National Security, Non-Disclosure and the Right to a Fair Hearing
A reflection on the fair trial aspects and implications of the Open Society Justice Initiative
“Preliminary Draft Principles on National Security and Access to Information”

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The aim of this paper is to identify the key issues raised by the non-disclosure of classified information during judicial proceedings vis-à-vis the right to a fair hearing, and how these issues might be impacted upon by aspects of the 13 April 2011 version of the Open Society Justice Initiative’s Preliminary Draft Principles on National Security and Access to Information.1 The paper considers the issue of access to information from a particular lens: that of the administration of justice. Bearing in mind that control over information in judicial proceedings rests, in the first place, with prosecuting and/or government agencies, much of the focus of the paper is on the rights of the accused in criminal proceedings, or the respondent in non-criminal proceedings. Consideration is also given to the potential ‘oversight’ roles of special counsel and judicial officers during the process of challenges to the classification and content of information that is not disclosed on the grounds of national security considerations. These evaluations are undertaken from an international and regional human rights law perspective, focussing on jurisprudence of the United Nations Human Rights Committee and the European Court of Human Rights. To provide context to these analyses, reference is also made to the use in the United Kingdom of special advocates.

Preliminary Draft Principles

The Preliminary Draft Principles on National Security and Access to Information recognize that the right of access to information may be subject to restrictions, including for the protection of national security (Principle 2). Although the expression “national security” is not defined within international legal instruments, it seems problematic that the Draft Principles do not contain a definition of the term. Despite the fact that the audience of the Principles includes the judiciary, they are also addressed to policy makers and non-judicial oversight mechanisms and might therefore lead to application in an overly broad manner. A suggestion made at the outset of this

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paper, then, is that Principle 2, and the Principles as a whole, be framed to centre themselves around “legitimate national security interests”.

The Preliminary Draft Principles acknowledge that any restriction on the right of access to information may only occur pursuant to a prescription by law, and where necessary (within the specific focus of the Principles) to protect a legitimate national security interest in a democratic society (Principle 3).\(^2\) Expanding on the necessity requirement, Principle 3.3 incorporates the key elements of the international human rights law requirement that any restriction on human rights should not only be necessary, but should also be proportionate, although express reference to the principle of proportionality is not made within the title or text of Principle 3.3.\(^3\) Proportionality means that the constraint must not use more restrictive means than are required to achieve the purpose of the limitation.\(^4\) It also requires proportionality as between the ameliorating effects achieved by the restriction and the negative impact the restriction has upon the right in question,\(^5\) provided of course that the limitation involves the least restrictive means of achieving the objective in question and that its negative impact does not impair the very essence of the right or freedom being affected.\(^6\) The latter provisos are not expressly set out within the Preliminary Draft Principles and their inclusion is addressed in one of the recommendations at the end of this paper. It should be recalled that central to the question of proportionality is the importance of the objective being pursued, as well as the nature of the right being restricted.\(^7\)

Moving from these general principles are those that are of specific relevance to the subject matter of this paper, namely: Principle 7 on partial disclosure; Principles 14A and 14C on information concerning fundamental human rights violations as a category of information calling for a high presumption in favour of disclosure; Principle 17 concerning the provision of the level, duration and justification for classification of information; Principle 22 on the need to give reasons in writing for non-disclosure; Principles 28 and 32 concerning general and judicial oversight of non-disclosure; and Principles 33 and 34 concerning access to information and evidence in judicial proceedings.

As noted in the introduction to the Preliminary Draft Principles, the elements therein are intended to complement and stand alongside the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information.\(^8\) Concerning the implications of non-disclosure on the right to a fair hearing, Principle 20 of the Johannesburg Principles recalls that

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2 See also Part II of the Preliminary Draft Principles, which sets out the proposed principles applicable to determining what information may be legitimately withheld on national security grounds, and information that should be disclosed. See, correspondingly, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, endorsed by the Commission of Human Rights in UN Doc E/CN.4/1996/39 (1996), Principles 1.1-1.3.

3 See further Alex Conte, Human Rights in the Prevention and Punishment of Terrorism. Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand (Berlin: Springer, 2010), 293-295.

4 See: ibid; United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4 (1985), Annex, para 3; and the Johannesburg Principles (note 2), Principle 1.3(b). Compare with Principle 3.3 of the Preliminary Draft Principles states that: “To establish that a restriction on the right to information is necessary to protect a legitimate national security interest, a government must demonstrate that: [...] (ii) the restriction is narrowly drawn”.

5 See Conte (note 3). Compare with Principle 3.3(iii) of the Preliminary Draft Principles, which requires demonstration that: “the harm outweighs the overall public interest in disclosure of the information”.

6 See: Conte (note 3); and the Siracusa Principles (note 4), para 2.

7 Conte (note 3) 295; and the Johannesburg Principles (note 2), Principle 1.3(c).

8 Johannesburg Principles (note 2).
any person accused of a security-related crime (involving the exercise by that person of his or her freedom of expression and/or the release or use of information) is entitled to the full range of the rule of law protections afforded by international law including, but not limited to: the right to disclosure of supporting evidence against him or her; the right to adequate preparation of one’s defence; and the right to cross-examination of witnesses and rebuttal of evidence produced in court.

Rights to a Fair Hearing

The non-disclosure of information on the grounds of national security has significant implications for the administration of justice. The focus of this paper is on the fair trial standards set out within, and relevant jurisprudence concerning, article 14 of the International Covenant on Civil and Political Rights ( ICCPR) and article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The fair trial standards in article 14 ICCPR and article 6 ECHR are of a complex and interlinked nature, aimed at ensuring the proper administration of justice. The overarching right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within paragraph (1) of both articles, and is expressly applicable to criminal and non-criminal (“civil”) proceedings. Paragraphs (2)-(7) of article 14 ICCPR, and paragraphs (2)-(3) of article 6 ECHR, expressly apply to criminal proceedings, although there are in many cases parallel guarantees for civil proceedings, such as the right to legal assistance for example. Having said this, there are some rights within the latter provisions that apply only to criminal proceedings, such as the right to be presumed innocent, and there is a clear division in the structure of article 14 ICCPR and article 6 ECHR in their treatment of civil and criminal proceedings.9

Preliminary issues

Before considering the key fair hearing rights engaged by the non-disclosure of information pertaining to national security, three preliminary points should be made: first, concerning the prominent place held by the right to a fair hearing within a democratic society; next concerning fair trial rights during states of emergency; and, finally, concerning the limited application of procedural rights in expulsion proceedings.

Central role of the right to a fair hearing in a democratic society

Within the preceding consideration of Principle 3.3 of the Preliminary Draft Principles, concerning proportionality, the point was made that central to the question of proportionality can be the nature and importance of the particular right being restricted.

9 As emphasised in Silva v Sweden, Communication 748/1997, UN Doc CCPR/C/67/D/748/1997 (1999), para 4.9; Strik v The Netherlands, Communication 1001/2001, UN Doc CCPR/C/76/D/1001/2001 (2002), para 7.3; and Dombo Beheer BV v The Netherlands [1993] EHRR 49, paras 32-33. The same division is to be found within the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948. Article 10 of the UDHR, which relates to both criminal and civil proceedings, states that: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Article 11, which applies to criminal proceedings only, provides that: “(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence” and “(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

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The right to a fair hearing has been treated, in this regard, as holding a prominent place in a democratic society. In a now infamous decision of the European Court of Human Rights, the Court stated:\(^{10}\)

“The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial… It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court… and that he or she is able to enjoy equality of arms with the opposing side…”.

The Human Rights Committee has similarly stated, in the criminal context, that States parties to the ICCPR have an obligation to ensure that any person accused of a crime is able to effectively exercise the right to a defence.\(^{11}\)

*Fair trial rights during states of emergency*

The *Preliminary Draft Principles* (Principle 10) and the *Johannesburg Principles* (Principle 3) recognise that access to information may be restricted during times of emergency. Both sets of principles reflect the elements of article 4 ICCPR and article 15 ECHR, namely that: (a) restrictions based on the derogation from information rights may only be adopted during a time of public emergency which threatens the life of the nation; (b) where such an emergency is officially and lawfully proclaimed; and (c) so long as the derogating measures (i) are limited to those strictly required by the exigencies of the situation (representing application of the principles of necessity and proportionality in the context of emergency derogations), and (ii) are not inconsistent with the State’s other obligations under international law. Neither set of principles, however, make express reference to one of the four substantive requirements of article 4(1) ICCPR, namely that derogating measures must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin – a list expanded upon by Principle 4 of the *Berlin Declaration on Counter-terrorism, Human Rights and the Rule of Law*.\(^{12}\) Although this is implicit from the requirement that measures must comply with a State’s other obligations under international law – in the case of the lack of express reference to non-discrimination in article 15 ICCPR, this was the approach taken by House of Lords, for example – a better approach is to be explicit on this point.\(^{13}\) Experience shows that derogating measures may specifically target foreign nationals, or disproportionately apply to persons on the basis of

\(^{10}\) *Steel and Morris v United Kingdom* [2005] ECHR 103, para 59. See also (amongst many other decisions referring to the important role of the right to a fair trial in a democratic society): *De Cubber v Belgium* [1984] 14, para 30; and *Belziuk v Poland* [1998] ECHR 17, para 37.


\(^{12}\) International Commission of Jurists, *Berlin Declaration on Counter-terrorism, Human Rights and the Rule of Law* (2004), which provides that “States must not suspend rights which are non-derogable under treaty or customary law. States must ensure that any derogation from a right subject to derogation during an emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national or ethnic origin, property, birth or other status” (emphasis added).

\(^{13}\) *A and Ors v Secretary of State for the Home Department* [2004] UKHL 56, Lord Bingham para 68.
their nationality, ethnicity or beliefs. A recommendation to this effect is to be found at the conclusion of this paper.

Concerning derogation from the right to a fair hearing, and as explained in the UN ECOSOC’s Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of an emergency situation, i.e. an emergency declared under article 4 ICCPR or article 15 ECHR. Even in such situations, however, the Siracusa Principles (and the Human Rights Committee’s General Comment on the right to a fair trial, General Comment 32) explain that the denial of certain fair trial rights can never occur, because “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency”. Of significance to the subject matter at hand, this list includes the right to be informed of the charges promptly, in detail and in a language understood by the defendant, and the right to have adequate time and facilities to prepare the defence.

For the sake of completeness, it should also be recalled that the General Comment 32 adds that, even in emergency situations, the guarantees of a fair trial may never be made subject to derogation if this would circumvent the protection of non-derogable rights. For example, because the right to life is a right that is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must comply with all of the requirements of a fair trial.

**Fair trial rights do not apply to all judicial proceedings**

Although rights of access to and equality before the courts apply whenever the domestic law entrusts a judicial body with a judicial task, it should be recalled that proceedings relating to the expulsion of aliens require fine but significant distinctions to be made concerning the scope of applicable rights. This is an important point to bear in mind since the use of classified evidence in expulsion proceedings is becoming increasingly prominent, as seen, for example, in expulsion proceedings in the United Kingdom under the Special Immigration Appeals Commissions Act 1997.

In the case of expulsion proceedings concerning an alien that is lawfully within the territory of a country, article 14 of the ICCPR and article 6 of the ECHR do not apply, but certain due process guarantees in article 13 of the ICCPR and article 1 of Protocol 7 to the ECHR do apply. Article 13 of the ICCPR – which only regulates the procedure, and not the substantive grounds, for expulsion – requires any decision concerning the expulsion of an alien who is in the territory of a State to be made pursuant to the law. Unless prevented by compelling national security concerns, it also requires that the subject of the expulsion proceedings must be provided with the opportunity: (i) to submit reasons against the expulsion; (ii) to have the case reviewed by the authority competent to determine whether or not the expulsion should proceed (or the person or persons

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14 Conte (note 3) 548.
15 Human Rights Committee, General Comment 32. Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), para 16.
16 Siracusa Principles (note 4), para 70(g).
17 General Comment 32 (note 15), para 6.
18 General Comment 32 (note 15), para 7.
designated by the competent authority to conduct such a review); (iii) and to be represented in such a review. Article 7 of Protocol 7 to the ECHR provides the for the same guarantees, except that it allows limitations not only when this is based on national security concerns, but also if this is necessary in the interests of public order (article 1(2)).

While these elements of due process are not as extensive as the fair hearing guarantees under article 14 ICCPR and article 6 ECHR, the Human Rights Committee and the European Court of Human Rights have commented that these procedural guarantees should be interpreted consistently with the fair trial provisions of each instrument. The Human Rights Committee has explained that this means that: 19

“Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable. All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.”

It should be noted that the rights contained within article 13 ICCPR and article 1 of Protocol 7 ECHR are only applicable to aliens “lawfully” within the territory of a State party. This means that illegal entrants, and aliens that have stayed longer than the law or their permit allows, are not afforded protection under these provisions. However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to expulsion or deportation must be taken in accordance with the guarantees under articles 13 and 1 of each instrument. 21

From a practical perspective, the above discussion means that challenges before national and international courts based on the non-disclosure of information during expulsion proceedings will be treated as non-admissible ratione materiae.

To be fair, the conduct of a hearing must comply with various substantive requirements and “sub-rights”. Of those especially impacted upon by the non-disclosure of information are: the principle of equality of arms; the right to prepare one’s case; the right to effective cross-examination of witnesses; the right to effective counsel; and the right not to be compelled to confess guilt or testify against oneself.

Equality of arms

The principle of equality of arms is intimately linked to the principle of equality before courts and tribunals. The notion of equality is referred to in this broader context within article 14(1) ICCPR, and also within the specific context of criminal proceedings in the chapeaux to article 14(3)

19 General Comment 32 (note 15), para 62; and Maaouia v France [2000] ECHR 455, para 36.
21 General Comment 32 (note 15), para 9.
22 General Comment 32 (note 15), para 9.
ICCPR, in terms of the enjoyment of fair trial rights “in full equality”. 23 Although it is not expressly referred to within article 6 of the ECHR, the principle of equality of arms is a fundamental aspect, and inherent element, of the overarching right to a fair hearing under the ECHR. 24 It has been expressly acknowledged by the European Court of Human Rights that the principle of equality of arms is applicable to criminal and non-criminal proceedings alike. 25 Some have observed, however, that: “For criminal cases, where the character of the proceedings already involves a fundamental inequality of the parties, this principle of ‘equality of arms’ is even more important”. 26

In the case of the non-disclosure of information on the grounds of national security, this type of inherent inequality between the parties is further accentuated. It is the defendant in criminal proceedings, or the plaintiff or respondent in civil proceedings, who will face restrictions on information, either through the provision of redacted documents, or summaries, or through the complete non-disclosure of information. Depending upon the agency concerned and the regulations and practices applicable to it, the agency concerned may give notice of the non-disclosure together with reasons for this. More problematic is the situation where the non-State party in the proceedings (“the civilian litigant”, for want of a better description) is ignorant of the existence of documentation and remains so through lack of notification by the State.

In the trial context, the procedural guarantees offered by Draft Principles 7, 17 and 22 would, if implemented be relevant agencies and if accompanied by suitable oversight mechanisms, considerably assist in ensuring a greater balance in achieving equality of arms between government and civilian parties to judicial proceedings. In this regard, the application of Principle 7 would see the segregation of exempt and non-exempt information to allow for the greatest possible extent of disclosure; Principle 17 would require the clear marking of classification levels, their duration and justification; and Principle 22 would call on the State to give reasons in writing for any non-disclosure of information. Possible oversight mechanisms are considered in the next part of this paper. Access to evidence in judicial proceedings is also a matter inherent to equality of arms, affected by Draft Principle 34 and considered further in the following parts of this paper.

The right to prepare one’s case

Fundamental to the subject at hand is the right to prepare one’s case, which itself involves a range of issues. Some of these are contained within the minimum guarantees applicable to criminal proceedings, i.e. the right to have adequate time and facilities for the preparation of one’s defence (article 14(3)(b) ICCPR and article 6(3)(b) ECHR). Parallel guarantees apply to non-criminal proceedings, based either on the principle of equality of arms or on the overall need to ensure that proceedings are “fair” (as required by article 14(1) ICCPR and article 6(1) ECHR). The right to prepare one’s case has been expressly recognised as an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. 27

23 In similar terms, article 10 of the UDHR (note 9) also guarantees that: “Everyone is entitled in full equality to a fair and public hearing… in the determination of his rights and obligations and of any criminal charge against him”.
24 Ofner and Hopfinger v Austria, Application Nos 524/59 and 617/59 (23 November 1962), 78.
The right to disclosure of information

The right to prepare one’s case must include access to documents and other evidence. In the context of criminal proceedings, the European Commission of Human Rights has held that, read together with the principle of the equality of arms, the right to “adequate facilities” for the preparation of one’s defence in article 6(3)(b) ECHR imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating him or herself or in obtaining a reduction in sentence. In Foucher v France, for example, the refusal by the prosecutor to give access to the case file, and to allow copies of documents contained in it to be made, by a defendant who was representing himself was concluded to prevent the defendant from preparing an adequate defence. In van Marccke v Belgium, however, the Human Rights Committee observed that the right to a fair hearing does not in itself require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence.

Exculpatory material should be understood, the Human Rights Committee has explained, as including not only material establishing innocence but also other evidence that could assist the defence, such as indications that a confession was not voluntary (see further the discussion below). In Yassen and Thomas v Guyana, for example, the author Thomas had been tried and, in the process, appeared at a preliminary hearing. At that preliminary inquiry, the police produced a written statement, alleged to be a confession made by Mr Thomas, and recorded in a pocket book. This pocket book, along with the Police station diary for the relevant days, disappeared between the time of the preliminary hearing of Thomas and the trial of Thomas and Yassen together. The station diary was kept in a storeroom under lock and key. The authors complained that these documents may have contained exculpatory evidence and that their disappearance therefore prejudiced the preparation of the defence case. The Human Rights Committee concluded that the failure to produce police documents at the trial, which had been produced at the preliminary hearing and which may have contained evidence in favour of the authors, constituted a violation of article 14(3)(b), since it may have impeded the authors in the preparation of their defence.

The right to disclosure of information also applies to civil proceedings, not just as between the parties in the proceedings, but also as between the court and the parties. Krcmar and Others v The Czech Republic, for example, concerned proceedings before the Constitutional Court of the Czech Republic about the nationalisation and possible restitution of the applicants’ property. On its own initiative, the Constitutional Court gathered evidence additional to that presented by the parties. Although this evidence formed a basis for the Court’s subsequent decision, the information was not communicated to the applicants. The European Court of Human Rights considered that, by itself, the gathering of evidence by a court is not incompatible with the requirements

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of a fair hearing. The Court concluded, however, that: “the concept of a fair hearing also implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision”.

Grounds for non-disclosure of information about the case

The right to disclosure of information about the case is not an absolute right. Non-disclosure of information may be justified if this is required to pursue a legitimate aim such as protecting national security provided, of course, that the necessity and proportionality aspects of such a restriction are observed (as discussed earlier). In order to ensure that overall fairness is achieved in judicial proceedings, any difficulties caused to a party in the proceedings as a result of the non-disclosure – especially in criminal cases – must be “sufficiently counterbalanced” by the judicial authorities. This is a point explored further within the discussion, below, of oversight in the non-disclosure process.

What should be emphasised at this point is that, to amount to a “sufficient counterbalance”, the procedures adopted by the judicial authorities in non-disclosure cases must ultimately ensure that the defendant, or the respondent in civil proceedings, is able to answer the case against him or her. In Edwards and Lewis v United Kingdom, the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapmed into committing the offence with which he was charged by one or more undercover police officers or informers. This was critical to the defence case because, had this complaint been accepted by the judge, the prosecution would, in effect, have had to be discontinued. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police. The defendants were denied access to the evidence and their lawyers were therefore precluded from fully arguing the case on entrapment. Nor were the defendants informed of the nature of the non-disclosed material. In concluding that this amounted to a violation of article 6(1) ECHR, the European Court of Human Rights did not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms.

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Preliminary Draft Principles

Principle 33 of the Preliminary Draft Principles concerns itself mainly with the general notion of the open administration of justice. Principle 34 more specifically deals with the question of access to evidence by parties to judicial proceedings, reflecting an approach of only permitting exceptional circumstances to allow for the non-disclosure of information in criminal and civil proceedings. Drawing from the preceding overview of the implications of non-disclosure in the context of fair trial rights, two specific qualifications should be added. First, if non-disclosure of evidence occurs, any difficulties caused to a party in the proceedings as a result of the non-disclosure must be sufficiently counterbalanced by the judicial authorities. Secondly, the non-disclosure must never be to the extent that the civilian litigant is prevented from being able to answer the case against him or her, i.e. the non-disclosure does not impair the very essence of the right to a fair hearing.

The right to cross-examine witnesses

In both criminal and civil proceedings, parties to the proceedings have the right to call, examine and cross-examine witnesses on equal terms. Specifically applicable to criminal proceedings, article 14(3)(c) ICCPR and article 6(3)(d) ECHR enunciate a right to “examine, or have examined, the witness against him”.

The right to call and cross-examination

The right to call and examine witnesses does not provide an unlimited right to obtain the attendance of any witness at any time or in any manner. The right is only to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses.

The right requires that a proper opportunity be afforded to question and challenge witnesses that are presented by other parties in the proceedings. In Dugin v Russian Federation, the failure to allow a witness to be summoned for cross-examination was found to violate article 14 ICCPR, particularly in circumstances where the Court gave very considerable weight to the statement of that witness in its decision.

Intimately linked to the effective enjoyment of the right to cross-examination is the right to disclosure of all material relevant to the case. In Peart v Jamaica, for example, it became apparent during the cross-examination by the defence of the main witness for the prosecution that the witness had made a written statement to the police on the night of the alleged offence. The prosecution refused to provide defence counsel with a copy of the statement, and the trial judge subsequently held that the defence had failed to put forward any reason why a copy of the statement should be provided. It transpired that, in the written statement, the witness had named another man as the one who had shot the victim in the proceedings. Even notwithstanding this, the Human Rights Committee took the

view that the evidence of the witness, as the only eye-witness produced at trial, was of primary importance in the absence of any other corroborating evidence. It therefore concluded that the failure to make the police statement available seriously obstructed the defence in its cross-examination of the witness, thereby constituting a violation of article 14(3)(e) ICCPR.\footnote{Peart v Jamaica, Communications 464 and 482/1991, UN Doc CCPR/C/54/D/464/1991 (1995) and CCPR/C/54/D/482/1991 (1995), para 11.5.}

**Anonymous witnesses**

The problems faced by non-disclosure overlap with those posed by the use of anonymous witnesses. In some cases, both problematic issues may present themselves, particularly where reliance is had by the State on intelligence by a non-disclosed operative or informant.

Concerning the potential anonymisation of witnesses, the interests of a witness, including a victim giving information to police or called on to testify at trial, may in limited circumstances require that the identity of the witness remain confidential. This will most often be an issue where there are concerns about the possible intimidation of witnesses, or retaliation against witnesses in the event of their giving evidence against an accused. As explained by the European Court of Human Rights in *Doorson v The Netherlands*:\footnote{Doorson v The Netherlands [1996] ECHR 14, para 70.}

> “It is true that Article 6 [fair trial] does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [privacy] of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled.”

Notwithstanding this explanation, the European Court has taken a very cautious approach to the use of anonymous witnesses.\footnote{Compare this with the recommendation that any decision to grant anonymity to a witness in criminal proceedings should be in accordance with domestic and European human rights law”: Council of Europe Committee of Ministers Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice, para 18. See also Council of Europe Committee of Ministers Recommendation R(97)13 concerning intimidation of witnesses and the rights of the defence, para 12.} The Court has recognised that that the ECHR does not preclude reliance on anonymous informants at the investigative stage of proceedings.\footnote{Kostovski v The Netherlands [1989] ECHR 20, para 44; Doorson v The Netherlands [1996] ECHR 14, para 69; Balsyte-Lidetkiene v Lithuania [2008] ECHR 1195, para 62.} However, as explained in *Kostovski v The Netherlands*, the subsequent use of anonymous statements as evidence sufficient to base a conviction on is a different matter.\footnote{Unterpertinger v Austria [1986] ECHR 15, para 31; Kostovski v The Netherlands [1989] ECHR 20, para 44.} This should be distinguished from the situation of witnesses that are not “key”
witnesses, i.e. where conviction is not based solely or to a decisive degree on the statement of the witness.\textsuperscript{46}

The use of anonymous witnesses at trial will normally present handicaps for the defence. Therefore, while the protection of witnesses may in principle be called for in order to prevent their intimidation, or to protect their lives or privacy, any disadvantages caused to the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities, including proper cautioning of the finder of fact (the trial judge or jury).\textsuperscript{47}

There are three principal concerns raised by the use of anonymous witnesses. The starting point is that an accused must be able to enjoy the right to be given an adequate and proper opportunity to challenge and question a witness, either at the time that the witness gave his or her statement to investigating authorities, or at some later stage in the proceedings, such as at the trial itself.\textsuperscript{48} In \textit{Kostovski v The Netherlands}, the statements and subsequent testimony of anonymous witnesses were given in the absence of the accused and his counsel. By way of counterbalance, the defence was able to submit written questions to one of the anonymous witnesses indirectly through the examining magistrate. However, because the nature and scope of the questions were considerably restricted by reason of the decision to anonymise the statements of the witnesses, the European Court of Human Rights found this to be an insufficient counterbalance to the right to cross-examine witnesses.\textsuperscript{49} More effective measures might include allowing an anonymous witness to give evidence orally by way of video-link, whereby the face and voice of the witness is distorted while still allowing the defence to ask questions in real time. These measures do not necessarily overcome the second and third problems associated with the use of anonymous witnesses.

The second problem caused by the use of anonymous witnesses is that if the defence is not aware of the identity of the person being questioned, it may thereby be deprived of the ability to demonstrate that the witness is prejudiced, hostile, or unreliable.\textsuperscript{50} This is a problematic feature that will almost always exist when use of an anonymous witness is made.

The third problem arises where a witness does not give evidence in person and the trial court is thereby not given the opportunity to observe the demeanour of an anonymous witness. This prevents the finder of fact from forming its own impression of the reliability of the witness.\textsuperscript{51} This may be counterbalanced by the screening off of witnesses in an area visible only to the judge, and jury where applicable.

It should also be noted that, in the case of witnesses that are members of the police force, the approach of the European Court of Human Rights has been even more restrictive. Although the interests of police officers and their families deserve protection, the


\textsuperscript{47} \textit{Doorson v The Netherlands} [1996] ECHR 14, para 76; \textit{Al-Khawaja and Tahery v United Kingdom} [2009] ECHR 110, paras 47-48.

\textsuperscript{48} \textit{Kostovski v The Netherlands} [1989] ECHR 20, para 44.

\textsuperscript{49} \textit{Kostovski v The Netherlands} [1989] ECHR 20, para 42.

\textsuperscript{50} \textit{Kostovski v The Netherlands} [1989] ECHR 20, para 42.

\textsuperscript{51} \textit{Kostovski v The Netherlands} [1989] ECHR 20, para 43.
European Court has said that their use as anonymous witnesses should be resorted to in exceptional circumstances only.\textsuperscript{52} The Court has recognised, however, that it may be legitimate for the police authorities to seek to preserve the anonymity of an officer deployed in undercover activities.\textsuperscript{53} This principle may be particularly relevant in the context of the protection of undercover intelligence operatives, and potentially also of informants.

The right to counsel

The ICCPR and the ECHR take different linguistic approaches to the right to a lawyer in criminal proceedings, although the practical application by the Human Rights Committee and the European Court of Human Rights is almost identical. Under the ICCPR, the right to a lawyer in criminal proceedings is mentioned in two contexts: first, under article 14(3)(b) as a right to communicate with counsel of one’s choosing for the preparation of one’s defence; and, then under article 14(3)(d) as a right to defend oneself in person or through legal assistance of one’s choosing. The effect is that a person charged with an offence should have the right to a lawyer both for the preparation of his or her defence, and also for the conduct of that defence in trial. In contrast, the ECHR only has one reference to the right to a lawyer, in article 6(3)(c), which is the right to defend oneself in person or through legal assistance of one’s choosing. The European Court of Human Rights has read article 6(3)(b) and (c) together to imply a right to a lawyer during the preparation stage of proceedings.\textsuperscript{54}

What is key is that the right to counsel involves a right to effective legal counsel. The European Court of Human Rights has emphasised that the right to “legal assistance” (as it is referred to in both article 6(3)(c) ECHR and article 14(3)(d) ICCPR) is more than a right to the nomination of legal counsel on behalf of an accused. The right to legal assistance must, the Court has explained, be practical and effective in order to provide an adequate defence.\textsuperscript{55}

It is here that the discussion turns to the use of special counsel, or “special advocates”, a specialised form of security-cleared legal counsel first used in the Canada and referred to in the European Court of Human Rights case of \textit{Chahal v United Kingdom} as a potential means of safeguarding the right to a fair trial in circumstances where the State seeks to prevent the disclosure of information on the grounds that the harm caused by disclosure would prejudice national security. Their use in the United Kingdom soon followed the decision in \textit{Chahal v United Kingdom}, in which the European Court had concluded that because Chahal had not been entitled to legal representation, and because he had only been provided with an outline of the grounds on which the Home Secretary sought Chahal’s continued detention pending expulsion, there had been a violation of Chahal’s right to liberty through failure to allow an effective challenge against his (effectively indefinite) detention.\textsuperscript{56} The use of special advocates has since spread to many different type of proceedings, including expulsion proceedings before the Special Immigration Appeals Commission and before ordinary courts in the case of proceedings concerning the imposition of control orders. Both types of proceedings involve the use of closed evidence, material that is submitted on behalf of the Home Secretary and the disclosure of which is

\begin{itemize}
\item \textsuperscript{52} \textit{Van Mechelen and Others v the Netherlands} [1997] ECHR 22, para 56.
\item \textsuperscript{53} \textit{Lüdi v Switzerland} [1992] ECHR 50, para 49; \textit{Van Mechelen and Others v the Netherlands} [1997] ECHR 22, para 57.
\item \textsuperscript{54} \textit{Campbell and Fell v United Kingdom} [1984] ECHR 8, para 98.
\item \textsuperscript{55} \textit{Artico v Italy} [1980] ECHR 4, para 33; \textit{Imbrioscia v Switzerland} [1993] ECHR 56, para 38; and \textit{Duad v Portugal} [1998] ECHR 27, para 38.
\item \textsuperscript{56} \textit{Chahal v United Kingdom} [1996] 54, para 130.
\end{itemize}
considered by her or him to be prejudicial to national security. The role of special advocates in the United Kingdom is further considered below, in the context of oversight mechanisms.

Before leaving the general subject of the right to counsel, and for the sake of completeness, it should be noted that article 14(3)(d) ICCPR and article 6(3)(c) ECHR both speak of the right to defend oneself in person or through legal assistance of one’s choosing. Two remarks can be made in this regard, as they apply to the potential appointment of special counsel to act on behalf of a party to judicial proceedings involving closed material. First, the right to self-representation is not absolute. The Human Rights Committee has recognised that, in the case of a specific trial assessed on its particular merits, the interests of justice may require the assignment of a lawyer against the wishes of an accused.57 The second point is that the right to counsel of one’s choosing is also not absolute. The right may be restricted where a person relies on legal aid, in which case the legally aided person has no right to choose his or her legal representative, nor even to be consulted in the matter.58 The right to counsel of choice may also be restricted in circumstances where the State is entitled to regulate the appearance of counsel before courts and to regulate counsels’ obligation to respect certain principles of professional conduct.59 Against the background of these permissible restrictions, there can be no argument against the imposition – in principle – of State-appointed special advocates where the need for such advocates is shown to be required in the interests of the State and the civilian litigant.

**Rights concerning evidence obtained by torture or ill-treatment**

Principle 14 of the *Preliminary Draft Principles* refers to categories of information with a high presumption in favour of disclosure. Concerning the subject of evidence obtained by torture or ill-treatment, Principles 14A and 14C(2) and (3) are intimately linked, although there is regrettably no express mention of the prohibition against torture or other forms of cruel, inhuman or degrading treatment. Nor is mention made of the inadmissibility of statements obtained through such means during government use of interrogation techniques (Principle 14C(2)). It should be recalled, in that regard, that the inadmissibility of such evidence applies irrespective of whether the torture or ill-treatment occurred at the hands of government agents or as a result of their complicity.

*Exculpatory evidence*

As explained earlier, the right to disclosure of information for the purpose of preparing one’s case includes the right to be provided with exonerating evidence. The Human Rights Committee has explained that exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence, such as indications that a confession was not voluntary. In cases of a claim that evidence was obtained in violation of the prohibition against torture or other forms of cruel, inhuman or degrading treatment, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such


59 Ensslin, Baader and Raspe v Germany, Application Nos 7572/76, 7586/76 and 7587/76 (1978) 14 Decisions & Reports 64.
a claim.\textsuperscript{60} The implications of this are two-fold: first and foremost, the use in judicial proceedings of evidence obtained by torture is prohibited by article 15 of the Convention against Torture (CAT); secondly, in the specific context of the use against a defendant of evidence obtained by torture or ill-treatment, i.e. in obtaining of a full or partial confession, the combined effect of CAT, ICCPR and the ECHR is to prohibit use of that information against the defendant.

\textit{Silence and non-compulsion}

Article 14(3)(g) ICCPR expressly guarantees that any person charged with a criminal offence is entitled not to be compelled to testify against him or herself. This is often referred to as the privilege against self-incrimination and, along with the entitlement not to be compelled to confess guilt, is part of the overall right to silence. In the context of the ECHR, it is implied from the overarching right to a fair trial in article 6(1) of the ECHR. As stated by the European Court of Human Rights in \textit{Saunders v United Kingdom}:\textsuperscript{61}

\begin{quote}
“Although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.”
\end{quote}

As explained by the European Court, protecting an accused person from improper compulsion by the authorities is aimed at contributing to the avoidance of miscarriages of justice.\textsuperscript{62} Particularly relevant in this regard is the prohibition against torture or other forms of inhuman or degrading treatment (article 7 ICCPR and article 3 ECHR) and the right to be treated with humanity when detained (article 10(1) ICCPR). As explained by the Human Rights Committee in its general comment on fair trial rights:\textsuperscript{63}

\begin{quote}
“To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.”
\end{quote}

Despite this, the Human Rights Committee has observed that methods that violate the prohibition against ill-treatment are frequently used. In \textit{Burgos v Uruguay}, for example, Lopez Burgos and several others were forced, under threats of death or serious injury, to sign false statements that were subsequently used in legal proceedings against them.\textsuperscript{64}

\begin{footnotesize}
\begin{enumerate}
\item General Comment 32 (note 15), para 33.
\item Saunders v United Kingdom [1996] ECHR 65, para 68.
\end{enumerate}
\end{footnotesize}
No statements or confessions, or in principle other evidence, obtained in violation of article 7 of the ICCPR or article 3 of the ECHR may be invoked as evidence in any criminal or civil proceedings, including during a state of emergency, even if the admission of such evidence was not decisive in securing the conviction. The only exception to this rule is that a statement or confession may be used as evidence that torture or other treatment prohibited by article 7 of the ICCPR or article 3 of the ECHR has occurred. In such cases, the burden is on the State to prove that statements made by the accused were given by the free will of the accused.

Oversight in the Non-Disclosure Process

Principles 28 and 32 of the Preliminary Draft Principles concern themselves with general and judicial oversight of non-disclosure of information on the grounds of national security. Against that background, and in the context of judicial proceedings, this part of the paper considers judicial oversight, and the use of special advocates as a potential mechanism to assist in the oversight of the non-disclosure process.

Oversight through the use of special advocates

Brief mention has already been made of the historical development of the use of special advocates in the United Kingdom in the case of the use of closed (non-disclosed) material in judicial proceedings. The role of the special advocate in such cases is to take full instructions from the respondent in the proceedings, following which the advocate has the opportunity to view the full, un-redacted, file and may then undertake three main functions:

1. To challenge the admissibility of – and weight to be given to – closed evidence, including that which may have been obtained through torture or ill-treatment;
2. To challenge the non-disclosure itself, i.e. advocating that disclosure is either unnecessary or disproportionate; and
3. To advocate on behalf of the respondent in a closed hearing before the trial judge and based on instructions obtained from the respondent prior to viewing the closed material.

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65 General Comment 32 (note 15), paras 6 and 41, and Human Rights Committee, General Comment 29: States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001) paras 7 and 15. See also Jalloh v Germany [2006] ECHR 721, para 99; Levinta v Moldova [2008] ECHR 1709, paras 101, and 104-105; and Gafgen v Germany [2010] ECHR 759, paras 166-167. See also article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

66 General Comment 32 (note 15), para 41. See also article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ibid).

The use of special advocates had been recognised within the United Kingdom as a mechanism intended to enhance the administration of justice in cases involving the use of closed material, although courts have also noted their weaknesses.\(^{68}\) In principle, the three main functions of the special advocate sit well with the requirement stated a number of times in this paper: that any disadvantage caused by non-disclosure must be sufficiently counterbalanced. Allowing the special advocate to challenge the admissibility of evidence (function 1) fits with the traditional role of effective legal counsel and also with the critical need to enable challenges to evidence obtained by torture or other forms of ill-treatment. The special advocate’s second function enables a check to be had on the classification of information as prejudicial to national security and the State’s consequent non-disclosure of that information to the individual party concerned, thus capable of establishing oversight of the implementation of the procedural guarantees offered by Principles 7, 17 and 22 of the Preliminary Draft Principles. Allowing advocacy based on both open and closed material (function 3) is meant to enable effective legal representation of a litigant to whom full disclosure has not been made.

However, as observed by Lord Woolf in *R (Roberts) v Parole Board*, a special advocate can never be “a panacea for the grave disadvantages of a person affected not being aware of the case against him”.\(^{69}\) The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed the same reservations in his thematic report on fair trial rights in the fight against terrorism.\(^{70}\) Regrettably, despite the positive aims of the functions of special advocates, there are severe limitations in practice upon the ability of special advocates to discharge these stated aims and functions to such an extent that it can be said that the disadvantages of non-disclosure are truly counterbalanced. A report of the UK-based nongovernmental organisation JUSTICE, entitled *Secret Evidence*, is particularly helpful in identifying and explaining those limitations.\(^{71}\)

**Lack of post-disclosure instructions**

The most crucial restriction on the effective functioning of special advocates concerns her or his ability to take instructions from the litigant concerned, i.e. instructions may be taken only before the special advocate is given access to the open file. The aim of this restriction is clear: to prevent counsel from deliberately or unknowingly disclosing prejudicial information.\(^{72}\) However, this restriction severely limits the counterbalancing role of the special advocate. As concluded by the European Court of Human Rights in *A v United Kingdom*:\(^{73}\)

> “…the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate”.

\(^{68}\) See, for example: *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, para 34; and *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, para 35.

\(^{69}\) *R (Roberts) v Parole Board* [2005] 2 AC 738, para 60.


\(^{71}\) JUSTICE, *Secret Evidence* (June 2009). See also:


\(^{73}\) *A v United Kingdom* [2008] ECHR 113, para 220.
This affects all three functions of the advocate. Concerning the third, general advocacy function, the European Court distinguished between three situations of restricted disclosure of information and the ability of the respondent to answer the case. In the first situation, it took the approach that where the evidence is to a large extent disclosed and this open material played the predominant role in the determination, the opportunity effectively to challenge the reasonableness of the Home Secretary's belief will be available. This situation will not be problematic. The European Court also accepted as capable of being consistent with the right to a fair trial a second situation where, notwithstanding that most or all of the underlying evidence remains undisclosed, it will be possible for the person to provide his or her representatives and the special advocate with sufficient instructions if the allegations contained in the open material are sufficiently specific, i.e. even without knowing the detail or sources of the evidence which formed the basis of the allegations, the thrust of the case is effectively conveyed through the open information which is made available. This will require a very careful approach to ensure that the essence of the right to a fair hearing is indeed guaranteed. Most often, in the view of this author, the inability of the special advocate to take post-disclosure instructions will prevent an effective counterbalance in this second situation. In the third scenario, where the open material consists purely of general assertions and the determination of the judicial authority is based solely or to a decisive degree on closed material, the European Court concluded that the procedural requirements of a fair hearing will not be satisfied, even with the use of special advocates.

As to the other two functions of the special advocate, the lack of post-disclosure instructions impacts least on function 2 (challenging the non-disclosure itself) since this is mainly a mechanism akin to ensuring the proper implementation of procedural safeguards. It is nevertheless conceivable that the special advocate may be at a disadvantage through his or her inability to know both sides. Concerning function 1 (admissibility and weight of evidence), this will be more immediately impacted upon by the lack of post-disclosure instructions, particularly as this might pertain to the ability to challenge the evidence of witnesses whose identity has not been disclosed to the litigant.

Other limitations on the role and functioning of special advocates

Many other practical and conceptual restrictions apply to special advocates in the United Kingdom. Notwithstanding the role of special advocates, they do not “act” for the civilian litigant. In fact, a special advocate “owes an applicant no duty of care”. While the author does not question the ethical conduct of any particular advocate, this is problematic from the perspective of the ordinary client-lawyer relationship, albeit that it must be acknowledged that the use of special advocates is not in ordinary circumstances. However, even with the best intent, special advocates face severe practical restrictions on their ability to execute their functions, above and beyond the crucial restriction on their inability to seek post-disclosure instructions. These problems are caused by the very reason of being “special” advocates, i.e. by reason of their security clearance and access to classified information. Special advocates cannot seek independent expertise on any closed material. Research is limited to what the advocate can him or herself do, since assistance by non-security cleared personnel is prohibited. And despite the existence of a small, shared secretariat, the reality is that research will almost invariably be limited to English-language sources. These are not the type of restrictions that can allow the

74 Ibid.
75 Special Immigration Appeals Commission Act; and Special Advocates Support Office Open Manual.
enjoyment by the civilian litigant of truly effective legal counsel in all cases, no matter how much faith one might place on the diligence and ethical standards of individual advocates.

Judicial oversight of the non-disclosure process

A point already made is that, in any situation where non-disclosure occurs, such a restriction must be strictly necessary and must be weighed against the rights of the party involved to ensure that proportionality is achieved. Where non-disclosure is proposed, the trial court must be involved in assessing the necessity and proportionality of the proposed non-disclosure. A procedure whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply – said the European Court of Human Rights in Rowe and Davis v United Kingdom – with the requirements of article 6(1) of the ECHR.

Linked to this point is the need for judicial authorities to act as a counterbalance to the inherent imbalance in the equality of arms where there has been non-disclosure of information. To ensure that overall fairness is achieved in judicial proceedings, any difficulties caused to a party in the proceedings as a result of the non-disclosure – especially in criminal cases – must be “sufficiently counterbalanced” by the judicial authorities. In Jasper v the United Kingdom, for example, the European Court of Human Rights examined a procedure whereby evidence that was too sensitive to be safely revealed to the defence was examined ex parte by the trial judge. The European Court found that the fact that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise between the public interest in maintaining the confidentiality of the evidence and the need of the defendant to have it revealed, was sufficient to comply with article 6(1). The European Court was likewise satisfied that the defence had been kept informed and been permitted to make submissions and participate in the decision-making process (as far as was possible without disclosing to them the material which the prosecution sought to keep secret on public interest grounds).

The question of summaries of information redacted for security concerns was considered by the Human Rights Committee in Ahani v Canada, which involved a hearing concerning the reasonableness of a security certificate issued against the author. The Human Rights Committee noted that the court had taken steps to ensure that the author was aware of, and able to respond to, the case made against him and that he was also able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, and the safeguards introduced by way of providing the person with a redacted summary of the information, the Committee was persuaded that this process was fair to the author and thus found no violation of article 14 of the ICCPR.

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76 Doorson v The Netherlands [1996] ECHR 14, para 70; and Rowe and Davis v United Kingdom [2000] ECHR 91, para 61.
77 Rowe and Davis v United Kingdom [2000] ECHR 91, para 63.
Notwithstanding these positive affirmations of judicial oversight mechanisms, van Harten warns that specialised secret courts can be dangerous and self-sustaining.81 The jurisprudence of the European Court of Human Rights already evidences a long history of judicial deference.82 In the context of closed proceedings in which special advocates challenge the use of secret evidence, van Harten cautions that such proceedings “may condition a judge to favour unduly the security interests over priorities of accuracy and fairness”.83

Conclusions and Recommendations

The foregoing analysis leads to the following conclusions and recommendations concerning the Draft Preliminary Principles and the impact on fair trial rights of non-disclosure of information on the grounds of national security:

1. Draft Principle 2, and the Principles as a whole, should be framed to centre themselves around “legitimate national security interests” rather than retaining an undefined reference to “national security”.

2. Draft Principle 3.3 concerning necessity should make more express reference to the requirement of proportionality, including by reformulating the title of Principle 3.3 to: “Necessary and Proportional in a Democratic Society”. The following more specific amendments are also recommended:

   “To establish that a restriction on the right to information is necessary and proportional to protect a legitimate national security interest, and proportionate to that end, a government must demonstrate that:
   
   “(i) disclosure of the information poses [an identifiable] [a significant] risk of [significant] [serious] [irreparable] harm to a legitimate national security interest;
   
   “(ii) the restriction is narrowly drawn and is the least restrictive means of mitigating against the harm;
   
   “(iii) the restriction does not impair the very essence of the right to information;
   
   “(iv) the harm outweighs the overall public interest in disclosure of the information.”

3. When having regard to the question of proportionality, consideration must be given not only to the harm potentially caused by the disclosure of information, but also to the nature of the right being restricted. The right to a fair hearing has been treated, in this regard, as holding a prominent place in a democratic society. Litigants must enjoy an equality of arms and cannot in any circumstances be denied the opportunity to present their case effectively before the court, i.e. non-disclosure must not impair the very essence of the right to a fair hearing.

4. Draft Principle 10 on states of emergency should be amended to expressly include reference to non-discrimination, as done in article 4(1) of the ICCPR:

   “In time of public emergency that threatens the life of the nation and the existence of which is officially and lawfully proclaimed in accordance with both national and international law,

82 See Conte (note 3) 288-290.
83 Gus van Harten (note 82).
a state may impose restrictions on the right to information but only to the extent required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under national and international law and do not involve discrimination on the ground of race, colour, gender, sexual orientation, language, religion, political or other opinion, national or ethnic origin, property, birth or other status.”

5. The procedural guarantees offered by Draft Principles 7, 17 and 22 would, if implemented be relevant agencies and if accompanied by suitable oversight mechanisms, considerably assist in ensuring a greater balance in achieving equality of arms between government and civilian parties to judicial proceedings. The application of Principle 7 would see the segregation of exempt and non-exempt information to allow for the greatest possible extent of disclosure; Principle 17 would require the clear marking of classification levels, their duration and justification; and Principle 22 would call on the State to give reasons in writing for any non-disclosure of information.

6. As a starting point, the right to prepare one’s case, applicable to both criminal and non-criminal proceedings, demands that the State disclose to the civilian litigant all material in its possession relevant to the case, including potentially exculpatory evidence and information which may assist the accused in obtaining a reduction in sentence, or material obtained by judicial authorities and on which the judicial body has based its decision. Non-disclosure of information may be justified, however, if this is required to pursue a legitimate aim such as protecting national security, provided that the extent of non-disclosure is both necessary and proportional.

7. Although Draft Principle 34 reflects an approach of only permitting exceptional circumstances to allow for the non-disclosure of information in criminal and civil proceedings, it should be amended to make express mention of two qualifications on the non-disclosure of information, namely:

(i) First, if non-disclosure of evidence occurs, any difficulties caused to a party in the proceedings as a result of the non-disclosure must be sufficiently counterbalanced by the judicial authorities.

(ii) Secondly, the non-disclosure must never prevent the civilian litigant from being able to answer the case against him or her.

8. Consideration should be given to including a principle on the use of anonymous witnesses, perhaps as part of Draft Principle 33 or 34, a highly problematic issue that is intimately linked to the non-disclosure of information in the context of judicial proceedings. Any such principle should make it clear that the use of anonymous witnesses should be exceptional and strictly limited to situations where the identity of the witness would prejudice a serious and identifiable harm to national security posed by the disclosure of the witness’ identity, or the life and safety of the witness. There should be a presumption against the use of anonymous witnesses where the witness is key to the government’s case. Any disadvantages caused to the civilian litigant must be sufficiently counterbalanced, i.e. allowing an adequate and proper opportunity to challenge and question the witness, and counterbalancing the disadvantages caused by being deprived of the ability to demonstrate that the witness is prejudiced, hostile, or unreliable. The finder of fact should, wherever possible, be allowed to observe the demeanour of the anonymous witness to allow an impression to be gained of the reliability of that witness. In no circumstances should the non-disclosure of a witness’ identity prevent the civilian litigant from being able to answer the case against him or her.
9. Draft Principle 14 of the Preliminary Draft Principles, especially Principles 14A and 14C(2) and (3), should be amended to make express mention of the prohibition against torture or other forms of cruel, inhuman or degrading treatment, as well as to the inadmissibility of information obtained through such means. Account should be taken, in Principle 14C(2), of the fact that the inadmissibility of such evidence applies irrespective of whether the torture or ill-treatment occurs at the hands of government agents or as a result of their complicity.

10. Special advocates in the United Kingdom are intended as a means of helping to enhance the administration of justice in cases involving the use of closed (non-disclosed) material. In principle, the three main functions of special advocates are in harmony with the requirement that any disadvantage caused by non-disclosure must be sufficiently counterbalanced – those functions being: (i) to challenge the admissibility of and weight to be given to closed evidence, (ii) to challenge the non-disclosure itself, and (iii) to undertake general advocacy based on the combined effect of closed and open material. Despite the positive aim of these functions, there are severe limitations upon the ability of special advocates to discharge these stated aims and functions, most critical of which is the inability of special advocates to seek and obtain post-disclosure instructions. Without a model in which such restrictions are absent, oversight through special advocates is not recommended for wider adoption.

11. Where non-disclosure is proposed by the State, the trial court should be involved in assessing the necessity and proportionality of the proposed non-disclosure. Judicial authorities should consider the extent to which the civilian litigant would be disadvantaged by the non-disclosure and what mechanisms might be put in place to sufficiently counterbalance any disadvantage(s). Where insufficient counterbalances are available, the court should either order the non-disclosed information inadmissible or provide the State with the option of disclosing the information to the civilian litigant. Notwithstanding the positive role of judicial oversight, further consideration should be given to the danger of conditioning judicial officers to unduly favour security interests through their extensive participation in specialised secret courts.