

CONFIDENTIAL INVESTIGATIONS (ARTICLE 54(3)(E) ICC STATUTE) VS. DISCLOSURE OBLIGATIONS: THE LUBANGA CASE AND NATIONAL LAW

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After a short introduction to the procedural history of the Lubanga case (infra I.) the paper analyzes, in its first substantive part (II.), the disclosure regime of the ICC with particular regard to the tension between disclosure and confidentiality as displayed in Lubanga. An interpretation of Article 54(3)(e) of the ICC Statute that pretends to be compatible with the Prosecutor's disclosure obligations (Article 67(2)) is offered. In the second part (III.), the law on disclosure/discovery in England and Wales and the United States is examined with a view to its possible contribution to an improvement of the ICC disclosure regime. This analysis confirms that the law of disclosure is of great complexity, not least because of the underlying tension between defense rights and opposing interests of public or private security. This tension cannot be solved by blanket rules but only on a case-by-case basis that strives for an appropriate balance between the public interest of an efficient prosecution of (international) crimes and the (disclosure) rights of the accused.

I. INTRODUCTION

On June 13, 2008, ICC Trial Chamber (hereinafter T.Ch.) I ordered a stay of proceedings in the Lubanga case because it concluded, on the basis of

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the Prosecution's repeated violation of its disclosure obligations under Article 67(2) of the ICC Statute,¹ that "the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial."² A few weeks later, the same T.Ch. ordered the release of Lubanga.³ In the same decision the T.Ch. also stated that suspensive effect could be granted if an appeal was filed within five days and a request to that effect was made in the appeal.⁴ The Prosecution's reaction to these developments was twofold. First, it sought leave to appeal the decision of June 13,⁵ which was granted by the T.Ch. with regard to the following grounds of appeal:⁶

- The T.Ch. erred in law in its interpretation of the nature and scope of Article 54(3)(e).
- The T.Ch. erred, in law and in fact, in its characterization of the Prosecution's conduct pursuant to Article 54(3)(e).
- The T.Ch. erred by imposing an excessive and premature remedy in the form of an indefinite stay of proceedings.

Second, the Prosecution (hereinafter OTP) filed an appeal against the release decision⁷ in order to suspend its effect;⁸ suspensive effect was granted

1. Articles without reference belong to the ICC Statute.

2. Prosecutor v. Lubanga, No. ICC-01/04-01/06-1401, 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, ¶ 93 (June 13, 2008).

3. *Lubanga*, No. ICC-01/04-01/06-1418, Decision on the Release of Thomas Lubanga Dyilo (July 2, 2008).

4. *Id.* at ¶ 35.

5. *Lubanga*, No. ICC-01/04-01/06-1407, Prosecution's Application for Leave to Appeal "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" (June 23, 2008) [hereinafter Prosecution Application June 2008].

6. *Lubanga*, No. ICC-01/04-01/06-1417, Decision on the Prosecution's Application for Leave to Appeal the "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" (July 2, 2008).

7. Pursuant to art. 82(1)(b), rule 154(i) of the ICC Rules of Procedure and Evidence [hereinafter RPE] and reg. 64(1) of the Regulations of the Court.

8. *Lubanga*, No. ICC-01/04-01/06-1419, Prosecution's Appeal Against "Decision on the Release of Thomas Lubanga Dyilo" and Urgent Application for Suspensive Effect (July 2, 2008) [hereinafter Prosecution Appeal July 2008].

by the Appeals Chamber (hereinafter App.Ch.) on July 7, 2008.⁹ Further, on July 11, 2008, the OTP requested T.Ch. I to lift the stay and resume the proceedings because of the possible disclosure of new evidence.¹⁰ On September 3, 2008, T.Ch. I decided to uphold the stay because it concluded that there were still too many obstacles for adequate disclosure.¹¹

On October 14, 2008, the OTP decided to withdraw its first and second ground of appeal.¹² According to the OTP, information providers now agreed to allow complete access to all the Article 54(3)(e) documents by both the T.Ch. and the App.Ch., if necessary.¹³ In the OTP's view, however, this new situation did not affect the third ground of appeal nor the appeal against the release decision.¹⁴ On October 21, 2008, the App.Ch. issued two decisions. In its decision on the stay of proceedings it rejected the Prosecutor's third ground of appeal and confirmed the stay. It also noted that, pursuant to Rule 157 of the ICC Rules of Procedure and Evidence (RPE), an appeal can only be discontinued in its entirety, not partially.¹⁵ In addition, the App.Ch. pointed out that the notice of discontinuance was without effect because

the questions raised under the first two grounds are inextricably linked to the third ground of appeal, which the Prosecutor wishes to maintain. Even if the Prosecutor had never raised the first and second grounds of appeal, the Appeals Chamber would have had to consider the issues raised there

9. *Lubanga*, No. ICC-01/04-01/06-1423, Decision on the Request of the Prosecutor for Suspensive Effect of His Appeal Against the "Decision on the Release of Thomas Lubanga Dyilo" (July 7, 2008); *Lubanga*, No. CC-01-04-01-06-1444, Reasons for the Decision on the Request of the Prosecutor for Suspensive Effect of His Appeal Against the "Decision on the Release of Thomas Lubanga Dyilo" (July 22, 2008).

10. *Lubanga*, No. ICC-01/04-01/06-1431, Prosecution's Application to Lift the Stay of Proceedings (July 11, 2008) [hereinafter Prosecution Application July 2008].

11. *Lubanga*, No. ICC-01/04-01/06-1467, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings," ¶ 39, 40 (Sept. 3, 2008).

12. *Lubanga*, No. ICC-01-04-01-06-1479, Prosecution's Notice to the Registrar of Its Discontinuance, as Moot, of the First and Second Grounds of Appeal in Its Appeal Against Decision to Stay Proceedings (Oct. 14, 2008).

13. *Id.*

14. *Id.*

15. *Lubanga*, No. ICC-01-04-01-06-1486, 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, ¶ 16, (Oct. 21, 2008).

under as part of its consideration of the arguments raised under the third ground of appeal.¹⁶

In its second decision on the release of Lubanga, the App.Ch. reversed the T.Ch.'s release decision, essentially arguing that in the case of a conditional stay, as in this case,¹⁷ the Court is not permanently barred from jurisdiction and therefore the unconditional release is not an "inevitable consequence," especially if the stay "might be lifted in the not-too-distant future."¹⁸ In fact, T.Ch. I lifted the stay on November 18, 2008, concluding that the reasons for the suspension had "fallen away."¹⁹ Finally, on January 26, 2009, the trial of Thomas Lubanga Dyilo began before T.Ch. I.

II. THE DISCLOSURE REGIME OF THE ICC AND LUBANGA

While the Statute only provides for some basic norms on disclosure (cf. Articles 54(3)(e), 61(3) and (6), 67(2), 68(5), and 72), the RPE contain more detailed rules, applicable to both Prosecutor and defense (cf. Rules 76–84, 121).²⁰ The disclosure obligations for the Prosecutor are much

16. *Id.* at ¶ 17.

17. See already *Lubanga*, supra note 2, ¶ 94, 97, where the Chamber stated that the stay was capable of being lifted in the future.

18. *Lubanga*, No. ICC-01/04-01/06-1487, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I entitled "Decision on the Release of Thomas Lubanga Dyilo," ¶ 37 (Oct. 21, 2008). According to the Chamber the T. Ch. has to consider all relevant circumstances and base its decision on release or detention on arts. 60 and 58(1) (*id.*).

19. *Lubanga*, No. ICC-01/04-01/06-T-98, Hearing Transcript Trial Chamber I (Nov. 18, 2008).

20. For a more detailed analysis of the disclosure regime at the ICTY, ICTR, and ICC, see Kai Ambos, *The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?*, in *International Criminal Justice: A Critical Analysis of Institutions and Procedures* 429, at 464–73 (Michael Bohlander ed., May 2007). See also Helen Brady, *Disclosure of Evidence*, in *The International Criminal Court* 403 (Roy S. Lee ed., 2001); Sabine Swoboda, *The ICC Disclosure Regime: A Defence Perspective*, 19 *Crim. L.F.* 449, at 450–72 (2008); William A. Schabas, *Article 67: Rights of the Accused*, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 1507 (Otto Triffterer ed., 2nd ed. 2008); Bernhard Kuschnik, *International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings Before the ICC*, 9 *Int'l Crim. L. Rev.* 157, 185 (2009); Vladimir Tochilovsky,

broader than those for the defense (e.g., existence of an alibi, or grounds for excluding criminal responsibility).²¹ The functions and powers accorded to the Chambers (Articles 57 and 64 (2)) show that the—in principle adversarial—disclosure regime also possesses strong inquisitorial features.²²

A. Disclosure Prior to and After the Confirmation Hearing

According to Article 67(2) of the ICC Statute, the Prosecutor²³ shall disclose to the defense all (exculpatory) evidence that “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”²⁴ According to RPE Rule 77, the Prosecutor shall permit the defense access to all materials and objects in its possession “which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence. . . .” While disclosure is a continuing process that may last, parallel to an ongoing investigation, until the trial phase (cf. RPE Rule 84), exculpatory evidence in the sense of Article 67(2) must be disclosed “as soon as practicable.” Ideally, this would mean that the investigation and the corresponding disclosure are completed by the time of the confirmation hearing,²⁵ since otherwise the parties could be surprised by the new evidence and the proceedings delayed by the late disclosure.²⁶ In any case, disclosure standards differ according to the stage of proceedings.

As has been explained elsewhere,²⁷ disclosure must be ensured by the Pre-Trial Chamber (RPE Article 61(3), Rule 121(2)) *prior to the confirmation*

Prosecution Disclosure Obligations in the ICC and Relevant Jurisprudence of the Ad Hoc Tribunals, in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* 843 (José Doria et al. eds., 2009).

21. Kuschnik, *supra* note 20, at 161.

22. *Id.* at 159.

23. On the (limited) disclosure obligations for the defense (which are not relevant in our context), see ICC RPE rules 78, 79, 80 and Swoboda, *supra* note 20, 449, at 455–59.

24. Adopting this definition: *Lubanga*, *supra* note 2, ¶ 59; *Lubanga*, *supra* note 15, ¶ 59.

25. Cf. *Lubanga*, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence,” ¶ 54 (Oct. 13, 2006).

26. *Lubanga*, Hearing Transcript, ¶¶ 5–7 (Feb. 13, 2008).

27. Kai Ambos & Dennis Miller, Structure and Function of the Confirmation Procedure Before the ICC from a Comparative Perspective, 7 *Int’l Crim. L. Rev.* 335, at 341–44 (2007). See also Swoboda, *supra* note 20, 449, at 451–54.

hearing, although there is no statutory duty for the Prosecutor to disclose all the evidence at this procedural stage.²⁸ The OTP has to prepare a “document containing the charges” (Article 61(3)(a)), together with a list of the relevant evidence (Article 61(3)(a); RPE Rule 121(3); Regulation of the Court 51). Since potentially exculpatory material may also contain incriminating information, incriminating and exculpatory material must be disclosed in two separate categories.²⁹ According to the “bulk rule,” the “bulk” of the disclosure has to take place “as soon as practicable” (Article 67(2)), i.e., before the confirmation hearing; a later disclosure is exceptional and shall, in any case, be limited to such facts that have become known to the prosecution only after the confirmation hearing.³⁰ The bulk rule may also be interpreted in increasing the flexibility of the disclosure regime before the confirmation hearing by limiting the prosecution’s disclosure obligations to the bulk of evidence, instead of requiring that every piece of exculpatory evidence be disclosed. This interpretation was also endorsed by (Single) Judge Steiner in the *Katanga/Chui* case. While she expressed concerns about “reckless investigative techniques”³¹ and “the important number of undisclosed documents,”³² she did not order—unlike the Lubanga Trial Chamber—a stay of proceedings, concluding instead that the Prosecution “satisfied the bulk rule for the purpose of the confirmation hearing” by

28. Cf. David Scheffer, A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, 21 *Leiden J. Int’l L.* 151, 163 (2008), also in *The Emerging Practice of the International Criminal Court* 597 (Carsten Stahn & Göran Sluiter eds., 2009).

29. Swoboda, *supra* note 20, at 451, 453. The argument can also be based on the ICTY practice where two different rules for incriminating and exculpatory material exist (ICTY RPE rules 66, 68) and the Prosecutor is obliged to select the exculpatory material for the defense (see *Prosecutor v. Karemera*, No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, ¶¶ 9–13 (June 30, 2006); *Prosecutor v. Bralo*, No. IT-95-17-A, Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, ¶ 35 (Aug. 20, 2006).

30. In this sense, *Lubanga*, No. ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, ¶¶ 121–30 (May 15, 2006). See also Ambos & Miller, *supra* note 27, at 343; conc. Swoboda, *supra* note 20, at 453.

31. *Prosecutor v. Katanga & Ngudjolo Chui*, No. ICC 01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, Pre-Trial Chamber I, Single Judge, Sylvia Steiner, ¶ 123 (June 20, 2008).

32. *Id.*

disclosing hundreds of pieces of potentially exculpatory evidence.³³ Apart from the bulk rule, Judge Steiner also discussed “alternative measures in lieu of actual disclosure,” as suggested by the OTP.³⁴ These include the transmission of summaries containing the exculpatory information identified in Article 54(3)(e) documents and the “principle of analogous information,”³⁵ according to which disclosure may be limited to material “containing information analogous to that identified in Art. 54 (3)(e).”³⁶ Both of these “alternative measures” may satisfy the OTP’s disclosure obligations at the preconfirmation stage because of the confirmation hearing’s less demanding evidentiary standard.³⁷

Clearly, while there may be room for some flexibility before the confirmation hearing, *afterwards* every piece of exculpatory evidence must be disclosed.³⁸ The Prosecution must present a “summary of presentation of evidence,” explaining its case “by reference to the witnesses” and all the other evidence it intends to rely upon at trial. It must also explain how the evidence disclosed relates to the charges.³⁹ The defense may be given access to all the prosecution material on the conflict situation that might assist the defense in understanding the background of the conflict and the charges and thus help prepare the line of defense.⁴⁰ With regard to the “alternative measures” suggested by the Pre-Trial Judge, T.Ch. I voiced “grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing

33. *Id.*, ¶ 124.

34. *Katanga & Ngudjolo Chui*, Prosecution’s Fifth Report on the Status of the Procedures Initiated under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature under Article 67(2) of the Statute or as Material to the Defence under Rule 77 of the Rules, ¶ 3, 5 (May 23, 2008) [hereinafter Prosecution’s Fifth Report].

35. *Katanga & Ngudjolo Chui*, supra note 31, ¶¶ 65, 77–82.

36. *Id.*, ¶¶ 77, 85.

37. *Id.*, ¶¶ 1–7, 66–67, 78–86.

38. See also Brady, supra note 20, at 407; Swoboda, supra note 20, at 454.

39. *Lubanga*, No. ICC-01/04-01/06-1019, Timing and Manner of Disclosure Decision, ¶ 26 (Nov. 9, 2007); *Lubanga*, No. ICC-01/04-1/06-T-52, Hearing Transcript, ¶ 40 (Oct. 1, 2007); *Lubanga*, No. ICC-01/04-1/06-1119, Decision on Victim’s Participation, ¶¶ 110, 138(b) (Jan. 18, 2008).

40. *Lubanga*, No. ICC-01/04-1/06-1433, Judgement on the Appeal of Mr. Lubanga Dyilo Against the Oral Decision of Trial Chamber I of 18 January 2008, ¶ 77 (July 11, 2008).

a particular piece of exculpatory evidence,” since “the right of the accused is to both items.”⁴¹

B. Restrictions on Disclosure: Confidentiality Agreements (Article 54 (3)(e))

Disclosure obligations may conflict with the need or possibility to receive evidentiary material on the condition of confidentiality, as envisaged in Article 54(3)(e).⁴² The provision, by authorizing the Prosecutor to obtain such material “on the condition of confidentiality and solely for the purpose of generating new evidence,” accounts for the fact that informants often only come forward to share their knowledge with a law enforcement agency if it will not prejudice their personal security. The assurance of confidentiality is one response to the informant’s need of protection⁴³ and “goes to the heart of the fairness of criminal procedural law.”⁴⁴

Pursuant to Article 54(3)(e), Article 18(3) of the ICC-U.N. Relationship Agreement provides that

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

The same rule applies to the U.N. peacekeeping mission, MONUC, in the Democratic Republic of Congo by way of Article 10(6) of the MONUC Memorandum of Understanding with the ICC, which reads:

Unless otherwise specified in writing. . . , documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement.

41. *Lubanga*, supra note 2, ¶ 60; see also ¶ 81, 86 with further references; conc. *Katanga & Chui*, supra note 31, ¶ 6.

42. For other restrictions for reasons of witness and victim protection see Swoboda, supra note 20, at 463–67.

43. Cf. Brady, supra note 20, at 420; Swoboda, supra note 20, at 467.

44. Kuschnik, supra note 20, at 158.

In the *Lubanga* investigation, the prosecution admitted to having collected more than fifty percent of its evidence on the basis of these confidentiality rules, including a considerable amount of (potentially) exculpatory or mitigating evidence.⁴⁵ The confidential documents included, *inter alia*, information about an alleged mental condition of the accused that impeded him from controlling and understanding the unlawfulness of his conduct; that he had acted under duress or compulsion or even in self-defense; and that he had made efforts to demobilize child soldiers and lacked sufficient command over the subordinates who had committed the crimes attributed to him.⁴⁶

Both the Pre-Trial and the Trial Chamber repeatedly asked the OTP to ensure that the confidentiality agreements were lifted in order to comply with its disclosure obligations. Yet the information providers, among them the U.N., refused to renounce their claim for confidentiality. Meanwhile, the OTP tried to comply with its obligations by disclosing alternative material,⁴⁷ e.g., excerpts of potentially exculpatory information in witness statements or summaries of exculpatory evidence.⁴⁸ Yet, while this may be sufficient to comply with the disclosure obligations at the preconfirmation stage,⁴⁹ it is not enough at the pretrial stage.⁵⁰ Thus, T.Ch. I had no other option but to suspend the proceedings.⁵¹ It concluded that the prosecution had abused its competence under Article 54(3)(e) by entering “into confidentiality agreements routinely and for the purpose of gathering springboard and lead evidence alike.”⁵² In such a situation, fairness to the accused demands a stay of the proceedings, regardless of whether the OTP acted *mala fides* when concluding the confidentiality agreements.⁵³ In fact,

45. *Lubanga*, No. ICC-01/04-01/06-T-79, Hearing Transcript, ¶¶ 5–6 (Mar. 13, 2008).

46. *Lubanga*, supra note 15, ¶ 22.

47. See already supra note 34 and main text.

48. See *Lubanga*, No. ICC-01/04-01/06-1248, Prosecution Submission on Undisclosed Documents Containing Potentially Exculpatory Information, ¶¶ 17–18 (Mar. 28, 2008); *Lubanga*, No. ICC-01/04-01/06-T-52-EN, Hearing Transcript, p. 18 ll. 5–9 (Oct. 1, 2007); *Lubanga*, No. ICC-01/04-01/06-T-89-ENG, Hearing Transcript, p. 7 l. 22 to p. 8 l. 4 (June 10, 2008).

49. See supra notes 34–37 and main text.

50. See supra note 41 and main text.

51. *Lubanga*, supra note 2.

52. *Id.*, ¶ 72.

53. *Id.*, ¶ 90.

it seems as if the OTP had given premature promises of confidentiality to its informants to gather any possible information instead of investigating the alleged crimes in the first place.⁵⁴ The excessive recourse to Article 54(3)(e) was made plain by a statement of the OTP's Senior Trial Attorney during one of the pretrial status conferences:

Of course, there was never any intention on the side of the Prosecutor . . . that these materials were received only for lead purposes. The point was to obtain these materials as quickly as possible for the sake of the ongoing investigation and then to allow the Office of the Prosecutor to identify the materials it wishes to use as evidence and then seek permission.⁵⁵

The OTP later pointed out that this remark was the result of a misunderstanding, but the damage was already done. Against this background, it is fair to say that from the very beginning of the *Lubanga* investigation the Prosecution made overly generous use of Article 54 (3)(e), promising the information providers confidentiality without sufficiently taking into account its disclosure obligations and the respective rights of the accused.⁵⁶

C. The Difficult Interpretation of Article 54(3)(e)

Article 54(3)(e) refers to “documents or information . . . for the purpose of generating new evidence,” i.e., apparently to the so-called springboard or lead evidence, which cannot be used as (direct) evidence at the confirmation hearing or at trial. RPE Rule 82(2), on the other hand, allows the Prosecutor to introduce any “material or information [gathered under Article 54(3)(e)] into evidence,” i.e., it apparently allows for the use of “information” in the sense of Article 54(3)(e) as direct evidence. Indeed, this is the OTP position, which argues that Article 54(3)(e) is applicable to all material, independent of its nature, as long as it is used “for the purpose of generating new evidence.”⁵⁷ From Rule 82(1) it follows, according to the

54. See also Swoboda, *supra* note 20, at 470.

55. *Lubanga*, No. ICC-01/04-01/06-T-86-ENG, Transcript of the Hearing on May 2008, Trial Chamber I, p. 23 ll. 8–14 (May 6, 2008).

56. See also Heikelina Verriijn Stuart, *The ICC in Trouble*, 6 J. Int'l Crim. Just. 409, 412 (2008).

57. *Lubanga*, No. ICC-01-04-01-06-1446-AnXI, Prosecution's Document in Support of Appeal Against Decision to Stay Proceedings, ¶ 6 (July 24, 2008) [hereinafter Prosecution's Document in Support of Appeal, July 2008].

OTP, that there is no distinction between “lead material” and other material with evidentiary value.⁵⁸ As a consequence, the OTP believes that the T.Ch.’s creation of two independent, mutually exclusive categories of (evidentiary) material—“lead” or “springboard” material on the one hand and (direct) incriminatory or exculpatory evidence on the other⁵⁹—is mistaken.⁶⁰ In its view, Article 54(3)(e) cannot be read to govern or limit all potential uses to which material might be put, but only governs the use to which such material can be put without the provider’s consent.⁶¹

In its decision on October 21, 2008, the App.Ch. rejected the OTP submission and agreed with the T.Ch.⁶² It was not convinced that the T.Ch. had created a category of “springboard” or “lead material” as opposed to real (direct) evidence in the first place, because the T.Ch. had expressly referred to RPE Rule 82(1).⁶³ More importantly, it confirmed the T.Ch.’s restrictive interpretation of Article 54(3)(e): “[T]he purpose for which material could be collected on the condition of confidentiality was limited to the generation of new evidence and . . . the provision must be applied in light of the other obligations of the Prosecutor.”⁶⁴ In other words, a confidentiality assurance under Article 54(3)(e) must not be used to generate direct evidence. Judge Pikiş agreed with the T.Ch.’s interpretation that “documents and the information received should be collected solely for the purpose of generating new evidence.”⁶⁵ However, in his view, this should be the only limitation, which means that “[i]f a document provided to the Prosecutor constitutes evidence in itself, the duty of the Prosecutor is to gather evidence corresponding to its content.”⁶⁶ Therefore he may “gather evidence from persons mentioned or identified in oral or documentary material, or the suppliers or authors of such documents.”⁶⁷

58. *Id.*

59. *Lubanga*, No. ICC-01/04-01/06-T-52, Hearing Transcript, p. 86 ll. 11–13 (Oct. 1, 2007).

60. Prosecution’s Document in Support of Appeal, July 2008, *supra* note 57, ¶ 7.

61. *Lubanga*, *supra* note 6, ¶ 12.

62. *Lubanga*, *supra* note 15, ¶ 37.

63. *Id.*, ¶ 54.

64. *Id.*, ¶ 55.

65. *Id.*, Separate Opinion of Judge Georghios M. Pikiş, ¶ 39.

66. *Id.*

67. *Id.*

The foregoing positions are not pictures of clarity. The correct interpretation is predicated on a joint reading of Article 54(3)(e) and Rule 82(1). According to Article 54(3)(e), the Prosecutor may receive “documents or information”; Rule 82(1), on the other hand, speaks of “material or information.” Thus both provisions do not contain, in principle, any limitation as to the “material” that may be received by the Prosecutor. If one continues to read the (remaining) text of Article 54(3)(e), however, one might easily become confused, since it seems to mix up “confidentiality” and the “purpose” for which the material may be received. However, in fact, confidentiality and the use that may be made of the “confidential” information are two completely different aspects in Article 54(3)(e). On the one hand, the information provider may only give the material “on the condition of confidentiality” and, consequently, the use of this material, including its disclosure, depends on the consent of this information provider. This reading is confirmed by Rule 82(1), since it requires the informant’s consent for material “protected” under Article 54(3)(e). On the other hand, and irrespective of Rule 81(1)—which is silent on this point—Article 54(3)(e) provides that the material may be used “solely for the purpose of. . . .” It does not require the information provider’s consent to a specific use to which the material may be put. Thus, it seems that Article 54(3)(e) implies that the specific use made of the material is not in the interest of the information provider. It is, of course, in her interest to be informed if the material is going to be used, but this interest is limited to maintain the confidentiality assurance. As long as the prosecution honors this assurance by the way it makes use of the material, there is no need to also obtain the informant’s consent on the specific mode of use. The formulation “solely for the purpose of” in Article 54(3)(e) is thus exclusively addressed to the Prosecutor. He may use the material obtained “for the purpose of generating new evidence” only; the information provided can only serve as lead or springboard evidence. The new evidence generated from this information is, in turn, not subject to the information provider’s consent, since this “new evidence” is different from the original “documents or information” provided for by the information provider. While the new evidence was clearly “generated” by the original information and as such is its product, it is different from this information and as such is no longer governed by Article 54(3)(e). Concerning the scope of the disclosure obligation under Article 67(2), the victims’ representatives argue that material covered by Article 54(3)(e) need not be disclosed at all, even

if it contains exculpatory information, because it does not constitute “evidence” in the sense of Article 67(2). It can only become evidence if and as soon as the information provider consents to its disclosure.⁶⁸ But, before such consent is given, the Prosecutor is not legally obliged to obtain the provider’s consent for disclosure.⁶⁹

The App.Ch. took another view.⁷⁰ While it agreed, in essence, that Article 67(2) of the Statute refers to “evidence” and material obtained under Article 54(3)(e) only turns into “evidence” once the information provider consents to its disclosure, it correctly pointed out that this interpretation would entail that the Prosecutor could withhold large amounts of information, collected on the basis of confidentiality agreements, which would be beyond the Chamber’s control. Such a creation of dossiers of secret information concerning the situation and the conduct of the accused must be regarded as incompatible with the fair trial standards of the ICC Statute. Judge Pikić correctly added that the OTP’s disclosure obligations cannot be “mitigated in such circumstances.”⁷¹ Information crucial to the case must always be accessible to the Chamber and the defense.

D. First Intermediate Conclusion

The tension between confidentiality and disclosure is obvious and calls for a restrictive use of Article 54(3)(e). The lesson learned from *Lubanga* is that the recourse to Article 54(3)(e) for the purpose of gathering direct evidence leads to irresolvable conflicts with the disclosure obligations under Article 67(2), because each piece of evidence relevant to the defense must ultimately, i.e., at the latest at the (pre-)trial stage, be disclosed and cannot be replaced by “alternative material” or “alternative measures.”⁷² At best, such preliminary or surrogate disclosure may suffice at the preconfirmation stage.⁷³ Thus, in line with the interpretation of Article 54(3)(e) offered above, the Prosecutor should conclude confidentiality agreements only

68. *Lubanga*, No ICC-01/04-01/06-1456-tENG, Victims’ Observations on the Prosecutor’s Appeal of the Decision of 13 June 2008 Ordering a Stay of the Proceedings, ¶ 8 (Aug. 12, 2008).

69. *Id.*, ¶ 14.

70. *Lubanga*, supra note 15, Separate Opinion of Judge Georgios M. Pikić, ¶ 43.

71. *Id.*, ¶ 40.

72. See supra notes 38, 47 and main text.

73. See supra note 37 and main text.

under three conditions: first, there is no other “normal” way to obtain the respective information; second, the information is absolutely necessary to continue the investigation; and third, the information is only requested to generate new evidence.

III. DISCLOSURE IN NATIONAL LAW

A. Disclosure in England and Wales

In England and Wales, the prosecution’s disclosure obligations originate in common law.⁷⁴ They were later regulated by statute, i.e. by the Criminal Procedure and Investigations Act (CPIA) 1996, as supplemented by a Code of Practice in force since April 1, 1997.⁷⁵ This law was amended by the Criminal Justice Act (CJA) 2003, which is complemented by the Criminal Procedure Rules 2005⁷⁶ and the Attorney-General’s Guidelines on Disclosure of Information in Criminal Proceedings of 2000.⁷⁷

1. Primary and Secondary Prosecution Disclosure

Traditionally, in English law the duty of pretrial disclosure applies more to the prosecution than to the defense.⁷⁸ This slightly changed with the introduction of the CPIA, under which two forms of disclosure exist.⁷⁹ Under the *primary (prosecution) disclosure* the prosecutor has to disclose previously undisclosed material to the accused if it “might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused” (CPIA, section 3(1)(a), as amended by the CJA 2003, section 32).⁸⁰ The material may be disclosed

74. John Sprack, *Criminal Procedure* 140 (2008).

75. Criminal Procedure and Investigations Act, 1996, c. 25 (U.K.), available at http://www.opsi.gov.uk/acts/acts1996/ukpga_19960025_en_1. See also Sprack, *supra* note 74, at 140; Colin Tapper, *Cross and Tapper on Evidence*, 301 (2007).

76. 2005 No. 384 (L.4), available at <http://www.opsi.gov.uk/si/si2005/20050384.htm>.

77. See <http://www.lso.gov.uk/pdf/guidelines.pdf>.

78. Paul Roberts & Adrian Zuckerman, *Criminal Evidence* 55 (2004).

79. Ian H. Dennis, *The Law of Evidence* 343 (2007); Mike Redmayne, *Criminal Justice Act 2003: (1) Disclosure and Its Discontents*, *Crim. L. Rev.* 441, 442 (2004).

80. Roger Leng & R. Taylor, *Blackstone’s Guide to the Criminal Procedure and Investigations Act 1996*, at 13 (1996).

in two ways: either by giving it directly to the defense or by enabling the defense to inspect it in a reasonable time and place.⁸¹ Further, the prosecution must provide the defense with a register of all unused material which is in its possession.⁸² If there is no such material, a written statement to that effect must be given to the accused.⁸³ In *Keane* it was held that material had to be disclosed if it could

be seen on a sensible appraisal by the prosecution: (a) to be relevant or possibly relevant to an issue in the case; (b) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution purposes to use; (c) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (a) or (b).⁸⁴

As the relevance test of *Keane* is based on an “appraisal by the prosecution,” it is a subjective one.⁸⁵ The term “undermining,” as employed in the CJA, should give this test a more objective direction.⁸⁶ In fact, the government intended to limit the relevant cases.⁸⁷ The doctrine, however, argues that “undermining” is to be interpreted more broadly for basically two reasons. On the one hand, “undermining” could be understood as “likely to fall or fail” and, on that basis, either the establishment of an alternative hypothesis or of a defense such as self-defense or duress would consequently “undermine” the prosecution’s case.⁸⁸ On the other hand, the government itself argues that evidentiary material weakening a specific piece of prosecution evidence has an “undermining” effect,⁸⁹ i.e., in such a situation, the prosecution would withhold evidence favorable to the defense.⁹⁰ In 2000, the Attorney General issued guidelines on disclosure that

81. Sprack, *supra* note 74, at 142.

82. Redmayne, *supra* note 79, at 441, 442.

83. Sprack, *supra* note 74, at 142.

84. (1994) 1 W.L.R. 746.

85. Leng & Taylor, *supra* note 80, at 13.

86. Tapper, *supra* note 75, at 303.

87. Sprack, *supra* note 74, at 142; Tapper, *supra* note 75, at 303; 567 HL Official Reports cols. 1437–1438 (Dec. 18, 1995).

88. Leng & Taylor, *supra* note 80, at 14.

89. 567 HL Official Reports col. 1437 (Dec. 18, 1995); The Crown Prosecution Service, Disclosure of Previous Convictions of Prosecution Witnesses, available at http://www.cps.gov.uk/legal/d_to_g/disclosure_of_previous-convictions_of_prosecution_witnesses/.

90. Leng & Taylor, *supra* note 80, at 14.

listed certain categories of material usually to be disclosed and thus supported this broad reading.⁹¹

Under the so-called *secondary prosecution disclosure*, the prosecutor has to disclose material “which might be reasonably expected to assist the accused’s defense as disclosed by the defense statement.” (Section 7(2)(a)).⁹² The defense statement (which is compulsory, except for matters to be dealt with in the magistrates’ court⁹³) is

a written statement (a) setting out the nature of the accused’s defense, including any particular defenses on which he intends to rely, (b) indicating the matters of fact on which he takes issue with the prosecution, (c) setting out, in the case of each such matter, why he takes issue with the prosecution, and (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.⁹⁴

The disclosure of the defense statement to the prosecutor and the court is called *defense disclosure* and takes place after the primary prosecution disclosure.⁹⁵ While primary disclosure, as explained above, is based on a subjective test and as such is designed to avoid or limit the possibility of judicial review, the test of reasonable expectation for secondary disclosure under section 7(2) is an objective one and is subject to judicial review.⁹⁶

2. Restrictions: Public Interest Immunity

The one disclosure restriction in English criminal procedure that is most similar to the confidentiality agreement of Article 54(3)(e) is public-interest immunity.⁹⁷ If the prosecution takes the view that the disclosure of certain *material* (information) would be contrary to the public interest, it will

91. *Supra* note 77.

92. Redmayne, *supra* note 79, at 441, 442.

93. *Id.*

94. CPIA § 6A (inserted by the CJA in 2003).

95. Sprack, *supra* note 74, at 143.

96. Leng & Taylor, *supra* note 80, at 13; 567 HL Official Reports cols. 1441–1442 (Dec. 18, 1995).

97. CPIA 1996 § 23(1); Code of Practice no. 6.12; see also Sprack, *supra* note 74, at 148.

98. David Ormerod, Improving the Disclosure Regime, 7 *Int’l J. Evidence & Proof* 102, 117 (2003).

request an *ex parte* hearing and the disclosure obligation will take a back seat.⁹⁸ Public interest immunity is a threat that runs through the provisions of the CPIA: section 3(6) makes prosecution disclosure subject to public interest immunity; section 8(5) prevents the courts from ordering disclosure where it would be contrary to public interest; and section 7A(8) places a similar limitation on the prosecution's continuing duty of review.⁹⁹ The resort to public-interest immunity is to be decided on a case-by-case basis, not by the application of blanket rules.¹⁰⁰

While the CPIA does not define the grounds on which public interest immunity can be claimed,¹⁰¹ the supplementary Code of Practice gives examples of *sensitive material* that “would give a real risk of serious prejudice to an important public interest, and the reason for that belief.”¹⁰² Such sensitive material also includes, similar to Article 54(3)(e), material given in *confidence* and relating to the identity or activities of informants or undercover police officers.¹⁰³ Thus, apparently, all a police officer has to do in order to avoid disclosure is assure the informant that material would be treated as confidential, even if this informant did not demand this assurance.¹⁰⁴ Indeed, confidentiality is nowadays one of the most important reasons to claim public-interest immunity.¹⁰⁵ In this sense, confidentiality is not an autonomous privilege but a material consideration within public-interest immunity.¹⁰⁶

In any case, nondisclosure in these situations allegedly serves to prevent retaliation against informers. However, according to the Court of Appeal in *Marks v. Beyfus*, the informer's name (as the only or part of the information that must be disclosed in principle) should be disclosed if this is necessary to demonstrate the defendant's innocence.¹⁰⁷ The Court further

99. CPIA §§ 3(6), 8(5), 7A(8): Material must not be disclosed under these sections to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly. See also Sprack, *supra* note 74, at 148; P. Hungerford-Welch, *Criminal Procedure and Sentencing* 423 (2009).

100. Tapper, *supra* note 75, at 303.

101. Dennis, *supra* note 79, at 382.

102. *Supra* note 75, ¶ 6.12.

103. Sprack, *supra* note 74, at 149.

104. Critically, Sprack, *supra* note 74, at 142.

105. Dennis, *supra* note 79, at 373.

106. *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners*, [1974] A.C. 405 at 406.

107. *Marks v. Beyfus*, (1980) 25 Q.B.D. 494 at 498; see also Sprack, *supra* note 74, at 148.

pointed out that a good deal of the work of prevention and detection of crime is facilitated by the use of informers and that this work would be adversely affected if the identity of informers was likely to be revealed, because then the sources of information would soon dry up.¹⁰⁸ The *Ward* case veers towards the same direction: it is for the Court, not the prosecution, to make the final decision as to whether immunity from disclosure should be granted.¹⁰⁹

Pursuant to *Davis, Johnson and Rowe*,¹¹⁰ there are *three different procedures* for dealing with public-interest immunity claims. While in the first procedure the defense will be informed of the application and of the type of material involved, in the second procedure defense participation is excluded out of the concern that it would lead to an “indirect” disclosure by informing the defendant that one of his associates is an undercover officer.¹¹¹ In this second procedure, the public-interest immunity hearing will be conducted *ex parte*, with only the prosecution presenting argument to the judge.¹¹² The third procedure refers to the situation where the defense is not even aware of the fact that a public-interest immunity application is being made.¹¹³ Such cases are rare.¹¹⁴ While the European Court of Human Rights has yet to rule on the compatibility of this procedure with the fair trial guarantees of the Convention, the problem clearly is that the defense is unable to appeal if it does not even know that a public interest application has been made.¹¹⁵

B. The Disclosure (Discovery) Regime in the United States

1. General Remarks

At the outset, two preliminary remarks are necessary. First, as a federal legal system, the United States has federal crimes that are tried in federal

108. Sprack, *supra* note 74, at 148.

109. (1993) 1 W.L.R. 619. See also Sprack, *supra* note 74, at 48.

110. (1993) 2 All E.R. 643.

111. Redmayne, *supra* note 79, at 441, 455.

112. *Id.*

113. *Id.*

114. Joyce Plotnikoff & Richard Woolfson, “A Fair Balance”? Evaluation of the Operation of Disclosure Law, RDS Occasional Paper No. 76, London: Home Office, at 88 (2001).

115. Redmayne, *supra* note 79, at 441, 455.

courts and state crimes that are tried in state courts.¹¹⁶ The following observations refer mainly to the federal level. Second, instead of disclosure, the term *discovery* is more common in U.S. law. It is understood as “the process by which each party to a case learns of the evidence that the opposition will present.”¹¹⁷ Thus, discovery by the defense corresponds to disclosure by the prosecution, discovery by the prosecution to disclosure by the defense.

While the disclosure regime has a constitutional foundation in the Due Process Clause of the Fourteenth Amendment,¹¹⁸ there were only a few provisions permitting discovery in criminal cases before the middle of the twentieth century.¹¹⁹ In 1949, the disclosure regime was codified in Rule 16 of the Federal Rules of Criminal Procedure.¹²⁰ With the adoption of this rule and the proliferation of similar rules at the state level, the scope of discovery began to expand.¹²¹ Federal Rule of Criminal Procedure 16(a) permits the defendant to discover from the prosecution any oral, written, or recorded defendant statement in its possession; the defendant’s prior criminal record; and documents, objects or other forms of real evidence considered material to the prosecution’s case. Some state rules are even broader in scope.¹²² Over half the states require, apart from the items covered in Rule 16(a), the prosecution to provide addresses of all persons known to have information relevant to the offense charged, as well as any statements about the offense these persons may have made.¹²³ In any case, as in English Law, the disclosure obligations of the prosecution (discovery rights of the defense) are greater than the ones of the defense (prosecution).¹²⁴ In other words, discovery is not reciprocal: in some situations the prosecution is required to supply information to the defense but not vice

116. James F. Anderson & Bankole Thompson, *American Criminal Procedures* 5 (2006).

117. John L. Worall, *Criminal Procedure* 295 (2007).

118. *Brady v. Maryland*, 83 S. Ct. 1194 (1963). See also Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure* 685 (2008).

119. Whitebread & Slobogin, *supra* note 118, at 671.

120. Accessible at <http://www.law.cornell.edu/rules/frcrmp/Rule15.htm> (last visited Feb. 22, 2009).

121. Whitebread & Slobogin, *supra* note 118, at 671.

122. *Id.*

123. Whitebread & Slobogin, *supra* note 118, at 671.

124. *Encyclopedia of Crime and Justice* 533 (Joshua Dressler ed., Macmillan 2nd ed. 2002).

versa.¹²⁵ Yet, unlike in England and Wales, criminal discovery in the United States is not mandatory but must be requested by the defense.¹²⁶

Apart from Federal Rule of Criminal Procedure 16(a) a criminal defendant may obtain formal discovery through the so-called “Brady Rule.”¹²⁷ The rule is based on *Brady v. Maryland*, in which the discovery regime received the Supreme Court’s constitutional blessing.¹²⁸ Justice Douglas stated:

[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.¹²⁹

While *Brady* established a constitutional obligation of pretrial discovery by the prosecution,¹³⁰ it left open when evidence is “material” enough to trigger the disclosure obligation. Also, it did not make clear whether a defense request is necessary in all cases.¹³¹ In *United States v. Agurs*,¹³² Justice Stevens distinguished between three kinds of due process disclosure obligations. First, if the prosecutor relies on perjured testimony, he must disclose if “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹³³ Second, where the defense makes a specific request for the allegedly exculpatory information, disclosure should be the normal response, because a specific request puts the prosecution on notice that the evidence may be exculpatory.¹³⁴ In this case, according to Justice Stevens, “it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.”¹³⁵ Thus, “the failure to make any response is seldom, if ever, excusable.”¹³⁶ Third, when the defense makes either no request (as in

125. *Id.* at 534; Whitebread & Slobogin, *supra* note 118, at 679.

126. Fed. R. Crim. P. 16.

127. Tobin Romero, Liberal Discovery on Selective Prosecution Claims, 84 *Geo. L.J.* 2043, at 2066 (1995–1996).

128. *Supra* note 118.

129. *Brady v. Maryland*, 83 S. Ct. 1194, at 1197 (1963) (emphasis added).

130. *Cf.* Wayne R. LaFare, Jerold H. Israel & Nancy J. King, *Criminal Procedure* 884 (1999).

131. Whitebread & Slobogin, *supra* note 118, at 686.

132. *United States v. Agurs*, 96 S. Ct. 2392 (1976).

133. Whitebread & Slobogin, *supra* note 118, at 687.

134. *Id.*

135. *Agurs*, 96 S. Ct. at 2399.

136. *Id.*

Agurs) or a general request for “all *Brady* material” or for “anything exculpatory,” a conviction will be overturned for failure to provide information only if it creates a reasonable doubt in the mind of the trial judges as to the defendant’s guilt.¹³⁷

The three-tiered approach of *Agurs* was abandoned¹³⁸ in *United States v. Bagley*,¹³⁹ in which the Supreme Court held that the prosecutor is governed by a “reasonable probability” test in all situations. Accordingly, there must be a “reasonable probability” that the exculpatory evidence would have influenced the outcome of the case.¹⁴⁰ In *Kyles v. Whitley*,¹⁴¹ Justice Souter interpreted *Bagley* broadly, arguing that four aspects of the reasonable probability standard “bear emphasis.” First, a “reasonable probability” does not require a preponderance of (exculpatory) evidence but rather, as the language suggests, something less. Second, it does not require the defendant to show that the remaining evidence renders the prosecution’s case insufficient.¹⁴² Third, once the defendant has demonstrated a reasonable probability of a different outcome, the appellate court cannot find the failure to disclose harmless, since the reasonable probability test “necessarily entails the conclusion that the suppression [of the evidence] must have had ‘substantial and injurious effect or influence in determining the jury’s verdict.’”¹⁴³ Finally, while the prosecution is not necessarily required to disclose each bit of evidence that might prove “helpful” to the defense, it “must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached.”¹⁴⁴

2. Restrictions

As in English law, under U.S. law the prosecution’s disclosure obligations may be outweighed by higher interests.¹⁴⁵ While, in principle, the

137. *Id.* at 2394.

138. *Cf. Whitebread & Slobogin*, *supra* note 118, at 688.

139. *United States v. Bagley*, 105 S. Ct. 3375 (1985).

140. *Id.*

141. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

142. *Id.*, at 1566; see also *Whitebread & Slobogin*, *supra* note 118, at 689.

143. *Whitley*, 115 S. Ct. at 1566.

144. *Whitley*, 115 S. Ct. at 1567.

145. *Whitebread & Slobogin*, *supra* note 118, at 682; another restriction: the Jencks Act (18 U.S.C. § 3500 (1995)) prohibits disclosure of witness identities and statements until the witness has testified at trial.

government must permit the defendant to inspect, copy, or photograph any item within the government's control and material to its defense (cf. Federal Rule of Criminal Procedure 16(a)(1)(E)(i)), according to *United States v. Armstrong* the rule's language refers only to information relevant to defense efforts to combat the prosecution's case in chief.¹⁴⁶ The Supreme Court in *Armstrong* proposed a twofold distinction: if the claim of discovery is a "sword," meant to challenge the prosecution's conduct of the case, it may not form the basis for Rule 16 discovery and thus the evidence need not be disclosed. This refers, *inter alia*, to vindictive prosecution allegations, claims regarding the grand jury and jury selection process as well as speedy trial claims. If, on the other hand, the claim is a "shield" designed to "refute the Government's arguments that the defendant committed the crime charged," it does form the basis for Rule 16 discovery and the evidence must be disclosed.¹⁴⁷ However, even this rule has an exception: nondisclosure/discovery is acceptable if "a strong showing of state interests" can be made.¹⁴⁸ In *State v. Eads*¹⁴⁹ the state interests ranged against granting the defense substantial access to the prosecution's files were summarized as follows:

(1) It would afford the defendant increased opportunity to produce perjured testimony and to fabricate evidence to meet the State's case; (2) witnesses would be subject to bribe, threat and intimidation; (3) since the state cannot compel the defendant to disclose . . . evidence, disclosure by the State would afford the defendant an unreasonable advantage at trial; and (4) disclosure is unnecessary in any event because of the other sources of information which the defendant has under existing law.

A strong state interest is implicit if a government agency invokes the *state secret privilege*, i.e., it argues that disclosure would reveal information relating to the national defense or national security or the international relations of the United States. In fact, the courts pursue a very deferential approach to that kind of argument, and the privilege is considered

146. *United States v. Armstrong*, 116 S. Ct. 1480 (1996). See also Whitebread & Slobogin, *supra* note 118, at 682.

147. *Armstrong*, 116 S. Ct. at 1485 (1996).

148. Whitebread & Slobogin, *supra* note 118, at 683.

149. 166 N.W.2d 766 at 769 (Iowa 1969).

absolute as long as the privilege is validly asserted by the proper government official.¹⁵⁰

C. Second Intermediate Conclusion

Both English and U.S. law provide for *disclosure obligations* of the prosecution. In English law this obligation refers to evidence that might “undermine” the case of the prosecution. In the United States, the “reasonable probability” test requires a “constitutional error” that indicates the outcome of the case would have been different if the evidence had been disclosed prior to trial. This high threshold, together with the requirement of a defense request, appears to narrow the prosecution’s obligation under U.S. discovery compared to the English disclosure law.¹⁵¹ In this sense, the “all cards on the table” approach of the ICC Rules¹⁵² is much closer to the English than to the U.S. system, which adopts—to keep using the metaphor of a poker game—a “cards on the chest” approach instead of a “cards on the table” approach.

As to the *disclosure restrictions*, the situation is probably the opposite. English law with its public interest immunity seems to be more restrictive than U.S. law, where a restriction, at least with regard to the “shield rule,” requires “a strong showing of state interests” (which is implicit, of course, if the state secret privilege is invoked). Nondisclosure for confidentiality reasons under English law is, at first sight, similar to ICC confidentiality, but it does not necessarily lead to nondisclosure: according to the Code of Practice, the “material given in confidence” can be seen as “sensitive material,” but it may only be withheld if there would be “a real risk of serious prejudice to an important public interest, and the reason for that belief.”¹⁵³

150. Cf. Jefferson L. Ingram, *Criminal Evidence* 381–86 (2007) with further references on the case law.

151. See for a general critique of the too restrictive U.S. discovery law The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* 8 and passim, available at <http://www.thejusticeproject.org/national/solution/expanding-discovery/>.

152. Fabricio Guariglia, *The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility*, in 2 *The Rome Statute of the International Criminal Court: A Commentary* 1127 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) [hereinafter *The Rome Statute Commentary*]. In favor of this approach, see Ambos, *supra* note 20, at 16.

153. See *supra* note 102 and main text.

Another question is what *consequences* ensue from a violation of the disclosure obligations. As has been seen above, the *Lubanga* T.Ch. (presided over by an English Judge!) considered the nondisclosure on the ground of Article 54(3)(e) an abuse of process that required a stay of proceedings. Under English law, the consequence would be the same, since a court would conclude that the nondisclosure would deprive the defendant of a fair trial.¹⁵⁴ Under U.S. law a breach of the disclosure obligation normally entails a sanction that primarily focuses on the evidence concerned, namely “an order to comply, a continuance, and a prohibition against introducing the evidence or calling the witness not properly disclosed.”¹⁵⁵

IV. FINAL CONCLUSION

Disclosure of (exculpatory) evidence goes to the heart of an accused’s right to a fair trial.¹⁵⁶ It is the most important, if not the only, instrument for the defense to counterbalance the greater resources of the prosecution¹⁵⁷ and achieve some kind of “equality of arms.”¹⁵⁸ Disclosure is recognized not only in adversarial systems,¹⁵⁹ but also in the so-called inquisitorial systems, albeit indirectly, in the form of access to the “case dossier.”¹⁶⁰ The law on disclosure is of great complexity, not least because of the underlying tension between defense rights and opposing interests of public or private security.¹⁶¹ The twin roles of the prosecution—on the one hand, to

154. Cf. *R v. Matthew Smith* [2004] EWCA Crim 2212, [19]; *R v. Hall* [2005] EWCA Crim 747.N.W.; see also N.W. Taylor, *Trial: Abuse of Process*, *Crim. L. Rev.* 991 (2005).

155. See *Encyclopedia of Crime and Justice*, supra note 124, at 539.

156. Cf. *Lubanga*, supra note 2, ¶¶ 77, 81, 92; see also Brady, supra note 20, at 403.

157. *Encyclopedia of Crime and Justice*, supra note 124, at 534; Brady, supra note 20, at 403.

158. Dennis, supra note 79, at 343; Swoboda, supra note 20, at 450.

159. Alphons Orié, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings Before the ICC*, in 2 *The Rome Statute Commentary*, supra note 151, at 1450; Schabas, supra note 20, at 1270 marginal number 54.

160. For a discussion with regard to the “one case” inquisitorial system see Ambos, supra note 27 at 472–73.

161. See, e.g., the Protocol of the Control and Management of Unused Material in the Crown Court (2006), available at www.justice.gov.uk/criminal/procrules_fin/contents/pd_protocol/pd_protocol_disclosure.htm, where it is stated: “For too long, a wide range

pursue criminal conduct vigorously and to gather incriminating facts; on the other hand, to play the part of a neutral investigation organ that also looks out for the interests of defendants and investigates exonerating circumstances¹⁶²—add to this tension.¹⁶³ Clearly, the Prosecution must be in a position to investigate properly. To do so, it often needs informants. But if the identity of these informants is revealed—either directly or indirectly by revealing the information they provided—they run a serious risk of being intimidated (or worse). As a consequence, these sources of information would sooner or later dry up.¹⁶⁴ This all applies even more for the type of investigations to be carried out by the ICC Prosecutor. Obviously, this does not mean that defense rights should be ignored or even that investigations should be conducted in secrecy. For this would certainly lead to miscarriages of justice¹⁶⁵ and bring (international) criminal justice into disrepute.¹⁶⁶ Ultimately, the question of whether certain information may be disclosed at all and whether certain evidence is relevant for the defense can only be solved on a case-by-case basis.¹⁶⁷

The tension between disclosure obligations (Article 67(2)) and confidentiality assurances (Article 54(3)(e)), as displayed in the *Lubanga* case, is a vivid example of the difficulties the prosecutors meet in international criminal proceedings. Yet, the procedural escalation in *Lubanga* is not only a result of these tensions; it has mainly been created by the OTP's erroneous strategy of focusing on confidential information in order to present

of serious misunderstandings has existed, both as to the exact ambit of the unused material to which the defence is entitled, and the role to be played by the judge in ensuring that the law is properly applied.”

162. See art. 54(1)(a). This view of the prosecutor's role is also endorsed by the House of Lords in *R v. H and C* (2004) 2 W.L.R. 335 ¶ 13. See also Code for Crown Prosecutors (2004), ¶ 2.2, stating that prosecutors must be “fair, independent and objective.” See also Dennis, *supra* note 79, at 343, 345 (acting in the interests of justice) and Redmayne, *supra* note 79, at 441, 443.

163. Redmayne, *supra* note 79, at 441, 443.

164. Dennis, *supra* note 79, at 374.

165. See *R v. H.*, [2004] UKHL 3, 550 at 560; (2004) 2 Crim. App. 10, 179 at 186 as per Lord Bingham: “Bitter experience has shown that miscarriages of justice may occur where material held by the prosecution that weakens its case or strengthens that for the defendant is withheld from disclosure.”

166. See also Swoboda, *supra* note 20, at 470, 472.

167. *Lubanga*, *supra* note 2, ¶ 89: “a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case by case basis.” See also Tapper, *supra* note 75, at 303.

quick investigative results. The prosecution strove for quick but not sustainable success by seeking “to obtain a wide range of materials under the cloak of confidentiality”¹⁶⁸ without carrying out a proper investigation in the first place and without paying due respect to the fundamental disclosure rights of the accused.¹⁶⁹ In this situation, T.Ch. I had no other choice than to impose a stay of proceedings in order to force the OTP to comply with its disclosure obligations. In fact, the OTP’s final disclosure of all relevant material confirms that T.Ch. I adopted the correct approach and that there were ways for the Prosecution to comply with the ICC Statute’s fair trial requirements. Ultimately, T.Ch. I made the right decision, since fairness must prevail: society “wins not only when the guilty are convicted but when criminal trials are fair”; “justice suffers when any accused is treated unfairly.”¹⁷⁰

168. *Lubanga*, supra note 2, ¶ 73 (June 13, 2008).

169. Critically also Stuart, supra note 56, at 409, 413.

170. *Brady v. Maryland*, 83 S. Ct. 1194, 1197 (1963) (per Justice Douglas); see also Orie, supra note 158, at 1450; as to *Lubanga*, in the same vein, D. N. Nsereko, *The Role of the International Criminal Tribunals in the Promotion of Peace and Justice: The Case of the ICC*, 19 *Crim. L.F.* 373, 389 (2008).