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National Security Evidence: Enhancing Fairness in View of the Non-Disclosure Regime of the Rome Statute

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The Rome Statute of the International Criminal Court completely divests the Court of the power to compel a state to disclose evidence in its possession if the state opposes such disclosure on grounds of national security. If a state refuses to disclose information essential to the adjudication of a case on national security grounds, the ICC may settle fair trial concerns either by drawing factual inferences favourable to the defendant or by staying the proceedings. I argue, however, that in practice such judicial powers do not provide a sufficient guarantee of a fair trial. I propose to allay fair trial concerns arising from the refusal of states to allow the ICC access to evidence in their possession by introducing a reform in the exercise of the ICC's prosecutorial discretion. According to my proposal, the requirement of a fair trial, which entails the disclosure of material essential for the defence, would be incorporated into the criteria that guide the ICC Prosecutor in the selection of cases for prosecution. Although the present article focuses on the issue of national security evidence, the reach of the proposed reform extends to all cases of state refusal to allow the ICC access to evidence, regardless of the grounds for refusal.

Keywords: International Criminal Court, international due process, national security evidence, prosecutorial discretion

1. Introduction

In establishing the International Criminal Court (ICC), the parties to the Rome Statute of the International Criminal Court[1] ('ICC Statute' or 'Statute') undertook a commitment to maintain for an accused person a standard of fairness to be expected in an enlightened criminal system.[2] This commitment presents an extraordinary challenge in view of the peculiarities of international criminal adjudication. The ability of the ICC to secure a fair trial depends largely on the cooperation of states with the Court.[3] Such cooperation is often lacking when it is contrary to the interests of the state in question.[4] The ICC has no powers to enforce the fulfilment of

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[1] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

[2] Hakan Friman, 'Rights of Persons Suspected or Accused of a Crime' in Roy S Lee (ed), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 247, 248 ('The general intent was that the highest international standards for protection of persons suspected or accused of a crime, being central to the concept of justice, should apply').

[3] For a general account of the ICC's dependence on state cooperation, see Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 *International and Comparative Law Quarterly* 49, 60–61 ('The ICC will not be effective unless States circumvent the lack of any real supranational enforcement system by cooperating with the ICC. Practically speaking, investigations would be extremely difficult and, in essence, no trial can take place at the ICC if States do not provide assistance. No trial can take place without the defendant being surrendered by States to the custody of the Court, and no protecting victims and witnesses and the like. A strong cooperation regime is crucial for the Court's success').

[4] Jacob Katz Cogan, 'International Decision: Prosecutor v. Milutinović' (2007) 101 *American Journal of International Law* 163, 167 (observing that '[i]n any particular situation, the degree of a state's willingness to

obligations undertaken by states that are parties to the ICC Statute[5] and it is frequently dependent on the cooperation of states that are not parties to the Statute. Commentators have thus observed that 'the disjunction between authority and control, common to international institutions, is too great to allow for consistently fair criminal adjudication'.[6]

This article, however, addresses primarily a significant derogation from the requirements of a fair trial, sanctioned under the terms of the ICC Statute itself. The derogation concerns a defendant's right of access to evidence that is necessary for the determination of innocence or guilt, but which implicates the national security interests of a state. Addressing the limits of the power of the state to withhold evidence from a defendant by relying on a privilege of national security, Israeli Supreme Court Justice Aharon Barak has held that 'if the investigation material to which the privilege applies is essential for the defence, justice obviously requires its disclosure, and this consideration prevails over any possible security consideration'.[7] This approach also prevails in other Western jurisdictions,[8] but it was plainly rejected by the ICC Statute, which completely divests the ICC of any power to compel a state to disclose evidence in its possession for as long as the state opposes such disclosure on national security grounds.[9] The absence of such judicial power goes hand in hand with the explicit right conferred by the ICC Statute upon states to deny a request for assistance from the ICC 'if the request concerns the production of any documents or disclosure of evidence which relates to its national security'.[10]

A broad national security privilege that limits the access of defendants to evidence necessary for the determination of guilt or innocence would adversely affect the fairness of *any* criminal justice system, and it has an especially devastating effect on the fairness of international criminal adjudication. This is mainly because of the subject matter of international criminal adjudication, which concerns mostly crimes related to armed conflicts and military operations, rendering

cooperate depends largely on the extent to which the court's intended action impinges on its interests, broadly construed').

[5] Bekou and Cryer (n 3) 63 (observing 'the absence of any meaningful enforcement measures against recalcitrant States who, in contumacy of the obligations to cooperate that they have (be they under the Statute or pursuant to a Security Council resolution), still refuse to accede to the ICC's requests for assistance'); Mirjan Damaška, 'The International Criminal Court Between Aspiration and Achievement' (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 19, 22. This absence of ICC enforcement powers may impinge heavily upon both the effectiveness and the fairness of international criminal law enforcement.

[6] Jacob Katz Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 111, 116.

[7] MP 838/84 *Livni v State of Israel* 1984 PD 38(3) 729, 738 (author's translation).

[8] Stephen C Thaman, 'Official Privilege: State Security and the Right to a Fair Trial in the USA' in Herwig Roggemann and Petar Šarčević (eds), *National Security and International Criminal Justice* (Kluwer Law International 2002) 25, 32 (observing that US courts have been using the 'relevant and helpful to the defense' test in deciding whether or not to allow the disclosure of classified information); *United States v Yunis* 867 F 2d 617 (DC Cir 1989). A similar balancing test prevails in English law: see Richard May, *Criminal Evidence* (3rd edn, Sweet & Maxwell 1995) 310; *Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281, 288 ('A judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty ... the weight to be attached to the interests of justice is plainly very great indeed').

[9] See nn 35–42 and accompanying text.

[10] ICC Statute (n 1) art 93(4).

national security issues the rule rather than the exception.[11] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) thus stated in *Prosecutor v Blaškić*:[12]

> [T]o allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions ... The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved … To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings.

The vulnerability of adjudication by the ICC arising from the national security privilege is further increased by the failure of the drafters of the ICC Statute to define 'national security' interests that may be cited as a basis for invoking this privilege.[13] Commentators disagree on whether such interests are limited to military aspects or extend also to other state interests.[14]

International criminal tribunals have recognised the 'real danger of a miscarriage of justice when a Trial Chamber is deprived of crucial evidence relating to the guilt or innocence of an accused that does not surface until the trial is completed'.[15] The case of ICTY defendant Tihomir Blaškić serves as an example. Blaškić, a high-ranking commander in the Bosnian Croat military forces, was indicted and convicted, under the doctrine of command responsibility, of crimes against humanity and war crimes.[16] A few days after the ICTY sentenced Blaškić to 45 years of imprisonment,[17] Croatian authorities announced that they had discovered documents that may provide exculpatory evidence.[18] As noted by one commentator, '[t]hat these new, perhaps

[11] Otto Triffterer, 'Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction versus "Protection of National Security Information", Article 72 Rome Statute' in Roggemann and Šarčević (n 8) 53, 72 (observing with regard to national security information, 'cases in which such information and documents may be of relevance for the proceeding are not very rare, but rather the rule').
[12] ICTY, *Prosecutor v Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chambers II of 18 July 1997, IT-95-14-AR, Appeals Chamber, 29 October 1997, [64]–[65].
[13] Triffterer (n 11) 58 ('Neither in Article 72 nor elsewhere in the Statute is defined what precisely security interests of States are').
[14] ibid (observing that 'the notion of this expression includes not only *military* or *defence* aspects. It rather comprehends ... "State interests", especially the sovereignty, independence, structure and/or the protection of its inhabitants'). For a different view see Rodney Dixon, Helen Duffy and Christopher K Hall, 'Article 72: Protection of National Security Information' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, CH Beck/Hart/Nomos 2008) 1361, 1367 (contending that '[t]he Court will need to give the term a strict construction that makes jurisdictional sense').
[15] ICTY, *Prosecutor v Kupreškić*, Judgment, IT-95-16-A, Appeals Chamber, 23 October 2001, [44].
[16] ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000.
[17] ibid.
[18] Katz Cogan (n 6) 122.

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exculpating, documents appeared when they did, or that they appeared at all, was simply fortuitous – the lucky result of one man's demise'.[19] The discovery of the documents was announced only after the death of Croatian President, Franjo Tuđman, who had opposed the disclosure of documents requested by the ICTY throughout the *Blaškić* trial, and the election of a new coalition government that was more inclined to cooperate with the Tribunal.[20] On appeal, the ICTY Appeals Chamber, relying in part on the new evidence, reversed 16 of the 19 convictions handed down by the Trial Chamber and reduced Blaškić's sentence to nine years' imprisonment.[21]

The prevailing view thus holds that the right of a defendant before an international criminal tribunal to a fair trial may be compromised by a state's refusal to allow the defendant access to evidence.[22] The adverse consequences of a significant derogation from the requirements of a fair trial in international criminal adjudication cannot be overstated. It is widely agreed that '[i]f trials are unfair, or perceived to be unfair, international criminal courts ... might quickly lose their legitimacy. Worse still, the entire enterprise of justice for these types of heinous crime – whether in international courts, domestic courts, or otherwise – might be dealt a serious blow'.[23]

Part 2 of the article examines the national security exemption that relieves parties to the ICC Statute of their obligation to comply with requests from the Court for the provision of evidence. It also examines the procedure set out by the ICC Statute to promote voluntary disclosure on the part of states citing national security concerns, and contrasts these provisions with the more demanding disclosure regime that is binding upon states under ICTY adjudication. If a state refuses, on national security grounds, to disclose information that is essential to the adjudication of a case, the ICC may settle fair trial concerns either by drawing factual inferences favourable to

[19] ibid.
[20] ibid.
[21] ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004, [4]. See also Gregory S Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 *Columbia Journal of Transnational Law* 635, 679.
[22] ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1, Appeals Chamber, 15 July 1999, [49]–[51]. The ICTY Appeals Chamber observed that decisions of human rights treaty bodies addressing *national* criminal proceedings do not indicate that a defendant's right to a fair trial is breached where conditions outside the control of the adjudicating court prevented him or her from obtaining material evidence (ibid [49]). Adopting a broader perception of the right to a fair trial in *international* criminal proceedings, the Appeals Chamber concluded, however, that the fairness of international adjudication may be compromised by a state's refusal to allow a defendant access to evidence. Pointing to the inherent differences between national and international proceedings, the Appeals Chamber explained (ibid [51]): '[Domestic] courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States without having the power to compel them to cooperate through enforcement measures. The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence.'
It seems that the ICC Appeals Chamber has adhered to the view that the fairness of international proceedings may be undermined if conditions outside the control of the adjudicating court prevent a defendant from obtaining material evidence: see ICC, *Prosecutor v Lubanga*, 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, ICC-01-04-01-06-1486, Appeals Chamber, 21 October 2008, [38].
[23] Katz Cogan (n 6) 114.

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the defendant or by staying the proceedings.[24] The latter option is available to the ICC also if a state refuses to disclose evidence in its possession on grounds other than national security. Part 3 demonstrates, however, that in practice such judicial powers do not sufficiently guarantee a fair trial.

I propose to allay fair trial concerns arising from the refusal of states to allow the ICC access to evidence in their possession by introducing a reform in the exercise of the prosecutorial discretion of the ICC. Although this article focuses on the issue of national security evidence, the reach of the proposed reform extends to all cases of state refusal to allow the ICC access to evidence, regardless of the grounds for refusal.

According to my proposal, the ICC Prosecutor would not select a particular case for prosecution if, in her opinion, it is likely that a state would refuse to disclose material evidence in its possession. For the purposes of this proposal, the definition of material evidence follows that set out by the US Supreme Court, which applies the 'reasonable probability' test to whether the evidence in question would affect the outcome of the trial.[25] I argue that such an assessment on the part of the ICC Prosecutor is feasible, and I term the proposed prosecutorial principle the 'sufficient disclosure criterion'. Part 4 demonstrates that although the application of the sufficient disclosure criterion does not completely resolve fair trial concerns arising from a state's refusal to disclose evidence in its possession, it goes a long way towards dispelling such concerns.

Part 4 also examines the potential costs of applying the sufficient disclosure criterion and sets out guidelines for its application, with a view to minimising costs as much as possible. Application of the sufficient disclosure criterion may increase the ability of certain states to influence the selection of cases by the ICC by withholding cooperation with the Court. This carries the risk of effective impunity for some perpetrators and of the inequality before the law that attaches to such impunity. Yet such concerns can be significantly alleviated by insulating the *investigative* role of the ICC from the purview of the sufficient disclosure criterion. The sufficient disclosure criterion would not affect the selection of situations and particular crimes to be investigated by the ICC. This would allow the ICC Prosecutor to establish and preserve an evidentiary record of the gravest international crimes even if due process concerns temporarily preclude a trial. The establishment of such an evidentiary record would significantly reduce the risk that the application of the sufficient disclosure criterion results in effective impunity and inequality before the law, particularly in view of the often temporary nature of obstacles to international prosecution raised by non-cooperation.

The reality of international criminal adjudication, which underlies the reform proposed here, departs sharply from the circumstances of national criminal justice systems. The ICC is completely dependent on state cooperation that is often withheld and operates under extraordinary pressure to produce convictions. In view of this reality, the requirement of a fair trial, which entails the disclosure of material essential for the defence, ought to be incorporated into the criteria guiding the ICC Prosecutor in the allocation of Court resources.

[24] See nn 74–80 and accompanying text.
[25] See nn 130–31 and accompanying text.

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The proposal advanced in this article does not require an amendment to the ICC Statute. Rather, it concerns the exercise of the ICC Prosecutor's inherent power to prioritise prosecutorial efforts as well as the exercise of the Prosecutor's power under Article 53 of the Statute to decline to prosecute an otherwise admissible case if the Prosecutor concludes that such prosecution 'is not in the interests of justice'.[26]

2. PROTECTION OF NATIONAL SECURITY INFORMATION IN ICC PROCEEDINGS

Article 93 of the ICC Statute sets out the obligations of member states to comply with requests from the Court for assistance in investigations and prosecutions.[27] These obligations do not extend to states that are not parties to the ICC Statute unless the UN Security Council imposes them on such states in the exercise of its powers under the UN Charter.[28]

Article 93(4) provides that 'a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security'.[29] The national security exemption contained in Article 93(4) is subject to the provisions of Article 72 of the ICC Statute, which requires a state invoking that exemption to engage in extensive discourse with the ICC in order to provide the parties to the proceedings with as much information as possible.[30] Article 72(1)(5) states that 'all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means'.[31] Such interaction may result in '[a]greement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute'.[32] If efforts to reach a cooperative agreement fail, Article 72(6) requires a state to give 'specific reasons' for withholding the information 'unless a specific description of the reasons would itself necessarily result in … prejudice to the State's national security interests'.[33]

A combined reading of Articles 93(4) and 72 suggests that a state invoking the national security exemption is required to demonstrate 'reasonableness and good faith'[34] in its discourse with the Court pursuant to Article 72. It is widely agreed, however, that '[t]he final decision on whether to disclose national security information rests essentially with the State and not the

[26] See ICC Statute (n 1) arts 53(1)(c) and 53(2)(c). See also nn 134–136 and accompanying text.
[27] ICC Statute (n 1) art 93.
[28] Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299. Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.
[29] ICC Statute (n 1) art 93(4).
[30] ibid art 72.
[31] ibid art 72(1)(5).
[32] ibid.
[33] ibid art 72(6).
[34] Dixon, Duffy and Hall (n 14) 1375. See also Susan Rose-Ackerman and Benjamin Billa, 'Treaties and National Security' (2008) 40 *New York University Journal of International Law and Politics* 437, 476.

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Court',[35] and that the ICC Statute 'emphasizes the right of States to refuse to cooperate with the ICC'[36] in relation to such information. Under no circumstances can the ICC compel a state to disclose information in its possession that in the opinion of the state implicates its national security interests.[37] The Court lacks such power even if it finds that the national security concerns invoked by the state are not genuine or if the state refused to take all reasonable steps to resolve the matter by cooperative means, as required by Article 72.[38]

The legislative history of the ICC Statute is revealing. In the sessions of the Preparatory Committee of the Rome Statute, the United Kingdom proposed to allow the Court very limited power to order the disclosure of information in the possession of a state citing national security concerns. This proposal limited such judicial power to cases where 'it is clear from the State's actions that it is not acting in good faith towards the Court ... and the Court is satisfied that the State's claim that its national security interests would be prejudiced by disclosure is manifestly without foundation'.[39]

During the Rome Conference, the United Kingdom submitted a slightly revised proposal, which clarified that the determination of the Court that the national security claim of a state was manifestly unfounded would be restricted 'to situations where this was apparent on its face, so as to avoid the possibility of the Court actually examining the merits of the security claim'.[40] This proposal, which set an extremely high bar for issuing a court order directing a state to disclose information in its possession,[41] was ultimately rejected by the Rome

[35] Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational 2002) 68.

[36] Geert-Jan A Knoops and Robert R Amsterdam, 'The Duality of State Cooperation with International and National Criminal Cases' (2007) 30 *Fordham International Law Journal* 260, 277. See also Simon Chesterman, 'The Spy Who Came from the Cold War: Intelligence and International Law' (2006) 27 *Michigan Journal of International Law* 1071, 1123 (observing with regard to national security evidence, 'in the ICC Statute the emphasis is on the right of states to deny the court's request for assistance').

[37] Matthias Neuner, 'The Power of International Criminal Tribunals to Produce Evidence' in Roggemann and Šarčević, (n 8) 163, 188 ('In conclusion, if the State possesses the document, it makes the final decision as to whether national security concerns prevent disclosure. The judges of the ICC cannot simply overrule this decision and compel the State to produce the document'); Rose-Ackerman and Billa (n 34) 479; Dixon, Duffy and Hall (n 14) 1364. Article 72(7) of the ICC Statute authorises the ICC Trial Chamber only to order the disclosure of information that is *already* within its control, 'for example, where this information has already been provided to the Court by another state, an intergovernmental organization, a non-governmental organization or an individual …' (ibid)).

[38] Triffterer (n 11) 77 ('Article 72 establishes, albeit as an exception, the right of a State to claim that its security interest would be prejudiced by the disclosure of national security information, and, thus, the right to "deny a request for assistance in whole or in part", Article 93(4). Independent of the fact whether this assertion is true or the State merely pretends such a danger, States *cannot be forced* to produce or disclose security information or documents ... they may resist and, insofar, are privileged by Article 72 in connection with Article 93(4)'). See also Asa W Markel, 'The Future of State Secrets in War Crimes Prosecutions' (2007) 16 *Michigan State Journal of International Law* 411, 435 (observing that art 93(4) grants states 'an absolute right to withhold military secrets').

[39] Donald K Piragoff, 'Protection of National Security Information' in Lee (n 2) 270, 275.

[40] ibid 279.

[41] Jerry Fowler, 'Review Essay – "Not Fade Away: The International Criminal Court and the State of Sovereignty"' (2001) 2 *San Diego International Law Journal* 125, 143 ('On its face, the standard proposed by the United Kingdom would have empowered States. Relatively minimal efforts to cooperate would result in respect even for assertions of national security that were "manifestly without foundation"').

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Conference, giving way to an approach advocated by the United States that opposed such judicial power altogether.[42]

Having determined that a state invoking the national security exemption 'is not acting in accordance with its obligations under this Statute',[43] the Court may refer the matter either to the Assembly of State Parties (ASP) or to the Security Council (if the case was referred to the ICC by the Security Council).[44] This provision clearly indicates that the Court may not refer the matter to these political organs unless it reaches the conclusion that the state has failed to comply with its obligations under the Statute. Considering the national security exemption contained in Article 93(4), it seems that if negotiation with a state does not produce an agreement on cooperation, the Court may not refer the matter to the ASP or to the Security Council if the national security concerns of the state are genuine and reasonable, even if such concerns are outweighed by the requirements of a fair trial. More importantly, the ASP 'has no more power than the Court to compel production of such evidence'.[45] Only referral to the Security Council, if such referral is within the powers of the Court, can produce a legal obligation for a state to disclose national security information, to the extent that the Security Council chooses to exercise its power to issue a binding resolution under Article 25 of the UN Charter.[46]

The national security exemption contained in the ICC Statute represents a derogation from the disclosure obligations of states under the ICTY Statute.[47] Article 29(2) of the ICTY Statute requires states to 'comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to ... the production of evidence'.[48] This obligation is binding on all states, whether or not they were part of the former Yugoslavia.[49]

In *Prosecutor v Blaškić* the ICTY Appeals Chamber held that the power of the Trial Chamber to order a state to produce information in its possession extends to material involving national

[42] David J Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12, 16 ('Our view prevailed: a national government must have the right of final refusal if the request pertains to its national security pursuant to Article 93(4)'). For a review of the US proposal see Piragoff (n 39) 276–77, 280.

[43] ICC Statute (n 1) art 72(7)(a)(ii).

[44] ibid.

[45] William A Schabas, 'National Security Interests and the Rights of the Accused' in Roggemann and Šarčević (n 8) 105, 106. See also Hans-Jörg Behrens, 'Protection of National Security Information in the ICC: A Guide to Article 72 of the Rome Statute' in Roggemann and Šarčević (n 8) 115, 125 (observing that a decision made by the ASP 'would have moral rather than practical consequences').

[46] Schabas, ibid 106; Akande (n 28) 307–8.

[47] Neuner (n 37) 187 ('At the ICTY the judges always make the final decision as to whether [national security] documents sought must be produced for trial. In the ICC, the possessor of the document makes this crucial decision'); Annie Wartanian, 'The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation' (2005) 36 *Georgetown Journal of International Law* 1289, 1298 (observing that '[u]nlike the ICTY and ICTR statutes ... the Rome Statute ultimately leaves that final determination in the hands of the state'); Knoops and Amsterdam (n 36) 277 ('While the ICTY and ICTR emphasize obliging States to hand over information to these tribunals, the ICC system ... emphasizes the right of States to refuse to cooperate with the ICC').

[48] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993), UN Doc S/25704 (3 May 1993), adopted by the Security Council in Resolution 827 (25 May 1993), art 29(2).

[49] *Prosecutor v Blaškić* (n 12) [29].

security interests.[50] The Appeals Chamber thus confirmed 'the basic principle that States may not withhold documents because of national security concerns'.[51] The disclosure regime laid out by the Appeals Chamber in *Blaškić* vests the power in the Trial Chamber to make the final decision on whether a state is required to disclose national security evidence.[52] The Appeals Chamber recognised, however, that 'the International Tribunal should not be unmindful of legitimate state concerns related to national security'.[53] The Appeals Chamber therefore held that after reviewing the materials in question, an ICTY judge may determine that documents relevant to the proceedings be returned to the state that produced them without being disclosed to the party requesting them to the extent that the probative value of such documents 'is outweighed, in the appraisal of the judge, by the need to safeguard legitimate national security concerns'.[54] The Appeals Chamber also envisioned situations in which the balancing of interests by ICTY judges would warrant that the state concerned 'be allowed to redact part or parts of the documents, for instance, by blacking out of part or parts; however, a senior State official should attach a signed affidavit briefly explaining the reasons for that redaction'.[55]

Furthermore, the *Blaškić* Court prescribed certain protective measures designed to ensure that the proceedings used by the Tribunal to scrutinise the validity of the national security claims of states do not in themselves compromise such interests.[56] These measures have been subsequently incorporated into the ICTY Rules of Procedure and Evidence (ICTY RPE).[57]

The judges of the ICTY went a long way to accommodate the national security and other concerns of states by also introducing the 'confidentiality track' contained in rule 70 of the ICTY RPE regarding '[m]atters not subject to disclosure'.[58] Rule 70(B) provides:[59]

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[50] ibid [61]–[66].
[51] ibid [67].
[52] ibid; see also May and Wierda (n 35) 61 ('Having examined the materials and heard the objection, it is a matter for the discretion of the Trial Chamber to determine whether an order should be made despite the objection or not and, if so, in what form. The exercise of this discretion will require the Trial Chamber to balance the cogency of the relevant national security concerns against the significance and importance of the material to the issues in the particular trial').
[53] *Prosecutor v Blaškić* (n 12) [67].
[54] ibid [68].
[55] ibid.
[56] ibid. Such measures may include: (a) hearing the state's objection to disclosure *in camera* and *ex parte*; (b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior state official explaining the reasons for the redaction; (c) ordering that no transcripts be made of the hearing and that documents no longer required by the Tribunal be returned directly to the state without being filed with the Registry or otherwise retained; (d) the designation of a single Judge from a Chamber to examine the documents or hear submissions; (e) allowing the state to provide its own interpreters for the hearing and its own translations of sensitive documents. Moreover, the Appeals Chamber envisioned exceptional cases 'where a State, acting *bona fide*, considers one or two particular documents to be so delicate from the national security point of view, while at the same time of scant relevance to the trial proceedings, that it prefers not to submit such documents to the judge' (ibid). The decision whether or not to grant a state's request not to submit such documents to the ICTY judge is vested with the judge, and the Appeals Chamber prescribed a procedure by which the judge would consider the request (ibid).
[57] ICTY Rules of Procedure and Evidence of the International Tribunal (ICTY RPE), (entered into force 14 March 1994), UN Doc IT/32/Rev 45, 8 December 2010, r 54 *bis*, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf.
[58] ibid r 70.
[59] ibid r 70(B).

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> If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

Upon an application by the defendant, the Trial Chamber may order that rule 70(B), as well as the other provisions of rule 70, shall apply *mutatis mutandis* to specific information in the possession of the defendant.[60]

If the prosecution or the defence elects to present as evidence any material provided under the condition of confidentiality, they must first obtain the consent of the state providing the information.[61] If such consent is granted, the state may avail itself of extensive protections regarding the procedure by which the evidence is introduced.[62]

Moreover, rule 54*bis* of the ICTY RPE, which establishes the general disclosure regime of the ICTY, provides that a party which requests the Trial Chamber to order a state to produce information in its possession must demonstrate, inter alia, that it has taken reasonable steps to secure the assistance of the state before requesting a judicial disclosure order.[63] Applying the 'reasonable steps requirement', the ICTY Appeals Chamber has held that an agreement on the part of the state to provide a defendant with information in its possession under the confidentiality terms of rule 70 may preclude the defendant from requesting the Trial Chamber to order the disclosure of the information under the national security evidence disclosure regime laid out in *Blaškić*.[64] The Appeals Chamber reasoned that '[a] party may not bypass a State's cooperative efforts to assist it with gaining access to certain confidential information simply because that party does not want the State to be able to utilize the protections afforded to it through Rule 70'.[65]

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[60] ibid r 70(F).

[61] ICTY, *Prosecutor v Milutinović*, Decision on Request of the United States of America for Review, IT-05-87-AR, Appeals Chamber, 12 May 2006, [33].

[62] In examining evidence provided initially under the terms of rule 70(B), the Trial Chamber may *not*: (a) order either party to produce additional evidence received from the state providing the initial information; (b) summon a person or a representative of that state as a witness or order their attendance for the purpose of obtaining additional evidence; (c) order the attendance of witnesses or require the presentation of documents in order to compel the production of additional evidence; or (d) compel a witness introducing into evidence any information provided by a state under rule 70 to answer any question relating to the information or its origin if the witness declines to answer on grounds of confidentiality: see ICTY RPE (n 57) r 70(C)–(D); *Prosecutor v Milutinović*, ibid [33]. But if evidence is submitted pursuant to rule 70 by way of a departure from regular court procedures, the Court may exclude such evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial' (ICTY RPE (n 57) r 70(G)).

[63] ICTY RPE (n 57) r 54*bis*. Rule 54*bis* further provides that in requesting the Trial Chamber to issue such a disclosure order directed at a state, the party must also (a) identify as far as possible the documents or information to which the application relates, and (b) indicate how they are relevant to any matter before the judge or Trial Chamber, and how they are necessary for a fair determination of that matter. The requirements of specificity, relevance and necessity stipulated by rule 54*bis* have been applied by the Tribunal rather loosely, allowing a party to request the disclosure of broad categories of documents if it has no means of identifying specific ones (*Prosecutor v Milutinović* (n 61) [15]–[25]).

[64] ibid [37].

[65] ibid. The Appeals Chamber warned, however, that 'Rule 70 should not be used by States as a blanket right to withhold, for security purposes, documents necessary for trial from being disclosed by a party for use as evidence

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The ICC Statute also provides for a 'confidentiality track', set out in its Article 54(3)(e). This provision, which establishes an exception to the disclosure obligations of the ICC Prosecutor under Article 67(2) of the Statute,[66] states that the Prosecutor may agree 'not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents'.[67] Rule 81 of the ICC Rules of Procedure and Evidence (ICC RPE)[68] states that 'such information shall not be disclosed'.

Whereas the ICTY has encouraged resorting to the confidentiality track,[69] the ICC seems less receptive to its use. In *Prosecutor v Lubanga*, the ICC Appeals Chamber subscribed to a restrictive interpretation of Article 54(3)(e) of the ICC Statute.[70] It agreed with the Trial Chamber that reliance on Article 54(3)(e) should be 'exceptional',[71] and stated that 'the provision must be applied in light of the other obligations of the Prosecutor',[72] thus implying her obligation to facilitate fair trials.

As far as national security evidence is concerned, the confidentiality track set out in Article 54(3)(e) seems far less appealing to states than reliance on the national security exemption. Whereas this exemption allows a state to withhold information from the ICC altogether, the confidentiality track entails the disclosure of the information to the ICC Prosecutor and, following the ruling of the ICC Appeals Chamber in *Prosecutor v Lubanga*, to the Trial Chamber as well.[73] A determination on the part of the Trial Chamber, after reviewing the information in

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at trial as this would jeopardize the very function of the International Tribunal and defeat its essential object and purpose' (ibid [38]). Not persuaded by this warning, one commentator has nevertheless observed that in view of the decision in *Milutinović*, 'a party does not have any other option than to accept the conditions placed by the state on disclosure of evidence': see André Klip, 'Confidentiality Restrictions' (2012) 10 *Journal of International Criminal Justice* 645, 650.

[66] ICC Statute (n 1) art 67(2) ('In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide').

[67] ibid art 54(3)(e).

[68] ICC Rules of Procedure and Evidence (entered into force 9 September 2002) ICC-ASP/1/3.

[69] See nn 64–65 and accompanying text. In *Prosecutor v Milutinović*, the Appeals Chamber noted that although the Trial Chamber has the power to issue a binding order requiring a state to produce information in its possession, there are 'two modes of interaction [by a state] with the International Tribunal in fulfilling its obligations: cooperative and mandatory compliance … it is sound policy for the Prosecutor as well as defence counsel to first seek the assistance of States through cooperative means' (*Prosecutor v Milutinović* (n 61) [32]).

[70] Kai Ambos, 'Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law' (2009) 12 *New Criminal Law Review* 543, 553 (observing that the Appeals Chamber 'confirmed the Trial Chamber's restrictive interpretation of Article 54(3)(e)').

[71] *Prosecutor v Lubanga* (n 22) [55].

[72] ibid.

[73] In *Prosecutor v Lubanga*, the ICC Appeals Chamber held that Article 54(3)(e) does not relieve the Trial Chamber of its duty to assess 'whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents' (ibid [45]). Thus, if the Prosecutor obtains information under the condition of confidentiality, the final assessment as to whether that material is relevant to the adjudication of the case 'will have to be carried out by the Trial Chamber and therefore the Chamber should receive the material' (ibid [46]).

question, that the disclosure of the information to the defendant is crucial for the fairness of the proceedings would increase pressure on the state to consent to such disclosure.

3. ICC PROTECTION OF THE RIGHT TO A FAIR TRIAL: THE DANGER OF EROSION

Article 72(7) of the ICC Statute provides that in the case of refusal by a state to disclose evidence on national security grounds, and having determined 'that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused', the Court 'may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances'.[74] Pursuant to this provision 'the Court could regard something as proven even though no evidence has been produced'.[75] Such factual inferences may obviously lead to the acquittal of defendants.[76] The language of Article 72(7) does not preclude factual inferences favourable also to the prosecution case, although such a possibility seems to be precluded by the presumption of innocence protected under Article 66 of the Statute, which requires the prosecution to prove the guilt of the accused 'beyond reasonable doubt'.[77] Hence, 'Article 72(7) read in conjunction with Article 66 must work to benefit the accused and not the prosecution. In other words, the accused should be able to plead an inference of reasonable doubt, but the prosecution should not be entitled to apply this intriguing mechanism in the other direction'.[78]

In *Prosecutor v Lubanga* the ICC Appeals Chamber recognised the inherent power of the Trial Chamber to stay the proceedings if the fairness of the trial has been seriously undermined.[79] The preferred view is that Article 72(7) of the ICC Statute, authorising the Court to draw factual inferences favourable to the defendant in the event of state reliance on the national security exemption, does not implicitly divest the Court of its power to order a stay of proceedings under such circumstances. In certain cases a stay of proceedings is preferable to the acquittal of defendants whose right to a fair trial has been compromised because the former remedy may be less adverse to the purposes of international criminal law, which include establishing the truth and preventing impunity. Indeed, the *Lubanga* case demonstrates that a stay of proceedings arising from fair trial concerns does not necessarily result in impunity because, subject to the right of a defendant to be tried without undue delay, proceedings may be resumed after such concerns have been resolved.[80]

The above analysis suggests that the ICC Trial Chamber is vested, in principle, with adequate powers to protect a defendant's right to a fair trial in the face of state refusal to disclose material

[74] ICC Statute (n 1) art 72(7)(a)(iii).
[75] Behrens (n 45) 125.
[76] Schabas (n 45) 108 ('[I]f a fact is relevant and necessary, and bears on the issue of guilt and innocence, then its non-availability should generally raise a doubt. The result should be acquittal').
[77] ICC Statute (n 1) art 66; Schabas (n 45) 109.
[78] Schabas, ibid.
[79] *Prosecutor v Lubanga* (n 22) [76]–[77].
[80] ibid [80–81] (distinguishing between a conditional and a permanent stay of proceedings).

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evidence. I argue, however, that in practice such judicial powers do not sufficiently guarantee the right to a fair trial.

Commenting on the protection of national security evidence in ICTY adjudication, Laura Moranchek pointed to the 'creeping erosion of defendants' rights to discovery'.[81] Such erosion is reflected mainly in the process of broadening the protections granted for information provided under the condition of confidentiality, 'first through judicial decisions unsupported by the rules and then through changes to the rules themselves'.[82] The process of repeated amendment of the rules in favour of confidentiality 'demonstrates that international tribunals have a hard time holding the line on defendants' rights in the face of state demands for secrecy guarantees'.[83]

This seems to apply to the ICC as well. It is possible to point to two 'erosion factors' pertaining equally to the ad hoc tribunals and to the ICC, which are likely to frustrate ICC efforts to 'hold the line' on the disclosure rights of defendants either through decisions to stay the proceedings or through factual inferences resulting in their acquittal. The first concerns the 'mismatch between the innate powerlessness of international courts and their punitive impulses';[84] the second concerns the absence of state incentives that allow the 'disclosure or non-conviction' formula in national jurisdictions:

1. In their effort to obtain material evidence, international tribunals are often entirely dependent on the cooperation of states over which they have no enforcement powers.[85] However, this inherent weakness of international tribunals notwithstanding, 'their *libido puniendi* seems stronger than that of national criminal justice'.[86]

   The strong punitive impulse guiding international tribunals derives from the gravity of the crimes subject to international adjudication (ICC defendants are charged with crimes that are 'of the most serious ... concern to the international community as a whole')[87] and from the objective of the tribunals to end impunity for perpetrators of such crimes. Commenting on the appropriate response of international tribunals to fair trial concerns, Damaška has thus observed that '[h]igh acquittal rates could easily augur failure of their mission, and accurately establishing what happened ("finding the substantive truth") is for them a high priority'.[88]

[81] Laura Moranchek, 'Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY' (2006) 31 *Yale Journal of International Law* 477, 489.
[82] ibid.
[83] ibid.
[84] Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10 *Journal of International Criminal Justice* 611, 613.
[85] See nn 3–6. Moranchek (n 81) 485 observes: '[T]he ICTY's rules came to reflect the cold reality of the Tribunal's dependence on state cooperation to obtain certain kinds of crucial witnesses and evidence. Compelling production of documents is not a realistic option for international prosecutors who often neither know what intelligence evidence states may have collected, nor have any realistic means of enforcing production orders against powerful states … International criminal courts, in being almost wholly dependent on states to provide this kind of crucial evidence, are particularly vulnerable to pressures for protection and secrecy.'
[86] Damaška (n 84) 613.
[87] ICC Statute (n 1) Preamble.
[88] Damaška (n 84) 613.

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The subject matter of ICC adjudication inherently places a substantial burden on the exercise of the Court's power to renounce the conviction of defendants on the ground of not having had the opportunity to review certain materials.[89] The uniquely egregious nature of the crimes tried by the ICC inevitably exerts significant pressure on the Court not to allow defendants to go free if *the evidence available to the Court* points to their guilt. Such pressure is also likely to emanate from the uniquely high costs of establishing and maintaining a system of international criminal adjudication. Subscribing to the view that 'the consequences of acquittal are "particularly costly" for international criminal tribunals',[90] Stephen and Fietta explain: 'In light of the time, effort, and cost required to create and maintain such institutions, there would certainly appear to be an in-built expectation of achieving "results". While "results" could (and should) mean trials run in a scrupulously fair manner, ultimately what matters is convictions.'[91]

2. State incentives that allow the 'disclosure or non-conviction' formula in national jurisdictions are absent in the case of international criminal adjudication.

The basic formula in force in many national jurisdictions presents the state with a choice between accepting certain national security costs attached to the disclosure of information essential for the adjudication of a case or letting the defendant go free.[92] To some extent, this formula is based on the assumption that more often than not the state would opt for disclosure. The interest of the state in maintaining law and order within its territory provides a strong incentive to ensure that offenders are punished. Often, although not always, this interest outweighs national security considerations that would warrant non-disclosure of the information. The unique interest of the state in regulating conduct and enforcing law and order within its borders provides a certain guarantee that it would be willing to accept some limited cost to national security interests in order to secure a conviction.

This assumption underlying 'disclosure or non-conviction' rules in national jurisdictions does not necessarily apply in the case of international criminal adjudication. Cases tried before international tribunals often do not involve any concrete link between the state in

[89] ibid; Gordon (n 21) 639–40. Addressing the relationship between the subject matter of ICC adjudication and the requirements of due process, Gordon observes that 'international criminal tribunals are not established to handle garden-variety crime. To the contrary, they exist to prosecute the most heinous crimes ever committed – genocide, crimes against humanity and war crimes. When weighed against the gravity of these horrific offenses, the otherwise compelling mandate to enforce criminal procedure protections may lose some of its urgency').

[90] Chris Stephen and Volterra Fietta, 'Book Review, Nancy A. Combs, Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions' (2011) 22 *European Journal of International Law* 602, 604.

[91] ibid. See also Katz Cogan (n 6) 133 (observing that 'despite the best inclinations of those involved, including judges, it is not too difficult to imagine that [international criminal] courts could have an institutional bias against defendants because their continued existence depends on producing convictions'); Sonja B Starr, 'Rethinking "Effective Remedies": Remedial Deterrence in International Courts' (2008) 83 *New York University Law Review* 693, 710 (observing that 'the costs, length, and political prominence of their trials make it prohibitively costly for the [international criminal] tribunals to order the standard remedies for serious and prejudicial criminal procedure violations, namely release or retrial').

[92] See sources cited in nn 7–8.

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possession of the information and the crime.[93] Thus, international criminal adjudication is often characterised by the absence of a strong incentive for a state to accept any cost, however limited, in disclosing information implicating its national security. Moreover, a state may abuse the 'disclosure or non-conviction' formula and refuse to cooperate with the ICC in order to shield a defendant from conviction.

In the absence of strong state incentives to opt for disclosure, a 'disclosure or non-conviction' formula would rapidly erode. It is doubtful that *any* criminal justice system could withstand the non-conviction of defendants whenever a fair trial requires the state to assume certain costs in its national security interests. The capacity of the system of *international* adjudication to withstand such non-conviction is further diminished in view of the subject matter of ICC adjudication and the costs attached to its maintenance.

The above erosion factors may be intensified by the negotiation mechanism set out in Article 72(5) of the ICC Statute in order to secure at least partial disclosure of evidence that implicates national security.[94] An agreement between the ICC and a state providing for partial or otherwise limited disclosure of national security information in the possession of the state (for example, information provided in the form of summaries or subject to redactions or other 'limitations on disclosure'; information provided to the Trial Chamber but not to the defendant in *ex parte* proceedings)[95] concluded pursuant to Article 72(5) seems to divest the Trial Chamber of its power under Article 72(7) to draw factual inferences favourable to the defendant.[96]

Observing that the limitations on disclosure envisioned under Article 72(5) 'will be difficult and, in some instances, impossible to apply and interpret in a manner consistent with the rights of the accused',[97] commentators have explained:[98]

> There are a number of problems with these measures. First, summaries are prepared by the State concerned, not by a neutral body, and will be incomplete and sometimes inaccurate or even biased. There are a number of instances in which an international criminal court has permitted the substitution of summaries by the prosecution which turned out to be inaccurate. Second, redactions and limitations on disclosure could deny crucial exculpatory or mitigating evidence to the accused ... *Ex parte* hearings deny the right of the accused to know the evidence against him or her.

The possibility of partial or otherwise limited disclosure of national security information was also recognised in the jurisprudence of the ICTY and in its RPE.[99] In contrast to the legal regime

[93] See, for example, *Prosecutor v Milutinović* (n 61) (a request to order the disclosure of information gathered by US intelligence).
[94] See nn 30–33 and accompanying text.
[95] ibid.
[96] paras (6) and (7) of art 72 of the ICC Statute indicate that the power of the Trial Chamber to draw factual inferences arises *only* where, having taken 'all reasonable steps ... to resolve the matter through cooperative means', the state still considers 'that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests' (ICC Statute (n 1) art 72(6) and (7).
[97] Dixon, Duffy and Hall (n 14) 1370.
[98] ibid.
[99] See n 55 and accompanying text.

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governing ICTY adjudication, however, the point of departure of the negotiations between the ICC and a state under Article 72(5) of the ICC Statute is the national security exemption contained in Article 93(4), and hence the lack of power of the Trial Chamber to order disclosure of the information. Moreover, under Article 72(5) the ICC would have to determine whether partial or otherwise limited disclosure sufficiently ensures a defendant's right to a fair trial without having the opportunity to review the information in question.[100] This represents another significant departure from ICTY jurisprudence and its RPE, which provide that, as a general rule, an ICTY judge determines the appropriateness of partial or limited disclosure after having reviewed the information in its entirety.[101]

Conducting the discourse required under Article 72(5) of the ICC Statute in the shadow of a Trial Chamber that lacks the power to order disclosure of the information if agreement on state cooperation is not concluded, and without the Trial Chamber having reviewed the information in question, greatly increases the likelihood that the erosion factors discussed above will cause the Trial Chamber to go a long way to accommodate the national security claims of a state, eventually approving a partial disclosure agreement that is inconsonant with the requirements of a fair trial.

4. The Right to a Fair Trial and the Allocation of ICC Resources

The national security exemption contained in the ICC Statute is the only explicit exemption from the duty to comply with requests by the Court for evidentiary assistance afforded under the Statute to states that are parties to it.[102] But exemptions from the duty to cooperate with the Court on evidentiary matters, or otherwise, provide only a partial account of the problem of non-cooperation by states with the Court. The Court may depend also on the cooperation of states that are not parties to the ICC Statute and are thus not duty-bound by its provisions in the absence of a Security Council resolution providing otherwise.[103] Moreover, state cooperation may be denied even where it is warranted under the terms of the ICC Statute or a Security Council resolution as a result of the Court's lack of coercive powers.[104]

I propose to allay fair trial concerns arising from the refusal of states to allow the ICC access to evidence in their possession by introducing a reform in the exercise of ICC prosecutorial

[100] paras (5) and (6) of art 72 of the ICC Statute indicate that a state may even refuse disclosure of the information to the Court through the use of *ex parte* proceedings. Art 72(6) provides that if a state decides, having completed its discourse with the Court, to withhold the information from the Court altogether, the state 'shall notify the Prosecutor or the Court of the specific reasons for its decision'. The Statute recognises an exception to this notification obligation where 'a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests'. One commentator (Behrens (n 45) 124) has observed that this exception 'will be the rule rather than the exception'.

[101] See nn 56–57 and accompanying text.

[102] Claus Kreß and Kimberly Prost, 'Article 93: Other Forms of Cooperation' in Triffterer (n 14) 1569, 1582 (observing that art 93(4) of the ICC Statute 'is the only explicit reason for denial in the Statute').

[103] Akande (n 28) 305.

[104] See n 5 and accompanying text.

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discretion. Although this article focuses on the issue of national security evidence, the reach of the proposed reform extends to all cases of state refusal to allow the ICC access to evidence, regardless of the grounds for refusal.

Prosecutorial discretion in the allocation of the investigative and adjudicative resources of the ICC concerns the selection of both 'situations' and 'cases'.[105] Situations are defined by temporal and territorial parameters – for example, 'the armed conflict in the territory of the former Yugoslavia between 1991 and 1995 or the crisis situation in the territory of Rwanda after 6 April 1994'.[106] 'Cases are specific incidents during which one or more "international crimes" seem to have been committed.'[107]

Commentators have urged the ICC Prosecutor to articulate guidelines that would shape and constrain the Prosecutor's discretionary decisions.[108] The Office of the ICC Prosecutor has circulated several policy papers in which it sets out the criteria for prioritising both situations and cases. Such criteria have also been formulated in the Regulations of the Office of the Prosecutor[109] and in numerous statements issued by the Prosecutor.

I propose that the requirement of a fair trial, which entails the disclosure of materials essential for the defence, be incorporated into the criteria guiding the ICC Prosecutor in the allocation of ICC resources. I term this prosecutorial principle the 'sufficient disclosure criterion'.

In applying this criterion to the selection of cases for prosecution, the ICC Prosecutor would need to assess the prospects of obtaining evidence in the possession of a state that is essential to the fairness of the trial in question. By contrast, the selection of *situations* to be investigated does not lend itself to an assessment that relates to individual trials because it precedes an investigation in which particular cases and defendants are identified and evidentiary deficiencies bearing on the fairness of individual trials come to the attention of the ICC Prosecutor. However, the application of the sufficient disclosure criterion to the selection of situations could turn on an assessment by the Prosecutor of whether the stance taken by a state towards a possible ICC investigation significantly raises the likelihood that the Court be denied access to evidence essential for the fairness of trials. A similar assessment could be made in selecting cases to be investigated.

The main questions that arise in applying the proposed criterion concern its weight, and whether it extends both to the allocation of ICC investigative resources (that is, the selection of situations and cases to be investigated) and to the selection of cases for prosecution. This inquiry must meet two challenges. First, it must strike an appropriate balance between the

[105] Morten Bergsmo and Jelena Pejić, 'Article 16: Deferral of Investigation or Prosecution' in Triffterer (n 14) 595, 600.

[106] Héctor Olásolo, 'The Lack of Attention to the Distinction Between Situations and Cases in National Laws on Co-operation with the International Criminal Court with Particular Reference to the Spanish Case' (2007) 20 *Leiden Journal of International Law* 193, 194; ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ICC-01/04, Pre-Trial Chamber, 17 January 2006, [65].

[107] ibid.

[108] Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 538.

[109] ICC, Regulations of the Office of the Prosecutor (entered into force 23 April 2009) ICC-BD/05-01-09 29, 33.

interests advanced by the sufficient disclosure criterion and the need to minimise the costs attached to its application. Second, it must ensure that the erosion factors that are likely to encumber the efforts of the Trial Chamber to protect ICC defendants during trial in the face of a state's refusal to disclose evidence have a far lesser effect on prosecutorial discretion in the allocation of ICC resources.

Taking up the first challenge, I examine the potential costs attached to the application of the sufficient disclosure criterion. Next, I propose guidelines for applying the criterion, with a view to minimising costs as much as possible. I argue that, if carefully designed, the benefits of the proposed reform in enhancing due process far exceed its costs.

4.1. The Costs of Applying the Sufficient Disclosure Criterion

The ICC Prosecutor has clearly rejected the view that the prospects of cooperation on the part of certain states have bearing on the exercise of prosecutorial discretion.[110] In a policy paper from 2006, the Prosecutor stated that his duty of independence 'goes beyond not seeking or acting on instructions. It also means the selection is not influenced by ... the importance of the cooperation of any party, or the quality of cooperation provided'.[111] The sufficient disclosure criterion departs from this position. Application of this criterion may increase the ability of certain states to influence the selection of situations and cases by withholding cooperation with the ICC. The proposed criterion is liable to abuse on the part of states in possession of relevant information, which may be directly implicated in the situation at hand or otherwise wish to direct the selection of situations and cases in accordance with their foreign policy interests. As noted by commentators:[112]

> [A] state acting in bad faith could deny information or documents to the Court in certain cases on the claim that in its 'opinion' disclosure would prejudice its national security to avoid prosecution of certain individuals and provide similar information or documents in other cases where the state concerned hoped that the accused would be convicted.

The prosecutorial discretion of the ICC is already vulnerable to state influence because of the institutional dependence of the ICC on rich and powerful states. Predicting that 'politicisation certainly will affect the ICC',[113] Mark Drumbl thus observed:[114]

[110] But see James A Goldston, 'More Candor about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 383, 396 ('… can the ICC Prosecutor help but take into consideration his dependence on states for his own effectiveness in deciding whether, when and whom to charge?').
[111] ibid (quoting Office of the Prosecutor of the ICC, Criteria for Selection of Situations and Cases 3 (June 2006) (unpublished draft policy paper)).
[112] Dixon, Duffy and Hall (n 14) 1367.
[113] Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 585.
[114] ibid 586–87.

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> In order for the ICC as an institution to maintain resource support, it is incentivized to investigate wrongdoers in politically powerless places ... A decision whether or not to investigate or prosecute will be as contoured by concerns over how that decision will affect the ICC's political standing, funding, and support among states as it will by the seriousness of those allegations.

Moreover, regardless of the exercise of prosecutorial discretion on the part of the Prosecutor, ICC trials of incumbent state officials or of former officials who have not fallen out of favour in their state would rarely be feasible. Because of the ICC's lack of coercive powers, states are able to shield perpetrators of international crimes from ICC adjudication by providing them with a safe haven. This was exemplified recently by the failure of states that are parties to the ICC Statute and which hosted the President of Sudan, Mr Omar El-Bashir, to execute an ICC warrant for the arrest of Mr Bashir, contrary to their obligation to do so and notwithstanding Court efforts to secure such cooperation.[115] Hence,[116]

> [i]t is ... only under a favorable constellation of political circumstances that international courts obtain the support needed for the successful performance of their functions. Absent these circumstances, even weak states are in a position to defy international justice, while convictions of officials, or other important persons, from powerful nations can realistically be expected only in the event of regime change, or the military defeat of these nations.

Incorporating the sufficient disclosure criterion into the ICC selection process may provide states with yet another means of thwarting ICC adjudication and increase the politicisation of the Court's prosecutorial discretion.

Enhancing the ability of certain states to influence the selection of situations and cases would increase the vulnerability of the principle of equality before the law in ICC operations. Equality before the law is a fundamental principle of criminal law[117] and a human right protected under both customary and conventional international human rights law.[118] A significant departure from this principle would compromise the legitimacy of the system of international criminal justice.[119]

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[115] Gwen P Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 *Fordham International Law Journal* 1584, 1587 (providing an account of the ICC's failure to secure the execution by its member states of its warrants for the arrest and surrender of El-Bashir, and arguing that the 'refusal to arrest President Al Bashir thus illustrates the lack of enforcement mechanisms available to the ICC' and 'exemplifies the impotence of the ICC when its member states refuse to cooperate').

[116] Damaška (n 5) 22.

[117] See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 195 (arguing that equality before the law 'is by no means exhaustive of the critical principles that ought to be applied to the law, but it is an immensely important one').

[118] See ICTY, *Prosecutor v Delalić*, Judgment, IT-96-21-A, Appeals Chamber, 20 February 2001, [605] (recognising 'a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law'); International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, arts 14, 26 (art 14 of the Covenant states: 'All persons shall be equal before the courts and tribunals ...'; art 26 explicitly provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law…').

[119] Ariel Zemach, 'Reconciling Universal Jurisdiction with Equality Before the Law' (2011) 47 *Texas International Law Journal* 143, 153–55.

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The principle of equality before the law is already uniquely vulnerable with regard to the prosecution of international crimes by the ICC. This vulnerability arises from the institutional dependence of the ICC on rich and powerful states and from the immensely broad discretion vested in the ICC Prosecutor. The capacity of the ICC to investigate and adjudicate crimes within its jurisdiction is extremely limited because of the scarcity of resources available to it.[120] This allows the ICC a broad discretion in choosing its battles in the enforcement of international criminal law.[121] Observing that such broad discretion renders the operations of the ICC especially amenable to abuse, Allison Danner noted:[122]

> That any prosecutions in an international forum will necessarily involve only a few accused rather than the many that might have been pursued does highlight the principal problem posed by discretion: it can be used in a way that produces arbitrary or – even worse – discriminatory results. As one commentator has noted, discretion 'makes easy the arbitrary, the discriminatory and the oppressive. It produces inequality of treatment'.

It is possible to argue that the ICC cannot afford to incorporate a new criterion into the selection process, which would further compromise the principle of equality before the law.

Moreover, the purposes of international criminal adjudication require the gravity of the crime to remain a prominent criterion in the exercise of prosecutorial discretion to select situations and cases. The gravity of the criminal activity attributed to suspected perpetrators is clearly the main factor that guides prosecutors in the selection of cases for prosecution. This view was also taken by the ICC Prosecutor. A 'prosecutorial strategy' paper published by the Office of the Prosecutor in September 2006 stated that, in selecting cases, 'the Office adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes ... cases inside the situation are selected according to their gravity'.[123] The Prosecutor has repeatedly emphasised that 'the gravity of the crimes is central to the process of case selection'.[124] The ICC Prosecutor relies also on the gravity criterion for selecting situations to be investigated.[125]

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[120] See, for example, William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53, 66.

[121] Louise Arbour, the former Prosecutor at the ICTY, thus noted that the challenge that the ICC Prosecutor will confront is actually 'to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones': Louise Arbour, 'Statement to the Preparatory Commission on the Establishment of an International Criminal Court' [1997] *ICTY Yearbook* 229, 232. See also Alexander KA Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *New York University Journal of International Law and Politics* 583, 610–11.

[122] Danner (n 108) 521 (quoting Charles D Breitel, 'Controls in Criminal Law Enforcement' (1960) 27 *University of Chicago Law Review* 427, 429).

[123] Office of the Prosecutor of the ICC, 'Report on Prosecutorial Strategy', 14 September 2006, 5, http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf.

[124] Statement of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 14 June 2006, 2, http://www.iccnow.org/documents/OTP_3rdReportUNSC_14Jun06_en.pdf. For an extensive review of the ICC Prosecutor's statements regarding the gravity criterion, see William A Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731, 737–40.

[125] See generally Schabas, ibid.

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In a recent prosecutorial strategy paper, the ICC Prosecutor announced that 'the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes'.[126] Observing that this position 'relies principally on a logic that appears to equate the seniority of the perpetrator with the gravity of the crime',[127] Alexander Greenawalt elaborates on the relationship between this understanding of the gravity criterion and the purposes of international criminal law:[128]

> Powerful considerations dictate that if one is to pursue a path of prosecution, and if one must make selections, it makes sense to give priority to high-level offenders, at least where those offenders exhibit a high degree of culpability. The planners and leaders of atrocities are broadly considered the most culpable, their arrest and prosecution is likely to have the greatest symbolic value and provide the greatest sense of justice for the largest number of victims, their incarceration is most likely to aid political transition, they provide a relatively narrow target for deterrence, and the deterrence resulting from their punishment, if effective, will have a broader impact than that of individual low-level perpetrators.

Hence, a departure from the gravity criterion as a result of the application of the sufficient disclosure criterion may set back the realisation of the purposes of international criminal law.

4.2. GUIDELINES FOR THE APPLICATION OF THE SUFFICIENT DISCLOSURE CRITERION

I propose that the sufficient disclosure criterion should not extend to the selection of situations and cases to be investigated but serve as a *conclusive* criterion in the selection of cases for prosecution. The sufficient disclosure criterion and the gravity criterion often point in different directions. Introducing in the selection of cases for prosecution a sufficient disclosure criterion that cedes to the gravity criterion would be likely to do little to promote fairness in ICC adjudication. Given the dominance of seniority in the application of the gravity criterion, such hierarchy is likely to result in the prosecution of the highest-ranking perpetrators in each of the situations investigated by the ICC, regardless of considerations of fairness. Requiring the ICC Prosecutor to balance the sufficient disclosure criterion against the gravity criterion on a case-by-case basis would also seem to be undesirable because it would increase the level of indeterminacy in how to handle any given situation. Concerns of abuse of prosecutorial discretion, arbitrariness, inequality before the law, and the devastating effect of these on the claim to legitimacy of the ICC underlie the plea for the introduction of prosecutorial guidelines to qualify the otherwise

[126] Office of the Prosecutor of the ICC, 'Prosecutorial Strategy 2009–2012', 1 February 2010, 6, http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf; see also Office of the Prosecutor of the ICC, 'Paper on Some Policy Issues before the Office of the Prosecutor', 7 September 2003 7, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf ('[T]he Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for the crimes').

[127] Greenawalt (n 121) 631.

[128] ibid 628–29.

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immensely broad discretion granted to the ICC Prosecutor.[129] Those considerations equally advise against affording the ICC Prosecutor broad discretion in balancing gravity against fairness.

According to my proposal, the ICC Prosecutor would not select a particular case for prosecution if she believes that it is likely that a state will refuse to disclose *material evidence* in its possession. For the purposes of my proposal, the definition of *material evidence* follows that formulated by the US Supreme Court,[130] which applies the 'reasonable probability' test to whether the evidence in question would influence the outcome of the trial.[131]

The ICC Prosecutor would conduct this assessment upon completing the investigation of a case taking into consideration: (i) the evidentiary materials gathered by the Prosecutor in the course of the investigation, and (ii) the Prosecutor's discourse with the pertinent states in the course of the investigation. Such discourse would usually place the Prosecutor in a position to assess the state's response to future requests by the Court for the provision of evidence. As noted by Otto Triffterer, '[i]n practice, questions concerning national security interests in general do not all of a sudden appear in the trial, but rather earlier when during the investigation and prosecution the evidence for the indictment is collected'.[132] This also seems to apply to evidence that is not related to national security issues. As far as national security evidence is concerned, I propose that consent by a state to a disclosure regime similar to that set out in the ICTY *Blaškić* case[133] would satisfy the sufficient disclosure requirement.

The proposal advanced in this article does not require an amendment to the ICC Statute. Application of the sufficient disclosure criterion would concern the exercise of the ICC Prosecutor's inherent power to prioritise prosecutorial efforts. It may also turn on the exercise of the Prosecutor's power under Article 53 of the ICC Statute to decline to prosecute an otherwise admissible case if the Prosecutor concludes that such prosecution 'is not in the interests of justice'.[134] The term 'interests of justice' has been aptly described as 'elastic'.[135] The ICC Prosecutor has noted that the 'interests of justice' recognised by Article 53 are necessarily 'broader than

[129] Danner (n 108) 519–20.

[130] *Brady v Maryland* 373 US 83 (1963), 87 (Justice Douglas stated: 'The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution').

[131] *United States v Bagley* 473 US 667 (1985), 682 (The Supreme Court held that a prosecutor is governed by a 'reasonable probability' test. Hence, in fulfilling disclosure obligations a prosecutor must assess whether there is a 'reasonable probability' that the exculpatory evidence would influence the outcome of the trial). In *Kyles v Whitley* 514 US 419 (1995) 434, Justice Souter explained that a 'reasonable probability' does not require a preponderance of evidence but rather, as the language suggests, something less.

[132] Triffterer (n 11) 58.

[133] See nn 50–56 and accompanying text.

[134] See ICC Statute (n 1) art 53(2)(c) (stating that the ICC Prosecutor may determine after investigation that '[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime').

[135] Danner (n 108) 542. See also Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court' (2003) 14 *European Journal of International Law* 481, 488 ('Article 53(1)(b) specifically juxtaposes the traditional criminal justice considerations – the gravity of the crime and the interests of the victims – with the broader notion of "interests of justice" and clearly indicates that the latter might trump the former').

criminal justice in a narrow sense'.[136] Such interests undoubtedly encompass the fairness of ICC adjudication. The ICC Prosecutor's discretion in applying the sufficient disclosure criterion would be subject to judicial scrutiny by the Pre-Trial Chamber.[137]

I submit that excluding the sufficient disclosure criterion from the allocation of ICC investigative resources, but considering it conclusive in the allocation of adjudicative resources, reflects an appropriate balance between the interests advanced by this criterion and the need to minimise the costs attached to its application. These costs, which are manifest in the departure from the gravity criterion and the undermining of the principle of equality before the law, are far more significant in the selection of situations and cases to be investigated than they are in the selection of cases for prosecution.

Making the sufficient disclosure criterion conclusive in the selection of cases for prosecution, but excluding it from the selection of situations and cases to be investigated, helps to restrict departures from the gravity criterion to instances in which such departure is truly required in the name of due process. The prospects of miscarriage of justice resulting from a state withholding evidence are inherently clearer after completion of the investigation than at the stage of selecting situations and cases to be investigated. First, a state that is initially reluctant to allow the Court access to evidence may revise its stance in the course of the investigation as a result of internal developments (for example, change of regime or in the identity of decision makers)[138] or as a result of international pressure.[139]

Second, even in the face of continuing state refusal to cooperate with the Court, the ICC Prosecutor may conclude, given the strength of the evidentiary material collected in the course of the investigation, that it is not likely that evidence withheld by that state from the Court will amount to material evidence – that is, evidence that, according to the reasonable probability standard, may influence the outcome of the case. Hence, the proposed application of the sufficient disclosure criterion raises the likelihood that departures from the gravity criterion in favour of the sufficient disclosure criterion occur only where the two criteria truly run contrary to each other.

Applying the sufficient disclosure criterion as conclusive only to the selection of cases for prosecution would also allow the ICC Prosecutor to establish and preserve an evidentiary record of the gravest international crimes even if due process concerns temporarily preclude a trial. The establishment of such an evidentiary record would significantly reduce the risk that the application of the sufficient disclosure criterion results in effective impunity for some perpetrators and in the inequality before the law that attaches to such impunity.

[136] Office of the Prosecutor of the ICC, 'Policy Paper on the Interests of Justice', September 2007, 8, http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422B.B23528/143640/ICCOTPInterestsOfJustice.pdf.
[137] Once investigation into a situation has been initiated, the Pre-Trial Chamber has broad powers to review a decision of the Prosecutor to indict a suspected perpetrator. The Pre-Trial Chamber also is empowered to review a decision of the Prosecutor not to prosecute alleged perpetrators whose crimes were the subject of investigation: see ICC Statute (n 1) arts 15, 19, 53(2)–(3).
[138] See nn 16–20 and accompanying text.
[139] See nn 149–50 and accompanying text.

The importance of establishing an evidentiary record of international crimes as a means of combating impunity, even if circumstances temporarily preclude a trial, has been observed with respect to the exercise of universal jurisdiction in absentia. Universal jurisdiction in absentia may be defined as 'the conducting of an investigation, the issuing of an arrest warrant, and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state. This definition does not include adjudication of the case'.[140] Commentators have noted that the exercise of universal jurisdiction in absentia is often essential in order to preserve a record and evidence of the crime, because:[141]

> If a state forestalls investigations and evidence gathering because the offender is not within its borders, crucial time-sensitive evidence may disappear before a thorough investigation can be conducted and a sound case brought. This delay could wipe out the possibility of conviction and result in an effective grant of impunity.

The evidence collected through the investigatory efforts of the state exercising universal jurisdiction in absentia would be available to the perpetrator's home state after it resolves to terminate the perpetrator's impunity.[142] It would also be available to a state in prosecuting the perpetrator under a doctrine of universal jurisdiction after some future event forces the perpetrator to leave the state harbouring him.

The practice of the ICTY provides another helpful analogy. In cases in which the Tribunal is unable to secure the arrest of the accused, it may resort to rule 61 of its RPE, which sets out the 'Procedure in Case of Failure to Execute a Warrant'.[143] This rule provides for a hearing in which the Prosecutor submits to the Trial Chamber the indictment and the evidence in support. If, upon reviewing the evidence submitted by the Prosecutor, the Trial Chamber concludes that 'there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine'.[144] The Trial Chamber then issues an arrest warrant for the accused[145] and may order a state to freeze his assets.[146] Commenting on rule 61, Thieroff and Amley observed:[147]

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[140] Anthony J Colangelo, 'The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes' (2005) 36 *Georgetown Journal of International Law* 537, 543.
[141] ibid 576; see also Ryan Rabinovitch, 'Universal Jurisdiction in Absentia' (2005) 28 *Fordham International Law Journal* 500, 525 (arguing that the exercise of universal jurisdiction in absentia 'would increase the likelihood of conviction, since it would facilitate the gathering of evidence and testimony').
[142] See Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 *Journal of International Criminal Justice* 561, 578 (noting that 'the state of universal jurisdiction will preserve the evidence secured through the investigation').
[143] ICTY RPE (n 57) r 61.
[144] ibid r 61(C).
[145] ibid r 61(D).
[146] ibid.
[147] Mark Thieroff and Edward A Amley, 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61' (1998) 23 *Yale Journal of International Law* 231, 251.

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> There are a variety of ... pragmatic reasons for the speedy introduction of information that tends to incriminate the accused. For example, evidence tends to degrade over time. Witnesses may forget important facts and details about the actions of the accused or the context in which the alleged violations took place. They may also die from natural causes.

Although the procedure under rule 61 has been sharply criticised as 'the functional equivalent of trials in absentia',[148] it underscores the importance of preserving a record of evidence as a means of combating impunity and advancing the objectives of international criminal law even when circumstances preclude a trial.

Similarly, establishing an evidentiary record of the gravest international crimes would significantly reduce the risk that a decision on the part of the ICC Prosecutor to temporarily refrain from selecting a particular case for prosecution, in view of fair trial concerns, spells impunity for perpetrators of such crimes. A broad range of circumstances underlying denial of assistance by a state to the ICC may change over time. Denial of assistance to the Court in bad faith may emanate from a state interest to shield the defendant, other individuals or the state itself, or from a desire to facilitate false conviction. The experience of international criminal adjudication demonstrates, however, that such positions often change.[149] This also applies to cases in which the reliance of a state on the national security exemption does not follow from genuine and compelling national security concerns. In time, a state may bow to international pressure to cooperate with an international tribunal.[150] State reluctance to cooperate with an international

[148] ibid 234.

[149] Damaška (n 5) 20 ('For the ICTY, outside assistance worked: albeit reluctantly and intermittently, successor states of the former Yugoslavia cooperated with the Tribunal, largely satisfying the Tribunal's need for both custody of suspects and incriminating evidence. It should not be overlooked, however, that such cooperation was the result not of the Tribunal's moral authority, or its "soft power", but rather the result of internal political changes in successor states and successful outside pressures on them'); Michael P Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal' (2000) 49 *DePaul Law Review* 925, 949 ('Croatia's cooperation, induced by the conditionality of financial assistance, resulted in the surrender of half of the indicted war criminals in custody at The Hague. Positive economic incentives have been used in the past to induce parties to make peace, as for example, in the mideast. The ICTY precedent suggests that the same type of approach can be used to successfully coax parties into cooperating with the ICC'). Scharf further observed (ibid 978) that 'in the absence of voluntary cooperation, the international community has generated an impressive arsenal of indirect enforcement mechanisms for the ICTY, which are potentially of great use to the ICC'.
Similarly, impunity from domestic proceedings initially granted by a state to perpetrators of grave human rights violations often gives way to prosecutions later on. For example, commentators have pointed to the increased willingness of Chilean authorities, as well as other states throughout Latin America, to prosecute and punish perpetrators belonging to former dictatorial regimes in the wake of the proceedings undertaken in several European countries against former Chilean dictator Augusto Pinochet under a doctrine of universal jurisdiction; Cedrik Ryngaert, 'Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations' in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher 2010) 165, 173–74.

[150] See n 149. See also Wartanian (n 47) 1306 (observing that one of the most effective means of procuring state cooperation with international tribunals 'is the use of economic aid inducements (where foreign aid is made conditional upon cooperation) and the use of diplomatic and economic sanctions against uncooperative governments'). The use of such measures by the US and (to a lesser extent) by the European Union has greatly facilitated the compliance of the republics of the former Yugoslavia with ICTY orders (ibid 1304–08).

tribunal may cease as a result of a change in the identity of the decision makers or of other internal changes.[151] Alternatively, at some point the ICC may obtain from another source the evidence withheld by a state, or obtain other evidence that diminishes the importance of the evidence withheld by the state.

After the resolution of fair trial concerns resulting from a state's refusal to grant the ICC access to evidence, the ICC Prosecutor would be able to select the case for prosecution. Moreover, a state's decision to revise an earlier position and cooperate with ICC proceedings against its nationals might go hand in hand with a newly born willingness on the part of that state to try the perpetrators in its own courts. Evidence collected in the course of an ICC investigation could then be presented in domestic proceedings. Importantly, Article 29 of the ICC Statute provides that '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'.[152] Similarly, under customary international law the prosecution of perpetrators of international crimes is not subject to a statute of limitations.[153]

It is important to recognise the limits of the sufficient disclosure criterion in promoting fair trials. Article 72 of the ICC Statute authorises the Trial Chamber to draw factual inferences resulting in the acquittal of defendants on the ground that the Trial Chamber did not have an opportunity to review certain evidence.[154] Similarly, applying the sufficient disclosure criterion in the selection of cases, the ICC Prosecutor would have to assess whether evidence withheld by a state constitutes 'material evidence' without having the opportunity to review this evidence. Ignorance of the content of the evidence withheld by the state, which would hamper the Trial Chamber in the use of its power to protect a defendant when a state cites the national security exemption, would also encumber the application of the sufficient disclosure criterion in the case selection process.

Moreover, the existence of evidence that a state refuses to disclose may come to the knowledge of the ICC Prosecutor and the Trial Chamber only after the case has been selected for prosecution (typically after the defendant has requested such evidence). Finally, it is always possible that a state denies the existence of particular evidence altogether rather than openly refuse to disclose it.

I submit, however, that although the proposed guidelines for the application of the sufficient disclosure criterion do not completely eliminate fair trial concerns arising from the refusal of a state to disclose evidence in its possession, they go a long way towards allaying such concerns. The erosion factors discussed in Part 3, which are likely to hinder the efforts of the Trial Chamber to protect defendants during trial, are not likely to similarly affect the application of the sufficient disclosure criterion in the selection of cases for prosecution. These erosion factors emanate from concerns of impunity. Acquittals of defendants before the ICC that result from the power of the

[151] See nn 16–20 and accompanying text.
[152] ICC Statute (n 1) art 29.
[153] See United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (entered into force 11 November 1970) 754 UNTS 73.
[154] See nn 74–76 and accompanying text.

Court to draw factual inferences from the refusal of a state to disclose national security evidence may spell effective impunity to perpetrators of the gravest international crimes. Because of the requirement of a speedy trial, such impunity would also result from a Court decision to stay the proceedings in view of fair trial concerns, unless these concerns are resolved and the trial resumed within a relatively short period of time.[155] By contrast, a decision of the ICC Prosecutor to temporarily refrain from selecting a particular case for prosecution, resulting from the application of the sufficient disclosure criterion, would not spell such impunity.[156] This would diminish the effect of the erosion factors examined above.

The proposed guidelines for the application of the sufficient disclosure criterion do not render the provisions of Article 72 of the ICC Statute redundant in relation to national security evidence in the possession of a state. As noted above, the existence of relevant evidence that a state refuses to disclose based on the national security exemption may come to the knowledge of the Prosecutor and the Trial Chamber only during trial. Moreover, defendants often request access to national security evidence not considered 'material evidence' by the Prosecutor, which is in the possession of a state. Article 72 would also govern the efforts of the Court to obtain national security evidence that may enhance the prosecution case.

Applying the proposed criterion in the selection of cases would reduce the number of ICC trials in which refusal by a state to disclose evidence raises fair trial concerns. This, in turn, is likely to enhance the ability of the Court to resist the erosion factors that would currently encumber the exercise of its powers to protect defendants in the face of such concerns.

Finally, making the sufficient disclosure criterion conclusive may induce efforts to facilitate the disclosure by a state of evidence to the ICC on the part of political actors who are in a position to do so and are interested in the international criminal adjudication of the situation in question. Such political actors may include other states, the United Nations through its Security Council, and regional organisations such as the European Union (EU).

When referring situations to the ICC, the UN Security Council had imposed on states directly implicated in these situations, which were not parties to the ICC Statute, a duty to assist the Court.[157] It seems that this duty to assist currently does not extend beyond the obligations undertaken by signatories to the ICC Statute.[158] However, the Security Council may exercise its power under Article 25 of the UN Charter to implement with regard to national security evidence a disclosure regime similar to that set out in the ICTY *Blaškić* case, binding on all states. Commentators agree that in referring a situation to the ICC the Security Council may impose obligations on states to assist the Court, exceeding those stipulated in the

[155] See n 80 and accompanying text.
[156] See nn 149–53 and accompanying text.
[157] See, for example, UNSC Res 1970(2011), 26 February 2011, UN Doc S/RES/1970 (2011), para 5. Resolution 1970 referred the situation in Libya to the ICC. In para 5 of that resolution, the Security Council 'decide[d] that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'.
[158] Akande (n 28) 309.

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ICC Statute, regardless of whether the states are parties to the Statute.[159] This view has also been adopted by the ICC Prosecutor.[160] The former Prosecutors of the ICTY and ICTR have thus stated:[161]

> [I]t must be expected that the Security Council will want to override some statutory limitations by conferring upon the Prosecutor and the Court powers to obtain both cooperation and compliance when it refers situations under Chapter VII of the United Nations Charter to the Court, so that the powers of the Court would not be significantly weaker than those of the ad hoc Tribunals already established by the Council. Frankly, it is difficult to imagine how situations referred to the Court by the Security Council could adequately be investigated with the limited powers conferred upon the Prosecutor by the Statute.

The Security Council may also exercise its powers under Chapter VII of the Charter to coerce a state into complying with its obligations to assist the ICC, although the experience of the ad hoc criminal tribunals established by the Security Council and of ICC investigations conducted pursuant to Security Council referrals indicates that such measures are unlikely.[162]

Pressure applied by a powerful state or by a regional organisation may also promote state cooperation with the ICC. Commentators noted that one of the most effective means of obtaining state cooperation with international tribunals is 'the use of economic aid inducements (where foreign aid is made conditional upon cooperation) and the use of diplomatic and economic sanctions against uncooperative governments'.[163] The use of such measures by the US, and to a lesser extent by the EU, has greatly facilitated the compliance of the republics of the former Yugoslavia with ICTY orders.[164]

5. CONCLUSION

The first President of the ICTY, Antonio Cassese, remarked that '[t]he ICTY is very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions'.[165] This applies equally to the ICC. Yet the sight of a court without arms and legs is not likely to provoke compassion on the part of states whose interests are directly implicated by ICC adjudication or to encourage cooperation by those states. The ICC lacks the power to coerce

[159] ibid 307–08.
[160] Office of the Prosecutor of the ICC, 'Informal Expert Paper: Fact-finding and Investigative Functions of the Office of the Prosecutor, including International Cooperation', 2003, http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281983/state_cooperation.pdf (cited in Akande (n 28) 307).
[161] Louise Arbour and Morten Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach' (1999) 1 *International Law Forum du Droit International* 13, 18–19.
[162] Scharf (n 149) 944 (observing that 'the experience of the ICTY indicates that, even in the most egregious of situations, the Security Council is unlikely to impose sanctions in the event of non-cooperation with the ICC').
[163] Wartanian (n 47) 1303.
[164] ibid 1304–08.
[165] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, 13.

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signatories to the ICC Statute to abide by their obligation to comply with requests from the ICC for evidentiary assistance. Moreover, the ICC Statute exempts states from the obligation to render evidentiary assistance to the Court in cases in which a state cites national security concerns as grounds for withholding information from the Court.

The inability of the ICC to secure state compliance with its requests for evidentiary assistance raises serious fair trial concerns. This article doubts whether these concerns can be addressed effectively during trial by the exercise of the powers vested in the ICC Trial Chamber. The article demonstrates, however, that fairness concerns arising from denial by states of evidentiary assistance to the Court may be allayed through the exercise of ICC prosecutorial discretion in the selection of cases.