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Guilty Until Proven Innocent: International Prosecutorial Failure to Disclose Exculpatory Evidence

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I. INTRODUCTION

Thomas Lubanga Dyilo was the first man convicted in the International Criminal Court (ICC).[1] After three years of leading the rebel group known as the

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Patriotic Force for the Liberation of Congo (FPLC), he was arrested and put on trial in the ICC.[2] The ICC accused Mr. Dyilo of leading the FPLC to commit ethnic massacres, torture, and child solider recruitment.[3] The international community viewed Lubanga's March 14, 2012 conviction as the beginning of international justice; now countless political and military leaders would finally be held responsible for the atrocities they committed in their countries.[4] It is easy to see why the world celebrated when the ICC finally charged an alleged war criminal.[5]

The ICC presents victims the opportunity to seek justice for egregious crimes; simultaneously, the ICC guarantees each defendant the right to a fair trial through due process of the law.[6] Similar to the United States (U.S.), every defendant comes to court with a presumption of innocence and the burden is on the prosecution to establish guilt.[7]

It is without question that the crimes the ICC charged Lubanga with are atrocious.[8] Although defendants retain a presumption of innocence, these accusations create significant hurdles for them because of the publicity surrounding the alleged crimes.[9] This is why it is especially critical that prosecutors be required to hand over potentially exculpatory evidence to the defense.[10] Disclosure of exculpatory evidence to the defense is particularly vexing for international courts.[11]

Review, Volume 47 Articles Editor, Sarah Kanbar, for inspiring me to write my Comment on this topic, and Professor Linda Carter for her insight, suggestions, and lessons on international criminal law and procedure.

1. *Prosecutor v. Thomas Lubanga Dyilo,* CASE INFORMATION SHEET (Int'l Crim. Court, The Hague, Netherlands), Feb. 10, 2016, at 1 (on file with *The University of the Pacific Law Review*); *DR Congo: ICC Arrest First Step to Justice*, HUMAN RIGHTS WATCH (Mar. 17, 2006), https://www.hrw.org/news/2006/03/17/dr-congo-icc-arrest-first-step-justice (on file with *The University of the Pacific Law Review*).

2. *Id*.

3. *Id.*

4. Rachel Katzman, Comment, *The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial*, 8:1 NW. J. INT'L HUM. RIGHTS 77, 77 (2009).

5. *See ICC Finds Congo Warlord Thomas Lubanga Guilty*, BBC NEWS (Mar. 14, 2012), http://www.bbc.com/news/world-africa-17364988 (noting that NGO and justice officials called the conviction significant) (on file with *The University of the Pacific Law Review*).

6. Rome Statute art. 67(1)(c), July 17, 1998, 2187 U.N.T.S. 90.

7. *Id.* at art. 66; *see also* U.S. Const. amends. V, VI, XIV, § 1 (mandating that no person be found guilty without being afforded due process of law).

8. Case Information Sheet, *supra* note 1 (detailing Lubanga's convictions for recruiting children soldiers and subjecting them to harsh training regimes and severe punishments).

9. *See ICC Finds Congo Warlord Thomas Lubanga Guilty*, *supra* note 5 (noting that NGO and justice officials called the conviction significant).

10. *See* Rome Statute, *supra* note 6, at art. 54 (establishing the prosecutor's duty to conduct a thorough investigation on incriminating and exonerating circumstances equally).

11. *See* Kai Ambos, *Confidential Investigations vs. Disclosure Obligations*, 12 NEW. CRIM. L. REV. 543, 543 (2009) (describing the underlying tension created by disclosure issues that exists between defense rights and security interests); *see also* Milan Markovic, *The ICC Prosecutor's Missing Code of Conduct*, 47:201 TEXAS INT'L L. J. 201, 212 (2011) (explaining how the *Lubanga* trial demonstrated the lack of any meaningful

During the first *Lubanga* pretrial hearing, the Trial Chamber suspended the proceedings after learning that the Office of the Prosecutor (OTP) failed to turn over the exculpatory evidence to Lubanga's counsel.[12] The OTP justified its failure to disclose the exculpatory evidence on the basis of confidentiality.[13] Despite the outrage these violations elicited from the international legal community, international prosecutors continue to withhold exculpatory evidence from the defense because of unclear expectations and ineffective deterrence from the current consequences of failing to disclose.[14]

National systems that struggle with this same issue can also serve as an example for the international system.[15] In 1963, long before the ICC and tribunals for Yugoslavia and Rwanda were established, the modern U.S. Supreme Court held in *Brady v. Maryland* that a prosecutor's failure to disclose material and potentially exculpatory evidence to a criminal defendant violates a defendant's due process rights.[16] The change, or lack thereof, in the U.S. system can provide a microcosm example of how important it is for international courts to develop clear rules and enforce them.[17]

Part II of this Comment briefly explores the background of several international court systems and then explains the equality of arms principle and its incorporation into disclosure rules.[18] Part III explains the specific rules that govern disclosure of exculpatory evidence in the international courts discussed in Part II and how case law further refined those rules.[19] Part IV suggests how the

code of conduct requiring prosecutors to disclose); *see also* Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477, 479–80 (2006) (arguing that international tribunals require special rules to govern discovery that allow broader disclosure of evidence).

12. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised on the Status Conference on 10 June 2008, ¶¶ 59, 73 (June 13, 2008), https://www.icc-cpi.int/iccdocs/doc/doc511249.pdf (on file with *The University of the Pacific Law Review*).

13. *Id.*; Katzman, *supra* note 4, at 84. The rules guiding disclosure on the basis of confidentiality are discussed further on in this Comment. *See infra* Part IV.E (discussing whether non-disclosure should be permissible for national security issues).

14. *See infra* Part IV.A (describing how creating specific nondisclosure rules and categories of exculpatory evidence will clarify expectations to both parties); *see infra* Part IV.D (explaining how prosecutors should be deterred from violating disclosure in addition to granting any necessary remedy to the defense).

15. *See generally* United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting) (describing the prevalence of disclosure violations happening throughout the United States and listing out a large number of cases that resulted in violations within the last ten years).

16. Brady v. Maryland, 373 U.S. 83, 87 (1963).

17. *See generally* Ambos, *supra* note 11, at 560–66 (describing the United States discovery system).

18. *See infra* Part II (describing the function and creation of the ICTY, ICTR, and ICC).

19. *See infra* Part III (explaining the specific rules that govern disclosure in general and regarding exculpatory evidence, which case law clarified further).

ICC could clarify its existing rules and improve enforcement of the rules by deterring its prosecutors from non-disclosure.[20]

II. LOST IN PROCEDURE: HOW INTERNATIONAL EVIDENCE AND PROCEDURE RULES WORK

This part provides a brief overview and function of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC.[21] It concludes by explaining the equality of arms principle and how it is incorporated into the tribunals and the ICC.[22]

A. International Criminal Tribunal for the former Yugoslavia (ICTY)

In May 1993, following reports to the United Nations (UN) Security Council on the atrocities taking place in Croatia and Bosnia and Herzegovina, the Council created the ICTY to respond directly to the reports and prosecute the individuals in power.[23]

As the first established tribunal in almost fifty years, the ICTY did not have much legal precedent on how to handle evidentiary and procedural issues.[24] The ICTY judges had to determine the best way to include evidence.[25] The tribunal's key objective was holding individuals responsible for crimes committed over a ten-year period.[26] These individuals included high-powered government, military, and state officials previously considered untouchable for the crimes they were accused of.[27] The ICTY created rules to fulfill these objectives; the ICTY prioritized creating precise rules for "principal aspects of the proceedings" and "provid[ing] a solid basis to the rights of the defense."[28] Providing a solid basis to the defense included a defendant's right to a fair trial and establishing a degree of predictability of outcome, due process, and efficiency of trial.[29]

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20. *See infra* Part IV (suggesting creating rules that govern exculpatory evidence specifically and creating categories to make judicial determinations easier).

21. *See infra* Part II.A–C (describing briefly why the tribunals were created and how that molded the rules of procedure and evidence used).

22. *See infra* Part II.D (showing the underlying principle that influenced major actors in international criminal justice).

23. *About the ICTY*, INT'L TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/about (last visited Nov. 15, 2015) (on file with *The University of the Pacific Law Review*).

24. INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS 12 (Linda Carter & Fausto Pocar eds., 2013). Before the ICTY, the last criminal tribunals were for Nuremberg and Tokyo during the late 1940s. *About the ICTY*, *supra* note 23.

25. *Id.*

26. *About the ICTY*, *supra* note 23.

27. *Id*.

28. INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 24.

29. *Id.*

B. International Criminal Tribunal for Rwanda (ICTR)

The Security Council established the ICTR in 1995 to prosecute individuals responsible for genocide and human rights violations in Rwanda.[30] Compared to the ICTY, the span of the violations the ICTR focused on was much shorter.[31] Along with the ICTY, the ICTR's case law played a role in developing the credibility of the international criminal justice system.[32] While many of the rules of evidence and procedure followed the ICTY's rules exactly, the ICTR was the first tribunal to interpret case law specifically related to the crime of genocide.[33] Along with prosecuting high-ranking political and military officials, the ICTR also prosecuted religious leaders and media members responsible for broadcasting material that contributed to the atrocities.[34]

C. International Criminal Court (ICC)

The ICC, created in 1998, is the permanent international criminal court that operates as a completely independent legal institution but frequently collaborates with other international organizations, such as the UN.[35] The Rome Statute created the ICC in response to the international community's need for a permanent international court to address crimes against humanity and crimes that national legal systems could not handle.[36]

The court contains three divisions: the pre-trial, trial, and appeals divisions, with a total of eighteen judges between the three.[37] The Rome Statute determines the court's jurisdiction and allows the court to investigate crimes referred to it by a state party, the Security Council, or through its own efforts after receiving related communications that a state is unable or unwilling to investigate the

30. *The ICTR in Brief*, UNITED NATIONS INT'L CRIM. TRIBUNALS, http://unictr.unmict.org/en/tribunal (last visited Jan. 8, 2016) (on file with *The University of the Pacific Law Review*).

31. *Id.* The atrocities occurred between January and December 1994. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Structure of the Court*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx (last visited Feb. 15, 2016) (on file with *The University of the Pacific Law Review*).

36. *About the Court*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Feb. 15, 2016) (on file with *The University of the Pacific Law Review*). The Rome Statute is an international treaty that established the ICC; it was signed into force in 1998 and established four core international crimes it would prosecute: genocide, crimes against humanity, war crimes, and the crime of aggression. *Id.* The ICC does not hear cases that could otherwise be or have been previously tried by national judicial systems. *Situations under investigation*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Feb. 15, 2016) (on file with *The University of the Pacific Law Review*).

37. *Structure of the Court*, *supra* note 35.

alleged crimes.[38] With the ICC's caseload growing rapidly, the court can and should rely on the tribunals' case precedent.[39]

D. International Due Process Through the Equality of Arms Principle

The European Court of Human Rights (ECHR) established the equality of arms principle.[40] The ECHR enforces the Convention for Human Rights and Fundamental Freedoms (The Convention), which is an international treaty signed to protect human rights and fundamental freedoms in Europe.[41] The equality of arms principle states that both parties in a criminal or civil dispute have a "reasonable opportunity" to put on a case equally.[42] This principle, which includes a defendant's right to a fair trial, should also encompass a criminal defendant's receipt of exculpatory evidence.[43]

Nearly every major criminal court or tribunal espouses due process rights similar to the rights guaranteed to criminal defendants in the U.S.[44] While the ECHR applies only to the European nations that sign onto it, the UN adopted the equality of arms principle in the International Covenant on Civil and Political Rights (ICCPR).[45] The ICCPR provisions incorporate equality of arms, bearing similarity to rights encompassed in the Fifth and Fourteenth Amendments of the U.S. Constitution.[46] There is no provision in the ICCPR that specifies what, if any, evidence is required to prepare an adequate defense, but certainly exculpatory evidence proving a defendant's innocence would be necessary, if available.[47] The Rome Statute, which created and governs the ICC, also adopted this principle.[48]

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38. *Situations under investigation*, *supra* note 36.

39. *About the ICTY*, *supra* note 23 ("In its precedent-setting decisions on genocide, war crimes and crimes against humanity, the Tribunal has shown that an individual's senior position can no longer protect them from prosecution."); *The ICTR in Brief*, *supra* note 30 ("With its sister international tribunals and courts, the ICTR has played a pioneering role in the establishment of a credible international criminal justice system, producing a substantial body of jurisprudence on genocide, crimes against humanity, war crimes . . .").

40. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, E.T.S 5.

41. *Id.*

42. Stefania Negri, *The Principle of "Equality of Arms"* and the *Evolving Law of International Criminal Procedure*, 5 INT'L CRIM. L. REV. 513, 513 (2005).

43. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 40; Negri, *supra* note 42 at 513.

44. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 40; U.S. CONST. amends. V, XIV, § 1; Negri, *supra* note 42 at 516.

45. International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

46. *Id.*; U.S. CONST. amends. V, XIV.

47. International Covenant on Civil and Political Rights, *supra* note 45.

48. Rome Statute, *supra* note 6, at art. 67(2).

III. DISCLOSURE OF EXCULPATORY EVIDENCE IN INTERNATIONAL COURTS

This Part explains the rules for disclosure of exculpatory evidence in the ICTY, ICTR, and ICC.[49] It then describes how the structures of the international tribunals and court can impact the disclosure of evidence.[50]

A. International Criminal Tribunal for the former Yugoslavia (ICTY)

Two rules under the ICTY's Rules of Procedure and Evidence govern disclosure of exculpatory evidence.[51] Rule 66 guides the prosecutor's disclosure of any evidence, regardless of whether or not it is exculpatory.[52] It allows an exception that any evidence does not need to be disclosed if disclosing that evidence would "prejudice further or ongoing investigation" or would affect the public or security interests of any State.[53]

The prosecutor must prosecute.[54] The prosecutor's duty to disclose exculpatory evidence is equally as important.[55] Rule 68 specifically refers to the disclosure of exculpatory evidence.[56] It states that the prosecutor must disclose any evidence "as soon as practicable" that "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."[57] But when it comes to proving disclosure, the prosecution does not need to prove that it met its disclosure obligations.[58] Rather, the defense must rely on the prosecutor's disclosure of evidence as a good-faith effort to share all material evidence, including possible exculpatory evidence; if the defense does not rely on the prosecutor's disclosure of evidence as a good-faith effort, then the defense must request the evidence and show the prosecution's non-disclosure.[59]

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49. *See infra* Part III.A–C. (applying the disclosure rules to case law as a backdrop to how the ICC can learn from the outcomes).

50. *See infra* Part III.D. (showing the structure of the court influences disclosure when compared to a national model).

51. ICTY R. P. & EVID. 66, 68.

52. *Id.* at 66.

53. *Id.* at 66(C).

54. ICTY STAT. art. 16.

55. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgment, ¶¶ 183, 242 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17 2004). The obligation to disclose exculpatory evidence is as important as the obligation to prosecute. *Id.;* Prosecutor v. Brdanin, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (Int'l Crim. Trib. for the Former Yugoslavia Dec. 7, 2004); Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2010).

56. ICTY R. P. & EVID. 68.

57. *Id.*

58. *Kordic & Cerkez*, Case No. IT-95-14/2-A at ¶ 182.

59. Prosecutor v. Mladic, Case No. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods, ¶ 24 (Int'l Crim. Trib. for the former Yugoslavia Nov. 28, 2013) (holding that there is a rebuttable presumption that a prosecutor operates in good faith to fulfill

Determining the materiality of evidence under Rule 68 and whether it is exculpatory falls within the prosecutor's good-faith discretion.[60]

The tribunal refined Rule 66 in *Prosecutor v. Karadzic*, where it held that the defense must be able to identify the items sought from the prosecution and to establish a prima facie case that the requested materials are: (1) material to the defense's preparation of its case, and (2) that the evidence sought is in the prosecutor's custody or control.[61] The tribunal clarified, in the same holding, that evidence is considered material to the defense's preparation if it "has some prospect of success."[62] But the ICTY never specified what exactly "some prospect of success" meant.[63]

The ICTY reiterated Rule 68's importance in ensuring the fairness of the trial and reinforcing the equality of arms principle.[64] In the event that the exculpatory nature of evidence is known and is accessible by the defense, the prosecution's obligation to disclose the evidence disappears; this is known as the "due diligence rule" in other national systems, such as the U.S.[65]

Requiring disclosure of disputed evidence does not occur automatically in cases where the prosecution withheld exculpatory evidence.[66] The Trial Chamber held that allowing the defense to re-call any prosecution witnesses affected by the

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disclosure obligations); *see also Kordic & Cerkez*, No. IT-65-14/2-A at ¶ 183; Prosecutor v. Bralo, Case No. IT-95-17-A, Decision on Motions for Access to *Ex-Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, ¶ 30 (Int'l Crim. Trib. for the former Yugoslavia Aug. 30, 2006) (holding that the determination of material exculpatory evidence falls completely in line with prosecutor's discretion); *see also Kordic*, Case No. IT-95-14/2-A at ¶ 183 (establishing that the prosecutor is to be respected and is expected to act in good-faith when disclosing evidence).

60. Prosecutor v. Oric, Case No. IT-03-68-T, Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 13, 2005); *Bralo*, Case No. IT-95-17-A at ¶ 30; *Mladic*, Case No. IT-09-92-AR73.2 at ¶ 24.

61. Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, ¶ 10 (Int'l Crim. Trib. for the former Yugoslavia Dec. 17 2008); *C.f.* Prosecutor v. Boskoski, Case No. IT-04-82-T, Decision on Boskoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2008) (holding that the defense cannot make a request for broad categories of evidence items, but must include the specific items they want disclosed).

62. *Karadzic*, Case No. IT-95-5/18-PT at ¶ 23.

63. ICTY R. P. & EVID. 68.

64. *Oric*, Case No. IT-03-68-T at ¶ 20 (" . . . the disclosure of Rule 68 material to the defense is of paramount important to ensure the fairness of proceedings . . . "); *Kordic,* Case No. IT-65-14/2-A at ¶ 17 ("Rule 68 . . . has an important function as it requires the Prosecution to disclose exculpatory evidence "because of its superior"—and sometimes even sole—"access to [this] material.").

65. *Bralo*, Case No. IT-95-17-A at ¶ 30. Although the ICTY does not officially refer to Rule 68 as requiring due diligence, the process is very similar to procedures seen in a case pending petition for certiorari in the Supreme Court. Brief for California Attorneys for Criminal Justice as Amicus Curiae Supporting Petitioner at 4, Georgiou v. U.S., 2011 WL 1081156 (No. 14-1535).

66. Prosecutor v. Stanisic, Case No. IT-08-91-PT, Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 31, 2009).

non-disclosure and re-cross-examine them suffices as a non-disclosure remedy.[67] The only precedent permitting the Trial Chamber to punish the prosecutor is in the form of a formal warning and the punishment is usually directed to the Office of the Prosecutor (OTP) and not to individual prosecutors who violate the rule.[68]

B. International Criminal Tribunal for Rwanda (ICTR)

The ICTR enforced almost exactly the same rules as the ICTY.[69] A prosecutor's duty to disclose is one that is guaranteed in every case and should never be affected by whether or not the defense's case theory would require the evidence's disclosure.[70] However, the rules still require the defense to raise issues regarding possible violations for the Trial Chamber to provide an order under Rule 66(B), even though it is the prosecution's duty to disclose.[71] The defense must know precisely what evidence the prosecution has that is not being disclosed.[72] The defense faces a lower standard if it requests an inspection into whether the prosecution violated Rule 66(B), instead of an order from the Trial Chamber directing the prosecution to remedy an alleged violation.[73]

The ICTR, much like the ICTY, does not have a blanket rule for when evidence is considered exculpatory, thus requiring the Trial Chamber to make

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67. Prosecutor v. Stakic, Case No. IT-04-84*bis,* Judgement, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006). Unlike the United States legal system, the ICC, ICTY and ICTR judges sit in what are referred to as "Trial Chambers"; the ICTY Trial Chambers constitute one-third of the Tribunal, the other two being the Office of the Prosecutor and the Registry. *Chambers*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA (last visited Oct. 29, 2016) http://www.icty.org/en/about/chambers (on file with *The University of the Pacific Law Review*).

68. Prosecutor v. Lukic, Case No. IT-98-32/1-A, Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia May 12, 2011). "The Appeals Chamber reminds the prosecution of the paramount importance of its disclosure obligations and expects the prosecution to take the necessary steps to prevent such disclosure violations from occurring in the future." *Id.*

69. ICTR R. P. & Evid. 66; *see generally* ICTY R. P. & Evid. 66 (showing the rules regarding disclosure of evidence are almost exactly the same).

70. ICTY R. P. & EVID. 66(B). The general test for materiality is whether the documents are relevant to the defense's preparation. According to the tribunal, "preparation is a broad concept." Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.11, Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations, ¶ 14 (Jan. 23, 2008).

71. The defense must prove a prima facie case for materiality of the evidence and that the prosecution actually possesses that evidence. ICTR R. P. & Evid. 66(B); Prosecutor v. Bagosora, Case No. ICTR-96-7-T, Decision on the Motion by the Defence Counsel for Disclosure (Nov. 27, 1997); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana, ¶ 15 (Apr. 27, 2006); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira, ¶ 8 (Sept. 20, 2007).

72. Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures ¶ 21 (Nov. 29, 2007).

73. Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents, ¶ 22 (Jan. 31, 2006). Defense is only required to show one of the three required conditions under Rule 66(B). *Id.*

individualized case-by-case determinations.[74] Cases where witness statements refuted the prosecution's claims and statements that impacted the credibility of the witness were considered exculpatory.[75] If the evidence includes any information relevant to a defense, such as an alibi or failure to establish the accused's role in the charged crime, it is considered exculpatory as well.[76]

Depending on how favorably the Trial Chamber viewed a defendant's case, the remedy for failure to disclose violations varied inconsistently between cases.[77] In order to justify exclusion of evidence, the violation by the OTP must be severe and prejudicial to the defendant.[78] The tribunal also acknowledged circumstances where disclosure is not a feasible option and allowed nondisclosure under certain protective or security-related circumstances.[79]

C. International Criminal Court (ICC)

The Rome Statute governs the ICC's rules of evidence and procedure.[80] Article 67 of the Rome Statute expressly grants each defendant the right to have

74. *See* Ambos, *supra* note 11, at 543 (explaining the delicate tension between disclosure and confidentiality requires case-by-case determination).

75. Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Notices of Rule 68 Violations and Motions for Remedial and Punitive Measures, ¶¶ 14–15 (Oct. 25, 2007). These statements included witness statements that corroborated whereabouts of the accused, which demonstrated involvement in the crime itself. *Id.* Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Defense Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, ¶ 33 (Sept. 22, 2008). In one case, the defense did not have access to witness statements related to attempts made by the accused to prevent further criminal actions that contradicted the witness' testimony on the stand. *Id.*

76. *See* Prosecutor v. Karemera, Case No. ICTR-98-44-T, Oral Decision on Disclosure of Material from Joseph Serugendo, ¶ 9 (May 30, 2006) (determining witness information that the accused ordered groups to stop killing was exculpatory and should have been disclosed); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, ¶ 10 (Sept. 11, 2008) (information that alleged subordinates of the accused were in fact working for RPF).

77. *Compare* Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56-T, Decision on Augustin Bizimungu's Motion for Disclosure of a Contested Document, ¶ 12 (Aug. 31, 2009) (admitting a withheld document to remedy the Rule 68 violation), *with* Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-R, Decision on Request for Review, ¶ 61 (Aug. 25, 2011) (acknowledging the violation is a sufficient remedy if there is minimal prejudice for the accused).

78. Karemera v. Prosecutor, Case No. ICTR-98-44-A, Judgment, ¶ 437 (Sept. 29, 2014); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures, ¶ 22 (Oct. 25, 2007); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, ¶¶ 31–32 (Nov. 29, 2007); Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ, and Others, ¶ 20 (Dec. 3, 2008).

79. Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure, ¶ 18 (Oct. 20, 2003) (holding the affidavit submitted in support of request for special witness protection measures would not be disclosed to the accused as it would compromise ongoing investigations and would not prejudice the preparation of the defense).

80. Rome Statute, *supra* note 6 at art. 89.

evidence that "mitigates the guilt of the accused which may affect the credibility of prosecution."[81] In cases where the nature of exculpatory evidence is uncertain and the application of the statute unclear, discretion is left to the ICC to determine whether this section applies.[82]

The first subsection of Article 54, which describes the prosecutor's investigatory authority, specifically mentions the prosecutor must investigate all claims, including those that may exonerate a defendant.[83] This language is stronger than what the tribunals' set forth in their rules, and also stronger than the requirement for prosecutors under U.S. law.[84]

Despite this stronger language, the ICC lacks any concrete guidelines regarding cases where exculpatory evidence was either improperly disclosed or not disclosed at all.[85] The ICC's case law is not as prevalent as the tribunals, only ruling on broad procedural issues.[86] The ICC takes a stricter approach than the tribunals as evidenced in some of the recent decisions on providing exculpatory evidence in redacted documents.[87] In the case *Prosecutor v. Ruto and Sang*, the ICC charged defendants Ruto and Sang with crimes against humanity committed in Kenya.[88] The Trial Chamber compared the prosecution's alleged disclosure violations to the total number of disclosures made over the course of the whole case.[89] The prosecution's failure to disclose evidence it obtained on the basis of confidentiality is perhaps the most well-known example of disclosure failure in

81. *Id.* at art. 67(2).

82. *Id.*

83. *Id.* at art. 54(1)(a).

84. *Compare id.* (requiring prosecutors to fully investigate into exculpatory circumstances), *with* Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring prosecutors to turn over evidence if it is material to the defendant's defense, but not to actively investigate into such evidence).

85. International Covenant on Civil and Political Rights, *supra* note 45.

86. *See* Prosecutor v. Bemba, Case No. ICC-01/05/01/08, Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", ¶ 21 (July 29, 2011), *and* Prosecutor v. Banda, Case No. ICC-02/05-03/09, Judgment on the Appeal . . . against the . . . "Decision on the Defence's Request for Disclosure . . . , ¶ 42 (Aug. 28, 2013) (refining the definition of material or exculpatory evidence as any piece of evidence that could lead to exonerating evidence or undermine the prosecution's case, but does not define what evidence would qualify under those definitions).

87. *See* Prosecutor v. Lubanga, Case No.ICC-01/04-01/06, Decision on the Prosecution Amended Application Pursuant to Rule 81(2), ¶ 6 (Aug. 2, 2006) (stating that redaction of exculpatory evidence is "not authorized").

88. Prosecutor v. Ruto, Kosgey, and Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, p. 10–12 (Jan. 23, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF (on file with *The University of the Pacific Law Review*). The Trial Chamber confirmed the charges against defendants Ruto and Sang, but declined to confirm the charges against defendant Kosgey; the case proceeded against Ruto and Sang only. *Id.* at 138.

89. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015, ¶ 59 (Feb. 16, 2015), https://www.icc-cpi.int/iccdocs/doc/doc1918724.pdf (on file with *The University of the Pacific Law Review*).

the ICC.[90] The prosecution withheld at least 212 documents containing exculpatory evidence from the defense and even some of those documents from the Trial Chamber.[91] After conducting a thorough analysis of the provisions referencing disclosure, the Trial Chamber ultimately concluded, "[t]he prosecution's approach constitute[d] a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances."[92] As the ICC continues to hear cases, it should continue to rely on the precedent the tribunals established in determining how and what evidence should be disclosed.[93]

D. How International Court Structure Affects Disclosure

The case for a more effective methodology in allowing defense attorneys better access to material, including potentially exculpatory evidence, is self-evident.[94] When considering the equality of arms principle, the defendant has all rights to a fair trial and to a fair opportunity in order to present his innocence.[95] Without access to the exculpatory evidence, the defense must work harder to present its case than if it had access to this evidence.[96]

The difficulty defense attorneys in the international court system face in procuring evidence raises a comparison to the due diligence rule within the U.S. national system.[97] The due diligence rule (*Brady*) states if the defendant had any

90. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ¶ 17 (June 13, 2008), https://www.icc-cpi.int/iccdocs/doc/ (on file with *The University of the Pacific Law Review*).

91. *Lubanga*, Case No. ICC-01/04-01/06 at ¶ 18; Katzman, *supra* note 4, at 78.

92. *Lubanga*, ICC-01/04-01/06 at ¶ 18.

93. *See Lubanga,* Case No. ICC-01/04-01/06 at ¶ 12 ("The defence submitted and relied on jurisprudence of the International Tribunal for the Former Yugoslavia ("ICTY"), in support of the proposition that restrictions on disclosure of materials do not relieve the prosecution of its obligation to disclose to the defence material which tends to show the innocence of the accused.").

94. *See infra* Part IV.D. (highlighting the difficult evidentiary hurdles defense attorneys must go through to prove the prosecutor has exculpatory evidence).

95. Rome Statute, *supra* note 6, at art. 66.

96. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Redacted Version of "Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", ¶ 21 (July 29, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.07.29_Prosecutor_v_Bemba.pdf (on file with *The University of the Pacific Law Review*) (refining the definition of material or exculpatory evidence as any piece of evidence that could lead to exonerating evidence or undermine the prosecution's case, but does not define what evidence would qualify under those definitions); Prosecutor v. Krajisnik, Case No. IT-00-39-T, Decision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence with Confidential Annex, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia June 2, 2006) (explaining that the evidence is material even if may suggest innocence (emphasis added)).

97. Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. Rev. Disc. 74, 76 (2013) (citing Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Due Diligence Rule*, 60 UCLA L. Rev. 138 (2012)).

chance of finding the evidence with a bit of "due diligence" the non-disclosure is not viewed as a violation.[98] Part of the issue with *Brady*'s implementation is that the adversarial nature of legal proceedings encourages the prosecution and defense to engage in what scholars refer to as "hide and seek" instead of more collaborative discovery measures.[99] Neither the ICC nor ICTY conform to a specific national system of practice in order to best represent the wide array of nations and systems it prosecutes.[100] Instead, the international courts and tribunals borrow elements of both civil law systems, with inquisitorial legal framework, and common law systems, which have a more adversarial legal framework.[101]

Critics accused ICTY prosecutors of being more adversarial—a system similar to what exists in the U.S.—in their prosecution of war crimes.[102] This transforms the role of the prosecutor from someone who is supposed to uncover the truth of what happened in a case, to someone who engages in a contest with defense counsel and covers up the truth in an attempt to win the case.[103] Prosecutors in the ICTY can get away with this kind of adversarial action because the language in the Standard of Professional Conduct is extremely vague.[104] Similar to the ICC, the Standard of Professional Conduct contains multiple statements of a prosecutor's responsibility to protect the privacy of any witnesses who testify, justifying any prosecutorial action that could be deemed a possible failure to disclose evidence to the defense.[105]

IV. THEY CAN DO BETTER THAN THAT: WHERE THE TRIBUNAL RULES STRUGGLED AND HOW THE ICC CAN FIX IT

This part lays out suggestions for the ICC to improve disclosure of exculpatory evidence, including clarifying the rules that govern disclosure.[106] It discusses how the issue of materiality can sometimes prevent disclosure of

98. *Id.*

99. Markovic, *supra* note 11, at 214–15.

100. INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 24.

101. Markovic, *supra* note 11, at 211; *Adversarial and Inquisitorial Legal Systems,* http://chatt.hdsb.ca/~mossutom/law/Handouts/Unit%203-Handout-Adversarial%20and%20Inquisitorial%20Legal%20Systems.htm (last visited Nov.13, 2015) (on file with *The University of the Pacific Law Review*).

102. *Id.*

103. Markovic, *supra* note 11, at 211.

104. Standards of Professional Conduct for Prosecution Counsel, Reg. No. 2 (Sept. 14, 1999) (Int'l Crim. Tribunal for the Former Yugoslavia, The Hague, Netherlands), http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf. In part, the relevant provisions state that "[t]he Prosecutor expects them . . . : . . . d) to exercise the highest standards of integrity and care, including the obligation to always act expeditiously when required and in good faith . . . h) to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused." There is only one provision that discusses evidence and only that the prosecutor must speak up if false evidence is brought before the Court. *Id.*

105. Markovic, *supra* note 11, at 211.

106. *See infra* Part IV.A.

evidence because of the perceived limited effect in changing the outcome.[107] This in turn contributes to the ineffective deterrence of prosecutors, thereby perpetuating nondisclosure because there is no real consequence.[108] This part concludes by explaining the difficulty defense lawyers face in learning that exculpatory evidence exists and how that difficulty impacts the ability to prove nondisclosure.[109]

A. Categorization of Exculpatory Evidence

The first step to remedying the ineffectual disclosure system currently in place is to clarify the rules that currently exist.[110] Although ineffective prosecutorial deterrence is an issue, first the exculpatory evidence disclosure rules must be clear to the prosecutors so there is no excuse for failing to follow them.[111]

In the ICTY, discovery rules divided evidence into three categories with different levels of required disclosure: basic threshold information, exculpatory information, and tangible materials that are "material" to preparing the defense's case.[112] Although these basic categories existed in the rules, judicial case-by-case determinations about whether evidence was exculpatory were still necessary.[113] Before delving into what exactly it would mean for evidence to be considered exculpatory, the rules should clarify the scope of exculpatory evidence; similar to how the ICTY determined that evidence required under Rule 68 did not need to be exculpatory on its face, but that evidence that "may seem exculpatory" should be disclosed.[114] It would be almost impossible to create a bright-line rule on when exactly exculpatory evidence must be disclosed, but categorizing types of

107. *See infra* Part IV.B.

108. *See infra* Part IV.C.

109. *See infra* Part IV.D.

110. *Compare* ICC R. P. & EVID. 84, arts. 64(3)(c), 64(6)(d), 67(2), 68(5) (vague references to disclosure with only one paragraph dedicated to exculpatory evidence), *with* ICTY R.P & EVID. 68 *and* ICTR R.P & EVID. 68 (dedicating entire rules to disclosure requirements for prosecutors in general and specifically regarding exculpatory evidence).

111. *See* Part IV.C (describing the issue of ineffective prosecutorial deterrence).

112. ICTY R.P. & EVID. 66(A). This includes materials that support indictment and any prior statements by the accused or the prosecution's witnesses. *Id.* Moranchek, *supra* note 11, at 486. ICTY R.P. & EVID. 66(B), 68.

113. Moranchek, *supra* note 11, at 486.

114. Prosecutor v Krajisnik, Case No. IT-00-39-T, Decision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia June 2, 2006), http://www.icty.org/x/cases/brdanin/tdec/en/31123823.htm (on file with *The University of the Pacific Law Review*); Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 7, 2009), http://www.icty.org/x/cases/karadzic/tdec/en/090807_1.pdf (on file with *The University of the Pacific Law Review*).

exculpatory evidence would expedite court discussions.[115] Case-by-case determinations make it difficult for attorneys to predict the success of their legal arguments in the Trial Chamber and require significant judicial time in order to review and decide.[116]

The tribunal Trial Chamber prefers specific evidence requests, rather than broad categorical requests.[117] But broad pre-determined categories of material exculpatory evidence could help the ICC make preliminary determinations when counsel submits more specific requests.[118] Once the materiality and exculpatory determination is made, judges can determine whether the prosecution wrongfully withheld information that was critical to the defense's case.[119] It would alleviate any time or money costs to the court in making preliminary determinations for every piece of evidence and would give counsel an idea of whether its requests fall within one of the categories.[120] An additional benefit to creating a series of categories would be to allow a preliminary determination about whether or not the reason for withholding the evidence qualifies as an exception.[121] Sometimes the OTP requires confidentiality in order to obtain the evidence in the first place because the source requires immunity or protection.[122]

Potential categories could include: witness statements, including any questioning by the prosecution or subsequent statements, evidence related to defenses raised, evidence of alternative explanations or justifications, or evidence

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115. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ¶ 89 (June 13, 2008) (" . . . [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."); Ambos *supra* note 11, at 567.

116. Ambos, *supra* note 11, at 543.

117. Prosecutor v. Boskoski, Case No. IT-04-82-T, Decision on Boskowski Urgent Defence Motion for an Order to Disclose Material Pursuant to Rule 66(B) ¶ 12 (Int'l Crim. Tribunal for the Former Yugoslavia Jan. 31, 2008) (deciding that specific evidence could be relevant to the defense's decision to call certain witnesses, but simply requesting categories of information related to any potential defense witness was not material).

118. *Cf.* Prosecutor v Kordic, Case No. IT-95-14/2-AR108 bis, Decision on Request of the Republic of Croatia for Review of a Binding Order ¶ 39 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 9, 1999) (holding that specificity requirement prohibits use of broad categories, but did not prohibit the use of categories in general, so long as the request is clear enough to identify the documents desired).

119. *Cf.* ICTY R.P & EVID. 68(iv) (allowing prosecutors to apply to Chambers to review certain evidence to relieve it from its disclosure obligation).

120. *Cf.* Prosecutor v. Karadzic, No. IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2010) (explaining the time required to suspend trial after disclosure violations occurred, not including the time required by the Trial Chamber to make the evidentiary determinations on materiality and exculpation).

121. *See* Prosecutor v Lukic, Case No. IT-98-32/1-A, Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia May 12, 2011) (defining the standard for determining whether evidence is material, but not indicating precisely when the inquiry should be made).

122. Markovic, *supra* note 11, at 214–15.

that contradicts or impeaches prosecution witnesses.[123] Since there is a considerable amount of case precedent related to these categories, counsel would be able to situate the client's case between cases where the court determined the evidence required disclosure or not, thus creating some degree of predictability and alleviating additional review by the Trial Chamber.[124]

B. But Is It Material?

Separate from the issue of exculpation, tribunals consider whether or not evidence is "material."[125] In the ICTY, materiality must have "some prospect of success."[126] The Trial Chamber did not further refine this definition, but only explained it as evidence "supporting a colorable argument."[127] Applying the standard does not provide much more clarification either.[128] The Trial Chamber concluded in one case that merely asserting there is evidence of some kind of agreement between the U.S. and the defendant was insufficient, but hinted that if the defendant had argued what the nature of the agreement was and what form it took, that may have been sufficient to meet the standard.[129] According to the ICTR, materiality refers to evidence relevant to the preparation of the defense's

123. *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 7, 2009) (evidence of alternative explanation for prosecution explanation is exculpatory and requires disclosure); Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's 47th Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia May 10, 2011) (evidence of justified use of military facilities and accused calling for following humanitarian law is exculpatory); Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions ¶¶ 11-12 (Int'l Crim. Trib. for the Former Yugoslavia June 8, 2015) (evidence of correct treatment of prisoners and that prisoners were not separated by sex was exculpatory and required disclosure); Prosecutor v. Popovic, Case No. IT-05-88-A, Judgment ¶ 343 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (alibi is not considered a complete defense, but any evidence produced that can support accused's assertion of the alibi can raise reasonable doubt in prosecution's case to exculpate accused); *see also* Niyitegeka v. Prosecutor, Case No. ICTR-96-14-R, Decision on Request for Review ¶ 29 (Mar. 7, 2007) (prosecution violated Rule 68 by failing to disclosue documents supporting the accused's alibi); *but see* Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Defence Motion for Exculpatory Evidence from Ephrem Setako and Bagosora et al Cases (Jan. 25, 2006) (holding that simply because witnesses cannot recall certain information, such as location, that is discovered in other evidence does not make the new evidence exculpatory under Rule 68).

124. *See id.* (demonstrating case precedent that could be used to create categories).

125. Ambos, *supra* note 11, at 547.

126. Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, ¶ 23 (Int'l Crim. Trib. for the former Yugoslavia Dec. 17, 2008). A similar standard applied in the ICTR where material "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." ICTR R. P & EVID. 68.

127. Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, ¶ 23 (Int'l Crim. Trib. for the former Yugoslavia Dec. 17, 2008).

128. *See id.* at ¶ 24 (holding that merely claiming an agreement existed was not material).

129. *Id.*

case, and preparation is a broad concept.[130] Yet, materiality is always trumped by the requirement that the evidence would affect the outcome.[131] Since that is rarely the case, there is no need to move investigation further.[132] The materiality issue ultimately reduces evidence analysis to a numbers game.[133]

Take, for example, the recent litigation in the ICC on the *Ruto and Sang* case: the Trial Chamber agreed that the prosecution failed to disclose evidence on nine occasions, but that failure did not warrant appointing a disclosure officer to investigate further.[134] This was because the Trial Chamber determined that those failures resulted from human error rather than intentional desire to withhold evidence from the defense.[135] The Trial Chamber then cited the thousands of items and pages that the prosecution disclosed, implying that seven of the disclosure failures had little to no significance or impact in the outcome of the defense's case.[136] Therefore, the prosecution could disclose thousands of pages, only to withhold a handful of documents that may be crucial for the defense, but that is not considered substantial enough to punish or investigate if it is a relatively small number of documents.[137] The focus should be on the quality or value of the evidence that is not disclosed rather than the amount of evidence that is disclosed.[138]

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130. Prosecutor v Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza ¶ 3 (July 10, 2008), http://www.worldcourts.com/ictr/eng/decisions/2008.07.10_Prosecutor_v_Karemera.pdf (on file with *The University of the Pacific Law Review*). Preparation for the defense's case goes beyond simply collecting evidence to rebut the prosecution's case. Prosecutor v. Nshogoza, Case No. ICTR-07-91-PT, Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence ¶ 26 (Dec. 22, 2008), http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Nshogoza/decisions/081222.pdf (on file with *The University of the Pacific Law Review*).

131. *See* Prosecutor v. Lukic, Case No. IT-98-32/1-A, Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution ¶ 14 (May 12, 2011), http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/acdec/en/110512.pdf (on file with *The University of the Pacific Law Review*) (defining the standard for determining whether evidence is material).

132. *See* Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal ¶ 7 (Apr. 28, 2006), http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Karemera/decisions/080123.pdf (on file with *The University of the Pacific Law Review*) (stating that the mere existence of a violation warrants a remedy).

133. *Cf.* Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material ¶ 12 (Feb. 9, 2009), http://www.worldcourts.com/ictr/eng/decisions/2009.02.09_Prosecutor_v_Bizimungu.pdf (on file with *The University of the Pacific Law Review*) (balancing the disclosure violation against the admitted evidence as a potential remedy for a violation when considering the outcome of the trial).

134. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breach of 9 January 2015, ¶ 8 (Feb. 16, 2015), https://www.icc-cpi.int/iccdocs/doc/doc1918724.pdf (on file with *The University of the Pacific Law Review*).

135. *Id.* at ¶ 34.

136. *Id.* at ¶¶ 9, 59.

137. *See id.* at ¶ 59 (holding that there was no violation for non-disclosure of a few pages).

138. *But cf. id.* at ¶ 30 (acknowledging that prosecution failed to disclose the documents requested, but that summaries created at the prosecution's discretion were sufficient to be material to the defense without giving the defense an opportunity to examine the documents in their entirety).

C. Righting a Wrong: Ineffective Deterrence of Prosecutors

The critical issue at the root of disclosure of exculpatory evidence is that the law fails to establish penalties for the prosecution for violating the disclosure rules.[139] Rightly, the ICTY focuses primarily on the harm caused to the defendant and whether the remedy for non-disclosure is sufficient.[140] In *Prosecutor v. Stakic*, the prosecution withheld evidence and did not turn it over despite multiple requests from the defendant, which was a direct violation of Rule 68.[141] Eventually the defense was able to use the evidence to re-call witnesses and cross-examine them using the new evidence.[142] Since the defense arguably had an opportunity to use the evidence at trial through re-calling witnesses, the Trial Chamber agreed with the prosecutor that although he admittedly violated Rule 68, it was as if no violation occurred.[143]

Similarly, in the ICTR, the prosecutor heavily redacted the relevant portions of evidence before disclosing it to the defense.[144] The prosecutor chose to redact witness statements in order to protect the witnesses because she was concerned that disclosing the evidence unredacted would allow the witnesses to be easily identified.[145] However, the prosecutor redacted the documents before filing a motion to the court to allow the redaction and before the evidence was disclosed to the defense.[146] Instead of requiring the prosecution to disclose the evidence, the Trial Chamber allowed the prosecution to apply for a delayed motion to

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139. *See* Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Forty -Sixth Disclosure Violation Motion, ¶ 9 (Int'l Crim. Trib. for the former Yugoslavia Apr. 20, 2011) *and* Prosecutor v. Karadzic, No. IT-95-5/18-T, Decision on Accused's 102nd and 103rd Disclosure Violation Motions, ¶ 35 (Int'l Crim. Trib. for the former Yugoslavia Nov. 4, 2015) (holding that absent any material issue or prejudice, the Trial Chamber rejected to request to exclude non-disclosed evidence).

140. *See* Prosecutor v. Stakic, Case No. IT-04-84*bis,* Judgement, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) *and* Prosecutor v Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Motion for Fourth Suspension of Proceedings ¶ 11 (Int'l Crim. Trib. for the former Yugoslavia Feb. 16, 2011) (suspending trial for six weeks to allow defense to review undisclosed documents); Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Seventy -Seventh and Seventy-Eighth Disclosure Violation Motions ¶ 22 (Int'l Crim. Trib. for the former Yugoslavia Mar. 11, 2013) (denying the defense access to OTP database as a remedy for multiple disclosure violations because it was neither realistic nor practical.); Prosecutor v. Karadzic, Case No. IT-95-5/18-AR98 bis.1, Decision on Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor ¶ 3 (Int'l Crim. Trib. for the former Yugoslavia July 4, 2013) (concluding that dismissal was an inappropriate remedy because evidence was not considered material to defense).

141. Prosecutor v. Stakic, Case No. IT-04-84*bis,* Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf (on file with *The University of the Pacific Law Review*).

142. *Id.*

143. *Id.*

144. Prosecutor v Mpambara, Case No. ICTR-2001-65-I, Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures ¶ ¶ 13, 19 (Feb. 28, 2002).

145. *Id.* at ¶ 18.

146. *Id.*

redact, leaving the defense without the evidence and the prosecution without a punishment.[147]

When confronted with a disclosure violation, the Trial Chamber's focus is on the disclosure's effect on the defendant.[148] But this leads to considering the prosecutor's actions on a contingent basis—whether or not it affected the outcome—instead of looking at the violation independent from the outcome.[149] The prosecutor is only punished if the outcome would have been different or if there is no way to offer the defense a remedy.[150] This encourages prosecutors to continue withholding evidence if the prosecutor believes any number of possibilities: that even without the exculpatory evidence, the defendant would be unable to meet his burden in trial; that there is some kind of remedy if the defense realizes non-disclosure; or, that the defense simply may never realize that non-disclosure occurred in the first place.[151]

In order to effectively deter prosecutors from withholding exculpatory evidence, even in circumstances where it may not significantly benefit the defense's case, a harsher penalty is needed.[152] The first step the ICC can take is to make sure its rules for disclosure are as clear as possible.[153] Both the ICTR and ICTY's rules and procedures have rules for general disclosure and for disclosure of exculpatory evidence, thus recognizing the significance of the evidence for both sides, especially the defense.[154]

The tribunals' rules do not allow the Trial Chamber to pass sanctions against individual prosecutors, but only against the OTP, unless the error is particularly egregious.[155] Given the Trial Chamber's general refusal to recognize violations,

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147. *Id.*

148. *Stakic*, Case No. IT-04-84*bis,* ¶ 193.

149. *See id.* (discussing how sanctions are discretionary rather that mandatory if there is not prejudice to the defendant stemming from the prosecutor's failure to disclose).

150. *See* Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Forty -Sixth Disclosure Violation Motion, ¶ 9 (Apr. 20, 2011) *and* Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's 102nd and 103rd Disclosure Violation Motions, ¶ 35 (Nov. 4, 2015) (holding that that the Trial Chamber would reject any requests to exclude non-disclosed evidence if no material issue or prejudice was presented).

151. *Id.*

152. *See* Prosecutor v. Haradinaj, Case No. IT-04-84 bis-T, Decision on Prosecutor's Motion for Reconsideration of Relief Ordered Pursuant to Rule 68 bis, ¶¶ 40–41 (Mar. 27, 2012) (stating that individual reprimands could not be given, but sanctions were only allowed against the Office pursuant to Rule 46(A) which requires that violations affect a material aspect of the defense's case).

153. *Compare* ICC R. P. & EVID 84, arts. 64(3)(c), 64(6)(d), 67(2), 68(5) (vague references to disclosure with only one paragraph dedicated to exculpatory evidence), *with* ICTY R.P & EVID. 68 *and* ICTR R.P & EVID. 68 (dedicating entire rules to disclosure requirements for prosecutors in general and specifically regarding exculpatory evidence).

154. ICTY R. P. & EVID. 66, 68; ICTR R. P. & EVID. 66, 68.

155. Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures ¶ 15 (Oct. 25, 2007). When issues regarding disclosure requirements arise, the Office of the Prosecutor must be viewed in singularity. Whether the actual prosecutor in charge of the case had actual knowledge of the undisclosed evidence is irrelevant. Prosecutor v

which would justify some form of sanctions, the OTP is not deterred from violations.[156]

A system for deterrence can be found in other systems that deal with the issue of non-disclosure, such as the U.S. system under *Brady*.[157] In a recent opinion, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit wrote:

> In the rare event that suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. Professional discipline is rare, and violations seldom give rise to liability for money damages . . . If the violation is found to be material (a standard that will almost never be met . . .), the prosecution gets a do-over, making it no worse off than if it had disclosed the evidence in the first place.[158]

In states where courts have little patience for nondisclosure, the prosecutor receives individualized ethical violations on his or her record and those violations are publically accessible.[159] It is a huge risk to the prosecutor's professional reputation to commit a non-disclosure violation.[160]

Ethical violations on the prosecutor's record for serious or repeat offenses might be more effective in international courts.[161] Compared to a national system where the defendant is unknown to the public and the case is between the individual and the state, international cases are on a grand scale and brought to international courts because they are outside the scope of the national legal system.[162] Before the prosecutors ever bring charges, the world already follows these atrocities as they happen.[163] In some cases, there is international pressure for the case to be prosecuted, so prosecutors know that every move they make is

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Karemera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures ¶ 8 (Nov. 29, 2007).

156. *See infra* Part III (examining the disclosure violations that the accused alleged in the ICTY, ICTR, and ICC and various examples of whether the Chambers held that violations occurred).

157. *See generally* United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting) (discussing the large number of disclosure violations in the United States).

158. *Id.*

159. *See Treatment of* Brady v. Maryland *Material in U.S. District and State Courts*, REPORT (U.S. Courts, Washington, D.C) Oct. 2004, at 27 (" . . . [S]anctions 'may include, but are not limited to, contempt proceedings against the attorney . . . '").

160. *See Olsen* 737 F.3d at 630 (Kozinski, J., dissenting) (calling the issue of nondisclosure "a serious moral hazard").

161. *Cf. id.* at 631(claiming that part of the reason that disclosure violations occur is because the courts fail to give prosecutors any reason to care about disclosure or worry about consequences for violating it).

162. *About the Court*, *supra* note 36.

163. Markovic, *supra* note 11, at 220.

being watched.[164] In order to bring justice to the victims and to the world, they must successfully reach a guilty verdict.[165]

These concerns, while valid, are no excuse for violating the due process rights of the accused, even if they are accused of the most heinous crimes imaginable.[166] Returning to the issue of materiality discussed earlier in this Comment, consider the impact a Trial Chamber's decision has on the prosecutor's future behavior; in many of the cases discussed, the Trial Chamber acknowledged a violation and that disclosure should have occurred.[167] Yet, if the disclosure could be remedied in some way, such as having the opportunity to question undisclosed witnesses, or if the verdict was unaffected by the nondisclosure, the prosecutor came out unpunished.[168] It could be argued that in cases where there was some sort of remedy, there was no due process violation because the defense eventually received the opportunity to access undisclosed evidence and use it in their case.[169] However, the due process violation occurs when the initial non-disclosure occurs, regardless of whether or not there is a remedy.[170] Failing to establish any meaningful repercussion sets a bad precedent and while it could be small in one case, there is no telling whether the same level of non-disclosure in a later case will not yield more serious consequences.[171]

D. Burden of Disclosing Exculpatory Evidence

The ICC, ICTY, and ICTR all place the burden of disclosing exculpatory evidence on the prosecution.[172] When the prosecutor encounters exculpatory evidence, the prosecution must notify the defense of the evidence and share it.[173] The responsibility of raising a disclosure violation lies with the defense, because

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164. *Id.*

165. *Id.*

166. Rome Statute, *supra* note 6.

167. *See infra* Part III (discussing the application of the exculpatory evidence disclosure rules).

168. *See* Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-R, Decision on Request for Review ¶ 61 (Aug. 25, 2011) (acknowledging violation is sufficient where minimal prejudice occurs).

169. *See* Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions ¶ 50 (June 30, 2011) ¶ 50 (holding that reducing the scope of the case will not be allowed if the Chambers determines that the accused was not prejudiced by violations).

170. *See* ICTY STAT. art. 21(4)(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"); ICTY STAT. Article 21(1) (explaining "that the Prosecution and the Defence must be equal before the Trial Chamber.")

171. Katzman, *supra* note 4, at 99 ("Lubanga stands for one bright line rule that likely will pertain to future ICC cases: the prosecution cannot use Article 54(3)(e) confidentiality agreements in a broad attempt to generate sweeping evidence against the accused at trial.").

172. ICC R. P. & EVID. 76; ICTY R. P. & EVID 68(i); ICTR R. P. & EVID 68(A).

173. ICC R. P. & EVID. 76 (requiring pre-trial disclosure of anticipated witnesses and statements to the defense); Prosecutor v Milosevic, Case No. IT-98-29/1-A, Decision on Motion Seeking Disclosure of Rule 68 Material, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 7, 2012) (determining that the prosecution's duty to disclose is ongoing).

this is the party adversely affected by the disclosure failure.[174] In effect, this shifts the burden onto the defense and requires the defense to put on a *prima facie* case to prove that the prosecution has the evidence, to specifically state what the evidence is, and to state how it is material to the defense's case.[175] In order to present a prima facie case, the defense must have some form of proof that the prosecution has the evidence it is not disclosing; otherwise, the prima facie case is not met.[176] Without any form of proof, the prosecution could argue that it has no such evidence.[177] The right to have exculpatory evidence disclosed was first eroded in *Prosecutor v. Blaškić,* where the ruling focused on how the defense should phrase a request for exculpatory evidence, failing to realize that the defense generally does not know the content of the evidence and can only submit a broad request.[178]

Even if the defense successfully proves its prima facie case, there is no guarantee that it will gain access to the evidence it seeks because of all the additional barriers and protections offered to the prosecution in order to ensure the prosecution will fulfill its duty to prosecute.[179] In practice, the interpretation of the disclosure rules that are vague in their language (perhaps on purpose to avoid being locked into complex, unnecessary, bright-line rules), ultimately requires the defense to do more work than the prosecution in order to obtain evidence it should have access to in the first place.[180]

E. Is It Ever Okay?: Non-Disclosure in the Name of National Security

Unfortunately for the defense, exculpatory evidence does not always have to be disclosed.[181] Given the weight of the prosecutor's burden, particularly on the

174. Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, ¶ 10 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 2008).

175. *See id.* (listing the elements required for the defense's prima facie case).

176. *Id.*

177. *See id.* (holding that if the defense requests a document, they must have proof that it is in the prosecution's possession).

178. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-rule 66(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1998). In this case, the ICTY indicted Tihomir Blaškić for serving as a colonel in the Croation Defence Council (HVO) and responsible for leading members of the HVO in "commit[ing] serious violations of international humanitarian law against Bosnian Muslims." Prosecutor v. Blaškić, Case No. IT-95-14, Second Amended Indictment ¶¶ 1, 3 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 25, 1997), http://www.icty.org/x/cases/blaskic/ind/en/bla-2ai970425e.pdf (on file with The University of the Pacific Law Review).

179. Markovic, *supra* note 11, at 214–15.

180. *See* Karadzic, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, ¶ 10 (listing the elements required for the defense's prima facie case).

181. *See* Prosecutor v. Popovic, Case No. IT-05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, ¶ 8 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2012) (discussing how if the prosecution receives privileged information when executing a search warrant, it is entitled to have the item reviewed to determine its

international front, it is important to offer the OTP a reliable resource to collect evidence that might not otherwise be available, unless promises are made to protect the source.[182] The current implementation of the exceptions for disclosing exculpatory evidence is on a case-by-case basis, which scholars agree is necessary because otherwise, the remedy would be insufficient considering the delicate tension between disclosure and confidentiality.[183] However, the confidentiality should be used to help prosecutors gather the evidence instead of using it as the sole source to gather the evidence and withhold it from the defense.[184]

1. Bending the Rules in the ICTY

Historically, the ICTY allowed prosecutors to get around the disclosure requirement on the basis that the materials were confidentially provided by another state, but the exception only applied to what was "material" to defense preparation.[185] Under 67(A)(ii), disclosure was only required if the defense agreed to provide reciprocal disclosure.[186] Defendants strategically tried to argue that materials fit within the broader category of basic threshold information, which required unilateral disclosure from the prosecution.[187] At the time of the *Blaškić* case, the ICTY expansively defined "prior statements of the accused" beyond the scope of the rule's text. The ICTY amended Rule 66 in 1999 to incorporate the holding.[188] The case law demonstrates the effect of this change: the Trial Chamber favored a stricter interpretation of what constituted a prior statement, so more documents and communications could be withheld under the

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privilege status which affects disclosure); *see also* Prosecutor v Gotovina, Case No. IT-06-90-T, Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 7, 2009) (ruling that when material is public disclosure is not required).

182. Ambos, *supra* note 11, at 543.

183. *Id.*

184. *Id.*

185. Moranchek, *supra* note 11, at 486.

186. ICTY R.P. & EVID. 67. Reciprocal disclosure "requires the defense to disclose all statements of its prospective witnesses to the prosecution. This includes testimony of statements taken by third parties in the possession of the defense . . ." Prosecutor v. Stanisic & Simatovic, Case No. IT-03-69-T, Decision on Prosecution Urgent Motion Relating to Non-Compliance of Stanisic Defence with Rule 65 ter (G) and Rule 67 of the Rules ¶¶ 29-30 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 12, 2011).

187. Prosecutor v. Blašić, Case No. IT-95-14-T, Decision on the Defense Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-rule 66(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1998) (explaining how defendant attempted to receive unilateral disclosure of his own military orders because they were his "prior statements); Moranchek *supra* note 11, at 486.

188. *Compare* ICTY R.P. & EVID. 66, rev. 16 (July 22, 1999), *with* ICTY R.P. & EVID. 66, rev. 17 (Nov. 17, 1999); Moranchek, *supra* note 11, at 487. Prior statements of the accused now included "all statements made by the accused during questioning in any type of judicial proceedings" and the judges noted that prosecution could apply for relief under Rule 66(C). *Id.*

guise of confidentiality and so more documents were protected under the new rule.[189]

Some instances warrant an exception, such as when the ICTY needed evidence of the mass graves in Bosnia as proof of the atrocities committed. The U.S. had satellite imagery it was willing to provide, but only if the source of the images was withheld.[190] For the U.S., the satellite imagery was crucial technology at the time and disclosing it on the international stage was considered a matter of national security.[191] The U.S.'s involvement is more complicated than the scope of this Comment. However, the U.S.'s insistence on maintaining absolute privacy in exchange for the evidence is what ignited the amendment of the rules to include more narrow rules against disclosure.[192] In an attempt to maintain good relations with reliable sources, defendants' rights and liberties are severely limited by this rule, and defendants are given no notice or opportunity to rebut the evidence.[193] Defendants' rights are suppressed even further when considering the procedural roadblocks in place to request disclosure.[194]

2. Breaking the Rules in the ICC

The actions in the tribunals set the stage for when the ICC heard the *Lubanga* case: there, the prosecutors relied heavily on the vague language of disclosure and used it to their advantage.[195] The apparent effects of the tribunals' limitation of discovery also show the entanglement with ineffective deterrence.[196]

Article 54(3)(e) of the Rome Statute gives prosecutorial discretion to "agree not to disclose" documents that the prosecution intends to use "for the purpose of generating new evidence."[197] The language of the statute is abundantly clear that non-disclosure of evidence for concerns related to protecting the source, whether for national security reasons or otherwise, would be allowed if the source is used for uncovering new evidence that is presumably subject to disclosure.[198] However, the *Lubanga* case was controversial among practitioners because the prosecutors used Article 54(3)(e) to directly obtain the evidence and used Article

189. Moranchek, *supra* note 11, at 487.

190. *Id.* at 479. David Rohde, *Graves Found that Confirm Bosnia Massacre*, CHRISTIAN SCIENCE MONITOR (Nov. 16, 1995), http://www.csmonitor.com/1995/1116/16012.html (last visited Jan. 4, 2016) (on file with *The University of the Pacific Law Review*). It is easy to understand the value of the evidence: the satellite imagery showed minute movements of individuals among these mass graves.

191. Rohde, *supra* note 190.

192. Moranchek, *supra* note 11, at 482.

193. *Id.*

194. *See infra* Part IV.D. (discussing the burden shifting and restrictions on defendants)

195. Markovic, *supra* note 11, at 214.

196. *See* Part IV.D (discussing need for prosecutorial deterrence).

197. Rome Statute, *supra* note 6, at art. 54(3)(e).

198. *Id.*

54(3)(e) as a shield against disclosing the evidence.[199] The procedural issues caused by the tensions between confidentiality and disclosure stem from the vague language in Article 54(3)(e), but are perpetuated by a lack of any meaningful penalty for prosecutors, who are usually not subjected to significant penalties.[200]

Prosecutors' burdens on the international scale are considered two-fold because they have a duty to prosecute criminals responsible for atrocities and crimes considered to be the worst crimes in humanity, but they also have a duty to respect and value justice and prosecute these suspects fairly.[201] This burden incentivizes prosecutors to hide behind these exceptions in name of preserving the strength of their case.[202]

The structure of international courts makes it subject to heavy outside influence.[203] The nature of charged crimes creates pressure for international prosecutors to ensure a conviction on the global stage.[204] However, if the evidence truly weighs in favor of the prosecution and it is almost certain to result in conviction, there is no justified argument for withholding exculpatory evidence from defendants other than depriving the defendant of his or her due process rights in the international court. Just as the pressure for the prosecution is higher, so is the need to ensure that each defendant receives his or her right to a fair trial.[205]

V. CONCLUSION

When the Rome Statute created the ICC almost two decades ago, the goal was to have a global criminal justice system that would finally give the international community a means to punish individuals guilty for war crimes that left behind countless victims.[206] In doing so, the Rome Statute made careful note of the significance of individuals' due process rights, the presumption of innocence, and the principles from other European court systems that emphasized these defendants' rights.[207] Under international pressure, prosecutors understand the weight of trials like the *Lubanga* case and the *Blašić* case and want to ensure

199. Markovic, *supra* note 11, at 214.

200. Ambos, *supra* note 11, at 568.

201. *Id.*

202. *Id.*

203. *See* Part IV.B.1. (discussing how the United State was able to negotiate admitting certain evidence which ultimately resulted in full blown changing the procedural rules).

204. *About the Court*, *supra* note 36.

205. Rome Statute, *supra* note 6, at art. 66.

206. *Id.* at arts. 5–8; *About the Court*, *supra* note 36.

207. Rome Statute, *supra* note 6, arts. 66–67; International Covenant on Civil and Political Rights, *supra* note 45.

that a conviction happens.[208] They feel like they owe it to the victims, but also to the whole world, to secure these convictions.

However, the evidence rules in place leave too much room for prosecutors to navigate procedural loopholes.[209] In the interest of intervening factors, such as sources that require confidentiality in exchange for testimony, the Trial Chambers historically interpreted the rules beyond what the text allowed.[210] When this could no longer be supported, the tribunals just changed the rules.[211] Once the rules changed, it became much more difficult for defendants to gain access to exculpatory evidence due to the heavy burden in order to request specifically what evidence they wanted without knowing what the prosecutor had in the first place.[212] In the event this inevitably leads to late disclosure, a Trial Chamber would be reluctant to find error if there was no impact on the defendant's conviction.[213] This result creates the circular line of reasoning: if conviction is so certain, where is the harm in disclosing the evidence, but disclosure is ultimately deemed unnecessary given the inevitability of conviction.[214]

The prosecutor's disclosure violations during the *Lubanga* trial shocked international scholars and raised critical questions about where to draw the line between disclosure and confidentiality.[215] But after a string of limited disclosure rulings in favor of defendants, the question becomes whether the ICC will allow these due process violations to continue or if it will make disclosure easier.[216] By clarifying the rules and designating one specifically for exculpatory evidence, the ICC would make prosecutors' expectations clear.[217] Then, by categorizing

208. *See Office of the Prosecutor*, INT'L CRIM. COURT https://www.icc-cpi.int/about/otp/Pages/default.aspx (last visited Oct. 30, 2016) ("It is for the first time in history that an international Prosecutor has been given the mandate, by an ever-growing number of States, to independently and impartiality select situations for investigation where atrocity crimes are or have been committed on their territories or by their nationals.") (on file with *The University of the Pacific Law Review*); see also *Prosecutions*, Int'l Crim. Tribunal for the former Yugoslavia http://www.icty.org/en/about/office-of-the-prosecutor/prosecutions (last visited Oct. 30, 2016 ("Here the Prosecution strives to use the results of investigations to obtain convictions against the accused who are sitting in the dock") (on file with *The University of the Pacific Law Review*).

209. *Id.*

210. *Id.*

211. *Id.*

212. *See infra* Part IV.D. (showing the burden shift from the prosecution to the defense because of the necessary awareness of the existence of exculpatory evidence).

213. *Id.*

214. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015 ¶ 59 (Feb. 16, 2015), https://www.icc-cpi.int/iccdocs/doc/doc1918724.pdf (on file with *The University of the Pacific Law Review*).

215. Ambos, *supra* note 11, at 543; Katzman, *supra* note 4, at 77.

216. *See Situations under investigation*, *supra* note 36 (listing the number of cases currently being investigated, which will inevitably include disclosure issues).

217. *See infra* Part IV.A. (suggesting making a separate rule for exculpatory evidence similar to the ICTY and ICTR).

exculpatory evidence into groups, it could expedite judicial decision-making on whether there was a violation against the accused.[218] Following both these changes, even if there is no viable remedy for the accused, the ICC should attempt some kind of meaningful repercussion for prosecutors who commit non-disclosure so it is not incentivized.[219] Unlike what universal sentiment suggests, these defendants are not guilty until proven innocent; non-disclosure perpetuates this notion and gives each defendant an uphill battle toward a fair trial.[220]

218. *See infra* Part IV.A. (categorizing evidence would spare judicial time and resources on case-by-case determinations).

219. *See infra* Part IV.C .(deterring prosecutors from non-disclosure even without any meaningful remedy for the accused).

220. *See* Markovic, *supra* note 11, at 220 (discussing how ICC prosecutors feel pressure to seek convictions because of international awareness of crimes accused).