Chapter 10: Indictment, Disclosure of Evidence, and Pretrial Motions

Part 1: The Indictment

Article 193: Joinder of Accused Persons

Persons accused of the same or different criminal offenses committed in the course of the same transaction may be charged jointly in one indictment.

Commentary

The joinder of accused persons in an indictment, or "party joinder" as it is sometimes called, is almost universally provided for in domestic criminal procedure laws. It allows the prosecutor, upon the consent of the competent judge, to file one indictment against one or more persons for related offenses. The practical effect is that the persons are tried jointly. This is a valuable tool to promote judicial economy because it saves the prosecutor from having to present the same or closely related evidence at a number of different trials. It also saves the court time and prevents witnesses from having to undergo the trauma of testifying at different trials. Joinder of persons accused of "the same or different" criminal offenses is permissible where there is some relationship between the alleged criminal offenses. In Article 193, the standard used is whether the persons committed the offenses "in the course of the same transaction." The term "transaction" as defined in Rule 2 of the International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence is "a number of acts or omissions whether occurring in one event or a number of events at the same or different locations and being part of a common scheme, strategy or plan." There is no need for the acts or omissions to have been carried out at the same time. This standard is used in many countries around the world. It implies that there is a logical relationship—known as "connexité," or the "nexus requirement" in some states—between the criminal offenses committed by the accused persons. After the accused persons have been jointly indicted and are on trial, the trial court may order that they be tried separately if the requirements of Article 219 are met.

Article 194: Joinder of Criminal Offenses

Two or more criminal offenses must be joined in one indictment if the series of acts committed together form the same transaction and the criminal offenses were alleged to have been committed by the same person.

Commentary

The joinder of criminal offenses means that all offenses alleged will be tried at one trial rather than at different trials. This is standard practice around the world and has many of the same advantages that joinder of accused persons has. The criterion for joining criminal offenses is the same as that for joinder of accused persons, namely, that the offenses joined in the indictment form the same transaction. The criminal offenses do not have to occur at the same time and place, although this will be indicative of offenses that formed part of the same transaction.

Part 2: Presentation and Confirmation of an Indictment and Disclosure of Evidence prior to the Confirmation Hearing

General Commentary

There are many different models around the world for the presentation and confirmation of an indictment against a person, and the mechanism may differ in a domestic setting depending on the seriousness of the offense of which a person is accused. In less serious cases, a judge may not be required to confirm the charges. The charges may be brought by the police, the prosecutor, or the investigating judge. In more serious cases, the indictment usually needs to be reviewed by a court before the prosecutor can proceed to trial. The court may make the final decision; in some systems, this decision is made by a grand jury. The purpose of examining the indictment pretrial is to ensure that there is sufficient evidence against the accused person to merit a trial taking place. Where there is insufficient evidence, the indictment will be rejected and the suspect (as defined in Article 1[43]) will not become an accused (as defined in Article 1[1]) and will not be tried under the indictment presented to the court.

In some systems, the review of the indictment may be a "paper review." In many legal systems, however, the review is done at a hearing. The nature of the hearing and the depth of inquiry into the evidence vary from state to state. In some states, only the prosecutor and relevant witnesses may be present. The defense is not allowed to be present or to present evidence. In other systems, the defense may be present and may refute evidence introduced by the prosecutor but may not bring evidence itself or call its own witnesses. In yet other systems, both the prosecutor and the defense may be present and both may bring evidence before the court, including witnesses.

The indictment facilitates the right of the suspect to be informed in detail of the charges against him or her, a right provided for under Article 60 of the MCCP.

Under Article 201 of the MCCP, the indictment must be examined by a single judge at a confirmation hearing. Prior to this, the indictment must be formally presented to the court (Article 195) and then forwarded to the defense, who can file a response to the indictment in advance of the hearing. Where the suspect has not waived the right to a confirmation hearing, the competent judge will set a time and date for the hearing and both parties may be present. At the confirmation hearing, the prosecutor presents relevant evidence and witnesses in order to prove that on the balance of probabilities the suspect committed the criminal offenses charged in the indictment. The confirmation hearing is not a mini trial; it is not an adversarial proceeding. The prosecutor plays the main role in presenting evidence, although the suspect may make a statement to the court.

Article 195: Presentation of an Indictment

1. A prosecutor may present a written indictment of the suspect to the competent trial court.
2. The indictment must be filed with the registry of the competent trial court.
3. The written indictment must include:
   (a) the first name, surname, date of birth, place of birth, nationality, and address of the suspect;
   (b) a statement identifying the provisions of the applicable law that the suspect is alleged to have violated;
   (c) the alleged time and place of commission of the criminal offense;
   (d) a complete and accurate description of the legal elements constituting the criminal offense the suspect is accused of;
   (e) a concise statement of the facts upon which the accusation is made; and
   (f) a request for the trial of the suspect.
4. In addition to the indictment, the prosecutor must file a list describing the evidence that supports the indictment with the registry of the competent trial court.

Commentary

Once the prosecutor has completed the investigation of the suspect, and when the prosecutor has gathered sufficient evidence to meet the burden of proof required at the confirmation hearing, he or she will present an indictment to the court. In some states, this is known as "preferring an indictment."

Article 196: Receipt of an Indictment by the Court and Notification of the Suspect

1. Upon receipt of the indictment by the registry, the indictment and the list of supporting evidence under Article 197(1) must be forwarded by the registry to the competent judge.

2. Where the competent judge finds that the indictment does not comply with the provisions of Article 195(3), he or she must return the indictment to the prosecutor to amend the indictment.
3. The prosecutor must amend the indictment within three days and submit the amended indictment to the registry, which must then forward the indictment to the competent judge.
4. The registry must ensure that notification of the indictment is promptly served upon the suspect in accordance with Article 27.
5. The notification must:
   (a) state that an indictment against the person has been presented to the trial court;
   (b) state the name of the competent trial court at which the indictment was filed;
   (c) state the date upon which the indictment was received by the registry of the trial court;
   (d) inform the suspect and his or her counsel, if any, that the defense has the right to submit a response to the indictment within eight working days of receipt of the indictment; and
   (e) inform the suspect and his or her counsel, if any, that the defense can waive the right to a confirmation hearing within eight working days of receipt of the indictment.
6. The notification of the indictment must be accompanied by a copy of the indictment.

Article 197: Disclosure of Evidence to the Defense prior to the Confirmation Hearing

1. The registry of the trial court must forward the following to the suspect in addition to the notification of the indictment and the indictment itself under Article 196:
   (a) a copy of the list of evidence supporting the indictment;
   (b) copies of prior statements made by witnesses and submitted to the competent judge by the prosecutor. Prior statements may be redacted, and any information that may lead to the identification of a witness deleted,

if a witness is subject to a protective measure order or order for witness anonymity that precludes the identity of the witness being disclosed to the defense; and

(c) copies and records of any statements made by the accused person to the police or the prosecutor.

2. Any new evidence or witness statements that will be used in the confirmation hearing that were not forwarded to the suspect at the time of the notification of the indictment under Paragraph 1 must be forwarded to the registry of the competent trial court and subsequently served upon the suspect in accordance with Article 27.

Article 198: Response to the Indictment by the Suspect

1. The defense may file a response to the indictment with the registry of the competent trial court within eight working days.
2. The response to the indictment may include written objections to the indictment, legal and factual observations with respect to the indictment, and any preliminary motions the defense wishes to raise under Article 212.

Article 199: Waiver of the Right to a Confirmation Hearing

1. The suspect may waive his or her right to a confirmation hearing.
2. Where the suspect waives his or her right to a confirmation hearing, the case must proceed to trial without a confirmation hearing if the competent judge finds on the basis of the evidence before him or her that probable cause exists that the suspect committed the criminal offenses set out in the indictment.
3. Where the suspect chooses to waive his or her right to a confirmation hearing, he or she must submit a written request to the competent judge explicitly waiving the right within eight working days of receipt of the indictment.

4. The competent judge must issue a written decision not to hold a confirmation hearing upon the request of the suspect if the competent judge is satisfied, by the written request, that the suspect understands the right to be present at the hearing and the consequences of waiving this right.
5. The competent judge must immediately inform the prosecutor of his or her decision not to hold a confirmation hearing at the request of the suspect and serve a copy of the written decision not to hold a confirmation hearing upon the prosecutor in accordance with Article 27.
6. If the request by the suspect for waiver of the confirmation hearing is rejected, the competent judge must set a time and date for the confirmation hearing.
7. Where the suspect has waived his or her right to a confirmation hearing, the competent judge must automatically confirm the indictment.

Commentary

The suspect may choose to go straight to trial rather than have a confirmation hearing. This occurs usually where the suspect does not contest the evidence against him or her. Where the suspect submits a request for waiver of the confirmation hearing, the judge must, nonetheless, conduct a review of the evidence against the suspect under Paragraph 2 to ascertain whether sufficient evidence against the suspect exists. Where the judge nullifies the request for waiver, the confirmation hearing will proceed and the prosecutor will be required to bring additional evidence to meet the burden of proof.

Article 200: Amendment of an Indictment prior to the Confirmation Hearing

1. Prior to the commencement of the confirmation hearing, the prosecutor may amend the indictment without the leave of the competent judge.
2. Where the prosecutor amends the indictment, the newly amended indictment must be filed with the registry of the competent court.
3. The newly amended indictment must be served upon the suspect and his or her counsel in accordance with Article 27.
4. Where the indictment is amended before the confirmation hearing, the suspect may file a motion at trial under Article 212 for a delay in proceedings to prepare his or her defense with respect to any new matters alleged.

Commentary

Before the indictment has been officially confirmed by the court at the confirmation hearing, the prosecutor may substantively amend it, even after it has been presented to the court. The defense must receive a copy of the newly amended indictment as soon as possible. Not only that, the defense must be given adequate time to study the new indictment and prepare for the confirmation hearing. Where the prosecutor amends the indictment close to the confirmation hearing, the defense may seek to delay the date of the hearing under Article 201. Once the indictment has been confirmed and the trial is pending, the prosecutor cannot make material amendments to it, save with the permission of the court as set out in Article 203.

Article 201: Confirmation Hearing

1. Upon the expiration of eight days after notification of the indictment on the defense or, alternatively, upon receipt of the response of the defense under Article 198, the competent judge must set a time and date for a confirmation hearing. The confirmation hearing must be held within twenty working days thereafter.
2. The prosecutor and the defense must be given notice of the confirmation hearing in accordance with Article 27. Any witnesses must be summonsed in accordance with Article 33. The competent judge must summon the suspect in accordance with Article 29, if he or she is not already in detention, to appear at the confirmation hearing.
3. At the commencement of the confirmation hearing, the competent judge must:
   (a) satisfy himself or herself that the suspect has read, or has had read to him or her, the indictment and that the suspect understands the nature and content of the charges against him or her. If there is a doubt about the suspect's understanding of the indictment, the competent judge must order the prosecutor to explain the indictment to the suspect in a way that he or she can understand it without difficulty;
   (b) ensure that the rights of the suspect, under Articles 54–71 and Article 172, have been respected, particularly the right to legal assistance;
   (c) inform the suspect of his or her right to silence and his or her right not to incriminate himself or herself at the hearing;
   (d) rule on any motions under Article 212, including motions for additional evidence filed by the defense; and

(e) afford the suspect the opportunity to make an admission of criminal responsibility. If the suspect makes an admission of criminal responsibility, the competent judge must proceed as provided for in Article 87.

4. The burden of proof is on the prosecutor.

5. The standard of proof at the confirmation hearing is the balance of probabilities.

6. The suspect, either personally or through his or her defense counsel, may make a statement during the hearing. If he or she chooses to make a statement, the competent judge, the prosecutor, and the counsel for the suspect may ask pertinent questions of the suspect with respect to his or her statement. The suspect is not obliged to respond to any questions posed to him or her.

7. After hearing the statements of the prosecutor and the suspect, either personally or through his or her counsel, the competent judge may confirm the indictment if it is proven, on the balance of probabilities, that the suspect committed the criminal offense or offenses set out in the indictment.

8. The competent judge must dismiss the indictment and order a termination of the criminal proceedings if he or she finds that:

   (a) jurisdiction over the criminal offense cannot be asserted under Articles 4–6 of the MCC;

   (b) jurisdiction over the person in question cannot be asserted under Article 7 of the MCC;

   (c) jurisdiction over the person in question cannot be asserted because the person has been tried for the criminal offense and has been finally convicted or acquitted under Article 8 of the MCC;

   (d) the investigation and prosecution of the criminal offense are barred by the statute of limitations under Article 9 of the MCC;

   (e) there is insufficient evidence that a criminal offense has been committed by the person in question; or

   (f) the person in question has died.

9. Where a judge confirms the indictment of a person who is subject to detention or house arrest, at the end of the hearing the judge must review the detention or house arrest in accordance with Article 188.

10. Where a person is not already detained or subject to house arrest, bail, or restrictive measures other than detention or bail, the prosecutor may file an oral motion with the court for an order for detention, an order for bail, or an order for restrictive measures other than detention. The procedure set out in Article 187 must be followed in determining whether to grant the order.

Commentary

As discussed in the general commentary to this section, an indictment is confirmed via many different models. The standard of proof required at a confirmation hearing also varies from country to country. In some systems, the standard required is a "prima facie case." In others, a "sufficient suspicion" is required. The drafters of the Model Codes considered many options from around the world and, after much discussion, decided upon the inclusion of a judicial hearing at which the prosecutor presents evidence and witnesses in order to prove that "on the balance of probabilities" the suspect committed the criminal offenses alleged. During the course of the confirmation hearing, the defense is entitled to be present.

A secondary purpose of the confirmation hearing that especially applies to detained suspects is to ensure that the competent judge conduct a review and examination of whether the rights of the suspect have been respected. The judge at a detention hearing and a hearing for continued detention, bail, or restrictive measures other than detention also has such an obligation. These hearings give the suspect and his or her counsel the opportunity to make claims regarding the violation of his or her rights or other mistreatment.

Once the confirmation hearing is over, the prosecution and the defense will work to prepare the case for trial. From the defense perspective, the prosecutors must fulfill their disclosure obligations and provide the defense with the materials outlined in Part 3 of this chapter. This enables the suspect and his or her counsel to adequately prepare their defense as required under Article 61.

Paragraph 5: Reference should be made to Article 1(36) for a discussion on the different standards of proof contained in the MCCP and on the meaning of "standard of proof." The standard of proof at the confirmation hearing is that of the balance of probabilities, also called the "preponderance of the evidence." It is the standard usually employed in civil cases. The balance of probabilities standard requires that evidence of convincing force exists, more than just a mere possibility that a proposition is true. Some commentators have stated that the standard is satisfied if there is a greater than 50 percent chance that the proposition is true. Others have stated that the test is met where it is "more probable than not" that the proposition is true or where the evidence brought forward would incline a fair and impartial mind to believe the proposition is true.

Article 202: Duration between the Confirmation Hearing and the Trial

The trial must commence within one month of the confirmation of the indictment.

Commentary

To ensure the accused's right to trial without undue delay under Article 63 and, where an accused person is detained, his or her right to trial within a reasonable time, Article 202 sets a time limit for trial once the indictment has been confirmed. There may be exceptional circumstances where it is necessary for the prosecution or the defense to have a longer time frame within which to prepare for trial. The time limit contained in Article 202 may, exceptionally, be extended under Article 88. Reference should be made to Article 88 and its accompanying commentary.

Article 203: Amendment of an Indictment after the Confirmation Hearing

1. After the confirmation hearing, the prosecutor may make only material amendments to the indictment by filing a motion for the amendment of the indictment under Article 203 with the registry of the competent trial court.
2. The motion for material amendments to the indictment must be forwarded by the registry of the competent trial court to the competent judge.
3. Where the competent judge agrees to the amendment of the indictment, the newly amended indictment must be served upon the accused and his or her counsel in accordance with Article 27.
4. Where the indictment is amended after the confirmation hearing, the accused may file a preliminary motion under Article 212 or a motion at trial under Article 225(1) for a delay in proceedings to prepare his or her defense with respect to any new matters alleged.

Commentary

Article 200 provides that the prosecutor may make any amendments he or she wishes to the indictment prior to the confirmation hearing under Article 201. After the confirmation hearing pursuant to Article 203, the indictment has become official and the prosecutor may only make material amendments to it by way of motion. Material changes would include new charges and factual allegations. The prosecutor may, however, correct typographical errors or other details such as a misspelling by way of motion.

Part 3: Disclosure of Evidence after the Confirmation Hearing and prior to the Trial

General Commentary

Disclosure, also called *discovery*, is the common term used to connote the procedure whereby relevant evidence is transmitted to or served upon either the prosecution or the defense in advance of the trial. The nature and scope of disclosure vary from state to state and depends on the particular legal system. In some systems, evidence is collected by an investigating judge and placed in a "dossier" (case file), to which the defense may have free access (subject to certain restrictions). In other systems, the defense may be served with a "book of evidence," which is a compilation of relevant materials. The prosecutor always has disclosure obligations. Depending on the state, the defense may also have such obligations. In some systems, the defense must disclose any defenses that he or she will raise at trial or the existence of an alibi. In others, the defense has more extensive obligations that may include disclosing evidence it will use at trial. In some systems, the defense is required to disclose the names of witnesses it will call at trial so that the prosecutor can investigate the witnesses, but also for the more practical reason of allowing the judge to estimate the length of the trial.

Obligations about the disclosure of evidence to the defense prior to a confirmation hearing are set out in Article 197.

The general duty to disclose supports the accused's right to defend himself or herself and is a core aspect of his or her right to adequate time and facilities to defend himself or herself, rights protected under Articles 61 and 65, respectively. Furthermore, because the defense is at a disadvantage (it does not have state authority behind it, including a police force and prosecutorial service to investigate the offense), the provision of evidence to the accused is vital to ensure "equality of arms" between the prosecution and the defense, which is an element of the right to a fair trial set out in Article 62.

Article 204: Disclosure and Inspection of Materials in the Possession or Control of the Prosecutor

1. The prosecutor has a duty to provide the defense with an inventory of and to grant access to all relevant materials and evidence that may be used at trial by the prosecutor.
2. The prosecutor also has a duty to provide the defense with an inventory of and access to exculpatory evidence that has not been disclosed under Paragraph 1. Exculpatory evidence is evidence that might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.
3. The inventory of the materials outlined in Paragraphs 1 and 2 and the granting of access to the materials and evidence must be undertaken within a reasonable time prior to the trial.
4. The duty of the prosecutor to provide the defense with an inventory of and access to all materials and evidence outlined in Paragraphs 1 and 2 is a continuing duty. The prosecutor must provide an inventory of and access to any additional materials or evidence as they become available, without unnecessary delay.
5. The right of the defense to an inventory and access to materials and evidence from the prosecutor is subject only to Articles 205 and 206.

Commentary

Article 204 describes two types of disclosure required of the prosecutor. The first type of disclosure, set out under Paragraph 1, relates to the provision of materials and evidence that will be used at the trial by the prosecutor to build his or her case. This may include witness statements (which may be used to refresh the memory of a witness under Article 259), tangible objects (e.g., a murder weapon), photographs of the crime scene, records, books, data, items belonging to the accused person that were seized, and documents. The second type of disclosure, set out under Paragraph 2, relates to the disclosure of exonerating evidence, or evidence that tends to show the innocence of the accused. Such evidence might include, for example, materials that discredit a prosecution witness, that cast doubt upon the reliability of a confession, or that explain or mitigate the accused's actions. Paragraph 2 concerns the disclosure of unused materials, namely, those materials that were collected but will not be used at trial by the prosecutor.

Any evidence relevant to the trial that was not disclosed to the defense prior to the confirmation hearing must be disclosed "within a reasonable period prior to trial." This is to give the defense enough time to review the evidence and prepare for trial. Disclosure after the confirmation hearing should take place as close to the confirmation of the indictment as possible. After that, the prosecutor has a continuing duty to provide the defense with information on and access to newly discovered materials and evidence. This duty continues until the appeal, if any, ends.

During the drafting of this provision on disclosure, the drafters of the MCCP discussed the modality by which disclosure should be affected. One method is for the prosecutor to make copies of all evidence, including, for example, audio- and videotapes of the questioning of the accused, and hand it over to the defense, as is common in some countries. Given the inevitable resource constraints in a post-conflict state, the drafters considered it preferable for the prosecutor to give an inventory, or list, of the evidence outlined under Paragraph 2. The defense is then granted the right to inspect the evidence and materials, most likely at the office of the prosecutor. In order to implement Article 204, provisions need to be made as to when the defense can make copies of evidence and how the inspection of evidence by the defense will be facilitated. Care also needs to be taken in allowing the defense to inspect evidence to ensure that the defense does not have access to evidence that is not subject to disclosure or other pieces of evidence, such as those that contain details of the name of an anonymous witness.

Article 205: Matters Not Subject to Disclosure

1. Reports, memoranda, or other internal documents prepared by the prosecutor in connection with the investigation or preparation of the case are not subject to disclosure.
2. If the prosecutor is in possession of information that has been provided to the prosecutor on a confidential basis and that has been used solely for the purpose of generating new evidence, the initial information and its origin must not be disclosed by the prosecutor without the consent of the person or entity providing the initial information and will not, in any event, be given in evidence without prior disclosure to the defense.

Commentary

Not every element of the prosecutor's case file will be disclosed to the defense. In addition to the restrictions set out in Article 206, Article 205 provides that work products belonging to the prosecutor are not subject to disclosure. Paragraph 2 refers to certain information obtained on a confidential basis that is not subject to disclosure. This includes, for example, information obtained through intelligence agencies. In a post-conflict setting, it may include military intelligence obtained from international military forces. This information is not subject to disclosure where it is used to generate evidence rather than as primary evidence that will be introduced at trial. Usually information intelligence merely gives the prosecutor or police clues as to how to proceed in the investigation rather than provides evidence that they will enter at trial.

Article 206: Restrictions on Disclosure

1. The prosecutor must file a motion where the criteria for disclosure under Article 204 are met, but where the prosecutor nonetheless seeks to restrict the disclosure of the particular piece of evidence on the grounds set out in Paragraph 3(a)–(c) below.
2. Restrictions on disclosure may involve a total restriction on access to the relevant piece of evidence. Restrictions may also involve the delay, limitation, or other regulation of disclosure of the evidence.
3. Taking into account the interests of justice and the rights of the accused, the competent judge may restrict disclosure of evidence through an order for restriction of disclosure where there is substantial risk:
   (a) to the integrity of physical evidence;
   (b) of physical harm to any person; or
   (c) to public safety or national security.
4. Where an order for protective measures under Article 147(1)(b) has been granted, the materials may be redacted to conceal the identity of the witness under threat.
5. Where an order for protective measures under Article 147(1)(d) has been granted, a pseudonym may be used in the materials to conceal the identity of the witness under threat.
6. The name of the protected witness must be disclosed to the defense sufficiently in advance of the trial.

7. Where an order for anonymity under Article 159 has been made, any information that may reveal the identity of the anonymous witness must be removed from any materials provided to the defense.

Commentary

Certain pieces of evidence may meet the disclosure test laid down in Article 204, but the prosecutor may seek to restrict access to them because disclosure will cause a substantial risk to the integrity of the evidence or potential harm to a person or to public safety or national security. Given the restrictions that this provision places on the rights of the accused, it is envisaged that it would be used exceptionally and where no other alternative exists. In some states, rather than fully limit access to evidence, written statements or other evidence is sanitized or edited to remove sensitive information and the edited version is made available to the defense. Some states also have special procedures for disclosure of sensitive information, such as requiring defense counsel to obtain security clearance. (See Colette Rausch, ed., *Combating Serious Crimes in Postconflict States: A Handbook for Policymakers and Practitioners,* p. 103)

Where a protective order has been granted that involves the temporary concealment of the identity of the witness from the defense or the redactment of materials to conceal the identity of the witness, the protective order will already have provided for nondisclosure until a specified time and will serve on its own as a legal means to restrict disclosure. There is thus no need for the prosecutor to file a motion for restrictions on disclosure. Where an anonymous witness order has been granted, disclosure of any evidence that may lead to the identity of the witness being found out will be fully restricted. Once again, the order for witness anonymity will serve as the legal grounds on which the prosecutor can justify nondisclosure of certain evidence related to the anonymous witness.

Article 207: Disclosure of the Names of Prosecution Witnesses to Be Called at Trial

1. The prosecutor must disclose to the defense within a reasonable period of time prior to the trial the names of the witnesses he or she intends to call at the trial.
2. The list of witnesses supplied to the defense under Paragraph 1 may exclude the names of any witnesses whose names cannot be disclosed at the time

because the witness is the subject of an order for witness protection or witness anonymity.

3. After disclosure of the witness list under Paragraph 1, where the prosecutor decides to call a witness that he or she did not know about previously or did not intend to call at the time, the prosecutor must inform the defense as soon as he or she decides to call the witness at trial.

4. Where the defense is informed of a new witness under Paragraph 3, it may file a preliminary motion under Article 212 or a motion at trial under Article 225(1) for a delay in proceedings to prepare his or her defense.

Commentary

Just like at a confirmation hearing, the defense must be aware of the witnesses that will be called against the accused at trial. The defense must also be aware of the names of these witnesses sufficiently in advance of the trial to inquire into their background and to study evidence that these witnesses may give at trial (which will in part be facilitated by access to witness statements). Under Article 64 of the MCCP, the accused has the right to examine witnesses. The accused also has the right to adequate time and facilities to prepare his or her defense under Article 61. According to Amnesty International's *Fair Trials Manual*, "The right of the accused to adequate time and facilities to prepare a defense includes the right to prepare the examination of prosecution witnesses. There is therefore an implied obligation on the prosecution to give the defense adequate advance notification of the witnesses that the prosecution intends to call at trial" (section 22.2).

Article 208: Disclosure Obligations on the Defense

The defense must notify the prosecutor in writing, within a reasonable period prior to the trial, of its intention to:

(a) present an alibi to the alleged criminal offense or offenses set out in the indictment, specifying the place or places at which the accused claims to have been present at the time of the alleged criminal offense or offenses and the names of any witnesses and any other evidence supporting the alibi; or

(b) present grounds for excluding criminal responsibility under Articles 23–26 of the MCC, specifying the names of witnesses, expert witnesses, and any other evidence supporting such grounds.

Commentary

The level of defense disclosure varies from state to state, from zero disclosure through what is known as "reciprocal disclosure" (where the defense's request for disclosure from the prosecutor triggers identical levels of disclosure from the defense). Some commentators have objected to the trend toward defense disclosure on the grounds that it violates the accused's right to silence and right to be free from self-incrimination (Article 57 of the MCCP). In contrast, some argue that increased defense disclosure enhances the efficiency of proceedings and trial management and is beneficial for the innocent accused. Between these two positions lies a middle ground where the defense is required to disclose its intention to present an alibi or to present any of the grounds excluding criminal responsibility (defenses) set out in Articles 23–26 of the MCC. In some systems, the accused will also be required to disclose the names of witnesses it intends to call. The MCCP follows the middle ground, balancing the rights of the accused against the need for efficiency and enhanced trial management.

Article 209: Disclosure of the Names of Defense Witnesses to Be Called at Trial

1. The defense must disclose to the prosecutor within a reasonable period of time prior to the trial the names of the witnesses it intends to call at the trial.
2. After disclosure of the witness list under Paragraph 1, where the defense decides to call a witness that it did not know about previously or that it did not intend to call at the time, the defense must inform the prosecutor as soon as it decides to call the witness at trial.
3. Where the prosecutor is informed of a new witness under Paragraph 2, he or she may file a motion for a delay in proceedings.

Commentary

The nature of the defense's obligation to disclose the names of witnesses to be called at trial is identical to that of the prosecutor's under Article 207.

Article 210: Breach of Disclosure Obligations by the Prosecutor or the Defense prior to the Trial

1. After the confirmation hearing and prior to the trial, the prosecutor or the defense may file a preliminary motion for disclosure under Article 212 in order to compel the other party to comply with its disclosure obligations under the MCCP.
2. Where the prosecutor or the defense intentionally fails to comply with the court order to disclose under Paragraph 1, the court may impose a sanction for noncompliance with a court order under Article 41.

Article 211: Breach of Disclosure Obligations by the Prosecutor or the Defense during the Trial

1. During the trial, where the trial court learns that the prosecutor or the defense has failed to comply with the disclosure obligations in the MCCP or an order of the trial court relating to disclosure, the trial court must order the prosecutor or the defense to disclose the relevant evidence.
2. Where the prosecutor or the defense intentionally fails to comply with the court order to disclose under Paragraph 1, the court may impose a sanction for noncompliance with a court order under Article 41.

Part 4: Preliminary Motions

Article 212: Preliminary Motions

1. Preliminary motions may be raised at any time prior to the commencement of the trial.
2. Either party may file any of the following preliminary motions:
   (a) a motion alleging defects in the form of the indictment;
   (b) a motion seeking severance of accused persons joined in the indictment under Article 193 or criminal offenses joined in the indictment under Article 194;
   (c) a motion for disclosure of certain evidence that has not been disclosed by the prosecutor or the defense as required under the MCCP;
   (d) a motion seeking the suppression of certain evidence;
   (e) a motion raising objections based upon refusal to grant legal assistance under Article 67; and
   (f) a motion seeking the adjournment of the confirmation hearing where the prosecutor has amended the indictment under Article 200.
3. Preliminary motions must be in writing and filed with the registry of the competent trial court.

Commentary

A motion is an application by the prosecutor or the defense to obtain a judicial order in favor of the applicant (see Article 1[32]). Once the trial commences, both the prosecution and the defense may make motions to the trial court. Both parties may also raise motions relating to the period of time since the confirmation of the indictment under Article 201.

Paragraph 2(c): Reference should be made to Articles 204–209 on the parties' disclosure obligations under the MCCP.

Paragraph 2(d): Paragraph 2(d) refers to suppression of certain evidence, which means that the party filing the motion seeks to limit certain evidence being used at trial, for example, because the evidence was obtained illegally. This paragraph may be used to suppress evidence where the evidence derives from a search that was conducted with-

out a warrant or where the police officer who executed the warrant went beyond the scope of the warrant (which is the equivalent of not having a warrant in the first place). A confession obtained through torture or other cruel, inhuman, or degrading treatment may also be targeted for suppression by the defense.