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The Extent of the Prosecutor's Duty to Disclose Evidence in the Charge of Genocide

Uma Arunachalam

MEMORANDUM

TO: Deputy Prosecutor of the International Criminal Tribunal for Rwanda
FROM: Uma Arunachalam
DATE: December 20, 2002
RE: Topic #10: Extent of the Prosecutor's Duty of Disclosure.

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I. Summary of Conclusions: Disclosure in the charge of genocide

Both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), like common law systems, adhere to rules of procedure with respect to disclosure. The rules of procedure and its interpretation by tribunals are especially important with regards to a charge of genocide. The gravity of the charge of genocide warrants the tribunals to ensure the accused is given a fair trial. One of those ways the ICTR and ICTY guarantees a fair trial is by adhering to the rules of procedure, which provide the accused with a right to disclosure of the evidence against him.

According to common law systems, disclosure of evidence is accomplished in two ways: (1) through rules and procedures and (2) through general rules determined on a case-by-case basis of the elements of a charge that may be at issue. Because the ICTY and ICTR are relative new ad hoc tribunals, the second method of disclosure has yet to be addressed by the ICTR and ICTY with respect to genocide. The *Akayesu* case may be instrumental in making such a determination because it presents a case of the charge of genocide and contemplates what elements may be at issue.

The dual nature of genocide, which requires both components of an *actus reus* (physical element) and a *mens rea* (mental element), complicate what evidence is potentially at issue. When evidence is potentially at issue, it may be deemed material to the case. One type of evidence that could potentially be at issue in the charge of genocide is prior indictments. An analysis of whether prior indictments should be disclosed to the accused takes into account three factors: the applicable standards of rules and procedures

for disclosure adopted by the ICTR, the charge of the crime of genocide, and the bearing of witness confidentiality upon disclosure.

The crucial factor of whether a prior indictment should be disclosed is contingent upon whether the *mens rea* element or the *actus reus* element of genocide is at issue. If the *actus reus* element is at issue, then other indictments and cases of genocide tend to be less relevant to the charge of genocide. Therefore, the disclosure of prior indictments should be guarded scrupulously and the defense should have to demonstrate its reasonableness in disclosure. If, on the other hand, the *mens rea* element is in dispute, then prior indictments and cases are potentially relevant. Therefore, its disclosure should be granted as long as it does not infringe upon public interest concerns such as witness confidentiality. When this happens, the Trial Chamber should be given broad discretion to make the determination of the disclosure.

II. Introduction: Why Procedural Guarantees are Important in International War Crimes Tribunals

The ICTR has the responsibility to investigate, prosecute and punish those responsible for atrocities committed in the Rwanda, including genocide. The ad hoc tribunals such as the ICTR, as well as the ICTY, have adopted rules and procedures that area hybrid of common law, civil law, and military law.[1] As in the common law systems, the ICTY and ICTR provide for an independent prosecutor who leads the investigation of

[1] Diane Marie Amann, Harmonic Convergence? *Constitutional Criminal Procedure in an International Context*, 75 Ind. L.J. 842 (2000). [Reproduced in TAB 1].

alleged crimes, and cases may end in guilty pleas.[2] In trial, attorneys call, examine and cross-examine witnesses.[3]

Although there may be disagreement whether the rules and procedures are predominantly inquisitorial or accusatorial in nature, I would argue that the ICTR have adopted rules with respect to disclosure that are predominantly inquisitorial. Much of the disclosure rules in the ICTR and the ICTY are derived from common law systems such as the United States, United Kingdom and Canada which have an inquisitorial system.

Both, common law systems and the ad hoc tribunals, have two bases for disclosure. First, there are rules of discovery, which are necessary for the defense to prepare a case. Second, and really apart from this basis for discovery, is the notion that as a basic rule of adjudicative fairness, the prosecution must disclose anything that hurts its case. This type of disclosure is necessarily highly case-specific and incorporates a wide-variety of evidence.

In addition to these two bases for disclosure, there are different ways of regulating the disclosure. One is through specific rules which detail specific items that must be given up by the prosecution when requested. These types of rules are specifically laid out in the Rules of Procedure and Evidence in the ICTR and ICTY.

Although the ICTR and ICTY rules of discovery are similar to those of common law systems, common law systems have an additional basis of disclosure that sets out a broad category of evidence that must be disclosed. Much of this evidence is case-specific—according to the alleged crimes and the elements of the crime that are in dispute. Because the ICTR and ICTY are relatively recent institutions, the tribunals are still in the

[2] *Id.* [Reproduced in TAB 1].
[3] *Id.* [Reproduced in TAB 1].

developmental phase of what general rules to adopt when deciding the types of evidence that should be disclosed.

The *Akayesu* decision may be instrumental in determining what types of evidence are subject to disclosure in the charge of genocide. Arguably, the complex nature of the crime of genocide, as well as the gravity of the charge, warrants a broad disclosure standard. In order to protect the rights of the accused, the prosecution should be required to disclose to the full extent possible without impeding upon competing public interests. With respect to the disclosure of prior indictments, one of the most powerful public interests concerns is the protection of witness confidentiality. When faced with the dilemma of important and conflicting interests, the tribunal should be given broad discretion to decide whether evidence should be disclosed.

III. Disclosure[4]

[4] According to ICTY and ICTR Rules of Procedure and Evidence, there are three provisions that apply to disclosure: Rule 66 Disclosure by the Prosecutor, Rule 68 Disclosure of Exculpatory Evidence, and Rule 70 Matters not Subject to Disclosure. Rule 66 states:
"(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence 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.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such an application the Prosecutor shall

When discussing disclosure, countries such as the United States, Canada, and United Kingdom have adopted statutory provisions that codify the rules of procedure and evidence. In the United States, the rules and procedure for evidence are laid out in the Federal Rules of Evidence and the Federal Rules of Criminal Procedure.

In these countries, the criteria for assessing relevance for the submission of evidence are very similar. Rule 401 of the Federal Rules of Criminal Procedure adopted by the United States defines "relevant evidence" as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[5] Rule 402 of the Federal Rules of Criminal Procedure adds that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, Act of Congress, or by applicable rule.[6] These standards of relevancy are very low thresholds as to what evidence may be admissible and thus subject to disclosure. The Supreme Court of Canada has accepted a similar definition of relevancy to that of the United States. It has ruled that if evidence has any probative value it should be received unless a clear ground

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provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

Rule 68 Disclosure of Exculpatory Evidence

The Prosecutor shall, as soon as possible, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

[5] Fed. R. Evid. 401 (2002). [Reproduced in TAB 2].

[6] Fed R. Evid. 402 (2002). [Reproduced in TAB 3].

of policy or law excludes it.[7] The same standard is applicable in the ICTR and ICTY, according to Rule 89(C).[8]

A. United States

The United States has a similar rule of the duty of the prosecutor to disclose evidence under the Federal Rules of Criminal Procedure Rule 16 as the ICTR and ICTY Rules of Procedure and Evidence.[9] The central requirement of Rule 16(a)(1)(C) is that the defendant must show that the evidence or document sought to be discovered are "material to the preparation of the defense".[10] In *United States v. Ross*, the court held that the evidence must not simply "bear some abstract logical relationship to the issues in the case….There must be some indication that pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor."[11] While the documents do not need to directly relate to the accused's guilt or innocence, they must at least play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment or rebuttal."[12]

[7] *R v. Morris*, [1984], 2 W.W.R. 1. [Reproduced in TAB 4].
[8] ICTR Rules of Procedure and Evidence Rule 89(C) states:
"A Chamber may admit any relevant evidence which may deem to have probative value." [Reproduced in TAB 5].
[9] Federal Rules of Criminal Procedure Rule 16 Discovery and Inspection
Rule 16(a)(1)(C) states:
"Upon the request of the defendant the government shall permit the defendant to inspect and copy or photography books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(C) (2002).
[Reproduced in TAB 6].
[10] *United States v. George*, 786 F. Supp. 13 (1991). [Reproduced in TAB 7].
[11] *United States v. Ross*, 511 F.2d 757, 762-3 (5th Cir.1975). [Reproduced in TAB 8].
[12] *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979). [Reproduced in TAB 9].

In *George*, a former deputy director for the operations of the Central Intelligence Agency (CIA), who was indicted on charges stemming from illegal weapons shipments, was entitled to discover all documents produced by government during discovery in prosecution of others allegedly involved in illegal shipments, even though the documents sought contained classified information.[13] The Supreme Court has reiterated that a prosecutor is not required to deliver his entire file to the defense.[14] The level of "materiality" required is a "reasonable probability" that the evidence will contribute to guilt or punishment.[15]

The U.S. Supreme Court addressed the same disclosure rule as Rule 68 of the ICTR Rules of Procedure and Evidence in the application of evidence that may mitigate guilt or punishment in *Brady v. Maryland*.[16] In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violate due process where the evidence is material either to guilt or punishment."[17] However, a prosecutor is not required to deliver his entire file the adversarial party.[18] Once again, the Supreme Court finds that the level of "materiality" required is a "reasonable probability" that the evidence will contribute to guilt or punishment.[19] Impeachment evidence is material in that it mitigates guilt. As such, it is exculpatory.

[13] *United States v. George*, 786 F.Supp at 13. [Reproduced in TAB 7].
[14] *United States v. Bagley*, 105 S. Ct. 3375 (1985). [Reproduced in TAB 10].
[15] *Id.* [Reproduced in TAB 10].
[16] *See Brady v. Maryland*, 373 U.S. 87 (1963). [Reproduced in TAB 11].
[17] *Id.* [Reproduced in TAB 11].
[18] *United States v. Bagley*, 105 S. Ct. 3375 (1985). [Reproduced in TAB 10].
[19] *Id.* [Reproduced in TAB 10].

The duty of prosecutors to disclose exculpatory evidence requested by the defendant is further developed in *United States v. Bagley*.[20] In that case, the Court concluded that the evidence that the prosecution failed to disclose prior to trial must be "material" in order for there to be a *Brady* violation. "Materiality" is dependent upon whether the withheld evidence "creates a reasonable doubt that did not otherwise exist." Under *Bagley,* the Supreme Court reasoned evidence to be "material" in the sense that "its suppression undermines confidence in the outcome of the trial."[21] In an adversarial judicial system as the United States, the Sixth Amendment of the U.S. Constitution guarantees the right to cross-examination of a witness by the accused.[22]

However, individual states within the U.S. vary on what types of disclosure constitutes materiality and whether certain types of non-disclosure impedes on the accused's rights to cross-examination. One such type of evidence that may bear on the right to confrontation is the disclosure of the names and addresses of the witnesses for the prosecution. In *Smith v. Illinois*, the U.S. Supreme Court has ruled that that when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives.[23] The witness' name and address open countless avenues of in-court examination and out-of-court investigation.[24] Thus, in certain cases, the Supreme Court ruled impeachment of a witness might be sufficient basis for disclosure of names and addresses of witnesses because impeachment of a witness can be exculpatory evidence.

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[20] *United States v. Bagley* [Reproduced in TAB 10].
[21] *Id.* [Reproduced in TAB 10].
[22] *Id.* [Reproduced in TAB 10].
[23] *Smith v. Illinois*, 390 U.S. 129 (1968). [Reproduced in TAB 12].
[24] *Id.* [Reproduced in TAB 12].

B. United Kingdom/European Court of Human Rights[25]

In the United Kingdom, the Criminal Procedure and Investigations Act of 1996 was part of the legislative initiative by the Royal Commission to investigate "the role of the prosecutor in supervising the gathering of evidence" and the "arrangements for the disclosure of material, including unused material, to the defence."[26] The English courts have utilized the phrase "unused material" to the evidentiary material other than the evidence that the prosecutor plans to use at trial. The Commission found that the prosecutor might be obligated to disclose to the defense "virtually all the material collected during the investigation" but realized that this was perceived an unreasonable burden, which failed to take into account the needs of public interest.[27] By public interest, the English courts meant the protection of witnesses who may have testified under confidentiality. Confidentiality or other types of immunity may be granted to witnesses when their lives are in danger or for other reasons that would prevent them from giving live testimony.

Like the American system, there are two phases to disclosure: (1) the "primary disclosure" to the defense are certain categories of material which the prosecutor does not

[25] Article 6 states:
"1. In the determination …of any criminal charge against him, everyone is entitled to a fair…hearing…by an independent and impartial tribunal…
2….
3. Everyone charge with a criminal offence has the following minimum rights:
…
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."
[26] *See Taylor v. House of Lords*, [1999] 2 A.C. 177. [Reproduced in TAB 13].
[27] Crim. L.R. 1999, APR 274. [Reproduced in TAB 14].

intend to use at trial and (2) "secondary disclosure," which includes material that is reasonably expected to assist the defense.[28]

The prosecutor's duty of primary disclosure is contained in section 3(1)(a), which states that the "prosecutor must…disclose to the accused any prosecution material which…in the prosecutor's opinion might undermine the case for the prosecution against the accused."[29] One exception is where disclosure is not in the public interest.[30] Clearly, it is the decision of the prosecutor who determines the material that should be turned over the accused. According to *Keane*, material that should be disclosed (unless subject to immunity) if it is (1) material that is relevant or possible relevant to an issue in the case; (2) material that raises or may possibly raise a new issue whose existence is not apparent from the evidence the prosecution decides to use; and (3) material that holds a real prospect of providing a lead on evidence that goes to subsection (1) or (2)."[31] These guidelines are very similar to the guidelines presented by the ICTR Rules of Evidence and Procedure.[32]

C. Canada

In *R. v. Stinchcombe* (No. 1), the Supreme Court of Canada ruled that all relevant information must be disclosed.[33] This applies to material the prosecution, also known as the Crown, does not intend to introduce.[34] No distinction should be made between

[28] Crim. L.R. 1997, MAY 313. [Reproduced in TAB 15].
[29] Crim L.R. 1997, MAY 309. [Reproduced in TAB 15].
[30] *Id.* [Reproduced in TAB 15].
[31] *R. v. Keane*, [1994] 99 Cr.App.R. 1. [Reproduced in TAB 16].
[32] ICTR Rules of Procedure and Evidence Rule89(C). [Reproduced in TAB 5].
[33] *R. v. Stinchcombe* (No. 1), [1991] 3 S.C.R. 326. [Reproduced in TAB 17].
[34] *Id.* [Reproduced in TAB 17].

inculpatory and exculpatory evidence.[35] The Crown need not produce what is clearly irrelevant.[36] The Crown should err on the side of inclusion.[37] In other words, the prosecution should disclose any material that may possibly be exculpatory. Stinchcombe was a lawyer who had been convicted of thirteen counts of criminal breach of trust. During the preliminary inquiry, his former secretary had given evidence favorable to Stinchcombe. Following the inquiry, she was interviewed twice by the police. While the Accused was informed of these interviews, a request for disclosure of the statements was refused. The Crown decided not to call the secretary to give evidence at trial. The Supreme Court ruled that the Accused had a right to the statements made by the Secretary because they were exculpatory and thus, his confrontation rights were violated.

D. ICTR and ICTY

One could argue that the rules of disclosure among common law systems and the ad hoc tribunal vary slightly. The rules set out by the United States, United Kingdom, and Canada suggest that the level of materiality required is "reasonable probability." However, the ICTY and ICTR require a level of materiality that only "suggest[s] the innocence or mitigate[s] the guilt of the accused".[38] This variance suggests that the threshold for disclosure by the prosecutor is a bit lower in the ICTY and ICTR. Thus, the prosecutor ICTR and ICTY may have a duty that requires broader disclosure of any evidence that may possibly be exculpatory.

[35] *Id.* [Reproduced in TAB 17].
[36] *Id*. [Reproduced in TAB 17].
[37] *Id*. [Reproduced in TAB 17].
[38] ICTR Rules of Procedure and Evidence, Rule 69. [Reproduced in TAB 5].

IV. Charge of Genocide: Its Elements[39]

Genocide has been labeled as the "crime of crimes."[40] In 1998, the International Criminal Tribunal for Rwanda, in the case of *Prosecutor v. Jean-Paul Akayesu*, rendered the first conviction ever for an act of genocide, fifty years after the adoption of the definition of genocide created by the International Convention on the Prevention and Punishment of the Crime of Genocide.[41] Many of the decisions faced by the drafters of the Convention are still faced by ad hoc tribunals today as to what constitutes genocide.

The Trial Chambers of the ICTR and ICTY have limited its definition to the one adopted by the Convention .[42] According to the Convention, "a charge of genocide is limited to the subparagraphs of (a) through (e), which lists five different offenses utilized to prosecute genocide." There are essentially two types of elements that are required for a charge of genocide: (1) a physical element (*actus reus*) that consists of the acts listed under subsection (a) through (e) of the definition of genocide established by the Convention and (2) a mental element (*mens rea*). The *Akayesu* decision presents a

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[39] Article II of 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines:

> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
>
> a) Killing members of the group;
> b) Causing serious bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
> d) Imposing measure intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group.

Thus, a crime of genocide holds two elements: 1) physical elements (or actus reus, as referred to by Roman-continental system) and 2) mental element or (mens rea).

[40] *Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, Sept. 4, 1998, para. 16. [Reproduced in TAB 18]. Professor Schabas argues that genocide is the "apex of the pyramid" of international crimes. WILLIAM A SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 9 (2000). [Reproduced in TAB 19].

[41] *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998. [Reproduced in TAB 20].

[42] WILLIAM A SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 9 (2000). [Reproduced in TAB 19].

crucial analysis as to how the international ad hoc tribunals have applied the elements and the meaning of genocide today.

i. Physical Elements (*Actus Reus*)

An analysis by Professor William Schabas identifies and describes the problems of definition of each of the elements. The Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* identified two material elements in the definition of "killing" under subsection (a) of the paragraph: the death of a victim; and the death must be as a result from the unlawful act or omission of the accused or a subordinate.[43] The phrase of paragraph (a) of article II suggests that a single act of killing can satisfy the criteria for "killing."[44] Paragraph (a) also specifies that the victim must be a member of the national, racial, ethnic or religious group that is the target of the genocide in question. In *Akayesu*, the Trial Chamber considered whether a murder of an individual who was not a member of the group, but who was killed within the context of genocide, could be considered genocide.[45] The tribunal ruled that the victim was not a Tutsi, and therefore not a member of the targeted group so as to constitute an act of genocide.[46]

The crime of "causing serious bodily or mental harm" has been interpreted by the *Akayesu* tribunal to encompass "acts of torture, either bodily or mental, inhuman or degrading treatment, and persecution."[47] Professor Schabas argues that the scope of the element "mental harm" remains problematic.[48] He argues that some countries tend to

[43] *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 588. [Reproduced in TAB 20].
[44] WILLIAM A SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 159 (2000). [Reproduced in TAB 19].
[45] *Prosecutor v. Akayesu*, note 42 above, para. 710. [Reproduced in TAB 20].
[46] *Id.* [Reproduced in TAB 20].
[47] *Id* at para. 503. [Reproduced in TAB 20].
[48] WILLIAM A SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 161 (2000). [Reproduced in TAB 19].

translate mental harm to be a permanent one, while the ICTR has adopted the understanding to that the harm must be more than a "minor or temporary impairment of mental faculties."[49]

Professor Schabas concludes that "unlike the crimes set forth in paragraphs (a) and (b), the offense of 'deliberately imposing conditions of life calculated to bring about the group's destruction' does not require proof of a result" because they are typically acts of omission.[50] According to the Rwanda Tribunal, acts of omission include placing people on a substance diet and withholding sufficient living accommodations. Acts of omission are viewed as intentional when there is a positive duty to act. This interpretation provides for a duty to act amongst the military and civilian superiors.[51] However, it ignores the capabilities of a State or civilians to provide for adequate conditions.

The crime of "imposing measures intended to prevent births" has been given a narrow interpretation because many countries including China, United States and the Soviet Union have resisted a broad one.[52] However, the Trial Chamber in *Akayesu* has allowed rape to be included in the crime as well as "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and prohibition of marriages."[53]

The final paragraph,(e), which includes the crime of "forcibly transferring children" is left for serious debate. The drafters of the Convention did not specify what constitutes "children," although international norms interpret it to mean people under the

[49] *Id* at 162. [Reproduced in TAB 19]. *See Prosecutor v. Kayishema and Ruzindana,* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 94. [Reproduced in TAB 21]. Professor Schabas also notes that sexual crimes of violence directed against women falls within this category of mental and bodily harm.
[50] SCHABAS, *see* note 49 above, at 167. [Reproduced in TAB 19].
[51] *Id* at 171. [Reproduced in TAB 19].
[52] I*d* at 172. [Reproduced in TAB 19].
[53] *Prosecutor v. Akayesu*, note 42 above, para. 507. [Reproduced in TAB 20].

age of eighteen. The inclusion of paragraph (e) as a crime is an attempt to take into account the possibility of cultural genocide. Arguably, the belief is that children lose their cultural identity when forced to transfer because they take on another one.[54] Schabas points out that older children are not necessarily likely to do so.

Although many others have argued that other crimes such as cultural genocide, "ethnic cleansing," ecocide, and apartheid should fall under the paragraphs that constitute genocide, the Drafters decided to take a narrower interpretation.[55] The Drafters believed a limitation was necessary so as to protect the credibility of the Convention as well as its implementation in the international tribunals.

ii. Mental Elements (*Mens Rea*)

While genocide is one of the five acts in the paragraphs of Article II of the Convention, it must be coupled with the mental elements of knowledge and intent. The definition of knowledge and intent poses a problem as well as proving the elements.

According to the Rome Statute, "knowledge" means awareness of the circumstances of the crime genocide. Thus, the scope of genocide cannot be done acting alone. Ralph Lemkin, proposed that a plan was needed for the crime of genocide.[56] The ICTY has supported the proposition that a plan is a requirement for genocide.[57] The ICTY in *Kayishema and Ruzindana*, have acknowledged that although a plan is not an

[54] WILLIAM A SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 176 (2000). [Reproduced in TAB 19].
[55] *See id.* [Reproduced in TAB 19].
[56] Raphael Lemkin, *Axis Rule in Occupied Europe, Law of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnagie Endowment for World Peace (1944), p. 79. [Reproduced in TAB 22].
[57] *Prosecutor v. Karadzic and Mladic* (Case No. IT-95-5-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94. [Reproduced in TAB 23].

element of genocide, it would be a difficult task without one.[58] However, the Tribunal has reiterated that the accused must have knowledge of the circumstances or plan of genocide.[59]

Furthermore, the second requirement for knowledge is the consequences of one's action in the ordinary course of events.[60] Knowledge varies with the act and therefore, so does requirement of the knowledge of the accused.[61] There is debate about whether recklessness of the knowledge of the consequences satisfies the requirement. The Rwanda Tribunal in *Akayesu* states that this standard is satisfied because the accused knew or should have known the act would result in consequences that " would destroy, in whole or in part, a group."[62] Some argue that this "should have known" standard is too low for the requirement of knowledge and is inapplicable in a crime of genocide. However, the Tribunal has adopted the standard because it provides a mechanism that safeguards against "willful blindness" by a perpetrator of genocide and allows for "constructive" knowledge of the consequences of the act.[63]

Proof of intent is best expressed by the Trial Chamber of the ICTR in *Akayesu*, which stated "[t] he moral element is reflected in the desire of the Accused that the crime be in fact committed."[64] In other words, *mens rea* (specific intent) for committing the underlying offense of genocide is required. In paragraph (a) and (b), a specific intent for

[58] *Prosecutor v. Kayishema and Ruzindema* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 94. [Reproduced in TAB 21].
[59] *See Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 655. [Reproduced in TAB 24].
[60] SCHABAS, *see* note 49 above, 211. [Reproduced in TAB 19].
[61] *Id.* [Reproduced in TAB 19].
[62] *Prosecutor v. Akayesu*, note 42 above, para. 519. [Reproduced in TAB 20].
[63] *Prosecutor v. Tadic*, note 60 above, para. 659. [Reproduced in TAB 24].
[64] *Prosecutor v. Akayesu*, note 42 above, para. 475. [Reproduced in TAB 20].

the underlying crime is required whereas in (c) and (d) requires the additional mental element but not a result. Only paragraph (e) does not require a specific intent.

Proving intent in ordinary crimes is easier than specific intent crimes because criminal law presumes that an individual intended the consequences of his or her acts.[65] Nonetheless, proof of specific intent is almost impossible to determine.[66] Therefore, intent may be inferred by acts of the perpetrator. Professor Shabas argues "the specific intent required for a conviction of genocide is even more demanding than that required for murder."[67] The court in *Akayesu* states that

> "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender of by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[68]

The inquiry of intent is all-encompassing but consists of at least of an examination of the number of victims, the methodology of the genocidal conduct prior statements and acts of the accused.[69] Specifically, those acts may include (1) scale and nature of the atrocities committed, (2) discriminatory targeting of members of one group versus the other groups, (3) systematic planning or killing, (4) the weapons employed and the extent of bodily injury and (5) documents reflecting participation in or knowledge of atrocities.[70] Others have argued for an objective legal standard to be included in the

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[65] SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000*)*, 222. [Reproduced in TAB 19].
[66] FRANSISCO MARTIN & RICHARD WILSON, *THE RIGHTS INTERNATIONAL COMPANION TO CRIMINAL LAW AND PROCEDURE* 133 (1999). [Reproduced in TAB 25].
[67] *Id.* [Reproduced in TAB 25].
[68] *Prosecutor v. Karadzic and Mladic*, note 58, para. 94. [Reproduced in TAB 23].
[69] *Prosecutor v. Jelisic* (Case No. IT-95-10-71), Judgment ICTY Trial Chamber I, December 14, 1999, para. 60. [Reproduced in TAB 26].
[70] *Prosecutor v. Akayesu*, note 42 para. 523,93,94,527. [Reproduced in TAB 20].

analysis of specific intent because of the difficulties that may arise when providing for evidence of specific intent with respect to genocide.[71]

The specific intent requirement must apply to all three components: (1) to destroy the group, (2) to destroy the group in whole or in part and (3) to destroy the group that is defined by a nationality, race, ethnicity, or religion.[72] The Trial Chamber in *Akayesu* adopted a "clear intent to destroy" standard rather than a "mere knowledge" that certain acts will destroy a protected group.[73]

Genocide is directed against a group of people, not as individuals *per se*. In *Akayesu*, the court determined that "the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnic, racial or religious group."[74] The Trial Chamber also determined that a "national group" comprises "a citizenship, coupled with reciprocity of rights and duties."[75] A "racial group" is defined on the basis of "the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[76] The ICTR in *Akayesu* broadened the scope of the groups expressly protected by the Genocide Convention to include all institutional social entities. This would include persons who are involuntarily grouped by social status, such as sexual identity, gender or sexual orientation.[77] Political

[71] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, 225. *See* M. Cherif Bassiouni, 'Commentary on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind,' (1993) 11 *Nouvelles ètudes pènales*, p.233. [Reproduced in TAB 19].
[72] SCHABAS, *see* note 72 above, at 228. [Reproduced in TAB 19].
[73] *Prosecutor v. Akayesu*, *see* note 42, para. 521. [Reproduced in TAB 20].
[74] *Prosecutor v. Akayesu*, *see* note 42, para. 520. [Reproduced in TAB 20].
[75] *Prosecutor v. Akayesu*, *see* note 42, para. 511. [Reproduced in TAB 20].
[76] *Prosecutor v. Akayesu*, *see* note 42, para. 513. [Reproduced in TAB 20].
[77] *Prosecutor v. Akayesu*, *see* note 42, para 513. [Reproduced in TAB 20].

groups have been explicitly excluded from protection because some argue that the group is not formed on an intrinsic basis, and therefore lacked homogeneity and stability.[78]

There are many elements of genocide that are material to the defense. However, the determination of whether evidence should be disclosed is contingent upon the elements that are most in dispute. For example, the accused may ask for evidence that bears upon the ethnicity of a victim if it has reason to believe that it is elemental in its defense. However, the prosecution may be equally likely to show that the ethnicity of a victim is irrelevant because the accused had the intent to kill a particular ethnicity, regardless of what that ethnicity happened to be.

One could argue that because motive is the most difficult elements of genocide to prove, and therefore more likely to be in dispute, there should be a broad permission with respect to evidentiary disclosure. In other words, the defense should be allowed more discretion when the element of motive is in dispute, even when the prosecution may believe that the evidence in its possession has little bearing to the case at hand.

Genocide is generally acknowledged to be a particular form of crime against humanity. Regardless of the words in the definition, in practice, motive will remain extremely relevant to prosecutions.[79] When the defense can raise a doubt about the existence of a motive, it will have cast a large shadow of uncertainty as to the existence of genocidal intent.[80] Professor Schabas analyzes two types of motives: the collective motive and the individual motive.[81] Genocide is a collective crime by nature, committed with the co-operation of many participants. Professor Schabas argues that it is, moreover,

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[78] Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot,* 106 Yale L.J. 2263 (1997). [Reproduced in TAB 27].
[79] SCHABAS, *see* note 43, at 254. [Reproduced in TAB 19].
[80] *Id.* [Reproduced in TAB 19].
[81] *Id* at 255. [Reproduced in TAB 19].

an offence generally directed by the State. The organizers and planners must necessarily have a racist or discriminatory motive that is a genocidal motive, taken as a whole. Where this is lacking, the crime cannot be genocide. Evidence of hateful motive will constitute an integral part of the proof of existence of a genocidal plan, and therefore of a genocidal intent. At the same time, individual participants may be motivated by a range of factors, including financial gain, jealousy, or political ambition.[82]

Some States like the United Kingdom urged caution with respect to motive because of the evidentiary difficulties arising when it was applied on an individual level. They believe that that the motive requirement put obstacles in the way for an effective prosecution. Thus, individual offenders should not be entitled to raise personal motives as a defense to genocide, arguing for instance that they participated in an act of collective hatred but were driven by other factors. This position is the one taken by the Appeals Chambers of ICTY in the *Tadic* judgment.[83] Professor Schabas argues that on the issue of individual motive, practical considerations should nevertheless not be overlooked.[84] An individual who does not manifest genocidal motives, and who appears to have been driven by purely personal considerations, is unlikely to attract much attention from international tribunals at a time when there are "bigger fish to fry."[85]

The case law of the ad hoc tribunals is hardly enlightening as to this vexing problem of interpretation of motive and how it should be applied to intent. In *Akayesu*, the Trial Chamber of the ICTR effectively avoided the question. There is only a fleeing

[82] Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 Yale L.J. 2263 (1997). [Reproduced in TAB 27].
[83] *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, *see* note 60 above. [Reproduced in TAB 24].
[84] SCHABAS, see note 43, at 256. [Reproduced in TAB 19].
[85] *Id.* [Reproduced in TAB 19].

reference in the judgment to the discussion of intent: "the perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realization of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.[86] A second Trial Chamber of the ICTR, in *Kayishema and Ruzindana*, also failed to address the issue directly.[87] However, referring to the list of protected groups in article II, it said that the acts of genocide 'must be directed towards a specific group on these grounds.'[88]

Professor Schabas argues that this confuses two concepts, because the list in article II is not at all about 'grounds.'[89] He states that the International Law Commission debates reveal conflicting views on this issue as well.[90] The Australian Human Rights and Equal Opportunity Commission considered the relevance of motive with respect to charges of genocide that had been committed in transferring indigenous children to families of European descent, in violation of article II(e) of the Convention.[91] It was stated that in defense that the transfers had been committed in order to give children an education or job training. The Commission concluded that, even if motives were mixed, a fundamental element in the programme was the elimination of indigenous cultures, and that as a result the co-existence of other motives was no defense.[92]

Thus, the standard for disclosure in the ICTR and ICTY is crucial in determining what evidence can be construed as evidence of motive. Evidence of intent on a collective basis can sometimes be easier to collect than evidence of intent on an individual basis. A

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[86] *Prosecutor v. Akayesu*, note 42 above, para. 461. [Reproduced in TAB 20].
[87] *Prosecutor v. Kayeishema and Ruzindana*, (Case No. ICTR-95-1-T), Judgment, 21 May 1999, *see* note 59 above, para 98. [Reproduced in TAB 21].
[88] *Id.* [Reproduced in TAB 21].
[89] SCHABAS, *see* note 43 above, at 253. [Reproduced in TAB 19].
[90] *Id*. [Reproduced in TAB 19].
[91] *Id*. [Reproduced in TAB 19].
[92] *Id.* [Reproduced in TAB 19].

complex scenario to gauge is when evidence of individual motive is indistinguishable from collective motive. The prosecution may be forced to disclose all evidence of collective motive if the defense asks for evidence of motive.

This "reasonable" standard of when disclosure is appropriate becomes more evident as applied to the intent element. Because intent is more difficult to distinguish, thus prove or disprove, the accused should have greater access to disclosure of evidence of intent. For example, A may be accused of genocide of B. A is claiming issue as to the intent of killing B. Although A might have committed the physical act of genocide against B, he may not have the requisite mental element of committing genocide against B. If A would like to bring into evidence such as prior testimony from other witnesses that he did not have the requisite intent to commit genocide against B, he should be able to do so. However, admittance of such evidence would be more challenging if the other witnesses testimony is confidential. Nonetheless, prior testimony should be disclosed because intent of genocide is at issue.

Another possible debate that future tribunals may be forced to contend with is the definitional components of ethnicity. As some critics of the Rwandan tribunals have argued, the catagorization of Hutu and Tutsi as ethnicities are questionable.[93] If that seems to hold true, then the basis for a protected class also seems in question. Tribunals are left to clarify the basis for what groups fall under the category of victims of genocide when ethnicity is at issue. Using the same example, A is accused of genocide of B. A may claim that the B's ethnicity is at issue because B is not of the victim class that A is being indicted for genocide against. Therefore, B may claim that he has not committed a

[93] Matthew Lippman, *The Convention on the Prevention and Punsihment of the Crime of Genocide, Fifty Years Later*, 15 Ari.z. J.Int'l & Comp.L. 464 (1998). [Reproduced in TAB 28].

crime of genocide. However, a genocide charge may still be appropriate if A thought that B is of the victim class. This example raises the question as to ethnicity, and whether the evidence that may be at issue should always be disclosed to the defense. As indicated by the example, one could argue that it should not.

While the debate about definition will clearly continue, its interpretations bring up an issue about the extent of the rights of the accused. Although the tribunal would prefer to choose the terminology most favorable to the accused to afford him the rights of a fair trial and thus allow disclosure of evidence that is most favorable to the accused, the courts may not allow such disclosure at the expense of witness rights and protections. Therefore, the courts are left with the dilemma of how to balance the rights of the accused along with the public interest of maintaining confidentiality of witness testimony. Since the definitional debates will almost always pose a problem of interpretation, it is important for the tribunal to resolve these debates through its own discretion. .

V. Balancing Disclosure with Witness Confidentiality[94]

In the case of genocide, there is usually not much relevant physical evidence for the Prosecutor to submit due to the nature of the crime. Unlike the Holocaust perpetrated by the Nazis, physical evidence of concentration camps and other mechanisms are not

[94] According to the ICTY and ICTR Rules of Procedure and Evidence, Rule 69 Protection of Victims and Witnesses states:
"(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit.
(C) Subject to Rule 75, 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 prosecution and defence."

always so prevalent, nor is it required for a charge of genocide. In the International Tribunal for Yugoslavia, the Tribunal was hard pressed to produce witnesses because victims have fled the ongoing hostilities and have become difficult to locate, some were killed, and others are scared or reluctant to testify.[95] Likewise, relevant physical evidence will have been destroyed or lost.[96] Therefore, witness testimony is paramount in the evidence brought before the Trial Chamber by the Prosecutor as well as the defence.

In many circumstances, in both the ICTY and ICTR, the victims have feared retribution when they have decided to testify.[97] A real threat to their safety does exist. In Rwanda, the danger to witnesses who decide to testify in Rwanda is still pervasive. U.N. observers have estimated that between May and June of 1996, ninety-nine witnesses to the Rwandan genocide have been murdered by Hutu extremists.[98] The security of witness' lives is at stake. The court faces the challenge of maintaining its integrity by balancing of the security of witnesses or victims with the fundamental guarantees of the accused.

The challenge faced by the Tribunals is protecting witnesses so they will testify. Some argue that the Tribunal should take precautionary measure in order to insure that witnesses do not "reliv[e] a painful experience by testifying before an indifferent bureaucracy, an assaultive defense team, or an unsympathetic media."[99] Granting anonymity to witnesses has become instrumental is assuring those precautions.

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[95] *See* Alex Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 46 Hastings L.J. 910 (1995). [Reproduced in TAB 29].
[96] *Supra.* [Reproduced in TAB 29].
[97] *Supra.* [Reproduced in TAB 29].
[98] *Supra.* [Reproduced in TAB 29].
[99] Lakatos, *see* note 96 above, at 911. [Reproduced in TAB 29].

The Rwanda Tribunal has required the Prosecutor to disclose the identity of victims and witnesses to the defense, before the trial commences, to allow for adequate cross-examination. Additionally, the Trial Chamber of the Rwanda Tribunal has determined that a prosecutor, even in the pretrial phase, cannot withhold the identity of testifying witnesses from the defense without an order from the Trial Chamber. Doing so would be considered a violation of due process.

However, there may be cases where protection of witnesses involves withholding of evidence by the Prosecutor. The debate focuses upon the Prosecutor's duty to disclose this evidence and how to decide what information is deemed material evidence to the defense and the procedural safeguards in place to compensate for the handicap to the defense.

Under Article 14 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), the Tribunal is governed by the Rules of Procedure and Evidence originally created for the International Criminal Court for the Former Yugoslavia with some revision. Under the provisions provided by ICTY, the court has developed extensive procedures for safeguarding witness testimony as evidence through anonymous testimony.

One of the mechanisms implemented by the ICTY in the *Tadic* decision is a five-prong test that permits anonymous testimony into evidence:

1) "There must exist a real fear for the witness safety or that of their family, and real grounds for fear of retribution if the witnesses identity is released.
2) The witnesses testimony must be relevant and of such import that it would hinder the Prosecutor's case to proceed without it.
2) The Trial Chamber must be satisfied that there exists no prima facie evidence that the witness is untrustworthy. The prosecutor is required to examine the background of the witness and be assured of no criminality and that the witness is impartial.
3) The Trial Chamber's inability to provide adequate protection for witnesses has considerable weight when evaluating whether to grant anonymity.

5) If at all possible, the Tribunal must determine if less restrictive measure can be utilized to secure the necessary protection on behalf of the witness. For this to be satisfied the accused must suffer no additional avoidable prejudice in light of granting anonymity."[100]

While these rules and procedures lay out the rights of the parties and the protection of witnesses, there exists sufficient room for interpretation. There are opponents of the practice of allowing witnesses anonymous witnesses who believe that the rules must be amended so that anonymity for witnesses and victims is not an option.[101] Proponents of the Rules argue that narrowly construing the right of examination by the defendant is prudent in the Tribunal's desire to protect the victims and witnesses who participate in the trial.

The ambiguous language of the Rules leaves the judges with an enormous amount of discretion.[102] These concerns in relation to judicial discretion may negatively impact the integrity of the court. If the judges of the Tribunal are perceived as arrogant and fully justified in utilizing "unfettered discretion" then the overall purpose of the Tribunal in bringing war criminals to justice in a neutral and fair forum would be missed.

Realizing the controversial nature of this decision, under certain legal systems, the Trial Chamber stated that the right of the accused to examine, or have examined, the witnesses against him is not necessarily violated by a grant of anonymity. The Court developed the guidelines to assure the requisite level of fairness.[103] The Trial Chamber

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[100] *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997. [Reproduced in TAB 24].

[101] *See* Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Right of the Accused Under The Rules of Procedure and Evidence of The International Criminal Tribunal for the Former Yugoslavia*. 20 Hous. J. Int'l L. 381, 401 (1998). [Reproduced in TAB 30].

[102] *Id* [Reproduced in TAB 30].

[103] See *Prosecutor v. Tadic* (Case No. IT-94-1-T), Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for the Victims and Witnesses, August 10, 1995. [Reproduced in TAB 31].

The following guidelines include:

(1) [T]he judges must be able to observe the demeanor the witness, in order to assess the reliability of the testimony….;

has stated that it would consider the specific circumstances of each case. In the separate opinion of Judge Stephen, he recognized the tension between what is deemed the axiomatic and unconditional right of the accused to a fair trial, and the "quite distinct need 'to ensure the protection of victims and witnesses.'"[104] Judge Stephen voiced his disapproval of withholding from the Defense the name and other identifying data of a witness and allowing. He argues that Article 20(1) of the Tribunal's Statute by its very language and tone requires the court to apply a higher standard when considering the rights of the accused and commented on the "emphatic enumeration of distinct rights of the accused" in Article 21.[105]

Furthermore, the decisions of the Tribunal should be consistent with internationally accepted norms of procedure. The international community has an interest in the administration of justice and seeking vindication for war crimes committed. Therefore, its support is needed in order to establish the veracity of the Tribunal. The ICTY in its decision to adopt the five-prong test to allow for anonymous witness testimony took into consideration the procedural decisions through case law established by the European Court of Human Rights, as well as the model adopted by Great Britain and the United States.

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(2) The Judges must be aware of the identity of the witness, in order to test the reliability of the witness….;
(3) [T]he [D]efense must be allowed ample opportunity to question the witness of [sic] issues unrelated to this or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information….;
(4) The identity of the witnesses must be released when there are no longer reasons to fear for the security of the witness

[104] *Prosecutor v. Tadic* (Case No. IT-94-1-T), Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for the Victims and Witnesses, August 10, 1995. [Reproduced in TAB 31].

[105] Article 21 of the ICTY states:

The English courts have safeguarded the principle of equality of arms through the use of such mechanisms as *ex parte* proceedings to determine whether evidence should be disclosed to the defense in matters of security interest or public interest grounds that may prevent its disclosure. Under *Jasper v. United Kingdom*, the defense was kept informed and was permitted to make submissions and participate in providing adversarial proceedings and equality of arms to the extent possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.[106] Furthermore, the need for disclosure was at all times under assessment by the trial judge provided an additional safeguard for fairness against the evidence being withheld.[107] Thus, the English court has reiterated that it is for the court, not the prosecutor, to decide on disputed questions as to discloseable materials, and on any asserted legal ground to withhold production of relevant material.[108]

Article 6 of the European Convention of Human Rights requires that the accused in a criminal proceeding must be made aware of the prosecution evidence against him in order to prepare a defense adequately. In the context, Article 6(3) provides that the accused must be afforded 'adequate facilities', which the European Court of Human Rights (ECHR) has interpreted as requiring access to the results of investigations undertaken through the proceedings.[109] Under *Jespers v. Belgium*, the Commission held that investigating and prosecution authorities are under an obligation to disclose to the accused any material, which may assist the accused in exonerating himself or in obtaining

[106] *Jasper v. United Kingdom*, (2000) 3 E.C.H.R. 1. [Reproduced in TAB 32].
[107] *Id.* [Reproduced in TAB 32].
[108] *See id.* [Reproduced in TAB 32].
[109] Raymond J. Toney, *Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What Does the European Convention of Human Rights Require?*, 2001 Ev.Pro 5.1(39). [Reproduced in TAB 33].

a reduction in sentence.[110] In *Rowe and Davis v. UK*, the ECHR held that the full disclosure right is not absolute, and could "in the pursuit of legitimate aim such as protection of national security or of vulnerable witness" be subject to limitations.[111] The Court emphasized that limitations on disclosure must be proportionate and subject to procedural safeguards that compensate for the handicap imposed on the defense.[112]

Nonetheless, witness interests are not so heavily emphasized in the judicial systems of the United States, Canada, and ECHR. Their case law addresses minimally whether disclosure of names and witnesses of whom the prosecutor intends to call. Most of the countries do not require it but order its disclosure in limited circumstances.

The Trial Chamber in *Tadic* tempered its holding by recognizing that restricting the right of the accused—to examine, or have examined, witnesses against him—must be done only in exceptional circumstances.[113] The Trial Chamber held that situations of armed conflict where atrocities allegedly were committed qualify as an "exceptional circumstance par excellence."[114] The court pointed out that "[I]t is for this kind of situation that most major international human rights instruments allows some derogation from recognized procedural guarantees."[115]

VI. Conclusion

Disclosure benefits the administration of justice. Therefore, the best way to insure that justice is served is to allow for the broadest disclosure possible without impeding

[110] *Jasper v. United Kingdom,* (2000) 3 E.C.H.R. 1. [Reproduced in TAB 32].
[111] *Rowe and Davis v. United Kingdom*, (2000) 30 E.C.H.R. 1. [Reproduced in TAB 34].
[112] *Id.* [Reproduced in TAB 34].
[113] *See* Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 How.L.J. 166 (1997). [Reproduced in TAB 35].
[114] *Id.* [Reproduced in TAB 35].
[115] *Id.* [Reproduced in TAB 35].

upon conflicting interests. When there are conflicting interests such as public interests concerns of protecting witnesses, the disclosure exception should be construed as narrow as possible.

Therefore, when the relevancy of evidence is at issue, the existence of its information warrants its disclosure. When the existence of the information is in the hands of the prosecutor, he bears the initial burden of establishing that it has no relevance. Where the parties cannot resolve relevance and the accused seeks its disclosure, the prosecutor should produce a written itemized inventory of the evidence he intends to disclose and those which he does not. With respect to the latter, a statement of the purpose of withholding disclosure should be included.

This is an issue committed to the discretion of the trial court, which in its determination is "entitled to weigh the potential unfairness of a free wheeling inquiry of other genocide cases or impede upon the other cases involving genocide against whatever potential materiality the evidence of other indictments and cases of genocide might have." This determination poses the most difficulty where element of intent in the charge of genocide is concerned.

Therefore, it should be argued that an accused may examine an indictment or other cases of genocide where: (1) the accused has a factual predicate for the relevance of the indictment or other cases of genocide, and (2) the indictment or other cases of genocide bears directly upon the issues of genocide of the accused. This standard insures that the stronger the evidence that the indictments or cases of other genocide are at issue, the greater the probative value of those indictments to the relevancy of the charge of genocide of the accused.

VII. Appendix

1. **Diane Marie Amann, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, 75 Ind. L.J. 842 (2000).**

2. **Fed. R. Evid. 401 (2002).**

3. **Fed R. Evid. 402 (2002).**

4. **R v. Morris, [1984], 2 W.W.R. 1.**

5. **ICTR Rules of Procedure and Evidence (2002).**

6. **Federal Rules of Criminal Procedure Rule 16 (2002).**

7. **United States v. George, 786 F. Supp. 13 (1991).**

8. **United States v. Ross, 511 F.2d 757, 762-3 (5th Cir.1975).**

9. **United States v. Felt, 491 F.Supp. 179, 186 (D.D.C.1979).**

10. **United States v. Bagley, 105 S. Ct. 3375 (1985).**

11. **Brady v. Maryland, 373 U.S. 87 (1963).**

12. **Smith v. Illinois, 390 U.S. 129 (1968).**

13. **Taylor v. House of Lords, [1999] 2 A.C. 177.**

14. **Crim. L.R. 1999, APR 274.**

15. **Crim. L.R. 1997, MAY 313.**

16. **R. v. Keane, [1994] 99 Cr.App.R. 1.**

17. **R. v. Stinchcombe (No. 1), [1991] 3 S.C.R. 326.**

18. **Prosecutor v. Kambanda (Case No. ICTR-97-23-S), Judgment and Sentence, Sept. 4, 1998.**

19. **WILLIAM A SCHABAS, GENOCIDE IN INTERNATIONAL LAW 9 (2000).**

20. **Prosecutor v. Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998.**

21. **Prosecutor v. Kayishema and Ruzindana, (Case No. ICTR-95-1-T), Judgment, 21 May 1999.**

22. **Raphael Lemkin, Axis Rule in Occupied Europe, Law of Occupation, Analysis of Government, Proposals for Redress, Washington: Carnagie Endowment for World Peace (1944).**

23. **Prosecutor v. Karadzic and Mladic (Case No. IT-95-5-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996.**

24. **Prosecutor v. Tadic (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997.**

25. **FRANSISCO MARTIN & RICHARD WILSON, THE RIGHTS INTERNATIONAL COMPANION TO CRIMINAL LAW AND PROCEDURE 133 (1999).**

26. **Prosecutor v. Jelisic (Case No. IT-95-10-71), Judgment, ICTY Trial Chamber I, December 14, 1999.**

27. **Beth Van Schaack, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, 106 Yale L.J. 2263 (1997).**

28. **Matthew Lippman, The Convention on the Prevention and Punsihment of the Crime of Genocide, Fifty Years Later, 15 Ari.z. J.Int'l & Comp.L. 464 (1998).**

29. **Alex Lakatos, Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights, 46 Hastings L.J. 910 (1995).**

30. **Vincent M. Creta, The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Right of the Accused Under The Rules of Procedure and Evidence of The International Criminal Tribunal for the Former Yugoslavia. 20 Hous. J. Int'l L. 381, 401 (1998).**

31. **Prosecutor v. Tadic (Case No. IT-94-1-T), Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for the Victims and Witnesses, August 10, 1995.**

32. **Jasper v. United Kingdom, (2000) 3 E.C.H.R. 1.**

33. **Raymond J. Toney, Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What Does the European Convention of Human Rights Require?, 2001 Ev.Pro 5.1(39).**

34. **Rowe and Davis v. United Kingdom, (2000) 30 E.C.H.R. 1.**

35. **Mercedeh Momeni, Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia, 41 How.L.J. 166 (1997).**