

**Beiträge zum Internationalen und  
Europäischen Strafrecht**

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**Studies in International and  
European Criminal Law and Procedure**

**Band/Volume 20**

# **International Criminal Procedure and Disclosure**

**An Attempt to Better Understand and Regulate Disclosure  
and Communication at the ICC on the Basis of a Comprehensive  
and Comparative Theory of Criminal Procedure**

**By**

**Alexander Heinze**



**Duncker & Humblot · Berlin**

ALEXANDER HEINZE

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*Meiner Mutter*



## Preface

“You never truly know someone until you’ve walked a mile in their shoes.”

*American Adage, Source Unknown*

This work started as an attempt to systematise disclosure at the International Criminal Court and became a journey to all aspects of the criminal process. The reader will take part in this journey, along places of law that he or she would never expect to be *en route*. What will be witnessed in fast motion, became clear to me only gradually and after long periods of consideration: a systematisation of disclosure disregarding legal theory, legal philosophy and the meandering areas of comparative law would be like listening to *Bach* without the *basso continuo*. The original working title “Systematisation of the Disclosure Regime in adversarial and international criminal proceedings” was therefore maculation: a systematisation of disclosure requires an analysis of more general questions of law and the concept of “adversarial” proceedings is one of them.

Consequently, this work is more than a book about disclosure: it reflects the journey from a rather unrealistic working title to a holistic approach to a procedural issue of high practical relevance. On this journey, many people accompanied me. My doctoral supervisor *Prof. Dr. Dr. h. c. Kai Ambos* shaped my style of thought and improved my ability of self-reflection. He still inspires me a lot. *Dr. Stefanie Bock* and *Dr. Alexander Thiele* have always been there to answer my many questions and I admire their patience with me. *Kevin Robinson* and *Jennifer Dickson* – both Public Defenders in Eureka, California – gave me the opportunity to work in a Public Defender’s Office. With their help and advice, I learned many things about the administration of US criminal procedure I would never have learned from any book in the world. *Prof. Dr. Paul Roberts* changed my approach to legal philosophy during a single coffee break at the cafeteria of the University of Göttingen and *Eneas Romero de Vasconcelos* has been more than helpful in approving this approach. *Robynne Croft* called to my mind the bitter truth that I will never be as eloquent in a foreign language as a native speaker is in his own language; thank you, Robynne, for your time-consuming language revision!

Last but not least, I would like to express my gratitude to *Prof. Dr. Katrin Höffler*, the second referee of the work, for her prompt revision and useful comments.



Despite the company of these distinguished people who earned my deepest admiration, this work would not have been possible without the moral support of many people, whose mere presence was sometimes encouraging and comforting enough to continue my journey. I am grateful to my family, especially my parents and grandmother *Sigrid*, who constantly reminded me to look over the rim of a tea cup and not to forget to eat healthy (an apple a day...), get fresh air and visit an art gallery from time to time; to my dear friend *Dr. Pia Lange*, who with her brilliance, expansive knowledge, and incredible sense of humour, advised and inspired me; to *Anina Timmermann*, who spent hours with me discussing the depth of categorisation resulting in a painting called “The chicken in the garden with an electric toothbrush”; to *Mary Ann and Pete Bansen* from Ferndale, California for their overwhelming hospitality (and their incredible tri-tip) during my time at the Public Defender’s Office in Eureka; to *Kevin O’Neil* from Ferndale, California, without whom I neither would have worked in the Public Defender’s Office nor as a goalkeeper coach of the Eel River Rapids women’s soccer team; to *Roísín Rowley-Brooke* from the Trinity College Dublin, who never hesitated to send me journal articles (and to *An Post*, the Irish Post Office, for not losing them); to *Dr. Ousman Njikam* and *Anett Müller* for their help and advice; to *Pamela Ziehn*, who never lost faith in me and patiently answered all my questions about the daily routine of a judge; to *Friederike Schultze* for her support; and to *Stefan Sauer*, who has always been able to recognise the point when Bach, Händel and Ron Burgundy had to fix it. Last but not least, I am most grateful to *Uta Nolte*, who provided invaluable moral support and never complained when I spent countless days and nights in front of my laptop.

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This book will uncover the dependence of prosecution disclosure rules from the legal background of their interpreters and its results claim to be detached from any legal tradition. To resist the temptation of resolving a procedural contradiction against the backdrop of ones own legal education was one of the big challenges during this book’s origination process; it not only requires constant self-reflection and a strict application of comparative legal research, but also an eye for the cultural identity of persons who apply the law. This facilitates the understanding not only of other persons’ legal decisions, but first and foremost of ones own style of legal thought.

“You never truly know *yourself* until you’ve walked a mile in someone else’s shoes.”

## Table of Contents

<b>A. Introduction and Abstract</b> .....	27
I. The Problem .....	27
II. Methodology .....	29
<b>B. The Four Issues</b> .....	34
I. Introduction .....	34
II. Truth and the Pre-Trial Chamber .....	34
III. Exculpatory Evidence .....	36
IV. Analysis of the Relevant Evidence .....	38
V. General Communication Obligations – Broad or Narrow .....	39
<b>C. Case-by-case Approach or Consistency</b> .....	41
I. The Problem of the Case-by-case Approach .....	41
II. So What? Or: Is Consistency Necessary? .....	46
<b>D. How to Interpret the Law at the ICC – Methodology of the ICC?</b> .....	47
I. Sources .....	48
II. Interpretation .....	51
1. Interpretation in Domestic Legal Systems .....	52
a) Interpretation in Germany .....	52
b) Interpretation in Common Law .....	55
aa) Interpretation of Statutes .....	55
(1) Literal Rule .....	56
(2) The Historical Interpretation .....	58
(3) Teleological Interpretation (Purpose Approach) .....	59
bb) Interpretation of Case Law .....	60
c) Intermediate Conclusion .....	62
2. Interpretation in International Law .....	66
3. Specifics of Interpretation in International Criminal Law .....	69
a) Specifics of Criminal Law .....	69
aa) General .....	69
bb) International Criminal Law .....	71
b) Language .....	72
III. Finding or Justification .....	75
<b>E. Interpretation of the ICC Disclosure Regime</b> .....	77
I. The Applicable Law .....	77
II. Methods of Interpretation .....	80
1. The Extent of Communication .....	80

a)	Literal Interpretation .....	80
b)	Contextual Interpretation .....	82
c)	Teleological Interpretation .....	84
d)	Contextual/Teleological Interpretation .....	85
2.	Disclosure <i>Inter Partes</i> or Trough the Registry? .....	86
3.	Intermediate Conclusion .....	88
4.	The Broad Contextual Interpretation .....	89
5.	Intermediate Conclusion .....	91
III.	A New Contextual Interpretation .....	92
1.	Goals and Extent .....	95
2.	Disclosure Rules Transplants or Translation: The Approach of Máximo Langer.....	99
a)	The Approach .....	99
b)	Transplants.....	100
c)	“Translations” Instead of “Transplants” .....	103
3.	Categorisation of the Procedural System/Criminal Justice System of the ICC .....	104
a)	Families of Legal Systems/Legal Tradition.....	104
aa)	Terminology .....	105
bb)	Civil Law.....	107
cc)	Common Law .....	110
b)	Models of Criminal Procedure/Criminal Justice.....	113
c)	“Adversarial” and “Inquisitorial” .....	117
aa)	Traditional Meaning .....	118
bb)	Theoretical Model .....	119
cc)	Procedural Type .....	120
dd)	Ideal of Procedure .....	120
ee)	Historical Meaning .....	122
ff)	Máximo Langer: A New Theoretical Framework .....	123
(1)	The Technique for Handling Cases .....	124
(2)	The Procedural Culture.....	125
(a)	The Structure of Interpretation and Meaning.....	125
(b)	Internal Dispositions of Legal Actors .....	126
(3)	Ways to Distribute Powers and Responsibilities Between the Main Legal Actors.....	127
gg)	Conclusion .....	129
hh)	Appendix: Adversarial – Accusatorial .....	131
d)	Packer’s Model .....	133
aa)	The Crime Control Model .....	133
bb)	The Due Process Model.....	135
e)	Packer Extended.....	136
f)	Value and Principle Approaches.....	141

g) Damaška's Concept . . . . .	144
h) Other Procedural Models . . . . .	148
4. Conclusion: Which Model is Suitable? . . . . .	152
a) Models of Criminal Procedure and Criminal Justice – How to Find Out of the Jungle . . . . .	152
aa) Wrong Modelling in Domestic (Criminal) Procedure . . . . .	152
bb) Wrong Modelling in International (Criminal) Procedure . . . . .	158
b) How to Model ICC Procedure? . . . . .	162
aa) General Identification of a Purpose . . . . .	163
bb) Concrete Parameters of a Concept . . . . .	164
cc) Function of a Concept . . . . .	166
(1) Some Terminological Thoughts . . . . .	167
(2) Jurisprudence . . . . .	168
(3) General Jurisprudence with a View to the Purpose of this Study . . . . .	170
c) What Concept is Preferable? . . . . .	172
aa) Normative/Descriptive . . . . .	172
(1) Value and Principle Approaches . . . . .	174
(2) Packer's Models . . . . .	174
(3) Packer Extended . . . . .	176
(4) Vogler's Approach . . . . .	177
(5) Damaška's Concept . . . . .	178
bb) Sociological/Empirical . . . . .	180
(1) Ideal-types . . . . .	180
(2) Sociological/Empirical Elements Within the Said Models . . . . .	184
cc) Comparative . . . . .	187
(1) General Remarks on Comparative Law Research . . . . .	187
(2) Damaška's Contribution to Comparative Law Research . . . . .	189
dd) Intermediate Conclusion . . . . .	191
(1) Concluding Remarks on Wrong Modelling . . . . .	192
(2) The Inquisitorial/Adversarial Dichotomy and Damaška's Concept . . . . .	194
(3) Predictability and Weberian Ideal-types . . . . .	195
IV. Damaška and ICC Procedure . . . . .	200
1. Organisation of Authority and Form of Justice in General . . . . .	201
a) Hierarchical or Coordinate? . . . . .	202
b) Policy-implementing or Conflict-solving? . . . . .	207
aa) General Remarks . . . . .	207
bb) Goals of the ICC, Goals of International Criminal Justice . . . . .	209
(1) Traditional Goals . . . . .	211
(2) Special Goals of International Criminal Justice . . . . .	216

(a)	Provision of an Accurate Historical Record of Events/Substantive Truth Finding .....	218
(aa)	Substantive Truth Finding .....	218
(bb)	Provision of an Accurate Historical Record ..	221
(b)	Satisfaction of Victims .....	223
(c)	Other Goals and Intermediate Conclusion .....	225
2.	Organisation of Authority and Form of Procedure.....	228
a)	The Judge.....	229
aa)	Organisation of Authority .....	229
(1)	The Judge Within the Civil Law Tradition .....	229
(2)	The Judge Within the Common Law Tradition .....	231
(3)	The Judge Within the ICC System .....	233
bb)	Form of Procedure.....	238
(1)	The Decision Maker According to Damaška's Models	238
(a)	The Decision Maker in a Policy-implementing Form of Procedure .....	238
(b)	The Decision Maker in a Conflict-solving Form of Procedure.....	240
(2)	The Decision Maker at the ICC.....	243
(a)	Selected Observations: Evidence and Factual Knowledge .....	243
(b)	The Role of the Pre-Trial Chamber.....	245
(c)	The Existence of a Confirmation Hearing .....	247
(d)	The Legal Knowledge.....	248
(e)	Conclusion .....	249
b)	The Prosecutor .....	250
aa)	Organisation of Authority .....	250
bb)	Form of Procedure.....	254
(1)	Power to Initiate Proceedings .....	254
(2)	Obligation to Start Proceedings .....	255
(3)	Enforcement Agencies and Coercive Measures .....	256
(4)	Investigation of Incriminating and Exonerating (Exculpatory) Evidence.....	257
(5)	Conclusion .....	258
c)	Other Procedural Features .....	264
aa)	Case File .....	264
bb)	Concentration of Proceedings, the "Day in Court" and Live Testimony.....	268
(1)	Process England/Wales.....	269
(2)	Process U.S.A. ....	273
(3)	Process Germany .....	277
(4)	Process ICC.....	281
(5)	Conclusion .....	284

cc) Oral or Written Testimony and Prior Recorded Testimony	288
dd) The Role of Counsel	290
(1) The Role of Counsel in a Conflict-solving Form of Process	290
(2) The Role of Counsel in a Policy-implementing Form of Process	292
(3) Application of Damaška's Concept to the ICC	294
ee) Guilty Plea and Plea Bargaining	300
3. Intermediate Conclusion	305
<b>F. Prosecution Disclosure Before the ICC from a Comparative Perspective with a View to Damaška's Models</b>	309
I. Approach	309
II. General	311
1. Equality of Arms and Disclosure – General Remarks	311
2. Equality of Arms and Disclosure Within the Concept of Damaška	316
III. Disclosure Obligations Independent from Trial Stages – Exculpatory Material	322
1. Exculpatory Material in the U.S.A.	322
a) Brady v. Maryland	323
b) United States v. Agurs	324
c) United States v. Bagley	325
d) Kyles v. Whitley and Strickler v. Greene	327
e) The States' Brady Implementation and Rule 3.8(d) American Bar Association's Model Rules of Professional Conduct	328
f) A Short Comment on Sanctions and Remedies	330
2. Unused Material in England/Wales	331
a) Application, Common Law and Development Until the CPIA 1996	332
b) The CPIA 1996	335
c) The CPIA 1996 as Amended by the CJA 2003: the Current Status	337
3. Exculpatory Material at the ICC	344
IV. Disclosure Obligations Independent from Trial Stages – Documents and Tangible Objects	350
1. U.S.A.	350
2. UK	352
3. ICC	355
V. Disclosure Obligations Independent from Trial Stages – Prior Statements of the Prosecution Witnesses and Names of Witnesses	359
1. U.S.A.	359
a) Witness Lists	359
b) Witness Statements	362
2. UK	366

a)	Witness Statements the Prosecution Intends to Use .....	367
aa)	Crown Court (Indictable Offences Only).....	367
bb)	Magistrates' Court (Offences Either Way and Summary Offences) .....	368
b)	Witness Statements the Prosecution Does Not Intend to Use...	371
c)	Withholding of Witness Statements and Witness Identities.....	373
3.	ICC.....	376
a)	Possible Conflict with Rule 121.....	377
b)	Timing and Anonymity.....	380
c)	"Rolling Disclosure".....	385
d)	Witness Proofing .....	387
VI.	Prosecution Disclosure Prior and at the Confirmation Hearing.....	391
1.	U.S.A. ....	391
a)	Preliminary Hearing.....	392
b)	Grand Jury Proceedings .....	394
aa)	What Does the Prosecutor Present?.....	395
bb)	What Does the Defendant Receive? .....	398
2.	UK.....	401
a)	The Old Committal .....	402
b)	A Case to Answer Before the Crown Court .....	405
c)	Conclusion .....	407
3.	ICC.....	408
a)	The Confirmation Hearing .....	408
b)	Disclosure Prior to and at the Confirmation Hearing .....	411
c)	Conclusion: The Purpose, Aim and Nature of the Confirmation Hearing .....	414
VII.	Sanctions.....	421
1.	U.S.A. ....	421
a)	Sanctions by Rule or Statute.....	422
b)	Brady-Violation Sanctions? .....	425
aa)	Sanctions by Brady Itself, Due Process and Supervisory Powers.....	425
bb)	Civil Actions and Criminal Charges Against Prosecutors for Brady Violations .....	427
cc)	Disciplinary Proceedings .....	432
dd)	Other Potential Remedies.....	434
2.	UK.....	437
a)	Sanctions and Remedies Available at Trial.....	438
aa)	Stay of the Proceedings Because of an Abuse of Process (Trial) .....	438
(1)	Non-disclosure .....	440
(2)	Insufficient Disclosure .....	441

bb) Exclusion of Evidence . . . . .	443
cc) Orders by the Court . . . . .	444
b) Appeal Because of Disclosure-violations . . . . .	446
aa) Fresh Evidence Appeals . . . . .	448
bb) Procedural Irregularities Appeal . . . . .	449
cc) Stay of the Proceedings Because of an Abuse of Process (Appeal). . . . .	451
3. ICC . . . . .	452
a) Stay of Proceedings Because of an Abuse of Process . . . . .	453
aa) Non-disclosure in Connection with Art. 54(3)(e) ICC-Statute . . . . .	454
bb) Non-disclosure in Connection with Intermediaries . . . . .	458
b) Disciplinary measures. . . . .	465
aa) General Prohibitions Against Misconduct and Breach of Duty . . . . .	465
bb) Staff Rules . . . . .	469
cc) Rules of Professional Conduct . . . . .	471
VIII. Conclusion . . . . .	476
1. The Disclosure Rules in the U.S.A. and England/Wales with a View to Damaška's Categorisation . . . . .	477
a) Disclosure Problems in the U.S.A. with Regard to Exculpatory Material . . . . .	477
aa) Connick v. Thompson . . . . .	479
bb) U.S. v. Stevens . . . . .	481
cc) Intermediate Conclusion . . . . .	485
b) Disclosure Problems in England and Wales with Regard to Unused Material. . . . .	485
aa) Disclosure Failures Caused by Police and Prosecution . . . . .	487
bb) Disclosure Failures Caused by the Disclosure Test Itself . . . . .	488
cc) Intermediate Conclusion . . . . .	489
c) Conclusion. . . . .	490
2. The Disclosure Rules at the ICC with a View to the Damaška Categorisation. . . . .	492
<b>G. The Solution . . . . .</b>	<b>499</b>
I. Active Judge . . . . .	499
II. The Parties and the System in General . . . . .	505
III. Communication and Registration . . . . .	508
1. Communication . . . . .	508
a) Broad Communication Generally Ensures to Implement ICC Policies. . . . .	509
b) Broad Communication Specifically Facilitates Disclosure . . . . .	509
2. Registration – Introduction of the Double-dossier Principle. . . . .	510
a) Case File for the Pre-Trial Chamber and the Trial Chamber . . . . .	511



b)	Access of the Trial Chamber to a Possible Case File . . . . .	512
c)	The Record of the Proceedings as a Case File . . . . .	513
aa)	The Knowledge Component . . . . .	514
bb)	The Structural Component . . . . .	516
cc)	The Weight Component . . . . .	517
dd)	Advantages of the Case File Vis-à-Vis Its Biased Objections . . . . .	518
ee)	Solutions for a Case File in Line with Art. 74(2) ICC-Statute . . . . .	520
(1)	Does Art. 74(2) ICC-Statute Comprise Pre-Trial and Trial Phase? . . . . .	520
(a)	No Qualitative Difference in the Weight of the Evidence . . . . .	521
(b)	Contradiction Between Broad Communication and Weight . . . . .	521
(2)	Separation of the Case Record for the Pre-Trial Phase and the Trial Phase . . . . .	522
(a)	Case Record at the Confirmation Hearing: Emphasis of the Knowledge Component . . . . .	522
(b)	Case Record at Trial: Emphasis of the Weight Component . . . . .	523
(aa)	First Obstacle: the Prosecutor's (Alleged) Duty to Continue Investigations Beyond the Confirmation Hearing . . . . .	524
(bb)	Second Obstacle: Admitted Evidence Before the Pre-Trial Chamber is Not Automatically Admitted Evidence Before the Trial Chamber . . . . .	527
(c)	Adoption of the Double Dossier System Known in Italy . . . . .	529
(d)	The Double Dossier System Supplemented by the Adoption of Internal Rule 87(3) of the ECCC Internal Rule . . . . .	532
ff)	Conclusion . . . . .	533
IV.	Summary and Concluding Remarks . . . . .	535
	<b>Bibliography</b> . . . . .	545
	<b>Subject Index</b> . . . . .	594

## Table of Figures

Figure 1: Search for Truth According to the <i>Lubanga (Abu Garda)/Bemba</i> PTCs .....	35
Figure 2: <i>Inter Partes</i> Disclosure According to the <i>Lubanga/Bemba</i> PTCs ...	37
Figure 3: Communication to the PTC According to the <i>Lubanga/Bemba</i> PTCs .....	37
Figure 4: Analysis According to the <i>Lubanga (Abu Garda)/Bemba</i> PTCs .....	38
Figure 5: General Communication Obligations According to the PTCs.....	39
Figure 6: Communication to the Chamber According to the <i>Bemba</i> PTC.....	40
Figure 7: Methods of Statutory Interpretation (1) .....	65
Figure 8: Methods of Statutory Interpretation (2) .....	66
Figure 9: Finding or Justification of a Decision?.....	76
Figure 10: Interpretation of Rule 121(2)(c) According to the PTCs .....	93
Figure 11: Evidence Registered in the Record of Proceedings According to the PTCs.....	94
Figure 12: <i>Langer's</i> Approach .....	100
Figure 13: <i>Langer's</i> Categorisation .....	128
Figure 14: “Adversarial” and “Accusatorial” .....	132
Figure 15: <i>Damaška's</i> Models of Administering Criminal Justice.....	147
Figure 16: <i>Damaška's</i> Models of State Authority .....	147
Figure 17: Models of Criminal Procedure/Criminal Justice (1) .....	151
Figure 18: Models of Criminal Procedure/Criminal Justice (2) .....	151
Figure 19: Examples of the Uncertainty of the Label “Adversarial” According to <i>Damaška</i> .....	161
Figure 20: Examples of the Uncertainty of the Label “Inquisitorial” According to <i>Damaška</i> .....	162
Figure 21: The “Strong Ideal-type” and Its Use in Empirical and Evaluative Work .....	182
Figure 22: The “Weak Ideal-type” and Its Use in Empirical and Evaluative Work .....	183
Figure 23: The “Non-ideal-type” and Its Use in Empirical and Evaluative Work .....	183

Figure 24: Goals of International Criminal Justice . . . . .	211
Figure 25: Analysis of the “Traditional” Goals of Criminal Justice with a View to the Categories “Policy-implementing” and “Conflict-solving” . . . . .	227
Figure 26: Analysis of the “Special” Goals of International Criminal Justice with a View to the Categories “Policy-implementing” and “Conflict-solving” . . . . .	228
Figure 27: Comparison of the Procedural Stages: USA – England/Wales – ICC	283
Figure 28: Comparison of the Procedural Stages: USA – Germany – ICC . . . . .	284
Figure 29: Disclosure of Unused Material in England/Wales According to Statutory Provisions . . . . .	343
Figure 30: Disclosure of Exculpatory Material at the ICC . . . . .	349
Figure 31: Disclosure of Names and Witness Statements at the ICC . . . . .	390
Figure 32: General Prosecution Disclosure Obligations at the ICC . . . . .	420
Figure 33: The ICC’s Record of the Proceedings . . . . .	511
Figure 34: Standards of Decisionmaking According to <i>Damaška</i> . . . . .	537

## List of Abbreviations

ABA	American Bar Association
ACHPR	African Charter of Human and Peoples' Rights
ACHR	American Convention of Human Rights
AcP	Archiv für die civilistische Praxis
Admin. L. Rev.	Administrative Law Review
Alaska R.Crim.P.	Alaska Rules of Criminal Procedure
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Crim. L.	American Journal of Criminal Law
Am. J. Int. L.	American Journal of International Law
Am. Soc. Rev.	American Sociological Review
Annals Am.Acad.Pol.& Soc.Sci.	Annals of the American Academy of Political and Social Science
APA Newsl. on Phil. and L.	American Philosophical Association Newsletter on Philosophy and Law
ArCHR	Arab Charter on Human Rights
Arch.Sozialw. und Sozialpol.	Archiv für Sozialwissenschaft und Sozialpolitik
ASP	Assembly of States Parties
Austl. J. Legl Phil.	Australian Journal of Legal Philosophy
BGB	German Code of Civil Law (Bürgerliches Gesetzbuch)
BGH	Bundesgerichtshof = German Federal Court of Justice (Germany)
BGHSt	Entscheidungen des Bundesgerichtshofes in Straf- sachen = Decisions of the German Federal Court of Justice in Criminal Cases
Birt. J. Criminol.	British Journal of Criminology
Brook. J. Int'l L.	Brooklyn Journal of International Law
Buff. L. Rev.	Buffalo Law Review
B.U. Int'l L.J.	Boston University International Law Journal
BVerfG	Bundesverfassungsgericht = German Federal Constitu- tional Court (Germany)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts = De- cisions of the German Federal Constitutional Court
BWV	Berliner Wissenschafts-Verlag
CAA 1986	Criminal Appeal Act 1968 (England/Wales)
CAA 1995	Criminal Appeal Act 1995 (England/Wales)

Cal. L. Rev.	California Law Review
Cap. Def. J.	Capital Defense Journal
Cardozo J. Int'l & Comp. L.	Cardozo Journal of International and Comparative Law
Cardozo L. Rev.	Cardozo Law Review
Case W. Res. L. Rev.	Case Western Reserve Law Review
Chap. L. Rev.	Chapman Law Review
Charleston L. Rev.	Charleston Law Review
Chi.-Kent L. Rev.	Chicago-Kent Law Review
CICC	Coalition for the International Criminal Court
CJA 2003	Criminal Justice Act 2003 (England/Wales)
CLF	Criminal Law Forum
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Conn. JIL	Connecticut Journal of International Law
Cornell Int'l L.J.	Cornell International Law Journal
CPIA 1996	Criminal Procedure and Investigations Act 1996 (England/Wales)
CPR 2005	Criminal Procedure Rules 2005 (England/Wales)
CPR 2012	Criminal Procedure Rules 2012 (England/Wales)
CPS	Crown Prosecution Service
CRC	UN Convention on the Rights of the Child
Crim. L. R.	Criminal Law Review
Crime Law Soc Change	Crime, Law and Social Change
DA	District Attorney (USA)
D.C.L. Rev.	University of the District of Columbia Law Review
Dick. J. Int'l. L.	Dickinson Journal of International Law
DPP	Director of Public Prosecutions (England/Wales)
Draft Code of Professional Conduct CICC	Draft prepared by the secretariats of the International Association of Prosecutors and the Coalition for the International Criminal Court
Duke L.J.	Duke Law Journal
E. & P.	International Journal of Evidence & Proof
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice for the European Union
Edinburgh L. Rev.	Edinburgh Law Review
EJCL	Electronic Journal of Comparative Law
EJIL	European Journal of International Law
EU	European Union

Eur. J. Crime Crim. L. & Crim. Just.	European Journal of Crime, Criminal Law and Criminal Justice
Fordham L. Rev.	Fordham Law Review
FRCP	Federal Rules of Criminal Procedure (USA)
FS	Festschrift
GA	Goltdammer's Archiv für Strafrecht
Ga. L. Rev.	Georgia Law Review
Ga. St. U. L. Rev.	Georgia State University Law Review
Geo. Wash. L. Rev.	George Washington Law Review
GeorgeLJ	Georgetown Law Journal
GVG	Gerichtsverfassungsgesetz = German Law on Judicial Organisation (Germany)
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hous. J. Int'l L.	Houston Journal of International Law
HSE	Health and Safety Executive (England/Wales)
Hum. Rts. Q.	Human Rights Quarterly
HuV-I	Humanitäres Völkerrecht – Informationsschriften
IAP	International Association of Prosecutors
ICC	International Criminal Court
ICC-OTP	Office of the Prosecutor at the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC-RPE	Rules of Procedure and Evidence of the International Criminal Court
ICC-Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICJ-Statute	Statute of the International Court of Justice
ICL	International Criminal Law
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICTR-RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTR-Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY-RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
ICTY-Statute	Statute of the International Criminal Tribunal for the former Yugoslavia

IHL	International Humanitarian Law
Ind. J. Global Legal Studies	Indiana Journal of Global Legal Studies
Ind. L.J.	Indiana Law Journal
Int. Comm. Ev.	International Commentary on Evidence
Int. J.L.C.	International Journal of Law in Context
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
Int'l J. Evidence & Proof	International Journal of Evidence and Proof
Int'l Law	International Law
Int'l Legal Persp.	International Legal Perspectives
IOM	Independent Oversight Mechanism
JA	Juristische Arbeitsblätter
JbRSoz.	Jahrbuch für Rechtssoziologie und Rechtstheorie
J. Crim. & Crim. Just. Res. & Ed.	Journal of Criminology and Criminal Justice Research & Education
J. Crim. L.	Journal of Criminal Law
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
JICJ	Journal of International Criminal Justice
J. Int'l Crim. Just.	Journal of International Criminal Justice
J. Int'l L.& Prac.	Journal of International Law and Practice
J.L. & Pol'y	Journal of Law and Policy
J.L. Econ. & Pol'y	Journal of Law, Economics and Policy
J. Legal Pluralism	Journal of Legal Pluralism and Unofficial Law
JLS	Journal of Law and Society
JuS	Juristische Schulung
Just. Sys. J.	Justice System Journal
JW	Juristische Wochenschrift
J. World Inv. & Trade	Journal of World Investment and Trade
JZ	Juristenzeitung
Ky. L.J.	Kentucky Law Journal
Law & Phil.	Law and Philosophy
Law & Prac. Int'l Cts. & Tribunals	Law and Practice of International Courts and Tribu- nals
Law & Soc. Inquiry	Law and Social Inquiry
Law Quarterly Rev.	Law Quarterly Review
LJIL	Leiden Journal of International Law
Loy.U.Chi.L.J.	Loyola University Chicago Law Journal
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MCA 1980	Magistrates' Court Act 1980 (England/Wales)
McGeorge L. Rev.	McGeorge Law Review
Melb. J. Int'l L.	Melbourne Journal of International Law

Mich. J. Int'l L.	Michigan Journal of International Law
Miss. L.J.	Mississippi Law Journal
Mod. L. Rev.	Modern Law Review
NACDL	National Association of Criminal Defense Lawyers
Nat'l Law. Guild Rev.	National Lawyers Guild Review
N.C.J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
NCLR	New Criminal Law Review
N.C. L. Rev.	North Carolina Law Review
NGO	Nongovernmental Organisation
NJW	Neue Juristische Wochenschrift
NJW-Spezial	Neue Juristische Wochenschrift-Spezial
NLJ	National Law Journal
Notre Dame L. Rev.	Notre Dame Law Review
Nw. U. J. Int'l Hum. Rights	Northwestern University Journal of International Human Rights
Nw. U. L. Rev.	Northwestern University Law Review
NYIL	Netherlands Yearbook of International Law
N.Y.L. Sch. L. Rev.	New York Law School Law Review
N.Y.U. Ann. Surv. Am. L.	New York University Annual Survey of American Law
N.Y.U.J. Int'l. Law & Pol.	New York University Journal of International Law and Politics
Ohio St. L. J.	Ohio State Law Journal
OJLS	Oxford Journal of Legal Studies
Okla. City U. L. Rev.	Oklahoma City University Law Review
OPCD	Office of Public Counsel for the Defence
PACE	Police and Criminal Evidence Act 1984 (England/Wales)
PCMH	Plea and Case Management Hearing (England/Wales)
Penn St. L. Rev.	Penn State Law Review
Pepp. L. Rev.	Pepperdine Law Review
PTC	Pre-Trial Chamber
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RegCourt	Regulations of the International Criminal Court
Regent U. L. Rev.	Regent University Law Review
RegOTP	Regulations of the Office of the Prosecutor
RegRegistry	Regulations of the Registry of the International Criminal Court
S. & L. S.	Social & Legal Studies



Santa Clara L. Rev.	Santa Clara Law Review
SCSL	Special Court for Sierra Leone
SCSL-RPE	Rules of Procedure and Evidence of the Special Court for Sierra Leone
S.D. L. Rev.	South Dakota Law Review
Soc. F.	Social Forces
Soc.Sci.Q.	Social Science Quarterly
Stan. L. Rev.	Stanford Law Review
S. Tex. L. Rev.	South Texas Law Review
StGB	German Criminal Code (Germany)
STL	Special Tribunal for Lebanon
STL-Statute	Statute of the Special Tribunal for Lebanon
StPO	Strafprozessordnung = German Code of Criminal Procedure (Germany)
StuW	Steuer und Wirtschaft
StV	Strafverteidiger
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
Sw. U. L. Rev.	Southwestern University Law Review
Syd LR	Sydney Law Review
TEU	Treaty on European Union
Tex. Int'l L. J.	Texas International Law Journal
Tex. Tech L. Rev.	Texas Tech Law Review
Transnat'l L. & Contemp.Probs.	Transnational Law and Contemporary Problems
Tul. Eur. & Civ. L.F.	Tulane European and Civil Law Forum
Tulsa L.J.	Tulsa Law Journal
U.C. Davis J. Int'l L. & Pol'y	U.C. Davis Journal of International Law and Policy
U.C. Davis L. Rev.	U.C. Davis Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U.Cinn.L.Rev.	University of Cincinnati Law Review
UCLA J. Int'l L. & Foreign Aff.	UCLA Journal of International Law and Foreign Affairs
U. C. L. R.	University of Colorado Law Review
UDHR	Universal Declaration of Human Rights
U.N.	United Nations
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.S.A.	United States of America
USC	United States Code (USA)
Utah L. Rev.	Utah Law Review
U. Toronto L.J.	University of Toronto Law Journal

Va. J. Int'l L.	Virginia Journal of International Law
Va. L. Rev.	Virginia Law Review
Val. U. L. Rev.	Valparadiso University Law Review
VCLT	Vienna Convention on the Law of Treaties
Wash. & Lee L. Rev.	Washington and Lee Law Review
Wash. U. L. Rev.	Washington University Law Review
wistra	Zeitschrift für Wirtschafts- und Steuerstrafrecht
Wm. & Mary L. Rev.	William and Mary Law Review
Yale L.J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
Zbornik PFZ	Zbornik Pravnog Fakulteta u Zagrebu
ZEP	Zeitschrift für Europäisches Privatrecht
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZRP	Zeitschrift für Rechtspolitik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft



## A. Introduction and Abstract

### I. The Problem

Since the first trial before the International Criminal Court (ICC) started, one issue has been causing problems for all parties involved: the disclosure of evidence. By now, a lot has been written about this problem. Summarised and slightly simplified, authors are taking up the following four positions: First, disclosure of evidence is complicated. Thus, second, disclosure has been a problem in every legal system in the world. Ergo, third, it has to be accepted that there is no such thing as a perfect disclosure regime in the criminal process before the ICC, which is a system *sui generis*. Consequently, and fourth, we must apply a case-by-case approach to solve disclosure problems.

Of those positions, two are actually correct: disclosure of evidence is indeed complicated and it is obvious that it gives rise to great discussions in almost every legal system. However, it is false and dangerous to conclude that it may be the lesser evil to create an environment where the decision about a certain disclosure problem is dependent on the legal background of the decision maker. Further, it is even worse to justify this by noting the procedural system before the ICC is a system *sui generis*.

To create a disclosure regime where the parties will be able to actually foresee the consequences of their conduct (i. e. non-disclosure), it is necessary to understand disclosure. This is easier said than done, because disclosure is not only influenced by its rules but also by the usage of trial participants. Instead of battling one's way through the jungle without any idea of the right path, it is more helpful to simply get a map.

The most important information this map should provide concerns the nature of the procedural system before the ICC. To characterise this system, for various reasons, I will not apply the conventional adversarial-inquisitorial dichotomy. Instead, I will take *Damaška's* approach as a basis, analysing the types of authority (hierarchical or coordinate officialdom?) and justice (policy-implementing or conflict-solving?) before the ICC. Characterising the system of the ICC, most authors speak of a system *sui generis* because it blends different legal traditions. Using this label, one must verify that almost every state has a procedural system *sui generis* because a pure

procedural model is almost obsolete. Thus, calling the ICC system “*sui generis*” does not get us out of the jungle. Using *Damaška’s* distinction, I will demonstrate that the ICC and its organs are mainly hierarchically structured and the form of procedure seems to be mainly “policy-implementing” (I will explain this term in detail). However, I will also show that the procedure before the ICC contains many adversarial elements usually found in a system of coordinate authority with a “conflict-solving” form of justice. As long as those elements do not contradict the general structure of the ICC and its procedure, they are acceptable, and in some cases even complement policy-implementation (i.e. to achieve the goals of international criminal justice). This is the way many, and especially continental, systems work. However, the disclosure regime as it has been recently interpreted draws a different picture. In particular, the way that the Office of the Prosecutor (OTP) and also some Chambers apply it requires a model of coordinate authority and scrutinises policy-implementation. In other words: the current disclosure regime has the wrong type of blood. Most interestingly – and inconsequently – in case non-disclosure leads to an abuse of procedural principles, judges tend to apply a model of sanctions which is designed not to endanger policy-implementation (instead of sanctioning one party for the sake of fair conflict, irrespective of whether the policy is implemented or not).

So far, this tension has not been resolved. The case-by-case-approach, in connection with the lack of precedent, leads to legal inconsistency, encouraging the parties to file as many motions as they can – who knows which approach will be favoured by the judge this time? Is the judge going to lean back and let the parties try to resolve their conflict? Or will the judge actively involve himself or herself to ensure that the goals of international criminal justice are implemented? In the end, a speedy trial is literally not more than a paper promise.

My solution for this involves the structural and procedural facts at the ICC. In a hierarchically structured system with a policy-implementing model that contains many adversarial elements, the parties have to get their information through disclosure and communication. Disclosure has to be conducted by way of open-file-disclosure, i.e. the prosecution has to disclose almost all of their material (as long as it does not violate legitimate disclosure restrictions). This approach is increasingly employed in the U.S.A. and even implemented by some state prosecutors. Communication means that every piece of information that is disclosed between the parties has to be communicated to the Chamber and saved in the record of proceedings. This will safeguard open-file disclosure and takes advantage of procedural areas that have remained idle so far in this respect. The record serves as a *double-dossier* as it has been known in Italy since the reform of

1989: one dossier for the pre-trial stage and one for the trial stage. I will demonstrate that the structure of the process before the ICC allows for this double-dossier, which encourages the judge to actively involve himself or herself in the proceedings. All in all, this solution will help the process before the ICC to develop a disclosure regime with a matching blood type.

I am aware that such an approach may be criticised as being too theoretical and obsolete since the criminal process has been governed by practical and tactical considerations. Nevertheless, a theoretical approach or, in *Damaška's* words, logical legalism (i.e. a concrete life situation is evaluated on a network of principles and rules) is in-built in a hierarchical model with policy-implementing justice, while judges of coordinate officialdom and conflict-solving justice apply pragmatic legalism (i.e. a concrete life situation is evaluated on the basis of examples). This convincingly demonstrates that even the mode of thought can contradict an existing procedural structure, e.g. when at the ICC the presiding judge is used to coordinate officialdom and a conflict-solving model. However, in case even this justification of my approach is regarded as too theoretical: it is when pragmatic solutions fail, that logical approaches prove to be a necessary tool. If those approaches are ignored, miscarriages of justice<sup>1</sup> will inevitably emerge.

## II. Methodology

To prove the unpredictability and inconsistency of the recent disclosure regime, this work first provides an overview of Pre-Trial Chamber decisions addressing the following issues: first, the role of the Pre-Trial Chamber; second, the extent of disclosure and communication of exculpatory evidence; third, the requirement of analysing relevant evidence; and fourth, the extent of communication in general. In the course of this study it will become clear that these issues are not small drops in the large ocean of procedural rules at the ICC but are vital for the whole process and more or less intertwined. Thus, it seems only natural to expect the Pre-Trial Chambers to at least develop a basically coherent system to approach and eventually answer the relevant procedural questions stemming from those issues. Unfortunately, as it turned out, this has been wishful thinking, since the Pre-Trial Chamber has come to different conclusions, using different approaches.

This study will address this dilemma: at the end, the reader will not only find answers to the procedural questions asked by the Pre-Trial Chamber

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<sup>1</sup> About a definition and conceptualisation of “miscarriages of justice” see Jenkins, 40 JLS (2013), 329 ff.