THE FIRST MICHAEL HILL Q.C.* LECTURE
THE PROSECUTION'S DUTY OF DISCLOSURE: THE CASE FOR A GLOBAL STANDARD

PAPER FOR PRESENTATION TO THE INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW 18TH INTERNATIONAL CONFERENCE MONTREAL, QUEBEC, CANADA 8-12 AUGUST 2004

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This invitation to present this lecture while conveyed to me as Chief Justice and I hope as Michael's friend, is regarded as an honour by our entire judiciary. In the year or so that Michael lived and worked in the Cayman Islands in conduct of the defence in what has become known as the *Eurobank*[1] case, he endeared himself to all with whom he came in contact, which can especially be said of the profession and the judges.

Every sentiment expressed here in the first person singular can therefore be expressed in the first person plural. But while we are here to share fond memories, the more appropriate objective and that which Michael would

*Michael Hill Q.C., was one of Britain's most eminent Barristers. He was a founding member of the International Society for the Reform of Criminal Law and immediate past president. He died on August 19, 2003. His illustrious career involved appearances for both prosecution and defence in many notable cases. His very last appearance was in the matter of *R v Donald Stewart, Brian Cunha, Ivan Burges and Judith Donegan* (the *Eurobank* case) in the Cayman Islands. This paper is given in his memory.

[1] *R v Donald Stewart, Brian Cunha, Ivan Burges and Judith Donegan*. Indictment No.6 of 2001. 23 Rulings and judgments were produced in this matter.

most certainly have preferred, is the examination of a legal issue of importance, with the objective in mind of the advancement of the criminal law and the administration of justice.

In selecting that issue, none seemed more appropriate than that which often beleaguered the *Eurobank* trial, adding no doubt to its complexities and length but from which Michael never shrank nor faltered, the undeniable toll upon his declining health notwithstanding: by this we mean the prosecution's duty of disclosure.

The question just exactly what is that duty of disclosure, was raised in various forms throughout the trial. So, for instance the issue arose – was there a duty to provide copies of working drafts of witness statements which showed the development and thought processes which go into the final statement? That became an important issue in that complex case because the drafts revealed in important respects a number of changes of opinion by an expert witness - the liquidator of the bank – as he examined the records of the bank from the point of view of the allegations in the indictment. Yet the drafts were not revealed until well into the trial and well after he had commenced his testimony, because according to those responsible, the view

had been expressed that there was no Cayman Islands rule or practice requiring them to do so.[2]

There were issues over the duty of the prosecution to provide the defence with copies of, or access to, unused materials – whether that duty extended to materials in the custody of the liquidator and so not within the immediate control of the prosecution, although the prosecution had had full access to it.[3]

There were still further disclosure issues and these combining in the ultimate failure of the prosecution to fulfill its obligations in respect of them, resulted in the dismissal of the indictment.

We will describe these issues briefly for you.

Even while presenting a certain former senior member of the bank's staff as a paradigm of due diligence virtue, by showing the jury the seemingly unsolicited suspicious activity reports he had made to the police about certain accounts within the bank; the prosecution failed to disclose that he

[2] *R v Stewart et al* [2002] CILR Note 20.
[3] *In the matter of Euro Bank Corporation* [2002] CILR 15.

had for quite some time been operating within the bank as a mole for the police and had taken such particular interest in the affairs of the bank that what he reported as being suspicious --- influenced by his particular perspective as an undercover adjutant --- would not necessarily have so appeared to his erstwhile colleagues within the bank. They, in no small part due to the reports he had made, were indicted and on trial before judge and jury for being deliberately complicit in activities which he had, unbeknownst to them, reported as being suspicious; but in which they had obliviously continued to be involved by providing banking services. Thus, the defendants were to be judged by the standard of his behaviour by comparison to their own, without ever knowing that he conducted himself as he did because he was an informer. Worse still, it came to light that any material within the possession of the police which could reveal his contact with them was destroyed. This came about as the result of a compact between the prosecution, the police and a certain agency of the United Kingdom Government. That compact involved an agreement that his connection to the latter should be protected and kept secret at all costs, even if that meant misleading the Court.[4]

[4] *R v Stewart et al.* Findings of Fact on the Abuse of Process Application, dated 27th December 2002. Issued 3rd January 2003.

You will appreciate from that summary of the case that we do not begin with a narrative of the *Eurobank* case simply because it has come to be called Michael's swan song -----an expression by the way which he used to describe it to me before leaving Cayman. He explained that he had simply become too weary of them to be taking any more of such complex, stressful and lengthy trials.

We begin with this narrative because it helps to show how complex and multifarious but crucially important is this duty of disclosure. The lesson to be learnt from *Eurobank* is that the vesting of a complete prosecutorial discretion for the fulfillment of that disclosure obligation is not a reassuring or invariably safe principle. *Eurobank*, though an egregious example of the failure to meet the duty, is by no means the worst example. At least there the failure was recognized before the ultimate travesty occurred.

In countless other cases, the failure did not come to light until it was too late.

The thesis of this lecture is therefore, that there should be an acceptable global standard for the fulfilment of the prosecution's duty of disclosure. It is a thesis which we feel certain Michael would have been keen to support.

It recognizes the force of the concept of "equality of arms" which so permeates the current law of fundamental human rights. So vast are the resources of personnel, expertise, science and technology available to the State in the pursuit of its mandate of law enforcement, that unless the duty to disclose is placed firmly and squarely upon the shoulders of the prosecution, the fairness of the processes of criminal justice, the maintenance of that crucial balance between the rights of the accused and the rights of the State, would always be in doubt.

The brief slot available to us on your conference programme allows only for a brief examination of the subject. We have therefore done only a snapshot comparison of the law in selected jurisdictions. We hope you will nonetheless find that the case for reform is clear and compelling.

From our initial consideration of the standards already existing or proposed, there appears no jurisprudential mismatch or barrier to prevent the adoption of a more complete and effective global standard.

It is entirely fitting that we begin with the dicta of the **Canadian** Supreme Court in the leading Canadian case on the subject. That case is *R v. Stinchcombe* [1991] 3 S.C.R 326. At page 333 Justice Sopinka states:[5]

> *"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*
>
> *"I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown*

[5] Citing Rand J. in *Boucher v. the Queen* [1955] S.C.R. 15

for use in securing a conviction but the property of the public to be used to ensure that justice is done."

Similar exhortations have been uttered by the **United Kingdom's** highest Court. The House declared[6]:

" [I]t is "axiomatic" "that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all."

There is, of course, no question that the prosecution's duty of disclosure exists. It is the interpretation of the principle, in particular, with respect to the imposition or acceptance of a broad duty, that has often proved difficult and has resulted in miscarriages of justice.

[6] Citing *R v Horseferry Road Magistrates' Court, Ex .p.Bennett*[1994] 1 A.C. 42 at 68. Most recently adopted by the Appellate Committee of the House of Lords in *R v. H (Appellant)(2003) (On Appeal from the Court of Appeal (Criminal Division)) R v. C (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (Conjoined Appeals)[2004] UKHL 3 at Paragraph 10.*

The House of Lords in *R v. H* (supra) at paragraph 34 stated that: "*It would be unduly complacent to suggest that the guiding principles are uniformly applied as they should be."*

We agree and we believe that one of the causes is that the law remains uncertain and unclear.

In many Commonwealth jurisdictions, the duty is recognised only at common law[7]. In a few it is now overlain by statute. In the 25 Member States of the **European Union** discussion is now taking place as regards minimum standards that would be expected of all Member States as those standards apply to certain procedural rights in the criminal law.

In *Stinchcombe* the accused was convicted after trial for breach of trust, theft and fraud. The defence having been informed of the existence of a statement favourable to the accused sought an order for its production. The order was denied on the ground that there was no obligation on the Crown to disclose the statements. The Alberta Court of Appeal affirmed the conviction without giving reasons. Fortunately, the Supreme Court of Canada was not content

[7] For example, the Cayman Islands.

with that result. In allowing the appeal and ordering a new trial, the Justices provided what is perhaps the most compelling judgment written on the subject under discussion. It would certainly repay the time spent reading it.

The Supreme Court opined that: "*[T]he circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled.…….[and that] legislators have been content to leave the development of the law in this area to the courts."*[8]

In its endeavour to fulfill its duty to settle the law, the Supreme Court sought in clear terms at pages 339-340 to describe the nature of the duty of disclosure. But, as the following extract will show, even this judgment leaves important areas of the duty to be addressed primarily as a matter of prosecutorial discretion. It is an area of discretion which we say should not exist without an automatic right of inspection by defence counsel of any material to be withheld or, if access is not to be given for that inspection, an automatic obligation on the part of the prosecution to apply to a judge for endorsement of their position. The Court said:

[8] Stinchcombe (supra) at Pages 331-332.

"As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the Court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation.

Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be reopened and the Crown may have some discretion to delay disclosure in these circumstances.

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule."

The extent to which that dicta suggests that the very difficult question "to disclose or not to disclose" should be left to prosecutorial discretion is the extent to which we disagree. We suggest that if there is any basis at all for withholding any material or information gathered by the prosecution about a

case, then a judge must decide. Nowhere is the problem more perennially apparent than in the lower or summary courts.

Because it did not fall squarely before them for decision, the Supreme Court of Canada did not seek to settle the law or practice relating to the duty of disclosure in summary or non-indictable cases. They did, however, leave behind the idea that the duty in such cases may be somewhat lower than in more serious indictable cases. They said:

> *" A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings……Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue".*[9]

This idea that the duty of disclosure being somewhat lower and voluntary, has gained strong currency throughout the Commonwealth as the result of a more recent decision of the Privy Council on appeal from Jamaica[10]. And it

[9] *Stinchcombe* (supra) Page 342.
[10] *R v. Vincent and Franklyn* [1993]WLR 862 P.C.

certainly is an idea that has steadfast adherents among the prosecutorial authorities in the Cayman Islands.

This Privy Council case from **Jamaica** bears further witness to our concerns.

In *R v. Ian Vincent and Franklyn*[11], Vincent was charged with offences under the Dangerous Drugs Act. Franklyn was charged with receiving stolen goods, contrary to section 46(4) of the Larceny Act. Both were tried in the Resident Magistrate's Court where the statements of the prosecution witnesses were not disclosed to the defence and, although the prosecution case was outlined at the start of each trial, the defendants did not know the details of the evidence on which the prosecution intended to rely.

The issue in both cases was, therefore, the extent of the obligation on the prosecution to disclose the evidence on which it was proposing to rely prior to the commencement of a summary trial before a resident magistrate.

Normal practice in Jamaica on summary trials is such that no statements by the prosecution witnesses are served on the accused.

[11]Ibid.

Lord Woolfe, delivering the judgment of their Lordships at page 868 para. D, said:

> *" Undoubtedly a defendant will be assisted in preparing his defence if he is provided with copies of statements on which the prosecution proposed to rely prior to the commencement of his trial. It is therefore desirable,* ***where this is practicable,*** *for statements to be provided. Clearly, the more serious and the more complex the proceedings the greater the desirability that statements should be provided and the more likely that it will be practicable to provide the statements.*
> *In the converse situation,* ***where the offence is trivial,*** *to be dealt with summarily, where the issues are simple, the provision of statements before trial is less important."[*Emphasis added].

Obvious concerns arise from this statement. Surely, any criminal offence for which a defendant stands to lose his liberty or have his character and reputation impaired, cannot be described as "trivial".

Such concerns are not ameliorated by Lord Woolfe's rationalisation of the difference in treatment. He sought to make a distinction between three types

of cases: Those which are tried only summarily, cases which may be tried 'either way' and those triable on indictment only. He said at page 868 E-F:

> *" In Jamaica as in England, in the case of offences which are triable only summarily when the offences are properly regarded as being "petty offences," it is not normally practical or necessary in order to obtain a fair trial for the defendant to be served in advance with copies of witnesses' statements. In cases where the offences are being tried on indictment before a jury, again in Jamaica the position is the same as in England and before the trial begins the defendant will receive copies of the depositions or statements of witnesses to be called on behalf of the prosecution. In England in the case of offences triable "either way", that is summarily or on indictment, the position is now governed by the Magistrates' Courts (Advance Information) Rules 1985 (SI 1985 No. 601 Cl.7)). Under these the prosecution, <u>on request</u>, are required to furnish to a defendant as soon as practicable* [sic] *a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings."*[Emphasis added].

Magistrates' Court in Jamaica, as in the Cayman Islands and in many other Commonwealth nations, have the jurisdiction to try some very serious offences including perjury, forgery and drug offences and to impose prison terms ranging from 2 to 5 years.[12] Even recognising this fact, the prosecution still argued in *Vincent's and Franklyn's* case for the practice of not providing witness statements to the defence. In endorsing their position, it was noted by the Privy Council that even the language of the Jamaican Constitution, which mandates a fair trial, did not require that a defendant always be provided with copies of the statements made by the prosecution witnesses.

Taking a different view, one is reminded that no matter how trivial the offence, the dispensation of justice is no cloistered virtue. It is recognised only when it can be seen. And it is unacceptable that mere practicalities -- the cost of photocopying for instance -- should ever be held up as the obstacle to complete transparency.

[12] There is, moreover, no distinction taken in the dicta between those offences tried in the Magistrates' Court at the lower end of the spectrum carrying months rather than years of imprisonment and those at the upper end which may carry maximum terms of imprisonment of many years. As we have seen, in **Jamaica** drug offences, triable summarily, can attract 5 years imprisonment with a provision in the Act for consecutive sentences so that a Defendant may be technically liable for a sentence of 10 years. Fines of JA$500,000 may also apply. In the **Cayman Islands,** offences involving hard drugs triable summarily, can attract, a maximum of up to 15 years for a first conviction and 30 years for a second or subsequent conviction plus an unlimited fine, depending on the amount and type of offence**.** See Misuse of Drugs Law (2000 R) Second Schedule Part B.

In the **Cayman Islands** the relevant disclosure principles are those developed at common law in the UK (prior to the Criminal Procedure and Investigations Act 1996) and by local case law.

In the Cayman's summary courts there is no statutory requirement for the prosecution to give advance notice to the defence of what evidence it intends to call in summary proceedings.

Recent interviews with local attorneys [13] suggest that in 'summary only' and 'either way' matters; the defence counsel tends to receive a summary of evidence, a record of the accused's previous convictions (if any) and the charge sheet but only upon request. It is said to be rare, even for 'either way' offences, for the defence to receive any advance disclosure of witness statements upon which to base mode of trial decisions. Thus, unfortunately, the choice of a Grand (i.e. High) Court trial may be predicated upon concerns over disclosure issues; notwithstanding that a Grand Court trial is far more expensive than a summary court trial and will typically place a defendant at risk of greater sanctions.

[13] Conducted by Deborah Barker, Lecturer, Cayman Islands Law School.

Cayman practice seems to be consistent with the requirement in the UK that **either** copies of witness statements **or** a summary of the facts should be supplied to the defendant in 'either way' offences. However, these are not mandatory and the prosecution will only supply summaries, upon request.

From our survey of the Commonwealth, we discovered that the position in **Australia** equally cries out for reform.[14]

Because of Australia's federal structure there are 8 different trial jurisdictions and therefore 8 different procedural regimes. Some have legislated to impose statutory duties of disclosure[15], while others adhere to the common law. One can only imagine that this must be a very challenging task.

Generally speaking, each State and Territory has its own Director of Public Prosecutions. Disclosure policies followed are all very much dependent upon the police or investigative agency making full disclosure to the prosecutor.

[14] E-mail message of July 21, 2004 from Mr. Damian Bugg Q.C., Director of Public Prosecutions, Commonwealth of Australia.

Recently, there were two unfortunate cases in Australia[16] dealing with disclosure issues. One the fault of the investigative agency and the other a combination of unfortunate mishaps which made the Prosecution service seem complicit.

In both cases the Court held that the failure to properly disclose relevant material had caused prejudice to the accused and imposed a stay on further proceedings pending payment by the prosecution to the defendants of their costs thrown away.

Commenting on the Rules of Evidence and Procedure for the International Criminal Court **(ICC),[17] Human Rights Watch** recommended that "the Rules should clarify that the Prosecutor has a *duty* to disclose information or material which in any way tends to suggest the innocence or mitigate the guilt of the accused or which may affect the credibility of the prosecution evidence." Moreover, it was essential to establish that the Prosecutor's duty, while subject to practical constraints, was proactive in nature and not

[15] For example s.6. Crimes (Criminal Trials) Act 1999. Act No. 35/1999.
[16] R v *Fisher and Broster* [2003] NSWCCA 41*; R v Ulman-Naruniec*[2003] SASC 437
[17] www.hwr.org/campaigns/icc/docs/prepcom-feb99.htm. Human Rights Watch Commentary to the Preparatory Commission on the Rules of Evidence and Procedure for the International Criminal Court.

dependent on the defence requesting the material or the Court ordering it to be disclosed." [18]

This duty corresponds with the accused's statutory right under Article 67(2) of the Rome Statute of the ICC which states that:

> "[T]he Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide."

The challenge was to clearly enshrine in the Rules the obligation to disclose not only witness statements[19] but also all other material and not only "**on request**".[20] Consequently, Rule 77 of the ICC Rules of Procedure and Evidence now provides:

[18] Ibid. B: Disclosure. The Standard for Disclosure. The Duty to Disclose.
[19] Already provided for in Draft Rule 67, now Rule 76.
[20] As provided in Draft Rule 68, now Rule 77.

> "The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in Rules 81 and 82[21], permit the defence to inspect any books, documents photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person."

Thus the position in the ICC is to make the duty of disclosure mandatory and clearly enshrines the obligation to disclose all material. Incorporating as it does the right of the defence to inspect all relevant material, it comes close to the standard which we, in this paper, would commend for your consideration. But we go further yet, to suggest that the right should be to inspect all material, it not being left to the prosecution to say what is relevant and what is not. And where, for one reason or another, there is to be proper prosecutorial objection to this, an impartial tribunal must decide.

[21] PII, Privilege and Safety considerations.

Turning now to the position in **Europe**. For the past year the European Commission has been carrying out a review of procedural safeguards[22] and fairness of proceedings arising from the realization that the judicial authorities of each Member State must have confidence in the judicial systems of the other Member States. The aim is to achieve minimum common standards of procedural safeguards throughout the Member States in respect of persons suspected of, accused of, prosecuted for and sentenced in respect of criminal offences under the **Principle of Mutual Recognition.**

Article 6 of the Treaty on European Union, provides that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)".[23] Fundamental rights were identified to include, “fairness in obtaining and handling evidence (including the prosecution’s duty of disclosure).

[22] Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union/* COM/2003/0075 final*/.

[23] Article 6 (1) ECHR: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Commission's research and consultation, together with the case law of the European Court on Human Rights, shows that the European Convention on Human Rights is implemented to very differing standards in the Member States and that there are many violations of the ECHR.

From the consultation process, the proposal for a **Council Framework Decision** on certain procedural rights in criminal proceedings throughout the European Union[24] has now been derived. Its aim is to enhance fair trial rights generally. Presently, it does not include the right to have evidence handled fairly, as it was recognised that "fairness in handling evidence actually covers many rights and many aspects of the proceedings." Therefore the Commission decided to devote more time and a specific study to this topic.

The Commission through the Law Society of England and Wales has started work on this study. An interim report has been submitted with a final report expected towards the end of October. This will cover, *inter alia*, the right to silence, the right to have witnesses heard, the problem of anonymous witnesses and the right to disclosure of exculpatory evidence.

The intention is to use the study to see how much common ground there is between the legislation and the practice of the 25 EU Member States to see whether a proposal for minimum standards and common practice can be put forward. The Commission is now waiting to see whether Member States will agree to the first "safeguards" proposal - the **Framework Decision**. That will be debated in Council by representatives from the 25 Justice Ministries throughout the autumn.[25]

DISCLOSURE AFTER 9/11

We think that it is important to comment briefly on the new world we now face after the September 11 attacks. In October 2002[26], The General–Secretary of the United Nations, Kofi Annan said of terrorism:

> *"….[I]t is a global threat with global effects; … its consequences affect every aspect of the United Nations agenda - from development to peace to human rights and the rule of law."*

[25] E-mail message 20th July 2004 from Caroline Morgan, European Commission, Luxembourg, Brussels.
[26] http://www.unodc.org/unodc/en/terrorism.html

Having recognised this threat to the fundamental principles of law, order and human rights, the Secretary-General nonetheless stated unequivocally that a weakened commitment to international law as a response to the threat of terrorism would be a victory for enemies of human rights. At the Third Forum for Debate Salamanca 2004[27], he said:

> "*We must also strengthen the institutions we have to enforce the law in individual cases, so that those whose crimes are an affront to our common humanity and to world peace are brought to justice, and so that would-be violators are deterred. That is why the establishment of the International Criminal Court is a landmark in efforts to build peace and respect for human rights, and why the ratification of the Rome Statute by all States would be an equally important milestone for which we should continue to strive.*
>
> *To weaken our commitment to international law would be to hand the enemies of order and human rights a victory that they cannot achieve on their own."*

[27] http://www0.un.org/apps/press/searchsg-terrorAr.asp Press release SG/SM/9381.

We understand that statement as giving clear affirmation to the right to a fair trial according to accepted principles of international law. It declares that they are not to be compromised out of a fearful reaction to the threat of terror. As the great jurist, Lord Atkin, so famously declared:

> "…[*A]mid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace"*[28]

CONCLUSION

We do not dispute the notion that everyone having a responsibility within the criminal justice system must be taken to be aware of what is required of them. What we say is that the system remains fallible as are people upon whom it depends.

In *Stinchcombe*[29] (supra), Justice Sopinka remarked on the fact that in civil trials the element of surprise has long since disappeared and full discovery of documents and oral examination of the parties and even witnesses have become familiar features of the practice. This change, he said, has resulted from acceptance of the principle that justice was better served when the

[28] *Liversidge v. Anderson* [1942] A.C. 206 HL at Pg.243.
[29] At Pg. 333.

element of surprise is eliminated from the trial process and the parties are prepared to address the issues on the basis of complete information of the case to be met. Continuing, he said:

> *"Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory."*

"Fairness", as you are aware, is a constantly evolving concept. Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another".[30]

As with the European Union's method, the aim of any global initiative should indeed be the promulgation of a mandatory minimum standard.

[30] Op. Cit., n. 6 above, *R v. H et al* (supra) at para. 11.

Jurisdictions should remain free to implement the highest level of safeguards they consider appropriate as long as they comply with the agreed minimum.

We say again that the minimum should be the duty to disclose everything in the possession of the prosecution to the defence for inspection. If there is to be objection to that, the objection must be taken before an impartial tribunal to be resolved.

28. Special Recognition must be made of the research of Mrs. Terry Caudeiron, our Judicial Research Analyst, in the preparation of this Paper.