

Table of Contents

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

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

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

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

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

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

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

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