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The Scope of "Public Interest" as a Justification for Non-Disclosure of Evidence by the Prosecution in International Tribunals and Domestic Courts

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
SPECIAL TRIBUNAL FOR LEBANON

ISSUE: THE SCOPE OF "PUBLIC INTEREST" AS A JUSTIFICATION FOR NON-DISCLOSURE OF EVIDENCE BY THE PROSECUTION IN INTERNATIONAL TRIBUNALS AND DOMESTIC COURTS

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I. INTRODUCTION

A. Scope

Taking into account the well-established principle of international human rights law that an accused must be afforded a "fair and public hearing," including the right to examine the prosecution's witnesses and evidence in order to present a complete defense in full equality, this memorandum provides a legal discussion on circumstances in which prosecutors of international criminal tribunals have been able to successfully argue that materials in their possession should not be disclosed to the public, and more importantly, not disclosed to the defense. This memorandum specifically focuses on the scope of the ground of "public interest" as a justification for non-disclosure of evidence in international tribunals, as well as domestic courts.[*]

B. Summary of Conclusions

1. International law ensures the accused a fair and public hearing, including the right to confront and examine the prosecution's witnesses and evidence and present a complete defense in full equality. Thus, tribunal prosecutors have a general duty of disclosure to the defense prior to the trial, and a continuing duty of disclosure of any exculpatory evidence that comes into its possession or knowledge.

The accused's right to a fair and public hearing is well-established in international law under the Universal Declaration of Human Rights ("Universal Declaration"), the International Covenant on Civil and Political Rights ("ICCPR"), and the European Convention on Human Rights ("ECHR"). One of the touchstones to a fair hearing is the accused's right to confront and examine the prosecution's witnesses and evidence in order to present a complete defense in full equality. The principle of a public hearing is recognized as a safeguard to the concept of fairness. However, under the ICCPR, the accused's right to a public hearing is not absolute. The

[*] "On what grounds have prosecutors of international criminal tribunals been able to successfully argue that material should not be disclosed to the defense or the public? What is the scope of the ground of "public interest" as a justification for non-disclosure? How have arguments based on not exposing police methods fared in domestic and international courts (if any) in the past?"

accused's right to present a complete defense specifically implicates the prosecutor's duty to disclose the prosecution's evidence and witnesses to the defense, and the general disclosure obligations of the prosecutor are written into the Rules of Procedure and Evidence for the Special Tribunal for Lebanon ("STL Rules").

2. Contemporary international criminal tribunals are especially unique in that they play host to a wide range of competing interests within the context of each case and must properly balance those interests against the rights of the accused to a fair and public hearing.

The interests of the tribunal itself, the public at-large, and national governments inevitably collide with the accused's general right to a fair and public hearing, including the right of the accused to examine witnesses and evidence on equal footing with the prosecution, and to present a complete defense. The Rules of Procedure and Evidence ("Rules") of the tribunals require the Trial Chamber to balance such competing interests in the interests of justice.

3. Tribunal prosecutors have been successful in arguing that materials should not be disclosed to the defense and/or public when such evidence would prejudice ongoing or future investigations.

Decisions rendered in the International Tribunal for the Former Yugoslavia ("ICTY") and the International Tribunal for Rwanda ("ICTR") have allowed the prosecution to permanently or temporarily redact information from documents subject to disclosure to the defense, and keep materials from disclosure to the public, when such disclosure would prejudice ongoing or future investigations within the tribunal.

4. Domestic jurisprudence from the United States, Canada, and the UK reflects increasing court protection of information that would prejudice ongoing or future investigations, including non-disclosure of law enforcement techniques and police informants.

Common law evidentiary and testimonial privileges have long existed in the United States, Canada, and the UK for police informants. Court recognition of a similar privilege for

law enforcement techniques and methods is more established in the U.S. than in the other two countries. More recently, these countries have codified these common law privileges into statutory law, and simultaneously developed specific procedural mechanisms for balancing these privileges with the rights of the accused.

5. Tribunal prosecutors have been successful in arguing that materials should not be disclosed to the defense and/or public when such evidence implicates the safety or protection of a witness.

In *Tadic*, the ICTY granted the prosecutor's request for anonymous witnesses throughout the course of the trial. However, anonymity is no longer the accepted norm, and witness identities are typically subject to disclosure to the defense at least thirty days prior to trial. Overall, the tribunals have been lenient in finding "exceptional circumstances" in granting prosecutor requests for non-disclosure of witness identities to the public. Applications by prosecutors for witness protective measures require the Trial Chamber to determine, not only if protection is required, but what measures should be implemented if protection is justified.

6. Tribunal prosecutors have been successful in arguing that materials should not be disclosed to the defense and/or public when such evidence is provided to the prosecutor on a "confidential basis."

Rule 70 of the ICTY, ICTR, and the Special Court for Sierra Leone ("SCSL") allows the prosecutor to argue for non-disclosure and/or substantial protective measures for witnesses when such material is provided confidentially. Rule 70 helps facilitate the cooperation of international entities, including national governments, humanitarian organizations, and other third-party evidentiary sources, in coming forward with useful evidence and testimony

7. Tribunal prosecutors have been successful in arguing that materials should not be disclosed to the defense and/or public when such evidence is otherwise "contrary to the public interest."

The ICTY found a public interest that outweighed the interest in having all relevant evidence before the Trial Chamber in *Simic*, which recognized an absolute privilege for International Red Cross employees, and in *Brdjanin*, which recognized a qualified privilege for war correspondents. In addition, in *Blaskic*, the ICTY granted a member of the European Monitoring Mission substantial witness protective measures on the basis of public interest. Arguments for protection for other humanitarian organizations have seen mixed results.

II. FACTUAL BACKGROUND

Contemporary international criminal tribunals, which depend increasingly on witness testimony and intelligence information from outside sources,[1] often face the difficult task of balancing the rights of the accused to a fair and public hearing, with the competing interests of such outside evidentiary sources. The Rules adopted for the ICTY, ICTR, and SCSL have been shaped and developed over time to further the objectives and overall fairness of the tribunals.[2] One major area of the Rules that has received much attention is disclosure; namely, the

[1] *See generally Prosecutor v. Brdjanin*, Decision on the Defence "Objection to Intercept Evidence," Case No. IT-99-36-T, 3 October 2003 (stating "[I]n situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources.") [reproduced in accompanying notebook at Tab 23]; Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477, 479 (2006) (noting that witness testimony and intelligence information "now play the roles formerly held by captured memoranda and signed orders.") [hereinafter "Moranchek"] [reproduced in accompanying notebook at Tab 73].

[2] *See* Rules of Procedure and Evidence of the International Tribunal for Rwanda, adopted by the Security Council on 29 June 1995, U.N. Doc. ITR/3 (1995), as amended on 14 March 2008, *available at* http://www.ictr.org/ENGLISH/rules/index.htm [hereinafter "ICTR Rules"] [reproduced in accompanying notebook at Tab 8]; Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by the Security Council on 11 February 1994, U.N Doc. IT/32 (1994), as amended on 24 July 2009, *available at* http://www.icty.org/sid/136 [hereinafter "ICTY Rules"] [reproduced in accompanying notebook at Tab 9]; Rules of Procedure and Evidence of the Special Court for Sierra Leone, adopted by the Security Council on 16 January 2002, *available at* http://www.sc-sl.org [hereinafter "SCSL Rules"] [reproduced in accompanying notebook at Tab 10].

circumstances and procedures for challenging the general duty of disclosure, and the procedures employed by tribunal judges for balancing the rights of the accused to a fair and public hearing with other competing interests. Domestic courts have also evolved in criminal procedure law dedicated to disclosure of certain evidence, particularly when such evidence implicates a potentially overriding public interest.

The Special Tribunal of Lebanon ("STL") was established by the Security Council in March of 2003 through Resolution 1664, which contains the Statute of the tribunal. The Statute gives the tribunal jurisdiction "over persons responsible for the attack of 14 February 2005, resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons,"[3] in accordance with the provisions of the Statute. Much like the Statutes of the other ad hoc tribunals, the STL Statute empowers the judges of the tribunal with the ability to adopt and amend the STL Rules as they see fit.[4] The recently adopted STL Rules strongly reflect the procedural jurisprudence that has evolved from both international tribunals and domestic courts, and should prove to be successful in assisting the Trial Chamber in balancing the competing interests which will inevitably arise in cases before the tribunal.

III. LEGAL BACKGROUND

A. The Accused's Right to a Fair Hearing in International Law

The accused's general right to a fair hearing under international law is governed by several instruments promulgated by the United Nations ("UN"), the most important of which are the Universal Declaration[5] and the ICCPR.[6] In addition, the ECHR is an important and persuasive

[3] Statute of the Special Tribunal for Lebanon, adopted by the Security Council on 29 March 2006, U.N. Doc. S/RES/1757 (2007), *available at* http://www.stl-tsl.org [hereinafter "STL Statute"] [reproduced in accompanying notebook at Tab 13].
[4] *Id.* at Article 28.
[5] Universal Declaration of Human Rights, Article 10, adopted by the General Assembly of the United Nations on 10 December 1948, *available at* http://www.un.org/en/documents [reproduced

regional treaty that echoes much of what is contained in the UN instruments.[7] The ICCPR states, "In determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a *fair and public hearing* by a competent, independent and impartial tribunal established by law."[8]

One of the touchstones to a fair hearing is the accused's right to present a complete defense.[9] The accused's right to a complete defense is a well-recognized tenet of international human rights law, and stems from the principle of "equality of arms:" that the prosecution and defense should be on equal footing before the Trial Chamber.[10] As a fundamental tenet of international human rights law, the accused's right to present a complete defense is reflected within the STL Statute, which reads in pertinent part:

> In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality. . .[T]o have adequate time and facilities for the preparation of his or her defence. . .; [T]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; and [T]o examine all evidence to be used against him or her during the trial in accordance with the Rules of

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in accompanying notebook at Tab 81].

[6] International Covenant on Civil and Political Rights, Article 14, adopted by the General Assembly of the United Nations on 16 December 1966, *available at* http://www2.ohchr.org/english/law [reproduced in accompanying notebook at Tab 6].

[7] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, adopted on 4 November 1950 by the Council of Europe, *available at* http://www.echr.coe.int [reproduced in accompanying notebook at Tab 3].

[8] ICCPR, Article 14(1) [reproduced in accompanying notebook at Tab 6].

[9] *See* ECHR, Article 6(3)(b) (stating, "Everyone charged with a criminal offence has the following minimum rights. . . to have adequate time and the facilities for the preparation of his defence.") [reproduced in accompanying notebook at Tab 3]; ICCPR, Article 14(3) (stating, "An accused is entitled to minimum guarantees in the conduct of his or her defense in full equality.") [reproduced in accompanying notebook at Tab 6].

[10] GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS, p. 38-9 (2005) [hereinafter "KNOOPS"] [reproduced in accompanying notebook at Tab 64] (citing *Prosecutor v. Tadic*, Appeals Chamber Judgment, ¶ 44, Case No. IT-95-01-T, 15 July 1999 [reproduced in accompanying notebook at Tab 39]).

Procedure and Evidence of the Special Tribunal.[11]

Thus, the right to present a complete defense specifically implicates the idea of disclosure of witnesses and evidence to the defense by the prosecutor.[12] The European Court of Human Rights holds that the right to a fair trial assumes that the prosecution discloses to the defense "all material evidence in their possession, for and against the accused."[13] The Rules adopted by, and frequently amended by the tribunals, dedicate a substantial focus to disclosure obligations and procedures, largely to protect the fundamental rights of the accused.[14]

The prosecutor is under a general duty to disclose to the defense copies of all supporting material which accompany the indictment, copies of all statements made by witnesses and deponents, and must permit the defense to "inspect any books documents, photographs and tangible objects in the prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the prosecutor as evidence at trial or were obtained from or belonged to the accused."[15] In addition, the prosecutor is under a duty to disclose, "[A]s soon as practicable," any exculpatory information in the prosecutor's possession or knowledge.[16] These disclosure obligations written into the STL Rules, which occupy a relatively large focus in the Rules, stem from the "equality of arms" principle, and the established tenets of international law which afford the accused the right to present a complete defense.[17]

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[11] STL Statute, Article 16(4)(b), (e), (f) [reproduced in accompanying notebook at Tab 13].
[12] *See* KNOOPS at 159 [reproduced in accompanying notebook at Tab 64].
[13] *Rowe and Davis v UK*, App. No. 28901/95, 30 Eur. H.R. Rep. 1, ¶ 60 (2000) [hereinafter "*Rowe and Davis*"] [reproduced in accompanying notebook at Tab 14].
[14] *See* ICTY, ICTR, and SCSL Rules 66, 68 [reproduced in accompanying notebook at Tabs 9, 8, and 10].
[15] Rules of Procedure and Evidence of the Special Tribunal for Lebanon, adopted by the Security Council on 20 March 2009, U.N. Doc. STL/BD/2009/01 (2009), as amended on 5 June 2009, *available at* http://www.stl-tsl.org/sid/48 [hereinafter "STL Rules"] [reproduced in accompanying notebook at Tab 11].
[16] *Id.* at Rule 113.
[17] KNOOPS at 159 [reproduced in accompanying notebook at Tab 64].

B. The Accused's Right to a Public Hearing in International Law

The benefits to the accused of a right to a public hearing are not a mystery. The right is a well-established tenet of international law and is recognized as a safeguard to the concept of fairness. The ICTY states, "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial, the guarantee of which is one of the fundamental principles of any democratic society."[18] A criminal trial that is subject to immediate review in the court of public opinion serves as an effective restraint on the possible abuse of judicial power.

The accused's right to a public hearing is protected within the Statutes and Rules of the tribunals. The STL Statute states, "The judgment shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber and shall be delivered in *public*. It shall be accompanied by a reasoned opinion in writing, to which any separate or dissenting opinions shall be appended."[19]

However, while Article 10 of the Universal Declaration, Article 14 of the ICCPR, and Article 6 of the ECHR secure the accused's right to a "fair and public hearing," a right that is reiterated throughout the tribunal doctrines, the accused's right to a "public" hearing is not necessarily guaranteed.[20] Article 14(1) of the ICCPR states:

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[18] *Prosecutor v. Tadic*, Decision on Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 32, Case No. IT-95-01-T, 10 August 1995 (citing *Sutter v. Switzerland*, 74 Eur. Ct. H.R. (ser. A) (1984) [reproduced in accompanying notebook at Tab 15]) [hereinafter "*Tadic* Decision"] [reproduced in accompanying notebook at Tab 38].

[19] STL Statute, Article 23 [reproduced in accompanying notebook at Tab 13]; *See also* STL Rule 136 (establishing the general rule that all proceedings before the tribunal "shall be held in public.") [reproduced in accompanying notebook at Tab 11].

[20] Moranchek at 495 (stating, "[C]losed sessions and non-disclosure of witnesses' identities to the public and the media are familiar to most national law systems and do not in any specific sense jeopardize the fairness of a trial. Neither Article 14 of the ICCPR, nor Article 6 of the EHCR, nor similar instruments consider closed trials to be a violation of the rights of the accused, even if the entire proceeding is held in camera.") [reproduced in accompanying notebook at Tab 73].

> The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[21]

These limitations on the accused's right to a public hearing are also reflected in the Rules of the tribunals.[22]

C. Competing Interests in International Criminal Tribunals

International criminal tribunals, which are designed to seek justice on an international stage in the face of the most serious and egregious war crimes, crimes against humanity, genocide, and terrorist attacks, and which must often survive on the assistance of outside evidentiary sources, are by their nature, very unique. They are especially unique in that they play host to a wide range of interests within the context of each case.

The tribunal itself has an interest in furthering its own criminal justice system. Like any court of law, the tribunal seeks justice. It maintains the "[G]eneral purpose of protection and peace of criminal proceedings to restore legal order by ascertaining facts and circumstances and punishing the offender."[23] Where tribunal laws and procedures remain a continual work in progress, the tribunal also focuses on maintaining legitimacy.[24] The international community depends on the tribunal to succeed, and that persons accused of violations of humanitarian law be

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[21] ICCPR, Article 14(1) [reproduced in accompanying notebook at Tab 6]; *See also* ECHR, Article 6(1) [reproduced in accompanying notebook at Tab 3]; Moranchek at 495 [reproduced in accompanying notebook at Tab 73].
[22] *See* ICTY, ICTR, and SCSL Rules 53(A), 79 [reproduced in accompanying notebook at Tabs 9, 8, and 10]; STL Rules 74, 96, 137 [reproduced in accompanying notebook at Tab 11].
[23] Herwig Roggemann, *National Security and Protection of the State in National and International Criminal Procedure: Systematic and Comparative Aspects*, p. 8, *in* NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE (Herwig Roggemann and Petar Sarcevic eds., 2002) [hereinafter "Roggemann"] [reproduced in accompanying notebook at Tab 74].
[24] Moranchek at 495 (noting that "[W]idespread public acceptance of verdicts is half the battle.") [reproduced in accompanying notebook at Tab 73].

brought to trial and punished if found guilty. Additionally, the tribunal seeks to educate the international community.[25]

Aiding the tribunal's interest in furthering its own justice system are overriding public interest principles such as victim / witness protection and confidentiality of information and sources. Victim and witness protection furthers the criminal justice system by providing safety against potential reprisal or revenge for those willing to come forward as plaintiffs (in the case of victims), and in exchange for useful testimony (in the case of witnesses). The promise of confidentiality furthers ongoing investigations by protecting the lives of those who come forward with pertinent information.

Because the tribunals increasingly require the cooperation of national governments and other international entities to provide useful evidence and testimony, the national government or international entity has interests in protecting certain security, intelligence, and/or police technique information. The rationales for this interest are similar to those for witness protection or confidentiality: protection for the well-being of humanity, and the furtherance of criminal justice; in this instance, by not jeopardizing ongoing and future investigations.

D. Competing Interests in International Tribunals vs. The Accused's Right to Present a Complete Defense

The interests of the tribunal itself, the public at-large, and national governments inevitably collide with the accused's general right to a fair and public hearing, including the right of the accused to examine witnesses and evidence on equal footing with the prosecution, and to present a complete defense. In certain circumstances, a specified competing interest allows for an exception to the prosecutor's general duty of disclosure to the defense. Generally, prosecutors at the ICTY, ICTR, and SCSL, operating under similar procedural framework at each tribunal, have

[25] *Tadic* Decision at ¶ 32 [reproduced in accompanying notebook at Tab 38].

been successful in arguing that materials should not be disclosed to the defense and/or the public when such evidence: 1) prejudices ongoing or future investigations; 2) implicates the safety or protection of a witness; 3) is provided on a "confidential basis;" 4) is otherwise contrary to the "public interest;" or 5) affects the security interests of a national government or international entity.

These general exceptions are only found in the Universal Declaration, the ICCPR, and the ECHR with respect to non-disclosure to the *public*.[26] However, it is also well-established in both international and domestic courts that circumstances may exist in which non-disclosure of material to the *defense* is also appropriate. The European Court of Human Rights states, "[I]n any criminal proceedings there may be competing interests, such as national security, or the need to protect witnesses at risk of reprisals, or keep secret police methods of investigation, which must be weighed against the rights of the accused."[27] However, the court notes that any measures restricting the rights of the defense to disclosure must be "strictly necessary" to be permissible under Article 6(1).[28] These general exceptions to disclosure are also embedded into the Rules of the tribunals.[29] The Rules empower the Trial Chamber with the duty of balancing the competing interests, and ultimately, with the authority to decide what information is subject to non-disclosure to the defense, and what information must be disclosed.[30]

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[26] See *infra* note 21 and accompanying text.
[27] *Rowe and Davis* at ¶ 61 [reproduced in accompanying notebook at Tab 14].
[28] *Id.*
[29] *See generally* STL Rules 115-18, 162, 164 [reproduced in accompanying notebook at Tab 11]; ICTY and ICTR Rules 66(C), 69, 70 [reproduced in accompanying notebook at Tabs 9 and 8]; SCSL Rules 66(B), 69, 70 [reproduced in accompanying notebook at Tab 10]; Rome Statute of the International Criminal Court, Article 72, adopted by the Security Council on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm [reproduced in accompanying notebook at Tab 7].
[30] STL Rule 116 (demonstrating that the prosecutor must "apply" to the Trial Chamber) [reproduced in accompanying notebook at Tab 11]; *Rowe and Davis* at ¶ 63 (holding a violation of Article 6 when the prosecution itself assessed the importance of concealed information, and

Thus, while the accused's right to a fair and public hearing is a well-established principle of international criminal law, it is also well-established that the accused's right to full disclosure of evidence is not absolute. Judges of contemporary international criminal tribunals must undertake the difficult task of balancing the accused's right to full disclosure of evidence in preparation of a complete defense with the competing interests in the case which call for non-disclosure. Ultimately, the question as to which conflicting legal values, political objectives, and societal interests should be given priority is still an open debate in national legal systems and international procedural law, and "[M]ust be decided on the basis of the facts and circumstances of each case."[31]

IV. LEGAL DISCUSSION

The general grounds upon which the prosecution may argue to the Trial Chamber to be relieved of its duty to disclose material to the defense and/or public under a "public interest" justification are established in STL Rule 116, which reads in pertinent part:

> Where information in the possession of the Prosecutor is not obtained under or otherwise subject to Rule 118, and its disclosure would ordinarily be required under Rule 110 or 113, but such disclosure *(i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest*, the Prosecutor may apply ex parte to the Trial Chamber sitting in camera to be relieved in whole or in part of an obligation under the Rules to disclose that material.[32]

A. Protection for Ongoing or Future Investigations

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weighed it against the public interest, without first notifying the trial judge) [reproduced in accompanying notebook at Tab 14].

[31] Roggemann at 9 [reproduced in accompanying notebook at Tab 74].

[32] STL Rule 116(A) [reproduced in accompanying notebook at Tab 11]; *See also* ICTY and ICTR Rule 66(C) [reproduced in accompanying notebook at Tabs 9 and 8]; SCSL Rule 66(B) [reproduced in accompanying notebook at Tab 10].

One recurring "public interest" argument made by prosecutors of international criminal tribunals and domestic courts for the non-disclosure of otherwise relevant evidence to the defense and/or public is that disclosure would prejudice ongoing or future investigations. The scope of this argument includes non-disclosure of police methods and informant identities. The public interest rationales for such protection are numerous. The most compelling argument is, if law enforcement and intelligence gathering agencies are required to produce information as to their methods and techniques (including, among other things, surveillance such as wire-tapping, satellite reconnaissance, and espionage[33]) the technique would thus be revealed to the public and no longer hold its value in future operations. Second, disclosure of such information could also educate criminals on how to employ such techniques themselves and/or counter such techniques through other means.[34] Additionally, revealing such techniques might also endanger the lives of current and future law enforcement officers.[35]

1. International Tribunals

In an important decision from the ICTY, the prosecution argued that disclosure of a videotape of the arrest of the accused to the public would endanger future operations by revealing methods and techniques generally utilized in the execution of arrests.[36] In doing so, the prosecution submitted that "the videotape be watched in closed session, and not form part of

[33] *See* Kosta Cavoski, *Unjust from the Start…The Hague Tribunal, Part III: The Illegal Basis of the War Crimes Tribunal*, p. 8, *available at* http://emperors-clothes.com/articles/cavoski/c-3.htm [reproduced in accompanying notebook at Tab 66].
[34] *See, e.g., United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986) [hereinafter "*Van Horn*"] [reproduced in accompanying notebook at Tab 58].
[35] *See, e.g., Hicks v. United States*, 431 A.2d 18 (D.C. 1981) [hereinafter "*Hicks*"] [reproduced in accompanying notebook at Tab 52].
[36] *Prosecutor v. Mrksic*, Decision on Prosecutor's Motion to Modify Order Relating to Videotape of the Arrest of the Accused and Motion for Non-Disclosure of the Contents of the Videotape, ¶ 17, Case No. IT-95-13/1-PT, 26 September 1997 [reproduced in accompanying notebook at Tab 34].

the public record."[37] The Trial Chamber noted that because this was the first time that United Nations Transitional Authority in Eastern Slavonia, Baranja, and Western Sirmium ("UNTAES") forces undertook an arrest on behalf of the tribunal, and because States themselves had continually failed to make timely arrests, the methods of the UNTAES would be of "immense interest to those who seek to evade capture."[38] In addition, the defense failed to demonstrate any reasonable benefit to its case on allowing the public to view the videotape.[39] Thus, the Trial Chamber granted the prosecution's motion on the basis that the videotape would prejudice ongoing or future investigations if released to the public.[40]

Similar situations have previously arisen before the ICTR. In one instance, the prosecution sought to be relieved of its duty to disclose nine witness statements to the defense which identified potential new targets for investigation by the prosecutor.[41] In granting the request for redaction of the prejudicial information, Trial Chamber II ruled that relief from disclosure "is only authorised as long as such disclosure is prejudicial to its investigations, but ceases thereafter."[42] Thus, while requiring the immediate disclosure of the portions of the witness statements not subject to redaction,[43] the Trial Chamber II did not make a specific ruling on whether the unredacted disclosure of the witness statements needed to be disclosed to the defense prior to the date of the witness's testimony.[44]

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[37] *Id.*
[38] *Id.* at ¶ 19.
[39] *Id.* at ¶ 20.
[40] *Id.*
[41] *Prosecutor v. Nyiramasuhuko*, Decision on the Prosecutor *Ex-Parte* Motion Pursuant to Rule 66(C) to Be Relieved of Obligation to Disclose Certain Documents, Case No. ICTR-98-42-T, 31 May 2002 [reproduced in accompanying notebook at Tab 44].
[42] *Id.*
[43] *Id.*
[44] *But see Prosecutor* v. *Nahimana*, Decision on the Prosecutor's Application for Continued Temporary Redaction of One Portion of the Transcripts of Witness X Pursuant to Rule 66(C) of the Rules of Procedure and Evidence, Case No. ICTR-99-52-T, 6 February 2002 (granting

In a second instance, the prosecution sought to be relieved of its duty of disclosure to the defense of a videotape, arguing that the videotape would prejudice further or ongoing investigations by revealing to the defense the identities of certain Rwandan authorities assisting it in the course of its work, and that this would have an adverse effect on the prosecutor's relationship with the Rwandan authorities.[45] Ultimately, the Trial Chamber ruled that the videotape did not prejudice further or ongoing investigations, and ordered its immediate disclosure to the defense.[46] However, the Trial Chamber ordered the defense to keep the videotape confidential as to the public.[47]

2. Domestic Courts

The United States, the UK, and Canada have long-standing common law privileges for police informants and other sensitive information related to law enforcement techniques and methods. Each country has codified its laws related to such privileged information, and most recently, has developed certain procedural laws to assist courts in dealing with privileged materials. Overall, each country has demonstrated increasing court protection of such materials, in the furtherance of effective law enforcement at every level of government.

a. United States

i. "Law Enforcement Privilege"

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continued redaction of a witness statement that identified another target of the prosecutor's investigation, but requiring the unredacted disclosure of the statement "before the testimony" of the witness) [reproduced in accompanying notebook at Tab 45].

[45] *Prosecutor v. Kajelijeli*, Decision on the Motions of the Parties Concerning the Inspection and Disclosure of a Videotape, ¶ 4, Case No. ICTR-98-44A-T, 28 April 2003 [hereinafter "*Kajelijeli* Decision"] [reproduced in accompanying notebook at Tab 41].

[46] *Id.* at ¶ 18.

[47] *Id.* at ¶ 20; *See also Prosecutor v. Karemera*, Decision on Motions to Disclose a Prosecution Witness Statement and to Unseal Confidential Documents, Case No. ICTR-98-44-T, 25 October 2006 (granting the non-disclosure to the defense and the public of a document that contained information which is part of a State's investigative file) [hereinafter "*Karemera* Decision"] [reproduced in accompanying notebook at Tab 42].

The United States recognizes protection for ongoing and future investigations under the common law in what is typically called the "law enforcement privilege." The general rationale for the privilege is to safeguard sensitive information related to law enforcement investigations.[48] The privilege is qualified, as the entity asserting the privilege must meet certain criteria, and the court must weigh the rights of the accused to present a complete defense with the public interests in protecting human life and furthering ongoing and future criminal justice.[49]

The genesis for the common law privilege began with a court-recognized privilege for police informants.[50] The public interest rationale in such a privilege is to protect the life and health of the public by preserving their anonymity in coming forward with knowledge of crimes and other useful information that aids law enforcement.[51] However, the contents are only privileged if they reveal, or "tend to reveal" the informer's identity, or if they are not "relevant and helpful to the defense of an accused."[52] Since *Roviaro* laid the groundwork for the recognition of a "public interest in effective law enforcement,"[53] the law enforcement privilege has evolved over time to include many more types of protection.

Over the past thirty years, the law enforcement privilege has expanded to include the location of observation posts,[54] the nature and location of electronic surveillance equipment,[55]

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[48] Alyssa B. Minsky, *Case Comments: First Circuit Decides Qualified Federal Law Enforcement Privilege Outweighs State's Prerogative to Enforce Criminal Code,* XLI SUFFOLK U. L. REV. 313, 317 (2008) [reproduced in accompanying notebook at Tab 72].
[49] *See* Jayme S. Walker, *The Qualified Privilege to Protect Sensitive Investigative Techniques from Disclosure,* THE FBI LAW ENFORCEMENT BULLETIN (May 2000) (noting that the court must take into account "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors" in making a disclosure determination) [hereinafter "Walker Article"] [reproduced in accompanying notebook at Tab 78].
[50] *Roviaro v. United States*, 353 U.S. 53, 77 (1957) [hereinafter "*Roviaro*"] [reproduced in accompanying notebook at Tab 54].
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *See Hicks* at 21 [reproduced in accompanying notebook at Tab 52].

and most recently, has expanded to a general protection for all "law enforcement methods and techniques"[56] from exposure. U.S. Circuit Courts have continued to employ the *Roviaro* balancing test, in which the privilege must give way if the defendant can demonstrate a sufficient "necessity" for the information in preparation of its defense.[57]

The law enforcement privilege extends not only to local and regional police activities, but also extends to federal law enforcement and intelligence gathering activities, including those of the FBI and CIA.[58] The most recent decisions that implicate the law enforcement privilege at the national level recognize the increasing need to protect sensitive materials that implicate national security concerns, in that, "[T]he rationale for the privilege is even more compelling now."[59]

ii. Freedom of Information Act, Exemption 7

Exemption 7 of the Freedom of Information Act ("Exemption 7") essentially codifies the law enforcement privilege as it relates to disclosure of documents to the general public. It protects from public disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information":

> 1) could reasonably be expected to interfere with enforcement proceedings;
> 2) would deprive a person of a right to a fair trial or an impartial adjudication;
> 3) could reasonably be expected to constitute an unwarranted invasion of personal privacy;
> 4) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information

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[55] *Van Horn* at 1508 [reproduced in accompanying notebook at Tab 58]; *United States v. Cintolo*, 818 F.2d 980, 1002 (1st Cir. 1987) [hereinafter "*Cintolo*"] [reproduced in accompanying notebook at Tab 55]; *See also United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988) [hereinafter "*Sarkissian*"] [reproduced in accompanying notebook at Tab 57].
[56] *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 71 (1st Cir. 2007) [hereinafter "*Puerto Rico*"] [reproduced in accompanying notebook at Tab 51]; *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006) [reproduced in accompanying notebook at Tab 53].
[57] *Cintolo* at 1002 [reproduced in accompanying notebook at Tab 55].
[58] *See, e.g.*, Walker Article [reproduced in accompanying notebook at Tab 78].
[59] *Puerto Rico* at 63 (citing *In re U.S. Dep't of Homeland Sec.* at 569 [reproduced in accompanying notebook at Tab 53]) [reproduced in accompanying notebook at Tab 51].

> compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;
> 5) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
> 6) could reasonably be expected to endanger the life or physical safety of any individual.[60]

Thus, Exemption 7 protects documents evidencing both informant identities, and law enforcement techniques, from disclosure to the public.[61] In the 1986 amendments to Exemption 7, Congress deleted the word "investigatory" in front of "records," and added the words "or information," thus extending protection significantly.[62]

iii. Classified Information Procedures Act

In 1980, the United States codified procedures relating to sensitive national security intelligence information in criminal trials under the Classified Information Procedures Act ("CIPA").[63] One purpose for enacting CIPA was to limit the practice of "graymail" by criminal defendants in possession of sensitive or secretive government information. "Graymail" refers to the threat by a criminal defendant to disclose the classified information during the course of a trial in order to force the prosecutor to choose between allowing the disclosure of the classified information, or dismissing the indictment altogether.[64] Thus, to combat this problem, CIPA

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[60] Freedom of Information Act, Exemption 7, 5 U.S.C. § 552(b)(7) (2006) [reproduced in accompanying notebook at Tab 4].
[61] *Id.*
[62] U.S. Department of Justice Guide to the Freedom of Information Act, Exemption 7 (2009), p. 492, *available at* http://www.usdoj.gov/oip/foia_guide09/exemption7.pdf [reproduced in accompanying notebook at Tab 82].
[63] Classified Information Procedures Act, 18 U.S.C. App. III, §§ 1-16 (1980) [hereinafter "CIPA"] [reproduced in accompanying notebook at Tab 2].
[64] Larry M. Eig, *Classified Information Procedures Act (CIPA): An Overview*, CRS REPORT FOR CONGRESS, p. 1 (March 2, 1989) (discussing the "disclose or dismiss dilemma" that has hampered prosecutions of defendants holding classified information) [hereinafter "Eig Article"] [reproduced in accompanying notebook at Tab 68].

requires a defendant to notify the prosecutor and the court "within thirty days prior to trial," if the defendant "reasonably expects to disclose or to cause the disclosure of classified information."[65]

On the other hand, CIPA introduces several procedural mechanisms to assist the court in balancing the rights of the defendant to conduct discovery and present a complete defense when the prosecution is in possession of sensitive national security information. First, CIPA allows the prosecution to make an in camera and *ex parte* appearance to the court when it seeks to limit the disclosure of classified information to the defendant.[66] Much like the standard required in cases in which the prosecution asserts the law enforcement privilege, the defendant in CIPA cases is still entitled to disclosure upon a showing that the information is relevant and helpful to the defense.[67] Moreover, even when classified information is held to be discoverable after applying the balancing test, a court may still order the release of the information sought in an alternative form. The court may authorize the government to "delete specified items of classified information from documents to be made available to the defendant, to substitute a summary of information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove."[68] However, courts may disallow these measures if it finds them to be inadequate to protect the defendant's interests.[69]

b. Canada

Canada recognizes protection for ongoing and future investigations, including privileges

[65] CIPA at § 5 [reproduced in accompanying notebook at Tab 2].
[66] *Id.* at §§ 4, 6.
[67] *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro* at 60-61 [reproduced in accompanying notebook at Tab 54]) [reproduced in accompanying notebook at Tab 59]; *See also Sarkissian* at 965 [reproduced in accompanying notebook at Tab 57].
[68] CIPA at § 4 [reproduced in accompanying notebook at Tab 2].
[69] Eig Article at 6 (citing *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988) [reproduced in accompanying notebook at Tab 56]) [reproduced in accompanying notebook at Tab 68].

for police informants and law enforcement methods, in the doctrine of "public interest immunity." The scope of Canada's public interest immunity includes disclosure of information that would:

1. identify or tend to identify human sources of information;[70]
2. identify or tend to identify individuals other than the informant in the action who were or are the targets of investigation;
3. identify or tend to identify methods of operation utilized by the police agency in the investigation of criminal activity;[71] or
4. identify or tend to identify relationships that the police agency maintains with police and security forces in Canada and elsewhere and disclose criminal intelligence received in confidence from such forces.[72]

The common law of Canada clearly recognizes the informer privilege. Once an informer privilege is found to exist, neither the Crown nor the police can breach it, and unlike in the U.S., courts are not entitled to balance the benefits ensuing from the privilege against countervailing interests.[73] The informer privilege can only be overcome if the defendant can demonstrate that his or her "innocence is at stake."[74]

However, the common law of Canada is less clear with respect to a privilege for law enforcement techniques.[75] Statutory amendments to Section 37 of the Canada Evidence Act

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[70] *R. v. Leipert*, [1997] 112 C.C.C. (3d) 385, 393 (noting that the informer privilege not only protects the informer's name, but also any information that "may tend to reveal the identity of the informer") [hereinafter "*Leipert*"] [reproduced in accompanying notebook at Tab 61].
[71] *See, e.g., R. v. Durette*, [1994] 1 S.C.R. 469 (protection for wiretap surveillance information) [hereinafter "*Durette*"] [reproduced in accompanying notebook at Tab 60]; *R. v. Richards*, [1997] 15 C.C.C. (3d) 377 (Ont. C.A.) (protection for observation posts and information related to undercover police officers) [hereinafter "*Richards*"] [reproduced in accompanying notebook at Tab 62].
[72] Gordon B. Schumacher and Christopher Mainella, *Public Interest Privilege – A Canadian Perspective*, NATIONAL EXECUTIVE INSTITUTE ASSOCIATES LEADERSHIP BULLETIN, p. 5 (Jan. 2001) [hereinafter "Schumacher"] [reproduced in accompanying notebook at Tab 75].
[73] *Leipert* at 392 [reproduced in accompanying notebook at Tab 61].
[74] *Id.*; *See also R. v. Scott*, [1990] 3 S.C.R. 979 [reproduced in accompanying notebook at Tab 63].
[75] *See* Schumacher at 2 (noting how court treatment of investigative techniques and intelligence operations "have seemingly been cast in the shadows of obscurity") [reproduced in accompanying notebook at Tab 75].

("Section 37") have codified and expanded the principle of "public interest immunity" and applications by the Crown for non-disclosure of law enforcement techniques and methods have typically fallen under Section 37.[76] Section 37 also develops a procedural system, similar to CIPA, for assisting courts in dealing with such sensitive information. First, an objection to disclosure of the information is made by a "Minister of the Crown in right of Canada or other person interested."[77] The court then examines the information and determines whether the disclosure of the information "would encroach upon the specified public interest."[78] The court can then grant or deny the objection in full, or "authorize the disclosure, subject to any conditions that the court considers appropriate," including redacting, summarizing, or admitting facts relating to the information.[79]

Thus, Section 37 grants the Canadian courts with great autonomy in balancing the rights of the accused to disclosure against the specified public interest. However, Section 37 is seen as an "avenue of last resort," and reliance on it "should be the exception, not the rule."[80]

c. UK

The UK's privileges for police informants and law enforcement methods are also embodied in the doctrine of "public interest immunity," which was originally referred to as "Crown Privilege."[81] Public interest immunity in the UK has evolved in the context of civil

[76] *See, e.g., Richards* [reproduced in accompanying notebook at Tab 62].
[77] Canada Evidence Act, R.S.C., ch. C-5, § 37(1) (1985) [reproduced in accompanying notebook at Tab 1].
[78] *Id.* at § 37(4).
[79] *Id.* at § 37(5); *See also Durette* (ruling that the trial judge's editing of sensitive information contained in affidavits was improper) [reproduced in accompanying notebook at Tab 60].
[80] *See* The Federal Prosecution Service Deskbook, Part VII, Chapter 37 (Canada, 2009), *available at* http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch37.html [reproduced in accompanying notebook at Tab 79].
[81] Christopher Forsyth, *Public Interest Immunity: Recent and Future Developments*, 56 CAMBRIDGE L.J. 51 (March 1997) [reproduced in accompanying notebook at Tab 69].

cases more than in criminal.[82] Determining what standards and procedures to implement for public interest immunity in the criminal context is a continual debate in the UK.[83]

However, a common law privilege for police informants dates back to 1890, and disclosure of the informant's identity is only appropriate in order to demonstrate the accused's innocence.[84] In addition, the UK Freedom of Information Act of 2000 lists "information provided in confidence" as an absolute exemption to disclosure, and "investigations and proceedings by public authorities" and "law enforcement" as categories for which a public interest balancing exercise applies.[85] While case law relating to public interest immunity for law enforcement and intelligence gathering techniques is sparse, commentary on the subject suggests that the government is moving toward protecting information under the same categories as those defined as "sensitive" under the Intelligence Services Act of 1994.[86] Those categories include:

> (a) information which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to the Security Service, the Intelligence Service or GCHQ;
> (b) information about particular operations which have been, are being or are proposed to be undertaken in pursuance of any of the functions of those bodies; and
> (c) information provided by, or by an agency of, the Government of a territory outside the United Kingdom where that Government does not

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[82] Ian Leigh, *Reforming Public Interest Immunity*, WEB JOURNAL OF CURRENT LEGAL ISSUES (1995), p. 1, *available at* webjcli.ncl.ac.uk/articles2/leigh2.rtf [hereinafter "Leigh Article"] [reproduced in accompanying notebook at Tab 70].
[83] *Id.* at 11; *See also* Richard Scott, *The Use of Public Interest Immunity Claims in Criminal Cases*, WEB JOURNAL OF CURRENT LEGAL ISSUES (February 1996), *available at* webjcli.ncl.ac.uk/1996/issue2/scott2.html [hereinafter "Scott Report"] [reproduced in accompanying notebook at Tab 76].
[84] Scott Report at 5 [reproduced in accompanying notebook at Tab 76].
[85] Meredith Cook, *Balancing the Public Interest: Applying the Public Interest Test to Exceptions in the UK Freedom of Information Act 2000*, THE CONSTITUTION UNIT, p. 14 (August 2003) [reproduced in accompanying notebook at Tab 67].
[86] U.K. Treasury Solicitor's Office, *Paper on Public Interest Immunity* (1996), *available at* http://www.leeds.ac.uk/law/hamlyn/immunity.htm [reproduced in accompanying notebook at Tab 80].

consent to the disclosure of the information.[87]

Judicial in camera inspection of documents, and the subsequent balancing of competing public interests by judges, did not originate in the UK until *Conway v. Rimmer* [1968] AC 910.[88] The process of claiming public interest immunity in the UK in the civil context has traditionally involved two distinct steps. First, a decision is made as to the relevance of the information.[89] If the document is deemed relevant, the judge then conducts a balancing exercise between the public interest in non-disclosure and the public interest in the proper administration of justice.[90]

B. Protection for Witnesses

Perhaps the most frequent "public interest" argument made by prosecutors of international criminal tribunals for the non-disclosure of otherwise relevant evidence to the defense and/or public is for witness protection.[91] Protection for witnesses permeates the Rules of the tribunals,[92] and unlike any other justification, is specifically addressed in the Statutes of the tribunals.[93] The pertinent sections of STL Rule 115 state,

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[87] Intelligence Services Act, ch. 13, sch. 3, § 4 (1994) [reproduced in accompanying notebook at Tab 5].
[88] Leigh Article at 10 [reproduced in accompanying notebook at Tab 70].
[89] *Id.* at 2.
[90] *Id.*
[91] *Prosecutor v. Milosevic,* Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, ¶ 28, Case No. IT-02-54-T, 19 February 2002 (noting that the granting of protective measures for witnesses began as an exceptional practice, but has become the norm) [hereinafter "*Milosevic*, February 2002"] [reproduced in accompanying notebook at Tab 30].
[92] ICTY, ICTR, and SCSL Rules 69, 75 [reproduced in accompanying notebook at Tabs 9, 8, and 10]; STL Rules 115, 116, 133 [reproduced in accompanying notebook at Tab 11].
[93] STL Statute, Article 16(2) ("The accused shall be entitled to a fair and public hearing, *subject to measures ordered by the Special Tribunal for the protection of victims and witnesses*.") [reproduced in accompanying notebook at Tab 13]; *Id.* at Article 28 ("The International Tribunal shall provide in its rules of procedure and evidence *for the protection of victims and witnesses*."); *See also* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Article 22, adopted by the Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), *available at* http://www.icty.org [reproduced in accompanying notebook at Tab 12].

> In exceptional circumstances, the Prosecutor may apply to the Pre-Trial Judge or Trial Chamber to order interim non-disclosure of the identity of a victim or witness who may be in danger or at risk until such a person is brought under the protection of the Tribunal.
>
> Subject to Rule 133, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.[94]

Applications by prosecutors for witness protection provide for an extensive balancing exercise by the Trial Chamber. Generally, tribunals have been lenient in granting requests for non-disclosure of witness identities from the *public* on the basis that publicizing their identities would subject the witness and their family to safety risks. In almost all circumstances, however, witness identities are subject to disclosure to the *defense* at a time before the commencement of the trial, in furtherance of the accused's right to confront and examine witnesses on an equal basis with the prosecution.

1. Anonymity

There are examples from early case law from the tribunals where motions for anonymous witnesses were granted. In *Tadic*, the ICTY contemplated the conditions necessary for the granting of applications for complete witness anonymity, stating, "The limitation on the accused's right to examine, or have examined, the witnesses against him, which is implicit in allowing anonymous testimony, does not, standing alone, violate his right to a fair trial."[95] In drawing from ECHR and domestic jurisprudence, the Trial Chamber determined the conditions that would have to be met for anonymity to be granted:

> (a) there must be real fear for the safety of the witness or his or her family;
> (b) the testimony of the particular witness must be important to the Prosecutor's case;
> (c) the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
> (d) the ineffectiveness or non-existence of a witness protection programme; and

[94] STL Rule 115 (A), (C) [reproduced in accompanying notebook at Tab 11].
[95] *Tadic* Decision at ¶ 75 [reproduced in accompanying notebook at Tab 38].

(e) any measures taken should be strictly necessary.[96]

In granting the prosecution's application for anonymous testimony with respect to three of its witnesses, the prosecution was allowed to withhold from the defense the names and other identifying information of the witnesses, redact the witness statements of those witnesses, and withhold information on the general locality of two of the witnesses.[97]

However, the more recent law within the tribunals demands the disclosure of the witness' identity before the commencement of the trial.[98] The term "identity" does not include the witness' current address.[99]

2. Redaction of Identifying Information

The more frequent request in contemporary international tribunals is for a delay in disclosure of witness identities to the defense, including the current whereabouts of witnesses. This is generally accomplished by redacting any identifying information from witness statements which are subject to disclosure under the prosecutor's general duties to the defense.[100] The argument for redaction of identifying information centers on whether the prosecutor can demonstrate

[96] *Id.* at ¶¶ 62-66; *See also Prosecutor v. Blaskic*, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Case No. IT-95-14-A, 5 November 1996 [reproduced in accompanying notebook at Tab 16]; *Milosevic*, February 2002 at ¶ 25 [reproduced in accompanying notebook at Tab 30].
[97] *Tadic* Decision at disposition, ¶¶ 11-13 [reproduced in accompanying notebook at Tab 38].
[98] *Milosevic*, February 2002 [reproduced in accompanying notebook at Tab 30]; *Prosecutor v. Brdjanin*, Decision on Motion by Prosecution for Protective Measures, Case No. IT-99-36-T, 3 July 2000 [hereinafter "*Brdjanin*, July 2000"] [reproduced in accompanying notebook at Tab 19]; *Prosecutor v. Perisic*, Decision on Prosecution Motion for Protective Measures for Witnesses, Case No. IT-04-81-PT, 27 May 2005 [hereinafter "*Perisic* Decision"] [reproduced in accompanying notebook at Tab 35]; *See* STL Rule 110 (C) [reproduced in accompanying notebook at Tab 11].
[99] *Prosecutor v. Delalic*, Decision on the Defense Motion to Compel the Discovery of Identity and Location of Witnesses, Case No. IT-96-21-T, 18 March 1997 [reproduced in accompanying notebook at Tab 24].
[100] STL Rule 110 (A)(ii) [reproduced in accompanying notebook at Tab 11].

"exceptional circumstances" for each witness it seeks to protect.[101] The basic criteria for establishing exceptional circumstances is whether there exists a "[L]ikelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public."[102] The prosecutor must show that the witness "directly implicates the accused," or that the witness "will be living in an area in which the investigation on behalf of the accused would necessarily have to take place."[103] Once exceptional circumstances are shown, the Trial Chamber must strike a balance between the accused's right to a fair trial and the protection of witnesses.

The balancing exercise centers on the appropriate length of time for the redaction, that is, the time before the trial at which the witness statements must be disclosed to the accused in un-redacted form.[104] The ICTY has ruled that the time allowed for sufficient preparation must be a time before the trial commences rather than before the witness gives evidence.[105] In *Tadic*, the Trial Chamber ruled that the names of the witnesses were to be disclosed "not later than 30 days in advance of the firm trial date."[106] Since then, ICTY, ICTR, and SCSL decisions have typically followed the 30 day rule laid down in *Tadic*, but in some cases, disclosure has been

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[101] *Milosevic*, February 2002 at ¶ 24 [reproduced in accompanying notebook at Tab 30].
[102] *Id.* at ¶ 16 (citing *Brdjanin*, July 2000 at ¶ 24 [reproduced in accompanying notebook at Tab 19]).
[103] *Prosecutor v. Brdjanin*, Decision on Third Motion by Prosecution for Protective Measures, Case No. IT-99-36-T, 8 November 2000, ¶ 21 [reproduced in accompanying notebook at Tab 20]; *See also Prosecutor v. Milosevic*, Decision on Prosecution Motion for Protective Measures (Concerning a Humanitarian Organization), Footnote 15, Case No. IT-02-54-T, 1 April 2003 (requiring the prosecutor to show that the witness is "proximate" to the issue) [reproduced in accompanying notebook at Tab 31].
[104] *Brdjanin*, July 2000 at ¶ 33 [reproduced in accompanying notebook at Tab 19].
[105] *Id.*
[106] *Tadic* Decision at disposition, ¶ 12 [reproduced in accompanying notebook at Tab 38]; *See also Perisic* Decision (stating "[T]he prosecution shall disclose the full and unredacted statement and related exhibits of the witness no later than 30 days prior to the anticipated start of the trial. . .") [reproduced in accompanying notebook at Tab 35].

required to be made only 21 days before the start of trial.[107] In the *Bagosora* case before the ICTR, Trial Chamber III allowed the prosecutor to disclose, on a "rolling basis," the names of her witnesses 35 days before they were scheduled to testify, rather than prior to the commencement of the trial.[108] The majority determined that 35 days before the witness is called to testify is "a sufficient period of advance disclosure to provide the defence with a fair opportunity to effectively exploit the witnesses' unredacted statements and identification data to formulate an effective cross-examination."[109]

3. Protective Measures and Non-Disclosure to the Public

As non-disclosure to the public is seen as less intrusive on the rights of the accused,[110] the granting of prosecution motions for non-disclosure to the public and media is a much more common practice. In conjunction with the prosecutor's showing of "exceptional circumstances" pursuant to Rule 115,[111] non-disclosure of witness identities and other protective measures for witnesses with respect to the public is governed by STL Rule 133, which reads:

> The Trial Chamber may, proprio motu or at the request of a Party, the victim or witness concerned, or the Victims and Witnesses Protection Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> The Trial Chamber may hold an *in camera* proceeding to determine whether to order:
>
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness, by means such as:

[107] *See, e.g.*, *Prosecutor v. Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, p. 4, Case No. ICTR-2001-66-T, 30 June 2003 [reproduced in accompanying notebook at Tab 46].
[108] *Prosecutor* v. *Bagosora*, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, ¶ 22, Case No. ICTR-98-41-I, 5 December 2001 [reproduced in accompanying notebook at Tab 40].
[109] *Id.*
[110] See *infra* note 21 and accompanying text.
[111] See *infra* note 94 and accompanying text.

(a) expunging names and identifying information from the Tribunal's public records;[112]
(b) non-disclosure to the public of any records identifying the victim or witness;[113]
(c) giving of testimony through image or voice-altering devices or closed circuit television; and
(d) assignment of a pseudonym.[114]

(ii) closed sessions;[115]
(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.[116]

Another measure which has also been granted, but not listed among the enumerated measures within the tribunal rules is limiting the subject-matter of the witness's testimony and the cross-examination of such testimony.[117] In most instances, the Trial Chamber will order the disclosure of the confidential materials in question to the defense, but subsequently direct the defense not to disclose the materials to the public or media.[118]

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[112] *Compare Prosecutor v. Mrdja*, Decision on Review of Indictment and Order for Non-Disclosure, Case No. IT-02-59-I, 26 April 2002 [reproduced in accompanying notebook at Tab 33] (granting non-disclosure to public of indictment and arrest warrant) *with Prosecutor v. Jankovic*, Order on Prosecutor's Motion for Non-Disclosure of 29 December 1999, Case No. IT-96-23-PT, 5 January 2000 [reproduced in accompanying notebook at Tab 27] (ordering disclosure to public of arrest warrant).

[113] *See, e.g., Prosecutor v. Fofana*, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, Case No. SCSL-2003-11-PD, 16 October 2003 [reproduced in accompanying notebook at Tab 49].

[114] *See, e.g., Prosecutor v. Delalic*, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through "M", Case No. IT-96-21-T, 28 April 1997 [reproduced in accompanying notebook at Tab 25].

[115] *See, e.g., Id.*; *Prosecutor v. Jokic*, Order for Protective Measures, Case No. IT-02-60-T, 7 July 2003 [reproduced in accompanying notebook at Tab 28].

[116] STL Rule 133 (A), (B) [reproduced in accompanying notebook at Tab 11].

[117] *See, e.g., Prosecutor v. Blaskic*, Decision of Trial Chamber I on Protective Measures for Mr. Jean-Pierre Thebault, Witness of the Trial Chamber, Case No. IT-95-14-A, 13 May 1999 [hereinafter "*Blaskic*, May 1999"] [reproduced in accompanying notebook at Tab 18]; *Prosecutor v. Milosevic*, Decision on Prosecution's Application for a Witness Pursuant to Rule 70(B), Case No. IT-02-54-T, 30 October 2003 [hereinafter "*Milosevic*, October 2003"] [reproduced in accompanying notebook at Tab 32].

[118] *Brdjanin*, July 2000 at disposition, ¶ 3 [reproduced in accompanying notebook at Tab 19]; *See also Kajelijeli* Decision [reproduced in accompanying notebook at Tab 41]; *Karemera* Decision [reproduced in accompanying notebook at Tab 42]; *Prosecutor v. Seselj*, Decision on *Amicus Curiae* Prosecutor's Motion for Order of Non-Disclosure, Case No. IT-03-67-R77.2, 27 April

Thus, applications by prosecutors for witness protection, in the form of anonymity or other protective measures, provide for an extensive balancing exercise by the Trial Chamber. The Trial Chamber must not only determine whether protective measures should be granted in the first place, but if granted, what measures should be taken as to not infringe on the accused's right to a fair and public hearing; namely, the right of the accused to confront and examine the witnesses against him or her on an equal basis with the prosecution.

C. Protection of Confidential Information and Sources (ICTY/R, SCSL Rule 70)

Another recurring "public interest" argument made by prosecutors of international criminal tribunals for the non-disclosure of otherwise relevant evidence to the defense and/or public is for the protection of confidential information and sources. The underlying rationale for such protection is to facilitate the cooperation of international entities, including national governments, humanitarian organizations, and other third-party evidentiary sources, in coming forward with useful evidence and testimony.[119] ICTY, ICTR, and SCSL Rule 70(B) states:

> If the Prosecutor is in possession of information which has been *provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence*, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.[120]

In perhaps the most well-known application for Rule 70 protection, the ICTY prosecutor sought the cooperation of the U.S. government to allow it to call retired General Wesley Clarke to

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2009 [reproduced in accompanying notebook at Tab 36].

[119] *Prosecutor v. Milosevic*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, ¶ 19, Case No. IT-02-54-AR108*bis* & AR73.3, 23 October 2002 [reproduced in accompanying notebook at Tab 29].

[120] ICTY, ICTR, and SCSL Rule 70(B) [reproduced in accompanying notebook at Tabs 9, 8, and10]; *See also* STL Rule 118 [reproduced in accompanying notebook at Tab 11].

testify at the trial.[121] In seeking the consent of a third-party information-provider, Rule 70 provides the tribunal prosecutor with tremendous leeway for negotiation.[122] Ultimately, the United States consented to the testimony of Clarke, but demanded substantial protective measures in return. The U.S. government requested, and was subsequently granted, the following measures:

i) certain, specified parts of the witness's testimony be held in closed session on the basis that, in the opinion of the United States, they constituted sensitive information going to that Government's legitimate national interests;
ii) the broadcast of the testimony, to give effect to these protective measures, be delayed 48 hours to enable the United States to review the transcript;
iii) the testimony be entirely in temporary closed session and that the public gallery be closed;
iv) the examination-in-chief be limited to the contents of General Clark's witness summary;
v) the cross-examination be restricted to the examination in chief, subject to prior approval by the US; and
vi) two representatives of the US be allowed to be present in court.[123]

In addition to aiding in the cooperation of national governments with tribunal prosecutions,[124] Rule 70 has also proved beneficial to the prosecution with respect to assistance from humanitarian organizations.[125]

D. Other Public Interest Exceptions to Disclosure

Another recurring "public interest" argument made by prosecutors of international

[121] *Milosevic*, October 2003 [reproduced in accompanying notebook at Tab 32].
[122] *See* ICTY Rule 70(C) (precluding the trial chamber from compelling production of other associated information) *and* ICTY Rule 70(D) (precluding the trial chamber from compelling witness testimony outside the scope of the state's consent) [reproduced in accompanying notebook at Tab 9].
[123] *Milosevic*, October 2003 [reproduced in accompanying notebook at Tab 32].
[124] *See also Prosecutor v. Taylor*, Public Version of the Confidential Decision on Prosecution Motion Requesting Special Measures for Disclosure of Rule 70 Material, Case No. SCSL-03-1-T, 2 November 2007 [reproduced in accompanying notebook at Tab 50].
[125] *See, e.g., Prosecutor v. Blaskic*, Decision on Prosecutor's Request for Authorization to Delay Disclosure of Rule 70 Information, Case No. IT-95-14-A, 6 May 1998 [reproduced in accompanying notebook at Tab 17]; *Prosecutor v. Brima*, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, Case No. SCSL-2004-16-AR73, 26 May 2006 [hereinafter "*Brima* Appeal Decision"] [reproduced in accompanying notebook at Tab 48].

criminal tribunals for the non-disclosure of otherwise relevant evidence to the defense and/or public is that disclosure is otherwise "contrary to the public interest."[126] In addition to the greater public interest in furthering the criminal justice system, which is aided by not prejudicing ongoing or future investigations, by protecting witnesses from reprisal, and by protecting confidential sources, the public at-large has additional interests which may outweigh or infringe upon the accused's right to a complete defense. Two such arguments for non-disclosure of evidence that were successful in international criminal tribunals on the basis of public interest were made on behalf of International Committee of the Red Cross ("Red Cross") employees and war correspondents. Another argument for extensive witness protection measures was granted for a member of the humanitarian organization known as the European Monitoring Mission ("ECMM"). However, other humanitarian organizations have been denied such an exemption and have been required to produce information for the tribunals.

1. International Committee of the Red Cross - Absolute Privilege

In 1999, a motion was filed by the ICTY prosecution, seeking a ruling as to whether a former Red Cross employee could be called to give evidence of facts that came to his knowledge by virtue of his employment. The Trial Chamber was required to assess the potential ill effects that requiring the testimony of a former Red Cross employee would have on the public interest.

The Red Cross provides a unique and valuable service to the international community by "guaranteeing the observance of certain minimum humanitarian standards" and "protecting and assisting victims of armed conflicts."[127] The humanitarian organization is able to discharge its duty because of certain privileges it enjoys, namely, the rights to "be substituted for a protecting

[126] See *infra* note 32 and accompanying text.
[127] *Prosecutor v. Simic*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 72, Case No. IT-95-9-PT, 27 July 1999 [hereinafter "*Simic* Decision"] [reproduced in accompanying notebook at Tab 37].

power," to "visit places of detention of prisoners of war and to interview prisoners," and the right of "initiative in conflicts of a non-international character."[128] This unique function exposes Red Cross employees to potential war crimes, crimes against humanity, and other violations of international law. Because of this unique function, the Red Cross operates on fundamental principles of "impartiality, neutrality, and confidentiality."[129]

Ultimately, the Trial Chamber ruled that the former Red Cross employee's testimony could not be compelled as a matter of customary international law under the Geneva Conventions, the Red Cross was permitted to maintain its confidentiality policy in the course of its work, and was entitled to an absolute testimonial privilege in the ICTY.[130] Thus, because it found an absolute privilege, the Trial Chamber did not need to undertake a balancing exercise, yet noted that "[C]onfidentiality is necessary for the effective performance by the ICRC of its functions."[131] The *Simic* decision applies as a matter of precedent in the ICTY and ICTR,[132] and because of its persuasive weight, the absolute privilege for the Red Cross is now reflected within the Rules of the tribunals.[133]

2. War Correspondents - Qualified Privilege

A similar situation arose in *Brdjanin* when the ICTY prosecutor sought to admit into evidence an article written by Jonathan Randal, a war correspondent for the Washington Post. The article quoted statements attributed to the accused which the prosecutor claimed were relevant to establishing that he possessed the intent required for several of the crimes charged.

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[128] *Id.*
[129] *Id.* at ¶ 73.
[130] *Id.* at ¶¶ 74-76.
[131] *Id.* at ¶ 73.
[132] *See Prosecutor v. Muvunyi*, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, Case No. ICTR-2000-55A-T, 15 July 2005 (recognizing the persuasive weight of the *Simic* decision in the ICTR) [hereinafter "*Muvunyi* Decision"] [reproduced in accompanying notebook at Tab 43].
[133] STL Rule 164 [reproduced in accompanying notebook at Tab 11].

Randal was issued a subpoena to appear before the Trial Chamber, and challenged it by filing a written motion to set aside the subpoena.[134] The Trial Chamber, in its decision to uphold the subpoena, refused to recognize a testimonial privilege for journalists when no issue of protecting confidential sources was involved.[135] Randal subsequently filed an interlocutory appeal.

The Appeals Chamber cited numerous decisions throughout international and domestic law that supported a "qualified" privilege for war correspondents.[136] As compared to an absolute privilege, which shields the privilege-holder from compelled disclosure or testimony unless waived by the privilege-holder,[137] a qualified privilege shields the privilege-holder only if certain conditions are met. In determining whether to recognize such a privilege, and if so, what conditions would need to be met to compel the privilege-holder's testimony, the Appeals Chamber conducted a substantial balancing exercise between the differing interests involved in the case, stating,

> On the one hand, there is the interest of justice in having all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial. On the other hand, there is the public interest in the work of war correspondents, which requires that the newsgathering function be performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern.[138]

The work of war correspondents in gathering and reporting news is crucial to the international

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[134] *Prosecutor v. Brdjanin*, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, Case No. IT-99-36-T, 7 June 2002 [reproduced in accompanying notebook at Tab 21].
[135] *Id.* at ¶ 26.
[136] *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, ¶ 33, Case No. IT-99-36-AR73.9, 11 December 2002 [hereinafter "*Brdjanin*, December 2002"] [reproduced in accompanying notebook at Tab 22].
[137] *See* Emily Ann Berman, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241, 243 (2005) [reproduced in accompanying notebook at Tab 65].
[138] *Brdjanin*, December 2002 at ¶ 46 [reproduced in accompanying notebook at Tab 22].

community as a whole.[139] The Appeals Chambers found that "[C]ompelling war correspondents to testify before the Tribunal on a routine basis may significantly impact their ability to obtain information, and thus their ability to inform the public on issues of general concern."[140] In addition, compelling testimony of war correspondents would significantly increase the dangerousness of their work.[141]

Ultimately, in recognizing a qualified privilege for war correspondents, the Appeals Chamber found that the public interest in the work of war correspondents outweighed the public interest in having all relevant evidence before the Trial Chambers when: 1) the evidence sought is of direct and important value in determining a core issue in the case; and 2) may not reasonably be obtained elsewhere."[142]

Importantly, while the *Brdjanin* and *Simic* decisions represent instances where the *defense* successfully challenged the submission of evidence by the prosecution on the basis of "public interest," it is not far-fetched to imagine situations in which the opposite would be true; that is, where the prosecution seeks to assert the same privilege against the defense. Therefore, these public interest exceptions can be argued by either the prosecution or the defense depending on the circumstances.

3. Protection for Other Humanitarian Organizations

In light of the *Simic* decision, which recognized an absolute privilege for the ICRC,

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[139] *See Id.* at ¶ 36 (stating, "[T]he information gathered and disseminated by war correspondents is essential to keeping the international public informed about matters of life and death.").
[140] *Id.* at ¶ 44; *See also* Wendy Tannenbaum, *Media Appeal for Testimonial Privilege Before U.N. War Court*, THE NEWS MEDIA & THE LAW (Fall 2002) (noting that sources for the correspondents would be less open and distrustful if "seen as an arm of the UN") [reproduced in accompanying notebook at Tab 77].
[141] *Id.*; *See also* Kate Mackintosh, *Note for Humanitarian Organizations on Cooperation with International Tribunals*, p. 136, INT'L REVIEW OF THE RED CROSS (March 2004) [reproduced in accompanying notebook at Tab 71].
[142] *Brdjanin*, December 2002 at ¶ 50 [reproduced in accompanying notebook at Tab 22].

"public interest" arguments are frequently made by both the prosecution and the defense for protection for other humanitarian organizations.

One such argument which reached a successful result was granted for a witness from the European Monitoring Mission in the *Blaskic* case.[143] After receiving a subpoena to testify before the ICTY, the witness requested protective measures, among other reasons, "[T]o ensure that the neutrality and impartiality of his colleagues in the ECMM are not put into question by any party."[144] The decision granted the witness substantial protection on the grounds that "[T]he explanations which the witness will provide to the Trial Chamber might endanger the safety of civilian or military personnel on duty in the former Yugoslavia and might create difficulties for the military and humanitarian action of the European Union, France, or international or non-governmental organizations in that region."[145]

Other arguments have reached unsuccessful results. In one such case, a witness was a former UN human rights officer operating in Sierra Leone.[146] His former employer waived its rights to immunity as to his testimony, but demanded that the proceedings continue in closed sessions.[147] The prosecution submitted a motion to expand witness protection measures, including allowing the witness to decline to answer questions in cross-examination about the sources of his information sources.[148] The decision denied the prosecutor's motion, stating:

> [W]hereas the Trial Chamber recognizes the privileged relationship between a human rights officer and his informants as well as the

[143] *Blaskic*, May 1999 [reproduced in accompanying notebook at Tab 18].
[144] *Id.*
[145] *Id.*
[146] *Prosecutor v. Brima*, Decision on the Prosecution's Oral Application for Leave to Be Granted To Witness TF1-150 to Testify Without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality Pursuant to Rule 70 (B) and (D) of the Rules, ¶ 1, Case No. SCSL-04-16-T, 16 September 2005 [reproduced in accompanying notebook at Tab 47].
[147] *Id.* at ¶ 2.
[148] *Id.* at ¶ 3.

> public interest that attaches to the work of human rights officers gathering confidential information in the field, we do not think that the privilege and/or public interest should outweigh the rights of the accused persons to a fair trial as guaranteed by Article 17 of the Statute.[149]

However, the prosecution's appeal for the protective measures was granted, but only on the basis of Rule 70.[150] In another example from the ICTY, the Trial Chamber denied a motion to set aside a subpoena for a UN human rights officer on the basis that the organization "had, as one of its aims, to disclose information gathered from its activities to this Tribunal for use in judicial proceedings."[151] Finally, in an example from the ICTR, the defense sought to exclude the testimony of a witness who was a former member of the Belgian Red Cross Society.[152] The Trial Chamber ruled that the witness was required to testify and not entitled to any protective measures, in that, the ICRC privilege did not extend to national Red Cross societies.[153]

Thus, arguments for protection of other humanitarian organizations have reached mixed results. As with other "public interest" arguments, the determination is made on a case-by-case basis, and provides for a balancing exercise between the specified public interest and the interest in having all relevant information before the tribunal.

V. SUMMARY AND CONCLUSIONS

In sum, several "public interest" exceptions to the prosecutor's general duty of disclosure to the defense and/or public are now well-established in international criminal tribunal jurisprudence. Generally, international tribunal prosecutors at the ICTY, ICTR, and SCSL have been successful in arguing that materials should not be disclosed to the defense and/or the public

[149] *Id.* at ¶ 20.
[150] *See Brima* Appeal Decision at ¶ 31 [reproduced in accompanying notebook at Tab 48].
[151] *Prosecutor v. Haradinaj*, Decision on Motion by Witness 28 to Set Aside Subpoena or For Alternative Relief, ¶ 8, Case No. IT-04-84-T, 5 September 2007 [reproduced in accompanying notebook at Tab 26].
[152] *Muvunyi* Decision at ¶ 6 [reproduced in accompanying notebook at Tab 43].
[153] *Id.* at ¶ 16.

when such evidence: 1) prejudices ongoing or future investigations; 2) implicates the safety or protection of a witness; 3) is provided on a "confidential basis;" 4) is otherwise contrary to the "public interest;" or 5) affects the security interests of a national government or international entity. Domestic law from the United States, Canada, and the UK protects from disclosure, in varying degrees, information that may prejudice ongoing or future investigations by local, regional, or governmental law enforcement agencies. The scope of this information includes protection for both police informants and law enforcement methods and techniques, including various types of surveillance information.

However, contemporary international criminal tribunals often require the cooperation of national governments and other outside evidentiary sources in order to operate effectively. Counterbalancing mechanisms provided for prosecutors and judges in the STL Rules strongly reflect jurisprudence that has evolved from both the international tribunals and domestic courts.[154] These mechanisms, which include *ex parte* and in camera applications to pre-trial judges, identification of new, similar information, provision of the information in summarized or redacted form, and stipulation of relevant facts,[155] should allow for increased cooperation of third-parties with the Office of the Prosecutor.

[154] See *infra* notes 68, 79 and accompanying text.
[155] STL Rules 116, 117, and 118 [reproduced in accompanying notebook at Tab 11].