure their safety. In addition, the CIJ have the power to ‘charge any suspects’ or other persons against whom there is clear and consistent evidence. A written record of the investigations has to be kept as well—the so-called case file. It is also the task of the Co-Investigating Judges to conduct on-site visits and, in the event the CIJ need support, they can issue a ‘rogatory letter’ requiring that the judicial police or ECCC investigators undertake certain investigative actions. The parties, i.e. the Co-Prosecutors, a charged person or a civil party can also participate in the investigations. They may file written orders and request the CIJ to undertake actions, which they consider useful. However, if the Co-Investigating Judges do not agree with these requests, ‘they shall issue a rejection order.’ Rejection orders are subject to appeal before the Pre-Trial Chamber. Furthermore, the judicial investigations at the ECCC are not conducted publicly ‘in order to preserve the rights

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20 Art. 5 UN-RGC Agreement; Art. 23new ECCC Law; Rule 55 ff. IR.
21 Rule 55 (2) IR.
22 Rule 55 (3) IR.
23 Rule 55 (5) IR.
24 Rule 55 (5) a) and b); 61 IR
25 Rule 55 (4) IR.
26 Rule 55 (6) IR.
27 Rule 55 (8) IR.
28 Rule 55 (9) and Rule 62 IR.
29 Rule 55 (10) IR.
30 Ibid.
31 Ibid.
32 Rule 74 IR.
and interests of the parties.’ 33 The Public Affairs Section of the Court may, however provide information to the public or grant the media access to certain files if the CIJ have given their consent. 34 During the course of the investigations, a charged person may appear in front of the Co-Investigating Judges. If it is the first, the so-called initial appearance, the CIJ have to notify the charged person of the charges and inform them of the right to a lawyer and the right to remain silent. 35 The Co-Investigating Judges can also interview charged persons, order provisional detention or release the charged. 36

Once an investigation has been concluded, the Co-Investigating Judges ‘shall notify all the parties,’ including their lawyers of the outcome. 37 The parties then have fifteen days to ‘request further investigative action’ or waive such period. 38 If the CIJ ‘decide to reject such requests, they shall issue a reasoned order,’ 39 which is subject to appeal before the Pre-Trial Chamber. 40 The investigations end with a so-called closing order, which either indicts the charged person and sends him/her to trial or dismisses the case. 41 If the ‘acts in question do not amount to crimes within’ the ECCC’s jurisdiction, if ‘perpetrators of the acts could not be identified,’ or, in case ‘there is not sufficient evidence against a charged person,’ the Co-Investigating Judges ‘shall issue a dismissal order.’ 42 To repeat, all parties ‘must be immediately notified upon issue of a closing order, and receive a copy thereof.’ 43 In the event an indictment is approved by the Co-Investigating Judges, the Co-Prosecutors proceed with the prosecution of the suspect.

The previous paragraphs have shown that at the ECCC, the entire investigative work is carried out by the Co-Investigating Judges. Only if there are ‘sufficient charges’ or ‘sufficient evidence’ against the charged person will the CIJ launch an indictment. There is, however, no clear definition as to the standard of ‘sufficient evidence’ in the sense of Rule 67 or as to the concept of ‘sufficient charges.’ 44 Neither the UN-RGC Agreement nor the ECCC Law provides any extra information. Moreover, the case law of the ECCC does not provide any explicit points of reference on this standard. This is why the CIJ referred to other sources in the closing order of case 002, namely to a conglomerate of ‘French jurisprudence (since Cambodian law is derived directly from

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33 Rule 56 (1) IR.
34 Rule 56 (2) IR.
35 Rule 57 (1) IR.
36 Rules 58, 63 and 64 IR.
37 Rule 66 (1) IR.
38 Ibid.
39 Rules 66 (2) IR.
40 Rule 74 IR.
41 Rules 67 (1) IR.
42 Rules 67 (3) IR.
43 Rule 67 (5) IR.
French law), distinguished academic writings and the jurisprudence of the other international criminal courts. Based on the fact that the assessment of the sufficient evidence standard is left to an ‘unfettered discretion’ to the investigating judges in France, the ECCC’s Co-Investigating Judges concluded to have such discretion as well. Indicative of the assessment of the standard of proof was, according to the CIJ, that an indictment requires a ‘certain probability of guilt (i.e. more than a mere possibility).’ Yet, the CIJ made clear that the assessment of the charges ‘must not be confused with the beyond reasonable doubt standard’ of the trial stage. Hence, the scope of the application of the sufficient evidence standard remains at the discretion of the Co-Investigative Judges; and only if the Co-Investigating judges deem the evidence as sufficient for a possible conviction will the charged be prosecuted. Yet, having referred to the ICC’s jurisprudence as well as the case law of the ad hoc tribunals, it can be assumed that the Co-Investigative Judges regard the standard of ‘sufficient evidence’ to be in the same range as the ‘substantial grounds’ standard known from the ICC, due to CIJ’s announcement to follow this ‘common approach’. As a consequence, in Phnom Penh the Co-Prosecutors (and the defence counsels) have to build up their case based on the results of the Co-Investigating Judges—a huge difference in comparison with the ICC Prosecutor who has vast investigative powers.

By way of an example, in Phnom Penh it can be day-to-day business that the Co-Prosecutors request information from the case file.

2. The Cambodian model—an alternative?

Before elaborating on the advantages and disadvantages of investigating judges, it needs to be clarified that this thesis will not enter into the debate of whether or not national politics are systematically influencing the judiciary at the ECCC. The thesis exclusively refers to the question of whether or not an institution such as an

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45 Ibid.
46 Ibid, paras 1322, 1326.
53 See e.g.: Ciociairi, J.D. 2015. UN Credibility on Trial in Cambodia. YaleGlobal [Online] Available: http://yaleglobal.yale.edu/content/un-credibility-trial-cambodia [Accessed 21 August 2015]: ‘[t]he compromise between the UN and Cambodia is near its breaking point, as Cambodian Prime Minister Hun Sen refuses to execute arrest warrants issued by a UN-appointed judge.’
investigating judge may be an alternative for the ICC in order to enhance the level of fairness of its proceedings. Critics of the adversarial approach argue that the system is not sufficiently concerned with the search of the truth. Rather, the parties’ pursuit of winning would overshadow this search. On the contrary, a system operating with investigating judges combines two powers (judicial and investigative) and these two powers may be incompatible, ‘excessively powerful and not sufficiently subject to independent control.’\textsuperscript{54} In fact, scholarship has warned of such a step since an investigating judge may become “captivated by a ‘crime control’ ideology” all too easily, which would finally hamper ‘neutral investigations.’\textsuperscript{55}

What I think is important at this stage is to consider the circumstances of reality under which the ICC’s system has to operate. Of course every system should be developed on the foundations of normative values but one also needs to learn from practice and experience which may be applied in the future. So what does this mean for the ICC’s procedure? Should we shift to the adversarial approach and let the Office of the Defence conduct their own investigations, which would require a fitting with the necessary financial means, resources and creating a legal a framework for the defence counsels and their investigators in order to comply with their tasks adequately? One could do so. Yet, one of the reasons why we may lose sleep whilst thinking about this idea is the aspect of practicability. The circumstances of reality kick in when we consider the fact that very often investigators have to travel to crisis-hit regions, which may be under the control of militias or other armed non-governmental troops, who have no intention whatsoever to cooperate with the investigations of the ICC. Even if the region where the investigation takes place were under state control, there will always be a chance that a signatory state does not wish to fully cooperate with the ICC’s investigators. Two investigative teams could therefore face more difficulties than one team, or as Ambos described:

While it may be difficult for the Prosecution to enter the territory of a particular State for investigative purposes it is often completely impossible for the Defence if the State refuses to co-operate.\textsuperscript{56}

\textsuperscript{56} AMBOS, K. 2003. International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed? 3 International Criminal Law Review 1-37, at 35. On the other hand, there may be situations in which states prefer to support the investigators of the defence teams.
Does the investigating judge then become the only option? On first sight—it seems as if this could be the case. The Prosecutor would have to surrender a considerable amount of her/his powers to the investigating judges, who are meant to carry out the investigations impartially. Yet, there may be other options creating a mechanism which ensures the control of the Prosecutor’s investigations in a different way. In previous years, for example, a shift towards a more powerful PTC with an obligation to overlook the Prosecutor’s investigative actions was suggested, and indeed, this is a considerable option. Currently, however, there is debate as to the role of the Pre-Trial Chamber and the standard of evidence proof at pre-confirmation hearings.

In an attempt to supervise the investigations of the Prosecutor, Pre-Trial Chamber I initiated this debate as part of the adjournment decision in the case of Gbagbo. Eventually, however, the PTC returned yet again to its previous approach of the ‘limited scope’ of confirmation hearings. The crucial question concerned what kind of evidence should be presented, and whether or not a high standard of proof of evidence may indicate a conviction at a later stage. Pre-confirmation hearings have adopted a sort of filtering function that determines which cases should enter the trial stage and which not. The dichotomy is that a stronger PTC at pre-confirmation level, which regulates investigative issues, may hamper the expeditiousness of the proceedings. In addition, a ‘miniature judgment’ may predict a future conviction if the standard at the confirmation hearings is set too high; although PTC I has clearly denied such a function of the confirmation of charges hearings. In this context, Stegmiller raises an interesting point, namely that confirmation of charges hearings are not subject to appeal, neither for the prosecution nor the defence. Hence, if the PCT raised the standard of proof, there would be an issue as to whether the charged should have the right to appeal at that stage of the proceedings rather than later. On the other hand, as

57 JACKSON, J. 2009. Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy. 7 Journal of International Criminal Justice 17-39, at 35: ‘Although some have been sceptical about the ability of the Pre-Trial Chamber to make much impact on the pre-trial phase of evidence gathering, given that this continues to be dominated by the parties, first signs are that the chambers are keen to develop an active role in the investigative stage.’


the author has previously contended, somebody needs to overlook the Prosecutor’s investigative actions. To return to the question raised in the headline, that is, whether or not an investigating judge may represent an alternative for the ICC, the answer is yes; however it would be an unrealistic one. Instead, the author suggests the implementation of the Investigation Oversight Office—as an alternative to a compulsory investigation control by the PTC.

3. The Investigation Oversight Office

A new approach to balance the relatively one-sided investigation is the implementation of a mechanism called ‘Investigation Oversight Office’ (IOO). The speciality of this body would be to assess whether or not all of the evidence and facts have been gathered by the prosecution and whether the prosecution complies with its obligations to collect exculpatory evidence. The ever ongoing disputes on whether or not certain pieces of evidence have to be disclosed or redacted would still be a matter for the PTC or the TC. Yet, one of the tasks of the new oversight body would be to act as an early-warning system concerning special evidence. In the case of Lubanga, for instance, it would have been the task of the Oversight Office to inform the PTC or TC about the nature of the exculpatory evidence which has only been acquired due to confidentiality agreements. Hence, fair trial issues would have been dealt with at an earlier stage of the proceedings. This implies that without any exceptions, all of the evidence gathered by the prosecution has to be registered with the Oversight Office. In addition, the new investigation office sends its own investigators, together with the Prosecutor’s, to on-site visits.

If the investigation oversight has any concerns with the OTP’s investigations, it recommends to the PTC or TC to request further investigative measures. The office would, however, not have any judicial powers to order such measures directly. Still, it would disburden the PTC and TC on matters of investigation; and only in cases where the Oversight Office recommends further investigations, or in cases where the defence does so, shall the PTC or TC decide on the issue. As mentioned before, the prosecution would be obliged to register all of its evidence and facts with the IOO (as alleged, this would be compulsory and non-debatable), including evidence that has been gathered through so-called confidentiality agreements. If it turns out that evidence has not been registered with the Oversight Office in order to achieve an unfair advantage at a later stage of the trial, the evidence should not be admissible and, as far as exculpatory
material is concerned, the prosecution might have to drop the charges depending on the significance of the evidence. In the event the prosecution obtains evidence at post-confirmation level, such evidence needs to be registered with the IOO immediately. In fact, the author recommends an internal electronic system connecting the prosecution’s investigation office with the one of the Oversight Office. This would facilitate the proving of whether or not the Prosecutor has registered certain pieces of evidence accordingly if they were obtained at a later stage.

Since the new office would only be a watchdog, it would still be entirely up to the parties what kind of evidence they ultimately wish to present at pre or post-confirmation level. The implementation of such an Investigation Oversight Office guarantees that all facts and evidence have been gathered; on the other hand, it leaves room for the parties to present their evidence independently. Only in cases where the Oversight Office has reason to believe that exculpatory material has not been searched for, it shall inform the PTC or the TC. The rest of the trial procedures would run ‘as usual.’ To repeat, the IOO would neither be in charge of solving questions on disclosure nor engage into debates on the purpose of confirmation of charges hearings. This issue has to be resolved by the judges of the ICC themselves; and a standardized scheme would certainly facilitate the work for all the parties involved.63 The mission of this new office would ensure an equal chance of success during the investigative stage, since an intervention of the Chambers into the Prosecutor’s investigations is not foreseen as obligatory.

The idea of the creation of an Oversight Office is certainly only one of a number of options which might improve the ICC’s procedural system.64 Yet, fresh ideas on the improvement of the Rome Statute are needed in order to strengthen the general acceptance of the court. If the most powerful states are not convinced of the institution of the ICC, the Rome Statute should at least in terms of its technical composition on matters of fairness, seek to convince the waverers. Whether such a change of the Rome Statute will ultimately take place remains to be seen. The matter itself would technically fall into the competencies of the Assembly of States Parties deciding on a proposal which can be made by any state party: ‘After the expiry of seven years from entry into

force of the Rome Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all State Parties. The Assembly of States Parties can then, at its next meeting, decide whether to take up the proposal, ‘may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.’ Whether or not the implementation of the Investigation Oversight Office would finally be a ‘matter of substance’ or a ‘matter of procedure’ in accordance with the Assembly’s RPE would have to be decided by the President of the Assembly.

The author suggests the implementation of the Investigation Oversight Office as a neutral and independent organ next to the Appeals Division, the Trial Division and the Pre-Trial Division under Article 34 (b) of the Rome Statute. The IOO, however, should not have any judicial powers and should act independently of the judges. By no means should the IOO be in competition with the PTC or the TC. Rather, it would be the authority which ensures that all of the evidence and facts, inculpatory but especially exculpatory, have been gathered by the prosecution. Alternatively, the Investigation Oversight Office could also form part of the Registry and hold a similar status as does, for example, the Victims and Witnesses Unit.

The creation of the IOO can certainly not have any impact on previous judgments made by the ICC, nor would the proposal impact the ongoing cases in the course of hearing. Defence counsel of the suspects and accused of previous or ongoing investigations had the opportunity to convince the Trial Chamber to order ‘the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties’ according to Article 64 (6) (d) of the Rome Statute. Even if this can-solution was criticised by the author himself, any other decision would imply that procedural innovation at the ICC with regards to fairness will be impossible. What this thesis proposes is an enhancement of the fair trial conditions to improve the fairness and expeditiousness of the ICC’s procedural system. Hence, the implementation of the Investigation Oversight Office can only affect new situations and cases and must not have any impact on previous or ongoing trials.

One last nuance which cannot be clarified in this thesis is the comparison between the ICC and the ECCC regarding expeditiousness and the length of time from

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65 Art. 121 (1) RS.  
66 Art. 121 (2) RS.  
67 Art. 112 (7) (a) and (b) RS in conjunction with Rule 64 (2) of the RPEs of the Assembly of States Parties.  
68 Art. 34 (d) in conjunction with Art. 43 (6) RS.
the closing orders or confirmation of charges to judgment. Some may consider the ICC’s confirmation of charges as lengthy burden since its purpose is to separate those cases that proceed to the trial stage from those which should not. Be that as it may, and bringing the numbers of the following table into context, it needs to be highlighted that case 001 of the ECCC had an advantage as to the expeditiousness. Since guilty pleas are not possible at the ECCC, the ‘prosecution and the defence were able to agree on more than half of the factual allegations,’ which, in turn, accelerated the trial proceedings. With regards to case 002, one has to note that the case has been divided into cases 002/01 and 002/02. Since case 002/02 is still ongoing, it can be held that only the first part of case 002 has held judgment of first instance so far. Concerning the Lubanga trial, the turmoil of the proceedings is known and regarding Katanga, a final statement is hard to predict since the appellate proceedings have been discontinued. Ngudjolo, on the contrary, has been acquitted. Overall, one can claim that the trial stage at the ECCC has an advantage insofar that almost no further investigating actions take place after the closing order (there is a theoretical possibility but it has not been applied in practice yet) whereas, on the other hand, the ICC’s model provides more flexibility as to the admission of evidence at a later stage, i.e. the trial stage. The question of what is the most adequate solution for fair and expeditious trials is an open one. The following table serves as a brief overview of facts.

69 STEGMILLER in Stahn (n 62) 892.
Figure 7: Examples – from the confirmation of charges or closing order to judgment¹

<table>
<thead>
<tr>
<th></th>
<th>ECCC case 001</th>
<th>ECCC case 002/01</th>
<th>ICC Lubanga</th>
<th>ICC Katanga</th>
<th>ICC Ngudjolo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commencement of the trial of 1st instance</td>
<td>17/18 February 2009 (Initial hearings) 30 March 2009 (Substantive part)</td>
<td>21 November 2011</td>
<td>26 January 2009</td>
<td>24 November 2009</td>
<td>24 November 2009</td>
</tr>
<tr>
<td>Judgment of 1st instance given</td>
<td>26 July 2010</td>
<td>7 August 2014</td>
<td>14 March 2012 (judgment) 10 July 2012 (sentenced)</td>
<td>7 March 2014 (judgment) 23 May 2014 (sentenced)</td>
<td>18 December 2012 (acquitted)</td>
</tr>
<tr>
<td>Appeal judgement</td>
<td>3 February 2012</td>
<td>not applicable yet</td>
<td>1 December 2014</td>
<td>not applicable (appeals discontinued on 25 June 2014)</td>
<td>27 February 2015 (Judgment on appeal against acquittal)</td>
</tr>
</tbody>
</table>

¹ Information accessible on the ECCC’s and ICC’s websites respectively.
Chapter 8: Conclusion

The yardstick which was drawn from regional human rights decisions and the HRC has revealed that a restriction of the right to disclosure of evidence does not necessarily represent a violation of the right to a fair trial *per se*. However, any limitation on the disclosure of evidence must never lead to ‘substantial restrictions’ of the rights of the accused. A substantial restriction includes, for example, situations in which ‘essential’ or ‘crucial’ evidence is withheld in order to challenge the lawfulness of the detention, the validity of the arrest warrant or the admissibility of the case. Furthermore, whilst looking at the ECtHR’s and ICC’s case law, a common usage of similar terminology is recognisable.

Admittedly, there are practical inconsistencies in the management and the application of the Rome Statute and its RPE, both at pre-confirmation as well as post-confirmation level and a common, even standardized practice is recommended. Yet, these inconsistencies could not be measured against the yardstick of human rights law since it is for the national courts to apply their code of conducts independently. With regards to *ex parte* hearings, the ICC’s procedure and the yardstick of the human rights courts do not contradict each other. Yet, the legality of holding such *ex parte* hearings has been subject to criticism in the context of procedural fairness. What is clear thus far is that the Prosecutor has no discretion to decide whether or not evidence needs to be disclosed. Hence, any unilateral decision by the prosecution not to disclose evidence represents a human rights violation.

Furthermore, this thesis has revealed that the principle of equality of arms was not suitable to answer the question of fairness due to a different terminology used in the case law of the ECtHR and the ICTY. Yet, Chapter 4 managed to prove the inclusion of ‘the disclosure of exculpatory evidence’ in the term fairness, confirmed by the case law of the *ad hoc* tribunals. What Chapter 5 then has added was the assertion that there is a connection between the investigative phase and the disclosure of evidence which finally was fundamental for the overall assumption of fairness.

Whilst assessing the right to have witnesses examined in Chapter 5 by measuring it against the human rights yardstick, it can be held that the ICC has not necessarily adjusted to the ECtHR’s shift towards more accuracy. Hearsay statements
are, similar to the ad hoc tribunals, admissible at the ICC. The technical bar not to follow the current human rights doctrine, which has been labelled as ‘sole or decisive’ rule, however is Rule 68 of the ICC’s RPE. As a consequence, the standard to bring about a conviction in the context of the right to have witnesses examined is, at the ICC, higher than at its counterparts of international criminal or human rights law. Due to the fact that the ICC’s standard remains higher in this context, questions of reliability or corroboration of an uncross-examined witness statement did not emerge.

Nonetheless, the different approaches of other international tribunals leave room for a brief look of how this question might be administered at other international tribunals in the future. Under which circumstances is uncross-examined evidence reliable? And is corroborative evidence the key to prove such reliability? The ICTR established so-called credibility-indicators, for example, the role of the witness in the events in question, the plausibility and clarity of his/her testimony or his/her motivation to lie. Whether or not these indicators will be used by the international tribunals in the future remains to be seen. Overall, a violation of the right to have witnesses examined in the Rome Statute’s legal apparatus is by no means visible. However, questions of fairness still beleaguer the ICC’s procedure, which is often reduced to a blending of the common and civil law models.

The question of fairness in Chapters 4 and 5 had to prove that the disclosure of evidence forms a major part of fair procedures. Furthermore, it was necessary to portray that the investigative phase decisively contributes to what kind of evidence will be disclosed. Moreover, the assessment in Chapter 5 revealed that the blending of the adversarial and inquisitorial model at the ICC has overlooked one important element: it is the obligation to control the Prosecutor—which does not exist. Based on Fletcher’s approach that fairness requires an equal chance of success, one of the crucial questions of fairness was how this equal chance could be achieved. In the interim, there were two major suggestions, either to shift the ICC’s procedure into the civil law direction, which implies a body that overlooks the Prosecutor’s actions or, alternatively, a shift towards the common law model which would require the provision of the defence with all the necessary financial and logistical tools. Which one would be the more adequate was yet to be answered.

Fairness, besides aiming for an equal chance to success, is also linked to the term legitimacy, and Chapter 6 had to prove the nexus between fairness and legitimacy.
To accomplish this goal, the thesis elaborated on the elements which are included into the term legitimacy. The outcome has shown that legitimacy depends, on the one hand, on a rational acceptability that comes from correct judgments inside the ICC; on the other hand, the ICC’s legitimacy also depends on a rational acceptability from the people of the signatory states (external element or general acceptance). Thus, for an enhancement of the general acceptance it is necessary to improve the procedural fairness of the court. In other words, a higher quality of the ICC’s procedure with regards to fairness may raise the general acceptance of the court among the people of the signatory states. Only an enhanced level of fairness will achieve this goal and if the ICC’s investigative process, which affects the disclosure of evidence, is constantly perceived as unfair, its legitimacy will decrease.

The final assessment of this thesis concerned the investigating system of the ECCC and raised the question of whether or not such an investigating judge could be an alternative for the ICC. Rather than proposing an investigating judge for the ICC, the author suggests the establishment of an Investigation Oversight Office, which would not disturb the familiar system of the ICC. The task of this office would be to overlook the investigative actions of the Prosecutor. In addition, whenever the new office would have doubts as to the investigations, it would inform the PTC or the TC, which then can decide whether or not to take further action.

Having suggested the implementation of a control mechanism, *i.e.* the Investigation Oversight Office to overlook the Prosecutor’s investigations, it needs to be reiterated that this research was designed neither to promote nor to discourage the common or civil law system. Rather, it aimed to transcend this traditional dichotomy with an attempt to improve the level of fairness at the ICC’s procedure. The challenging complexity of the disclosure of evidence in the realm of fair procedure has, and always will, beleaguer international criminal courts; and, as mentioned previously, a variety of proposals exist as to how the investigative process at the ICC may be improved. What this research has particularly shown however is that the discussion on fairness has reached new dimensions, *i.e.* structural dimensions which require reform of the Rome Statute. The socio-legal lens used in this thesis has revealed how important the legitimacy of the ICC is for the societies of the signatory states and, in turn, how much it depends on it. If the criminal justice system of the ICC wants to be successful, it needs to philosophically clarify one of the crucial parameters on which it is based upon: fairness. A constant perception of unfairness in the public will be detrimental for the
ICC’s general acceptance; and its procedure will only be accepted if the presented ‘justice’ was achieved by fair means.

As a result, the overall goal at the ICC should be to increase the level of fairness in order to secure the court’s legitimacy. Only a fully persuasive court procedure will convince the public. After all, the criminal process, as much as being a resolution of conflicts, also needs to fulfil a societal function. Hence, action and reform of the ICC Statute are needed. The ICC would undermine its legitimacy by upholding fair trial rights in its legal apparatus while at the same time undermining these rights with a less fair procedure. The International Criminal Court should try to convince the rest of the world through a successful example of its procedure.

In addition, the author would like to encourage politicians and state leaders to fully cooperate with the International Criminal Court. Admittedly, it would be an overambitious goal to demand a complete agreement of moral values amongst state leaders in order to achieve success in international criminal justice. What would be a good start in the interim, however, is that state leaders simply stick to their consent which they have expressed in international documents. In short, the success of the International Criminal Court will, in addition to a fair procedure, also depend on a ‘truthful’ will of state leaders to realise the goals expressed in the Rome Statute—not only in words but also by action. Therefore, it can be held that the obstacle to the success of the ICC is still the Realpolitik of state leaders; be it the negation to ratify the Rome Statute on the one hand, or be it, on the other, the non-compliance of signatory states with their obligations under the Rome Statute. After all, it was these states and their representatives that created the ICC in the first place.

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