

Essay

Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*

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Obrenović: We've managed to catch a few more, either with guns or mines.

Krstić: Kill them all. God damn it.

Obrenović: Everything, everything is going according to plan. Yes.

Krstić: [Not a] single one must be left alive.

Obrenović: Everything is going according to plan. Everything.

Krstić: Way to go, Chief. The Turks are probably listening to us. Let them listen, the motherfuckers.

Obrenović: Yeah, let them.¹

I. INTRODUCTION

Prior to Serbia's surrender of Slobodon Milošević to the International Criminal Tribunal for the Former Yugoslavia (ICTY), General Radislav Krstić was the biggest "big fish" to be put on trial in the Hague. Krstić seemed to cut a sympathetic figure compared to many of the thugs and petty camp tyrants who had previously appeared before the Tribunal's judges. A mild-mannered professional soldier, Krstić had lost a leg in a land mine incident in December 1994 and was considered a valuable and cooperative partner with the Western powers in implementing the Dayton Accords.² Krstić, however, also had a

* This Essay was the prize-winning submission to the 2006 Yale Journal of International Law Young Scholars Conference, *Worlds Apart: Emerging Nations, Established Powers, and International Law*, held on March 4, 2006 at Yale Law School.

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1. Prosecutor v. Krstić, Case No. IT-98-33, Transcript of Hearing, 6806-07 (Nov. 1, 2000).

2. Prosecutor v. Krstić, Case No. IT-98-33, Trial Judgment, ¶¶ 298-99, 724 (Aug. 2, 2001) [hereinafter Krstić, Trial Judgment].

darker side. He had served as Chief of Staff and then Commander of the Drina Corps, a formation of the Bosnian Serb Army, during July 1995 when the Drina Corps participated in the forced evacuation of 25,000 Muslims from the United Nations "safe haven" of Srebrenica. The Drina Corps was heavily implicated in the accompanying massacre of approximately 7,000 Muslim men of military age.³ Charged with genocide, war crimes, and crimes against humanity, Krstić did not deny that the executions and secret burials had taken place. Instead, he insisted that he did not become commander of the Corps until after the crucial week when the massacre happened, that during the time in question he was miles away conducting an operation in Žepa, and lastly that he did not even learn of the atrocities until months later, in August.⁴ Ultimately, Krstić's story came unraveled in the face of evidence from hundreds of intercepts like the one that opens this Essay, recorded and transcribed by the Bosnian Army. These intercepts "sealed Krstić's fate," in the words of ICTY Judge Patricia Wald.⁵ The Turks were, indeed, listening.

Modern international criminal tribunals cannot expect to have the benefit of a lengthy paper trail to help them establish chains of command and responsibility for war crimes. When Nuremberg prosecutor Robert Jackson was assembling his case against top Nazi leaders, he had access to the full treasure trove of documents from a vanquished enemy that was known for its meticulous bureaucratic record-keeping. Many Nazi leaders never expected to lose the war, or, at the very least, never anticipated being held accountable to international justice. Contemporary tyrants may suffer similar delusions of grandeur, but many have learned the lessons of their Nazi predecessors and are less likely to give direct orders to kill or abuse.⁶ Indeed, the two greatest mass murderers of the twentieth century, Joseph Stalin and Mao Zedong, seem to have left little in the way of a direct record.⁷ Further, modern criminal tribunals like the ICTY often operate without the full cooperation of a state, which may be hesitant to hand over documents that implicate current as well as former leaders. Finally, even when a written record is available, the chain of command on paper may differ significantly from the real one. A lead investigator on the Milošević team suggested that one of the key commanders transmitting orders from Milošević to the Serbian police forces, deputy prime minister Nikola Sainović, did not even have a title in the police but was "willing to do the dirty work."⁸ The result is that prosecutors in modern criminal trials who seek to link the "big fish" to atrocities on the ground have

3. *Id.* ¶¶ 1-3.

4. *Id.* ¶¶ 301-09.

5. Patricia M. Wald, *General Radislav Krstić: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 459 (2003).

6. *Id.* at 468.

7. Tim Naftali, *The Lion in Whimper: Why Didn't We See Saddam's Weakness?*, SLATE, Apr. 5, 2006, <http://www.slate.com/id/2139353>. Saddam Hussein may yet prove to be a notable exception to this trend. See Robert F. Worth, *Prosecutors in Hussein Case Tie Him to Order To Kill 148*, N.Y. TIMES, Mar. 1, 2006, at A1. However, the prosecutors in the Hussein trial, like those at Nuremberg, notably have the rare benefit of full access to Hussein's files after his regime suffered total defeat and U.S. occupation.

8. Marlise Simons, *Case Against Milošević Is Not Simple To Prove*, N.Y. TIMES, July 2, 2001, at A8 (quoting Nancy Paterson, former team legal advisor, Office of the Prosecutor, ICTY).

to rely on very different kinds of evidence than their predecessors at Nuremberg and Tokyo. Witness testimony and, increasingly, intelligence information now play the roles formerly held by captured memoranda and signed orders.

Advances in intelligence technology, particularly signals surveillance and satellite reconnaissance, have given prosecutors new tools to document war crimes and command responsibility where the paper trail leaves off. The power of such evidence, which might allow judges to be a “fly on the wall” to a telephone discussion among top leaders as they conspire to commit crimes, is obvious. One ICTY judge described as “astounding” satellite photography furnished by the U.S. military that pinpointed down to the minute the movements of men and transport around Srebrenica.⁹ This evidence is not, however, unproblematic. For one, states must be convinced to provide it and often want assurances that valuable sources and methods will not be compromised.¹⁰ States providing such evidence may demand that it only be utilized by the prosecutor, protected from disclosure to the defense, or—if ultimately used as evidence—presented only in closed, in camera hearings. This, in turn, presents problems for preserving the openness of international criminal trials, protecting the defendant’s right to know the evidence against him, and protecting his right to challenge the authenticity of such evidence in court. These dilemmas are particularly acute for international courts, since the public often greets them skeptically, especially when egged on by demagogic defendants. Measures to protect and utilize “secret” evidence can always raise the specter of show trials. Further, since one of international justice’s main aims is public education and national reconciliation, prosecutors using secret evidence may win individual battles in court, but lose the broader war of reforming societies and healing victims. Indeed, Milošević’s sudden death in March 2006, after more than four years of trial but before the Tribunal could reach judgment, dramatizes that sometimes only the trial record itself may exist to serve as history’s lasting testament to heinous crimes.

In this Essay, I will argue that because defendants’ rights and national security interests often conflict, international tribunals, including the

9. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 101 (2001).

10. Following the ICTY’s controversial decision in *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoena Duces Tecum* (July 18, 1997), when the Trial Chamber requested the enforcement of a subpoena for documents against Croatia despite Croatia’s objection on grounds of state secrecy, much ink has been spilled on the propriety of allowing international tribunals to adjudicate state secrecy claims as grounds for non-cooperation. See, e.g., Grant Dawson & Mieke Dixon, *The Protection of States’ National Security Interests in Cases Before the ICTY: A Descriptive and Prescriptive Analysis of Rule 54 bis of the Rules and Procedure and Evidence*, in THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE 95, 112-34 (Hirad Abtahi & Gideon Boas eds., 2006); Matthias Neuner, *The Power of International Criminal Tribunals To Produce Evidence*, in NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE 163 (Herwig Roggemann & Petar Šarčević eds., 2002). This Essay focuses on national security evidence that is voluntarily submitted to international criminal prosecutors, not evidence that parties to such proceedings may attempt to procure from states through subpoena. In practical terms, I believe that the voluntary, cooperative model is the most likely way that state secret evidence will come into the hands of international tribunals and presents often-overlooked problems in its own right.

International Criminal Court and Iraqi Special Tribunal, must draft clearer rules to govern the discovery and use of such evidence and work toward greater overall transparency in rulemaking. Using the ICTY as a case study, I will examine how tribunals can work to create a flexible procedural regime that accommodates such evidence without undermining the tribunals' wider goals. Certainly, a bright-line rule excluding such evidence, simply because a state may demand some protections for the information, is unnecessary and would threaten a return to the era of impunity for those who are clever enough to not leave a paper trail. Frequent capitulation to the often obsessive secrecy demands of states, however, may do more harm than good, since international courts depend in large part on maintaining openness and a perception of fairness to defendants for their legitimacy. Striking the right balance between these two goals, as the ICTY discovered, is not always easy. In Parts II and III, I will sketch out a brief history of the ICTY's rulemaking on discovery, disclosure, and protection of state national security evidence to show the inevitable political constraints on international tribunals' ability to procure sensitive information from states. In Part IV, I will examine how ICTY judges ultimately handled defendants' rights to discovery of confidential material. In Part V, I will explore some of the consequences of using witness protection measures and in camera sessions to protect a state's intelligence-derived evidence during trial. Lastly, in Part VI, I will compare the practice and procedure of the ICTY with those of the nascent ICC and Iraqi Special Tribunal, to explore what lessons for international criminal justice have, and have not, been learned.

II. CREATING A RULES FRAMEWORK FOR NATIONAL SECURITY EVIDENCE AT THE ICTY

When the ICTY's appointed judges first convened at the Hague in late November 1993, the Tribunal had no permanent premises, staff, or prosecutor. Although some judges suggested adjourning until the U.N. General Assembly provided a semblance of infrastructure, ICTY President and Judge Antonio Cassese insisted that the work of drafting rules of procedure should begin immediately, so that the tribunal would be ready by the time the office of the prosecutor was functioning.¹¹ The result was that two months later, on February 11, 1994, the ICTY adopted 125 rules of procedure, covering some 72 pages. The speed of the undertaking was impressive; by way of comparison, a committee of American judges and law professors spent four years drafting the first U.S. Federal Rules of Criminal Procedure in the early 1940s.¹² The rules tilted toward embracing the adversarial approach common to the Anglo-American tradition, perhaps because the Americans provided the most detailed set of proposals. Unsurprisingly, the rules would be modified frequently over the years; in 2000 and 2001 alone, ninety-one rules were

11. MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 66 (1997).

12. *Id.* at 67.

amended, seven new rules were adopted, and one was deleted.¹³ Nonetheless, the adopted rules provided a much stronger framework for procedural justice than the oft-criticized, scanty rules that had governed the Nuremberg proceedings.¹⁴

The United States was the first party to the rulemaking process to request incorporating specific protections for national security classified information that countries might someday share with prosecutors.¹⁵ The original U.S. draft of proposed rules for the ICTY suggested a sweeping non-disclosure rule that would allow the Trial Chamber to withhold "a State's national security information" from the accused, even if that information was used to support indictment.¹⁶ The United States also recommended protecting all such materials from mandatory disclosure to the accused—including those that might be exculpatory or otherwise material to the defense—and did not expressly forbid such evidence from being used at trial. The U.S. draft rules suggested that the Trial Chamber could hold *ex parte*, in camera hearings to determine whether relevant protected information needed to be disclosed to the public or the accused and then notify the State accordingly.¹⁷ An American Bar Association special task force, which reviewed and commented on the rules proposed by the United States, criticized the breadth of the suggested non-disclosure rule and urged a tighter definition of "national security information." The ABA suggested that *all* information used in support of an indictment or in trial be disclosed to the accused, and urged the tribunal to resist using closed sessions to protect secret information. To do otherwise, warned the ABA, could "seriously impair the credibility and apparent integrity of the International Tribunal."¹⁸

The rules adopted by the Tribunal in February 1994 took into consideration some of the American government's concerns regarding information secrecy, but ultimately contained far fewer broad carve-outs to

13. Gideon Boas, *A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY*, in *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 1, 5 (Gideon Boas & William Schabas eds., 2003).

14. See, e.g., Kevin Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 *DICK. J. INT'L L.* 57 (1995).

15. Dawson & Dixon, *supra* note 10, at 111-12. Dawson and Dixon note that the issue of protecting state's national security evidence was neither raised in the Secretary General's report regarding the establishment of the Tribunal nor in debate about the Tribunal in the U.N. Security Council.

16. U.S. Proposal for Rules of Evidence, Rule 8.1.B (Nov. 18, 1993), *reprinted in* ABA SECTION OF INT'L LAW AND PRACTICE, REPORT ON THE PROPOSED RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES IN THE FORMER YUGOSLAVIA 72 (1995) [hereinafter ABA REPORT].

17. U.S. Proposal for Rules of Evidence, Rules 8.2(A) and 17.6(A) (Nov. 18, 1993), *reprinted in* ABA REPORT, *supra* note 16, at 72, 87-89 (proposing that the Tribunal adopt a rule that "[s]tate national security information cannot be disclosed to the public without the prior approval and consent of that state," and exempting from disclosure "information protected by a non-disclosure order pursuant to Rule 8"); see also Rule 8 cmt., *reprinted in* ABA REPORT, *supra* note 16, at 87-89 ("Information provided to the International Tribunal by a State, which the states believes necessary to protect as a matter of national security . . . may initially be reviewed by the Trial Chamber in closed proceedings or in camera.").

18. Report on the Proposed Rules of Procedure and Evidence of the International Tribunal To Adjudicate War Crimes in the Former Yugoslavia, *reprinted in* ABA REPORT, *supra* note 16, at 141-43.

protect a state's national security information. While the Tribunal did not choose to have the whole of the prosecutor's file automatically provided to the defense, it did adopt an expansive disclosure rule, at least by American standards. This original rule required the prosecutor to share with the defense—without an explicit exception for state secrets—materials that supported indictment, statements by the accused, and statements from prosecution witnesses, as well as any exculpatory information.¹⁹ Mimicking the U.S. Federal Rules of Criminal Procedure, the rules also required the prosecutor to submit to the defense, upon request, "any books, documents, photographs and tangible items in its custody or control" that would be "material" to the preparation of the defense.²⁰ Such a rule reflected the broad trend, now embraced even in common law countries like England, against "trial by surprise;" it also helped even out the equality of arms for defendants who might be less likely to get cooperation on discovery from reluctant states.²¹ However, the rule also threatened to throw open to the defense information that the prosecutor had no intention of presenting at trial. The disclosure rule, as adopted, did not even contain a carve-out to allow the prosecutor to apply for permission to withhold confidential information that might affect a state's security interests.²² In other words, the prosecutor had limited ability to offer prior confidentiality guarantees to states that were considering divulging such information.²³

In the months after the initial adoption of the ICTY rules, the U.S. Department of State suggested numerous amendments and rule changes, focusing first and foremost on protecting national security information from disclosure. Noting that the United States (and other states) "may be able to make available to the Prosecutor sensitive intelligence information for use in investigations for lead purposes only," the Americans urged that the rules be amended to give the prosecutor explicit power to enter into binding agreements with states that would protect secret information.²⁴ Further, ignoring the ABA's suggestion, the United States again pressed the ICTY to allow for the possibility that documents used to support an indictment could be withheld from the accused. The ICTY eventually conceded on the latter point, amending the rule on non-disclosure of indictments in January 1995 to allow a judge or the Trial Chamber to order the withholding of "any particular document or information" so as to "protect confidential information obtained

19. ICTY R. P. & EVID. 66(A), 68 (Feb. 11, 1994) (on file with author).

20. Compare FED. R. CRIM. P. 16(a)(1)(E), with ICTY R. P. & EVID. 66(B) (Feb. 11, 1994) (on file with author). For a more detailed discussion of the ICTY's rules, see *infra* Part IV.

21. For an overview of Great Britain's steady move toward greater discovery rights for defendants, culminating in the 1996 Criminal Procedure and Investigation Act, see Stanley Z. Fisher, *The Prosecutor's Ethical Duty To Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 *FORDHAM L. REV.* 1379 (2000).

22. ICTY R. P. & EVID. 66 (Feb. 11, 1994) (on file with author).

23. See ICTY R. P. & EVID. 53(B) (Feb. 11, 1994) (on file with author). Rule 53(B) as adopted in 1994 made no specific mention of withholding national security information, and provided only that the Tribunal, in consultation with the prosecutor, could order non-disclosure "if satisfied that the making of such is in the interests of justice." *Id.*

24. U.S. Comments on Rules Adopted by the Tribunal (May 2, 1994), reprinted in ABA REPORT, *supra* note 16, at 170-71.

by the Prosecutor” or otherwise further the interests of justice.²⁵ The ICTY did not, however, initially amend the rules to include language proposed by the United States that would have given the prosecutor broad authority to enter into air-tight, enforceable confidentiality agreements with states in order to acquire information.²⁶

III. JUSTICE MEETS POLITICS: ADJUSTING THE RULES TO ACCOMMODATE STATE CONCERNS

Unsurprisingly, as the real investigatory and prosecutorial work of the ICTY got underway in late 1994 and 1995, the rules governing confidentiality for state-provided intelligence information were tested repeatedly. At the start, prosecutors discovered that soliciting evidence from states from whom they had no effective power to compel discovery involved great diplomatic effort. The first chief prosecutor for the ICTY, Richard Goldstone, described his early months at the ICTY as ones of globe-trotting and hand-shaking to convince states to cooperate and share sensitive information with the prosecutorial team:

Arrangements to receive police information, and, even more so, intelligence information, required lengthy, complex and detailed negotiations. Again, there was no substitute for personal visits. Trust and confidence had to be built between the institution and the government concerned. This could not be achieved without direct contact with the relevant officials. The necessary agreements required special procedures, including the building of secure premises to house such confidential documents. The rules of procedure had to be amended to enable the Prosecutor to accept information in confidence. More particularly, the Prosecutor had to be allowed to receive “lead” evidence without the obligation to disclose it to defendants and their legal representatives.²⁷

By the fall of 1994, the ICTY’s rules not only clarified that “lead” evidence provided in confidence by a state and not intended to be used at trial does not have to be disclosed to the accused,²⁸ but also added a host of restrictions to the ICTY’s power to compel verification of state confidential information in the event that the state ultimately consented to the information’s use in court. Under an amended Rule 70, ICTY judges—who, like civil law judges, may question witnesses and order the production of additional evidence when desired—were banned outright from ordering a party to produce “additional evidence received from the person or entity providing the initial [confidential lead] information.”²⁹ The amended rule also prohibited the Trial Chamber, “for the purpose of obtaining such additional evidence, [to] itself summon that person or a representative of that entity as a witness or order their attendance,” and clarified that no witness could be

25. ICTY R. P. & EVID. 53(C).

26. See the discussion in ABA REPORT, *supra* note 16, at 172, concerning a possible Rule 39 *bis* that would have provided the prosecutor with the power to enter binding agreements with states and to have those conditions enforced by the Tribunal through Rule 53 non-disclosure orders.

27. Richard Goldstone, *A View from the Prosecution*, 2 J. INT’L CRIM. JUST. 380, 381 (2004).

28. See ICTY R.P. & EVID. 66(C), rev. 3 (Jan. 30, 1995), *reprinted in* 2 AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 41, 69 (Virginia Morris & Michael P. Scharf eds., 1995).

29. ICTY R. P. & EVID. 70(C).

compelled to answer a question on cross-examination if he declined to answer on grounds of state secrecy.³⁰ The practical effect of such changes was to allow the prosecutor to offer new assurances to states that a little bit of cooperation would not make them wholly vulnerable to the whims of Tribunal judges.

As the Appeals Chamber would later note, the entire purpose of amending Rule 70 was to encourage states to cooperate with the Tribunal.³¹ The Chamber described the rule as "creat[ing] an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and . . . the information's sources will be protected."³² When the United States allowed former UN Ambassador Richard Holbrooke and General Wesley Clark to testify in Milošević's trial, it was only after intense negotiations with prosecutors conducted under Rule 70 terms.³³ In explaining the hard line that the United States took with the ICTY in the negotiations, a U.S. official told reporters, "[former officials] either won't testify or they will have to testify under these rules. . . . It is a matter of intelligence collection and a fear that sources and methods of obtaining information could be jeopardized if Holbrooke or others have to testify in open court."³⁴ Ultimately both Holbrooke and Clark testified in closed sessions with two U.S. government officials present, and the United States had permission to redact any testimony that it felt could compromise national security.³⁵

Given the U.S. government's sometimes tepid embrace of international justice and its undisputed power as the number one intelligence collector in the world, the ICTY's willingness to accommodate its demands is hardly unsurprising. Few could doubt that the United States was not making idle threats when it suggested it would not allow Holbrooke or Clark to testify if the government's terms were not fully met. Even when the American government has adopted an officially friendly attitude toward an international tribunal, as in the case of the ICTY, skeptics in Congress in particular have pressured the administration to take a strong line on protecting U.S. witnesses and evidence. In hearings about international criminal justice, members of Congress frequently invoked the risk such courts pose to intelligence sources and methods. United States Ambassador-at-Large for War Crimes David Scheffer had to reassure Congress in 2000 that intelligence sharing with the ICTY only took place under a "very rigorous procedure" that was "dominated

30. ICTY R. P. & EVID. 70(C)-(D).

31. Prosecutor v. Milošević, Case No. IT-02-54-A, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, ¶ 19 (Oct. 23, 2002) [hereinafter *Milošević, Confidential Decision*].

32. *Id.*

33. See Ian Black, *Wesley Clark Testifies in Secret at Milosevic Trial*, GUARDIAN (London), Dec. 16, 2003, at 11; *Closed Session Ordered for Envoy's War Crimes Testimony*, AUSTRALIAN, June 14, 2002, at 9 [hereinafter *Closed Session*]; Elaine Sciolino, *Clark Testifies Against Milosevic at Hague Tribunal*, N.Y. TIMES, Dec. 16, 2003, at A3.

34. *Closed Session*, *supra* note 33.

35. Sciolino, *supra* note 33.

by interagency checks and balances.”³⁶ At a hearing on the ICTY and the International Criminal Tribunal for Rwanda, one attorney urged members of Congress not to adopt a critical view of cooperation with the ICTY, saying:

[W]hen we decide in the name of international justice to prosecute someone, we ought to have the backbone to stand behind that. If that means producing information and producing witnesses, I have heard all the talk about what a terrible thing it would be Why is that? . . . [I]f we are not prepared to do that, then we should not be convicting these people.³⁷

In the face of such widespread criticism and skepticism, the ICTY’s rules came to reflect the cold reality of the Tribunal’s dependence on state cooperation to obtain certain kinds of crucial witnesses and evidence. Compelling production of documents is not a realistic option for international prosecutors who often neither know what intelligence evidence states may have collected, nor have any realistic means of enforcing production orders against powerful states. As one of the ICTY Trial Chambers observed, without the guarantees of confidentiality provided by Rule 70, it would be “almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfill its functions.”³⁸ International criminal courts, in being almost wholly dependent on states to provide this kind of crucial evidence, are particularly vulnerable to pressures for protection and secrecy. Although the United States provides the most dramatic example of state hesitation to provide secret evidence to international tribunals without protections, other powerful Western states, such as the United Kingdom and France, have expressed similar concerns in other fora.³⁹ Rulemaking in international criminal tribunals will therefore almost inevitably reflect the push-and-pull of politics, with powerful states holding disproportionate power. The ultimate balance struck between these competing demands reflects not only on the fairness of a particular trial but also on the legitimacy of international criminal law. The following two sections explore how the ICTY judges, faced with the formidable task of expounding the meaning of these rules, attempted to resolve some of the special problems posed by national security evidence.

36. *The International Criminal Court: Hearing Before the H. Comm. on Int’l Rel.*, 106th Cong. 51 (2000) (statement of David L. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State).

37. *The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice, or Show of Justice?: Hearing Before the H. Comm. on Int’l Rel.*, 107th Cong. 137 (2002) (statement of Larry A. Hammond, Attn’y, Osborn Maledon, P.A.), available at http://commdocs.house.gov/committees/intlrel/hfa77896.000/hfa77896_0f.htm.

38. Milošević, Confidential Decision, *supra* note 31, ¶ 19 (quoting Prosecutor v. Brđanin & Talić, Case No. IT-99-36-PT, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of May 6, 2002, ¶ 18 (May 23, 2002)).

39. See Donald K. Piragoff, *Protection of National Security Information*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 270, 275-84 (Roy S. Lee ed., 1999), for a thorough explication of British, French, and American negotiating positions on national security evidence during the drafting of the Rome Statute of the International Criminal Court.

IV. WORKING OUT THE DEFENDANT'S RIGHT TO DISCOVERY OF PROTECTED INFORMATION

As discussed, the United States devoted particular energy to securing procedural rules that would shield confidential information from not just the public, but also the accused. The discovery rules of the ICTY broadly divide the prosecutor's files into three categories of materials, subject to varying levels of disclosure to the defense: (1) basic, threshold information, such as the materials that supported indictment, prior statements of the accused, and prior statements of prosecution witnesses;⁴⁰ (2) exculpatory information or information that would tend to mitigate the guilt of the accused;⁴¹ and (3) tangible materials that would be "material" to the preparation of the defense, such as "any books, documents, photographs and tangible items in [the prosecutor's] custody or control."⁴² The first two categories were subject to mandatory disclosure under Rules 66(A) and 68, respectively, while the third category was subject to disclosure only if the defense agreed to provide reciprocal disclosure under Rule 67(C). The rules of procedure provided an exception to disclosure for information that was provided to the prosecutor on a confidential basis by a state, but in the early years of the Tribunal, this exception only clearly applied to the third category of materials, those tangible items that would be material to the preparation of the defense.⁴³ One of the problems repeatedly faced by ICTY judges was whether this exception to disclosure was broad enough to ensure the proper functioning of the Tribunal, achieving the right balance of securing state cooperation without overly compromising defendants' rights.

As the work of the Tribunal progressed, it did not take long for the judges to conclude—first through decisions from the bench, and then through changes to the procedural rules—that even materials subject to mandatory disclosure under Rule 66(A), such as the prior statements of the accused, could be withheld on grounds of national security.⁴⁴ This became particularly important as the Tribunal struggled to define exactly what constituted "prior statements" of the accused. Because not all defendants were willing to subject themselves to reciprocal disclosure under Rule 67(C), they often sought to define broadly those materials that were subject to unilateral, mandatory disclosure by the prosecution. In the *Blaškić* case, the defendant even attempted to procure his own military orders as commander by labeling them his "prior statements."⁴⁵ Anticipating this problem, the prosecution had

40. ICTY R.P. & EVID. 66(A).

41. ICTY R.P. & EVID. 68.

42. ICTY R.P. & EVID. 66(B).

43. See ICTY R.P. & EVID., 66, rev. 6 (Oct. 6, 1995) (specifying that the prosecution could apply for relief from disclosure under sub-rule (C) of materials subject to the optional, triggered disclosure under sub-rule (B)).

44. ICTY R.P. & EVID. 66(A) ("The Prosecutor shall make available to the defence . . . all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.").

45. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-rule 66(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused (July 15, 1998) [hereinafter *Blaškić*, Sanctions Decision].

suggested earlier in the case that the only materials that should be considered “statements” are “the official statements taken under oath or, at least, signed and recognized by the accused as an exact and precise interpretation.”⁴⁶ The Trial Chamber initially rejected this interpretation and ordered the prosecution to surrender immediately “all the previous statements of the accused . . . whether collected by the Prosecution or originating from any other source.”⁴⁷ In the face of Blaškić’s request for his own military orders, however, the Chamber retreated, eventually arriving at a definition not that far off from the prosecutor’s original suggestion. Henceforward, the Chamber declared that the term “must be understood to refer to all statements made by the accused during questioning in any type of judicial proceeding . . . but only such statements.”⁴⁸

When the Trial Chamber handed down its first, more expansive ruling on the meaning of “prior statements of the accused” in the *Blaškić* case, it did pause to note that the prosecution could apply for relief from disclosure under the terms of Rule 66(C) to protect a state’s confidential information.⁴⁹ Notably, the Trial Chamber’s construction was not supported by the text of the rule itself, which at the time of the *Blaškić* decision applied the Rule 66(C) confidentiality protections only to tangible materials and documents requested under the reciprocal disclosure requirements of Rule 66(B), not materials subject to mandatory initial disclosure. The rule, however, was ultimately amended in November 1999 to incorporate this aspect of the *Blaškić* ruling, thereafter making clear that a prosecutor could apply for Rule 66(C) relief for *any* of the materials discoverable under Rule 66, whether the materials were part of the threshold, mandatory disclosure or only part of the optional, triggered disclosure.⁵⁰ Therefore, by 1999, the ICTY had effectively narrowed the defendants’ discovery rights in two key ways: first, by favoring a strict definition of what constitutes a “prior statement” so as to exclude materials like captured documents or intercepted communications, and second, by extending the protections for state confidentiality to cover all such materials. These protections ensured that many kinds of intelligence information in the prosecutors’ files would not be open to disclosure and gave prosecutors the ability to reassure states that protection of state confidentiality was among the Tribunal’s top priorities.

The evolution of the Tribunal’s rule on the mandatory disclosure of exculpatory evidence followed a similar trajectory, but one that is far more problematic for defendants’ core rights. Rules requiring the disclosure of prior statements of the accused or materials relevant to the preparation of the defense are reasonable attempts to even out the “equality of arms” between defendants and prosecutors, and therefore are subject to reasonable exceptions

46. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Production of Discovery Materials, ¶ 3 (Jan. 27, 1997) [hereinafter *Blaškić*, Discovery Decision].

47. *Id.* ¶ 37.

48. Blaškić, Sanctions Decision, *supra* note 45.

49. Blaškić, Discovery Decision, *supra* note 46, ¶ 39.

50. Compare ICTY R.P. & EVID. 66, rev. 16 (July 2, 1999), with ICTY R.P. & EVID. 66, rev. 17 (Nov. 17, 1999).

on grounds of state secrecy. A rule requiring the prosecutor to share with the accused any information that suggests *actual innocence*, however, is fundamental to notions of due process under many national legal systems and international law.⁵¹ Allowing the prosecutor to quash exculpatory evidence implicates the basic fairness of any criminal proceeding. The ICTY's original rule on disclosure of exculpatory evidence was accordingly quite broad, covering any material "known to the Prosecutor, which in any way tends to suggest the innocence or mitigate the guilt of the accused."⁵² Indeed, in 1995, under pressure from non-governmental organizations, this right was expanded to include mandatory disclosure of any material that might "affect the credibility of prosecution evidence," such as special agreements with prosecution witnesses.⁵³ The rule did not provide any specific exemption for state confidential information.

The first erosion of this clear right came, again, in the *Blaškić* case, and ultimately found codification in the Tribunal's rules. The primary concern in the *Blaškić* ruling was how specifically a request for exculpatory evidence must be phrased. The defense in general is unlikely to know the nature of the evidence in the hands of the prosecutor and thus can only make a broad request under Rule 68; at the same time, a general query absent some showing of a *prima facie* case that the prosecutor is, in fact, withholding such evidence would allow the defense to obtain broad disclosure while ducking the mutuality requirement of Rule 66(B).⁵⁴ The Trial Chamber ultimately sought to resolve this quandary by suggesting that the defense needed to present specific requests for information to the prosecutor, who would then be obligated to state whether she possessed such materials, whether these materials contained exculpatory evidence, and whether the prosecutor believed the confidentiality of any exculpatory materials needed to be protected on the basis of a state's national security.⁵⁵ This latter point indicates that the Trial Chamber believed it *would* be permissible to withhold exculpatory evidence to protect state confidentiality, even though no text supported this conclusion. Ultimately, in 2003, the Tribunal codified the substance of this ruling into the rules of procedure, allowing the prosecutor to apply *in camera* for relief from disclosure of exculpatory materials as long as

51. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) (establishing defendant's right to exculpatory information as an element of U.S. constitutional due process of law); *R. v. Brown*, (1995) 1 Crim. App. 191, 198 (holding that under English common law, where "the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial," including the right to receive exculpatory information); *Jespers v. Belgium*, App. No. 8403/78, 22 Eur. Comm'n H.R. Dec. & Rep. 100, 125 (1981) (Commission report) (holding that the prosecution's failure to disclose exculpatory information, including information that would tend to undermine the credibility of prosecution witnesses, "is a flagrant violation of the rights of the defence").

52. ICTY R.P. & EVID. 68 (Feb. 11, 1994) (on file with author).

53. See ICTY R.P. & EVID. 68, rev. 6 (Oct. 6, 1995); see also Lawyers Committee for Human Rights, *Fairness to Defendants at the International Criminal Court* (Working Paper, 1996), available at <http://www.ciaonet.org/wps/lch02/#16>.

54. Renee Pruitt, *Discovery: Mutual Disclosure, Unilateral Disclosure, and Non-Disclosure Under the Rules of Procedure and Evidence*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 305, 310 (Richard May et al. eds., 2001).

55. *Blaškić*, *Discovery Decision*, *supra* note 46, ¶ 56.

the prosecutor at least first undertook “reasonable steps” to secure the state’s permission to disclose.⁵⁶

This creeping erosion of defendants’ rights to discovery, first through judicial decisions unsupported by the rules and then through changes to the rules themselves, demonstrates that international tribunals have a hard time holding the line on defendants’ rights in the face of state demands for secrecy guarantees. The ICTY’s decision to grant an exception to disclosure on national security grounds even for *exculpatory* information is troubling. Under U.S. law, for example, defendants’ discovery rights regarding classified information are governed by the Classified Information Procedures Act (CIPA).⁵⁷ Under CIPA, the defendant may make requests for items “material” to the defense as well as exculpatory information per the normal processes of the Federal Rules of Criminal Procedure. However, on motion by the United States and a sufficient showing to the court, the court may authorize the government to delete specified items of classified information, substitute a summary of the information, or substitute a statement admitting relevant facts that the classified information would tend to prove.⁵⁸ Notably, CIPA does not permit the deletion of *discoverable* material, but rather the deletion of *nondiscoverable* material in a document that also contains discoverable information. The ABA, in its original review of the ICTY’s proposed rules, suggested a CIPA-like procedure that might allow classified information to be disclosed to the accused in “summarized or edited form” if the accused would not be prejudiced by such summarization.⁵⁹ Although such a procedure might not be wholly transplantable to international tribunals, the ICTY’s discovery rules would be less concerning if they included at least a CIPA-like summary option where disclosure is mandatory and implicates the rights of the defendant more strongly. Indeed, although it is not explicitly provided for in the rules, it seems that the Trial Chamber did allow for some kinds of redacting of information before it was passed to the defense, although it is unclear whether this redacting was done to protect state secret information or for some other purpose.⁶⁰

A final question of procedural fairness in discovery concerns how the Tribunal handles requests from the prosecutor to protect materials from disclosure. The rules as drafted allow the prosecutor to apply to the Tribunal sitting in camera for relief from the obligation to disclose; when making this application the prosecution submits to the Trial Chamber (but only the Trial Chamber) the information that it seeks to keep confidential.⁶¹ In a critical

56. ICTY R.P. & EVID. 68, rev. 30 (Apr. 14, 2004).

57. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C.A. app. §§ 1-16 (West 2000 & Supp. 2004)).

58. 18 U.S.C.A. app. § 4 (West 2000 & Supp. 2004); see Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 291 n.73 (1986); see also Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1962-63 (2005).

59. See ABA REPORT, *supra* note 16, at 142.

60. See *Prosecutor v. Jovica Stanisic*, Case No. IT-03-69-PT, Decision on the Defense Motion To Receive Hard Copies of Rule 66 Material (Mar. 11, 2005) (noting that information would be available to the defense “subject to redacting”).

61. ICTY R.P. & EVID. 66(C).

decision in 1996, the Trial Chamber found that while the prosecutor may submit the *confidential information itself* to the Chamber *ex parte* in order to obtain a decision on non-disclosure, this does not mean that the Chamber will hold *ex parte* hearings on arguments for non-disclosure.⁶² The Tribunal insisted that “*ex parte* proceedings undermine the basic foundation of the adversarial system of justice,” and therefore, “the Chamber must guarantee hearings with both parties present.”⁶³ In other words, the defense is allowed to make its case in favor of disclosure, although obviously its ability to make effective argument will be hamstrung by its lack of access to the materials in question. The Tribunal, of course, could not resolve this conundrum, but at the very least the ban on *ex parte* hearings encourages the prosecution to be judicious in its requests for non-disclosure and allows the defense to keep some tabs on the frequency with which such protections are invoked.

Although there seems to be no way around some kind of *ex parte* submission of information that the prosecutor wishes to protect, stronger procedural safeguards might nonetheless help preserve the defendant’s right to a fair trial. The ICTY judges no doubt consider themselves to be trained professionals who can compartmentalize information that has not been properly admitted into evidence, but the potential power of certain kinds of secret evidence certainly would put their skills to the test. Shocking bits of intercept evidence that have been used in open court have been unforgettable; the Krstić intercept cited at the outset of this Essay—although ultimately ruled inadmissible on other procedural grounds—was quoted repeatedly in news accounts and found its way into a documentary.⁶⁴ Even ICTY Judge Patricia Wald apparently had a hard time blotting out the memory of the intercept; she quoted it in a post-mortem article on the Krstić trial even as she noted that the evidence was thrown out.⁶⁵ It is not unreasonable to ask whether the provision of such information to the trial judges for the purpose of adjudicating discovery motions, when the prosecution has no intention of using the information at trial—indeed, because it might be utterly inadmissible in any case—could prejudice the Chamber against the accused. One way of strengthening defendants’ rights might be to have all discovery issues handled by a pre-trial or magistrate judge who would not play a role in the actual trial. The ICTY has already tacked more strongly toward creating such a quasi-inquisitorial procedure by having pre-trial judges manage aspects of discovery. In this particular context, that decision seems wise. With discovery likely to serve as the primary battleground on which struggles between state secrecy and defendants’ rights will be played out, the judges who sit in the Trial Chamber need to stay far from the fray.

62. Prosecutor v. Blaškić, Case No. IT-95-14, Decision Rejecting the Request of the Prosecutor for *Ex Parte* Proceedings (Sept. 18, 1996).

63. *Id.*

64. See, e.g., TRIUMPH OF EVIL (SENSE News Agency 2001), available at <http://www.sense-agency.com/en/multimedia/index.php?mulkat=2>; Marlise Simons, *Trial Reopens Pain of 1995 Bosnian Massacre*, N.Y. TIMES, Nov. 7, 2000, at A3.

65. Wald, *supra* note 5, at 461 n.46.

V. PUTTING INTELLIGENCE INFORMATION ON TRIAL AT THE ICTY

Although much of the rulemaking discussed above focused on how to *protect* information from disclosure to anyone other than the prosecutor, some intelligence-derived information proved so valuable that the prosecution convinced the state to allow its introduction as evidence in court. This opened up a different Pandora's box, one which was not well addressed through the rules of procedure and which the ICTY judges were largely forced to resolve for themselves. Should such evidence be admissible? If so, how can defendants meaningfully challenge its authenticity? And how much should the information, even if shared with the accused, be protected from public disclosure through closed, in camera hearings and other methods? The ICTY's rules generally gave judges wide latitude to determine the admissibility of evidence based on its probative value to the trial. Unlike in national systems where jury trials predominate, the Tribunal, which conducted all trials by bench, did not have to worry about the layman's ability to follow limiting instructions or weigh evidence against its reliability. As a consequence, the Tribunal adopted few blanket exclusionary rules. It never agreed to be bound by national rules of evidence and committed itself only to excluding evidence obtained "by means contrary to internationally protected human rights."⁶⁶ These loose rules of evidence virtually ensured that intelligence-derived information would be introduced during trial and that defendants could challenge admission on grounds of illegality, hearsay, or unreliability.

Most well-developed national law systems, as well as several international human rights treaties, recognize a basic "right to privacy" which is violated by typical intelligence-gathering methods, such as intercepting an individual's communications without warrant or other legal approval.⁶⁷ In most states in the former Yugoslavia, for example, evidence obtained from electronic surveillance cannot be used in court.⁶⁸ Defendants in the ICTY, therefore, unsurprisingly sought the exclusion of all "illegally obtained evidence," arguing that it was legally no different than evidence obtained by torture. This theory was tested prominently in *Prosecutor v. Brđanin*, when the accused tried to block the introduction into evidence of telephone conversation intercepts recorded both before and during the war by the Bosnian Ministry of Interior, which at the time was under the control of the Bosnian Muslim Alija Delamustafić.⁶⁹ Brđanin argued that the recordings

66. ICTY R.P. & EVID. 95 (Feb. 11, 1994) (on file with author). The rule was amended in 1997 to drop any explicit reference to "international human rights" and instead limited itself to excluding evidence where "its admission is antithetical to, and would seriously damage, the integrity of the proceedings." ICTY R.P. & EVID. 95, rev. 12 (Oct. 20 & Nov. 12, 1997). However, judges continued to consider violations of international human rights as informative to their interpretation of Rule 95. See *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence," ¶¶ 29-31, 61 (Oct. 3, 2003) [hereinafter *Brđanin*, Evidence Decision].

67. See, e.g., International Covenant on Civil and Political Rights art. 17(1), entered into force Mar. 23, 1976, 999 U.N.T.S. 171 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. . . .").

68. David Holley, *Kosovo Serbs Fear Day They'll Have To Walk Alone*, L.A. TIMES, Mar. 24, 2002, at A10.

69. *Brđanin*, Evidence Decision, *supra* note 66, ¶ 6.

made before the war, at least, violated domestic law, and further tried to invoke the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) to prove that his right to privacy had been violated by the interception of his calls.⁷⁰ The Tribunal recognized this as effectively a back-door way of trying to force national evidence standards onto the ICTY, held that the right to privacy guaranteed by the ICCPR and ECHR is not absolute—particularly in wartime—and that in any case, national laws by no means universally exclude illegally obtained evidence.⁷¹ Therefore, the intercepts, even those collected before the war, were admissible.

Although the Trial Chamber in the *Brđanin* case undertook a fairly detailed analysis of various domestic and international laws concerning the admissibility of illegally obtained evidence, ultimately its decision was based more on practicality than legal principle. The Trial Chamber conceded that its mission was “to adjudicate serious violations of international law,” and that in light of this heavy burden, it would “be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.”⁷² Another Trial Chamber noted in a very similar case that the primary role of exclusionary rules in domestic law is to punish over-reaching by law enforcement, something the ICTY had little power to influence and which was, in any case, not its primary duty.⁷³ Some commentators have criticized the Tribunal’s interpretation of relevant human rights law as well as its lax approach to admitting such evidence, calling the Tribunal’s “selective, self-justifying approach” to international evidentiary rules one that had the arguable effect of elevating the “lowest common denominator” legal rule.⁷⁴ However, given that the ICTY itself is a distinct entity not related to the national police and intelligence forces that gathered this material, such concerns seem overstated, and a broad proscription on introducing otherwise credible evidence intercepted in violation of the law would further neither privacy nor justice.

Because ICTY defendants failed to get intercept evidence excluded from their proceedings, their next best defense was typically to attack the credibility of the evidence itself, insisting that the recordings were manipulated, inaccurate, or badly transcribed. Upon hearing the intercept transcribed at the beginning of this Essay, General Krstić told the Trial Chamber that it was “rigged,” a “one hundred per cent montage,” and that “I did not recognise the other participant in the conversation, and especially not my own voice”⁷⁵

70. *Id.* ¶ 10.

71. *Id.* ¶¶ 29-33.

72. *Id.* ¶ 62(7).

73. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2T, Transcript of Hearing, 13671-72 (Feb. 2, 2000) (“It’s not the duty of this Tribunal to discipline armies or anything of that sort. Its duty is to determine whether the accused is guilty or not I’m not accepting that we are approving or disapproving the conduct. All we are deciding is whether this evidence is admissible under Rule 95.”).

74. GEERT-JAN ALEXANDER KNOOPS, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* 237 (2005).

75. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Transcript of Hearing, 6809-6810 (Nov. 1, 2000).

Because intercepts are recorded for intelligence purposes—unlike law enforcement surveillance, which is carried out with a constant eye to documenting and preserving the chain of evidence so that the materials may be used at a future trial—these claims are not necessarily specious. Most of the Krstić intercepts came from the work of professional and amateur Bosnian Army signalmen, who would record conversations that they thought “relevant,” transcribe them by hand in schoolboy-type notebooks, make their best effort at identifying participants, and then send both tapes and notebooks to Army archives.⁷⁶ No doubt good faith efforts at identification and transcription were usually made, but reliability is hardly guaranteed. Further, the conversations themselves were often laden with “code” terminology that was subject to differing interpretations. For example, the prosecutor argued in the *Krstić* case that references to “distributing parcels” were in fact references to executions of Bosnian Muslim prisoners, an interpretation the Trial Chamber accepted but the Appeals Chamber did not feel was proven.⁷⁷

In the case of the *Krstić* recordings, the Trial Chamber did undertake a fairly extensive effort in open court to verify the authenticity of the intercepts and their transcriptions. The Office of the Prosecutor put together an entire “intercept project” of analysts, investigators, translators and others, who collected, assembled, analyzed, and translated the material from its original Serbo-Croatian to check its accuracy.⁷⁸ Although conceding that the intercepts could never be perfect, the intercept project team cross-checked transcripts against each other when more than one soldier had recorded the same conversation and spot-checked verifiable information against data gleaned from satellite sources and other documentation. The prosecution also called numerous Bosnian army soldiers into court to authenticate their handwriting on the record and submitted some of the key notebooks themselves into evidence.⁷⁹ Ultimately, though, verifying each individual conversation proved nearly impossible, so the Trial Chamber could only conclude that the transcripts were reliable in a general sense, arguing that it was impossible given the “level of documentable detail [that the transcripts] could have been completely manufactured by the Bosnian Muslim interceptors.”⁸⁰ While the work of the intercept project was impressive and no doubt largely reliable, it was also left entirely in the hands of the prosecution team and represented largely an ad hoc response to an unanticipated problem. It did not establish clear guidelines for handling such issues in the future and forced the judges to rely on the fairness and diligence of the prosecutor’s work.

The collaborative relationship between the Trial Chamber and the prosecution team in analyzing and verifying intelligence information highlights one of the key differences between an international tribunal like the ICTY and truly adversarial criminal legal systems, like those in the United

76. See Wald, *supra* note 5, at 460.

77. See Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment of the Appeals Chamber, ¶ 76 (Apr. 19, 2004).

78. Krstić, Trial Judgment, *supra* note 2, ¶ 106.

79. Wald, *supra* note 5, at 460.

80. Krstić, Trial Judgment, *supra* note 2, ¶¶ 106-17.

States or Great Britain. Although the ICTY's criminal procedure largely tracked the adversarial model by incorporating a party-driven sequence of examination-in-chief, cross-examination, re-examination, rebuttal and rejoinder, it also utilized some kinds of judge-driven presentation of evidence and questioning that is common to civil law systems.⁸¹ Therefore, judges and the prosecutor's office often seemed to be working in tandem to authenticate particularly problematic pieces of evidence, like the Krstić or Milošević signals intercepts, in ways that might seem less familiar to adversarial law practitioners. Given the international checks and balances on tribunals like the ICTY, however—where no one national party controls the intelligence gathering efforts, the prosecution team, and the judicial process collectively—a measure of trust and collaboration seems more appropriate than it might in a national law context. Realistically, only the prosecutor's office is likely to have the knowledge, resources and staffing to analyze and cross-check a mound of raw intelligence data. As long as the prosecutor's office undertakes reasonable efforts to make its methodology transparent, such efforts do not pose a substantial problem for defendants' rights.

Of course, the Tribunal was not always as fortunate as it was in the Krstić case, where it had a government that was willing to surrender the intelligence-derived information to the prosecutor and allow it to be presented in open court. Krstić apparently foolishly communicated over open signals, and therefore revealing the interceptions in court threatened neither sources nor methods of intelligence collection. In Milošević's trial, more of the intercepts introduced into evidence likely came from Western intelligence agencies, which are decidedly more adamant about protecting sources and methods.⁸² Further, some of the individuals called before the Tribunal to identify voices or corroborate intelligence may have been working as covert assets within Serbia, and thus could not testify without exposing themselves and their methods. In December 2003 the Tribunal preliminarily accepted into evidence *en masse* 245 intercepts, based on testimony of a single witness known as B-1793 who testified in closed session as to their authenticity; these were later fully admitted into evidence after the court hired its own expert to spot-check fifteen of them for accuracy and tampering.⁸³ During another key

81. See Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. INT'L CRIM. JUST. 1037 (2005), for a description of how the ICTY incorporated aspects of the different legal models and some of the conflicts of law that have arisen as a result.

82. Of course, it is hard to determine the exact provenance of many of the intercepts used at Milošević's trial, since these sessions were often conducted in camera. However, ICTY Deputy Prosecutor Graham Blewitt has said that both the American and British governments provided intercepts and other intelligence information to aid in the Milošević case, although he complained that some of the key evidence could not be used in court. See Simons, *supra* note 8. Similarly, Chief Prosecutor Carla Del Ponte noted in testimony to the U.S. Congress that the American government had provided the prosecutor's office with "transcripts of conversations . . . of Milošević, of Karadžić," and that "[s]ometimes we have success" in getting the U.S. government to authorize their use at trial, and "sometimes we have not." *Bringing Justice to Southeast Europe: Briefing of the U.S. Commission on Security and Cooperation in Europe*, 108th Cong. 4 (2003) (statement of Carla Del Ponte, Chief Prosecutor of the ICTY) [hereinafter *Bringing Justice to Southeast Europe*].

83. See Prosecutor v. Milošević, Case No. IT-02-54-T, Second Decision on Admissibility of Intercepted Communications (Feb. 9, 2004). After Milošević failed to respond to the court's request, his

point of the trial, the prosecution had to rely on yet another protected witness, C-061, to verify the voices of various Serbian government officials who could be heard conversing by phone with Milošević. Over the course of a week of testimony, C-061, who was said to have met both Milošević and Radovan Karadžić personally, identified voices in more than 50 intercepted telephone conversations presented as evidence at the trial.⁸⁴ Skeptics—perhaps the defendants but particularly the public—had no meaningful ability to assess the reliability or accuracy of this information.

The procedures used at the *Milošević* trial raise unique questions about the propriety of using closed sessions or witness protection measures in the name of national security. Closed 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 other similar instruments consider closed trials to be a violation of the rights of the accused, even if the entire proceeding is held in camera.⁸⁵ Public trials do, however, serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on "framed" trials, and giving the public a chance to suggest changes to the law or justice system.⁸⁶ In the case of international criminal tribunals like the ICTY, where the law and procedure remain very much a "work in progress" and widespread public acceptance of the legitimacy of the verdicts is half the battle, over-reliance on closed sessions does long-term damage to the court's broader goals. Milošević in particular became adept at manipulating perceptions of unfairness when the Tribunal held in camera sessions. As the Trial Chamber prepared to go into closed session to hear the testimony of a protected witness verifying various intercepts, Milošević interrupted to attack the Tribunal while his words would still appear on record:

Milošević: Well, I would like to say while we're still in public session that I categorically oppose this kind of practice, hearing some kind of secret witnesses. The example of yesterday shows this the best, because you saw yourself that this witness was not—

Judge May: No. We've made these decisions. It's not a matter for argument.⁸⁷

Chief Prosecutor Carla Del Ponte admitted to a U.S. congressional committee in May 2003 that the use of closed sessions in the *Milošević* trial was taking a toll and that "our judges from the trial chamber are hesitant to

amici chose fifteen intercepts for outside verification. Based on the results by the court's expert that showed no evidence of tampering, the court finally admitted all relevant intercepts into evidence. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Final Decision on Admissibility of Intercepted Communications (June 14, 2004).

84. *Prosecutors Play Tape of an Intercepted Call at Milošević's Trial*, N.Y. TIMES, Nov. 23, 2002, at A5.

85. Florence Mumba, *Ensuring a Fair Trial Whilst Protecting Victims and Witnesses—Balancing of Interests?*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 54, at 359, 365.

86. *Id.*

87. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Transcript of Hearing, 30096-97 (Dec. 4, 2003).

accept closed sessions, because Milošević is complaining every time he is asking to have closed sessions"⁸⁸

While closed sessions and witness protection measures were contemplated from the start of the ICTY, these rules were largely written to help the court protect witnesses' privacy and keep them safe from local retaliation.⁸⁹ Women who survived rape or sexual assault might find themselves retraumatized as social outcasts in their home communities if their status as victims was known.⁹⁰ Further, in parts of Yugoslavia where relations between ethnic groups remain tense and some accused war criminals are considered to be hometown heroes, public cooperation with the Tribunal could expose witnesses, their families, and even their towns to retribution and violence.⁹¹ In the *Tadić* case, the Trial Chamber decided that "any curtailment of the accused's right to a public hearing is justified by a *genuine fear* for the safety of witness[es]" and urged that the Tribunal explicitly balance the interests of the witness with the public and the accused.⁹² In the *Brđanin* case, the Trial Chamber implicitly acknowledged that closed sessions and witness protection undermine the perceived fairness of the trial, and therefore found that a mere *expression* of fear was not sufficient to support protective measures, but rather that the prosecution must show a real basis for the fear of violence.⁹³

While the Tribunal seems to have worked out an intelligible standard to govern the use of measures such as face and voice scrambling, pseudonyms, and closed sessions to protect genuinely vulnerable witnesses, the propriety of and standards for applying these same measures purely to protect a state's national security-classified information was less clear. Certainly, General Clark, who testified in the *Milošević* trial in closed session, had no genuine fear for his safety. Rule 79, which governed closed sessions, provided only three bases for the Trial Chamber to exclude the public and the press from trial proceedings: public order and morality, the safety and security of victims or witnesses, and the protection of the interests of justice.⁹⁴ The first two bases were clearly intended to be invoked only to protect truly vulnerable witnesses, leaving the Trial Chamber only the vague reason of "protecting the interests of justice" as grounds for closing trials to protect state secrets. Further, Rule 79 explicitly provided that "the Trial Chamber shall make public the reasons for its order"⁹⁵ to close the chamber, something which proved difficult or self-defeating in the case of state secrecy. Indeed, when the prosecution in the

88. *Bringing Justice to Southeast Europe*, *supra* note 82, at 10.

89. See, e.g., ICTY R. P. & EVID. 69 (providing that the Trial Chamber may "order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal"); ICTY R. P. & EVID. 75 (providing that the Judge or Chamber may "order appropriate measures for the privacy and protection of victims and witnesses").

90. See Mumba, *supra* note 85, at 361.

91. *Id.* at 360.

92. Prosecutor v. Duško Tadić, Case No. IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness "R," ¶ 6 (July 31, 1996) (emphasis added).

93. Prosecutor v. Brđanin and Talić, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, ¶ 31 (July 3, 2000).

94. ICTY R. P. & EVID. 79.

95. *Id.*

Milošević trial applied for protective measures for a witness known as B-1717, the only reasons given publicly were the “particular security risks attaching to the witness and the important nature of the testimony it is said he will give;” on this basis, the Trial Chamber concluded that protective measures would be appropriate and consistent with the rights of the accused.⁹⁶ Because the judges undoubtedly conducted their analysis on the basis of information about the witness that is not publicly disclosed, it is hard to evaluate their reasoning.

Undoubtedly, measures such as closed sessions and non-disclosure of witness identities ensure greater state cooperation where sensitive intelligence information is concerned, which in turn helps the Tribunal secure access to vital evidence that can support convictions for heinous crimes. The ICTY’s judges and prosecutors were admirably not cavalier about seeking protective measures on behalf of state secrecy; Carla Del Ponte even complained to the U.S. Congress that closing the session for Clark and Holbrooke was unnecessary, since “both are authors of books” that discussed the very issues to be covered in testimony.⁹⁷ Nonetheless, clear standards for when such measures are and are not appropriate could help legitimize these decisions in the eyes of the public and ensure consistency of application between chambers and between trials. In national court systems, the thousands of public trials that take place every day guarantee that the system is considered largely accountable and transparent, and closing a trial (or parts thereof) in the name of state secrecy becomes a rare exception to the rule. International courts generally are not going to have that luxury. Particularly because the defense is often blocked from being an effective participant in *ex parte* motions to protect witnesses and because even the judges themselves are supposed to give great deference to the prosecution’s assertion that the information provided by a state was only shared since it was protected under the Rule 70 confidentiality guarantee,⁹⁸ future tribunals would seem well advised to draw up meaningful guidelines for when such measures are appropriate.

VI. DRAWING LESSONS FROM THE ICTY EXPERIENCE

As the work of the ICTY winds down, attention is already shifting to how to apply its lessons to other forums.⁹⁹ The ten years of history of the ICTY likely provide the best and only real laboratory for learning about the implications of using and protecting national security evidence in international criminal trials, since NATO and the Western powers were more heavily involved in intelligence collection in Yugoslavia than in Rwanda or Sierra

96. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Confidential Prosecution’s Second Request for Permission to Call Witness B-1717 (Dec. 16, 2003).

97. *Bringing Justice to Southeast Europe*, *supra* note 82, at 4.

98. Prosecutor v. Milošević, Case No. IT-02-54-AR108bis & AR73.3, Decision on the Interpretation and Application of Rule 70, ¶ 29 (Oct. 23, 2002) (stating that the Trial Chamber has the authority to assess whether information has been provided in accordance with Rule 70(B), although “such enquiry must be of a very limited nature”).

99. See, e.g., Michael P. Scharf & Ahran Kang, *Errors and Misssteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT’L L.J. 911 (2005) (proposing that lessons regarding matters such as effective outreach, self-representation, prosecutorial strategy, and witness protection can be learned from the ICTY and applied to the Iraqi Special Tribunal).

Leone. Similar dilemmas over how best to balance defendants' rights against state security interests are likely to arise soon before international tribunals like the International Criminal Court and even before special "internationalized" domestic tribunals like the Iraqi Special Tribunal. In addition, the criminal procedure of the ICTY—rightly or wrongly—is already being suggested as one possible model for extraordinary *national* tribunals that adjudicate the laws of war, like the Combatant Status Review Tribunals or military commission trials for alleged terrorists held in Guantánamo Bay. The ICTY currently has the most well-developed body of law governing procedural rights when war crimes and sensitive national security evidence are on the line. The judges and prosecutors of the ICTY can largely be proud of their remarkable effort in adjudicating the first major war crimes trial since Nuremberg, but a clear-eyed look at both the successes and failures of the ICTY can help further the cause of international justice.

Nearly all questions arising from the use of national security evidence involve how to balance defendants' rights and the desire for openness on the one hand with the demand for state secrecy on the other, and the ICTY showed that it is easy to build a blind spot for the former. Although international criminal tribunals attempt to maintain the veneer of "innocent until proven guilty," few individuals actually believe that tyrants like Saddam Hussein and Slobodan Milošević are or were anything other than war criminals. Speaking of "rights" for defendants has always been considerably less popular than speaking of rights for victims, and it is thus easy to give short shrift. Similarly, when debating whether to use particularly powerful pieces of evidence that might support conviction, it is easy to toss overboard the basic but only generalized desire to keep the trial open for educational purposes. Unsurprisingly, therefore, the story of the ICTY when it came to national security evidence was largely one of resolving ambiguities in favor of state secrecy and away from defendants' rights and open trials. While in most cases such decisions were fair and probably necessary, they also highlight the importance of developing and maintaining clear rules of procedure to prevent a slide toward protecting state secrets at all cost. It proved dangerously easy at the ICTY for judges incrementally to rule against defendants or in favor of closing trials and then to incorporate such rulings and procedures into the Tribunal's rules, without debate about the cumulative effect these moves might have on the perceived fairness of the proceedings.

The ICTY's experience also shows the importance of developing a flexible framework that allows for compromise measures when national security evidence is involved, as long as a few clear lines exist to prevent rights erosion. Courts should generously allow for redaction and summarization of evidence as reasonable alternatives to full disclosure of materials to which the defense is normally entitled in discovery. Tribunals should also, however, take a firm stance against promising to shield national security evidence from defendants if it turns out to contain materially exculpatory information. Although this rule might tend to discourage some state cooperation, it ensures that basic due process rights will not be violated. During trials, courts should consider alternatives to fully-closed sessions to

protect classified information, such as selective redacting of testimony that would subsequently be released (as was done with the Clark testimony during the Milošević trial), or even unclassified summaries of evidence or testimony that could be presented to the public. If a state nonetheless insists on holding the hearing in camera to protect its evidence, then the tribunal should articulate a high bar as to when such measures are appropriate and force prosecutors to either attain disclosure or go forward without the evidence if it is not necessary to conviction. While true skeptics of international justice might not be fully satisfied by half-measures such as delayed, redacted, or summarized disclosure, these tools could contribute significantly to a perception of openness and accountability.

Fortunately, the new International Criminal Court has already taken a much more explicit approach to drafting procedural rules governing a state's national security information than was done in the early years of the ICTY, devoting several interlocking articles in the Rome Statute¹⁰⁰ primarily to such issues. In essence, the Rome Statute codified many of the pro-secrecy rules of the ICTY, but it did at least pair this tilt with enhanced procedural flexibility. Article 72 of the Rome Statute, which specifies the applicable procedures when a state refuses to provide information on grounds of national security or objects to a third party's disclosure of such information, imagines a cooperative and interactive framework in which ICC judges and prosecutors work directly with states to try to achieve solutions such as redactions, summaries, in camera proceedings, or attaining comparable information from a different state source, before deciding whether justice requires the disclosure of the materials.¹⁰¹ The negotiating parties to the Rome Statute devoted particular energy to working out the language of Article 72, since the ability of states to resist subpoenas most directly affects state sovereignty.¹⁰² Apparently less controversial among the drafting states, but arguably more sweeping in its effects, is Article 54(3) of the Rome Statute, which allows the ICC prosecutor to offer iron-clad guarantees of non-disclosure for any information voluntarily provided in confidence by a state, under any circumstance.¹⁰³ Such voluntarily provided information is even specifically exempted from the elaborate processes of compromise laid out in Article 72. Therefore, one of the most troubling due process concerns in the ICTY rules—that they allow even *exculpatory* information to be withheld from the accused if that information was provided to the prosecutor in confidence by a state—has now been codified as law into the ICC.

That the ICC procedures lean heavily toward protecting state interests is not surprising, since it was states, after all, that made up the negotiating parties to the Rome Statute. From an *ex ante* perspective, with no particular set of war criminals or trials on the line, the need to protect state sovereignty

100. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

101. *Id.* art. 72.

102. See Piragoff, *supra* note 39, at 275-94, for an extensive description of the Article 72 negotiating process.

103. Rome Statute, *supra* note 100, art. 54(3).

and state secrecy looms large. When one gets into the specifics of individual trials, however, it is easier to see why fairness and openness must remain fundamentally embodied in international criminal process. A U.S. scholar and adviser to the nascent Iraqi Special Tribunal (IST), which is undertaking the heroically difficult effort of trying Saddam Hussein for crimes against humanity, identified "gaining credibility in the community" and fighting off challenges to legitimacy as two of the top lessons the IST should learn from prior experiences with international justice such as the ICTY.¹⁰⁴ Of course, the biggest threats to the IST's legitimacy in Iraq are its sketchy provenance as an instrument of U.S. foreign policy and its continued relationship to the U.S. occupation; in comparison, how the IST handles any potential national security evidence is a drop in the bucket. Certainly, the obvious need to preserve openness in Saddam's trial to help win over a skeptical public will likely encourage state parties to declassify any evidence they might provide and discourage prosecutors from relying on protected evidence. However, proponents of the IST, including the United States, should well note that the many forms of internationalized criminal justice will likely succeed or fail together. If the ICC or ICTY are not perceived to be fair forums for high-profile defendants, special quasi-international efforts like the IST face an uphill battle.

Ensuring fairness and openness in international criminal procedure is ultimately important not only to the legitimacy of international and quasi-international tribunals, but also to debates on criminal justice within national law communities. The U.S. government is increasingly pushing for the power to withhold sensitive intelligence information from the accused and from the public when trying alleged terrorist detainees before military commissions or other non-traditional forums. Those on both sides of the debate over detainee rights have already attempted to invoke the procedural guarantees of the ICTY—or the lack thereof—as ammunition in this battle. In December 2001, Human Rights Watch issued a report with a side-by-side chart comparing ICTY procedures with the procedures created by President Bush's executive order establishing military commissions for detainees.¹⁰⁵ HRW was able to proclaim proudly that the ICTY rules imposed, among other things, a firm obligation on the prosecution to disclose all exculpatory evidence—since the report was written before the ICTY's rule was weakened. On the other side, one of the D.C. Circuit judges hearing the detainee rights case *Hamdan v. Rumsfeld* invoked the perceived lack of procedural guarantees at the ICTY as possible grounds for holding the Bush administration to a lax standard of justice:

Cmdr. Swift [Counsel]: Now, the government again has suggested that there might be rules that could work around all this. What's important for Your Honors to note is that at this time and this place there aren't any. They—

104. Scharf & Kang, *supra* note 99, at 916-18, 920-25.

105. HUMAN RIGHTS WATCH, DUE PROCESS PROTECTIONS AFFORDED DEFENDANTS: A COMPARISON BETWEEN THE PROPOSED U.S. MILITARY COMMISSIONS AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2001), available at <http://www.hrw.org/press/2001/12/miltrib1204.htm>.

The Court: Is that also true of the—what is the name of that court, the International Court of Criminal Justice tried the—Milošević in Bosnia. They didn't have any rules either. They didn't even have any rules regarding punishment.

Cmdr. Swift: The International Court, Your Honor, did develop rules.

The Court: They developed them.

Cmdr. Swift: Yes, sir.

The Court: But at the beginning they had nothing.¹⁰⁶

The point is not whether this particular judge had a spectacular grasp of the ICTY or its procedural rules; certainly anyone making a more thoughtful attempt to compare the systems would understand that the ICTY was governed by hybrid accusatorial/inquisitorial procedures that cannot be compared piecemeal to what the administration proposed for detainees. Further, advocates for “downloading” international procedure into purely nationally-driven legal systems ignore the unique checks on prosecutorial abuse that can be found only in multilateral or international tribunals. Some greater compromise of defendants’ rights may be appropriate in forums like the ICTY, where no one state has an interest in conviction *and* controls the prosecution, the procedural rules, the evidence, and the judges. Due process proponents cannot always pick and choose the lessons they want learned, however, and the debate over detainee rights in military trials in the United States shows that having a cavalier attitude toward defendants’ rights abroad, simply because such individuals seem clearly “evil,” could harm not just the project of international justice but also individual notions of due process. Striking the right balance when states have a virtual monopoly on critical evidence will never be easy. But when the states hold many of the cards, international tribunals may have to make the hard choice to play with less than a full deck.

106. Transcript of Proceedings at 58-59, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393).

