

FLORENCE MUMBA\*

## 28. Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?

### 1. INTRODUCTION

The ICTY Statute emphasises the right of the accused to a fair and public trial. The ICTY Statute also acknowledges the need for protection of victims and witnesses. During the trial, measures for protection of victims and witnesses, could potentially affect the right of the accused to a fair and public trial. This note addresses the need for protection of victims and witnesses, the balancing of the interests of an expeditious trial and protection of victims and witnesses against the interests of a fair and public trial for the accused.

A large number of witnesses testifying before the Tribunal are themselves victims of crimes for which the accused are being prosecuted. Many were themselves driven from their homes and subjected to torture, rape or other forms of inhuman treatment. Others saw their family, friends or close relatives being mistreated and killed.

In the following paragraphs, I will discuss the need for the protection of these witnesses and the balancing of interests of such witnesses with those of the accused to a fair and public trial.

---

\*Judge Florence Mumba LLB, Zambia, Vice-President of the International Criminal Tribunal for the former Yugoslavia; Judge Trial Chamber II. Formerly, Judge of the High Court, Investigator-General, Zambia; Vice-President of the International Ombudsman Institute Board; member, UN Commission on the Status of Women. The author wishes to express her gratitude to Jorunn Gjostein for her assistance in the research of this contribution.



## 2. THE NEED FOR PROTECTION OF WITNESSES TESTIFYING BEFORE THE TRIBUNAL

The conflict in the former Yugoslavia, in which the atrocities which are the subject of the trials at the Tribunal took place, was a conflict between basically three ethnic or religious groups: the Serbs, the Croats and the Muslims. Although the armed conflict in the former Yugoslavia has come to an end, there is still much tension, bitterness and hatred in the region. The bitterness of the peoples of the former Yugoslavia follows ethnic lines.

As mentioned above, witnesses testifying before this Tribunal are, in the main, survivors of these atrocities. In most of the trials, witnesses belong to a different religious or ethnic group from that of the accused. The aim of the testimony of a witness is to prove that the accused committed the crimes, with which he is charged. As a result of the lingering animosities between the various ethnic groups, not only the witness, but also his or her family, and in some cases, a whole local community may be the object of acts of revenge, not only from the accused himself, but also from other individuals belonging to his ethnic or religious group, who are interested in his welfare and are opposed to his being prosecuted.

After their appearance before the Tribunal, most witnesses return to the former Yugoslavia. The need for protection of the witnesses is therefore very real, especially after the witness' appearance before that Tribunal. The fact that there have been reports of cases where witnesses have been threatened proves that the fear of the witnesses is well founded.<sup>1</sup>

The higher an accused was in the hierarchy during the conflict in the former Yugoslavia, the greater is the danger for the witnesses who testify against him, as more individuals will care about the welfare of the accused. The need for protecting the witness' identity for reasons of security is therefore, in general, greater in cases where the accused held a high position in the former Yugoslavia. Due to the situation in the former Yugoslavia, there should be no need for witnesses who testify before the Tribunal to justify their fear or provide evidence of the dangers they face by testifying. Judges are well informed by the Victims and Witnesses Unit. Thus, the trial chambers may assume that the witnesses' fear is well founded.

The protection measures available to the Tribunal are mainly limited to the time before and during the witness' appearance before the Tribunal. Unlike national judicial systems, the Tribunal does not have its own police

<sup>1</sup>See *Prosecutor v. Tadić, Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence*, Case No. IT-94-1-A, A. Ch., 15 Oct. 1998 at para. 9: "The Appellant submits that witness and documentary evidence was not available at trial for a number of reasons, including [...] difficulty faced by Appellant in obtaining and collecting evidence in Republica Srpska at the time of the trial, as well as other investigatory difficulties, which meant that [...] some witnesses would not come forward due to threats or intimidation, in particular by Simo Drljača (now deceased) and/or Mišo Daničić." See also paras. 59 and 62.



## TESTIFYING

ties which are the conflict between Croats and the Serbs has come to the region. The ethnic lines.

are, in the cases belong to the aim of the crimes, between the family, and in of revenge, belonging are and are

turn to the therefore al. The have been

in the testify accused. is tion avia, all to ing. al

to al

to

to

to

to

to

to

force to protect witnesses on the ground after their testimony. The protection measures available to the Tribunal are therefore to a great extent aimed at minimising the risks to the safety of the witness after returning to his or her country of residence.<sup>2</sup>

In the *Tadić* case, the protective measures sought were divided into five categories: those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media (1); those seeking protection from retraumatisation by avoiding confrontation with the accused (2); those seeking anonymity, whereby the victims and witnesses would not be identified to the accused (3); miscellaneous measures for certain victims and witnesses (4); and, finally, general measures for all victims and witnesses who may testify before the Tribunal in the future (5).<sup>3</sup>

Witness anonymity has only been used for the protection of the safety of a witness, whereas confidentiality measures can be aimed at protecting both the safety and the privacy of witnesses. Protection of the witness' privacy through confidentiality measures is particularly relevant in cases of rape and sexual assault, where victims could feel it as an extra burden if it becomes known in their home community that they were raped or sexually assaulted. In many communities, in particular, the Muslim community, a woman known to have been raped will most likely become a social outcast and, if single, she may not have any suitors.

### 3. BALANCING THE PROTECTION OF WITNESSES WITH THE RIGHT OF THE ACCUSED TO A FAIR TRIAL

After having identified the witnesses, their need for protection and the various protective measures available to the Tribunal, we will now look at the accused. What are the rights of the accused and how should the Tribunal balance the rights of the accused *vis-à-vis* the need for protection of witnesses?

Judge Stephen put the problem in his Separate Opinion in the *Tadić* case as "how to respond to the very natural concern of witnesses while at the same time according justice to the accused and ensuring a fair trial".<sup>4</sup>

<sup>2</sup>Åsa Rydberg, "The Protection of the Interests of Witnesses – The ICTY in comparison to the Future ICC," 12 *Leiden Journal of International Law* (1999) at p. 470.

<sup>3</sup>*Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Measures for Victims and Witnesses*, Case No. IT-94-1-T, 10 Aug. 1995.

<sup>4</sup>*Prosecutor v. Tadić, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, Case No. IT-94-1-T, 10 Aug. 1995 at p. 2.



## 3.1 Relevant sources of law

The major instruments<sup>5</sup> in determining the balance between the rights of the accused and protection of victims and witnesses, are the basic documents of the Tribunal: the ICTY Statute and the ICTY Rules, and as the Tribunal gradually develops its own practice, the jurisprudence of the Tribunal. In interpreting the ICTY Statute and the ICTY Rules, however, the relevant Security Council resolutions<sup>5</sup> and the Secretary General's Report provide useful guidelines.

The rights of the accused are outlined in various international and regional human rights instruments, such as the Universal Declaration on Human Rights (UDHR), the UN Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the African Charter on Human and Peoples Rights and the American Convention on Human Rights.

One question which has been an issue both in decisions by the Tribunal and in legal literature, is the weight which is to be given to the above mentioned instruments. To what extent is the Tribunal bound by other Human Rights Instruments and the practice of other international bodies?<sup>6</sup>

The question was discussed by the Trial Chamber in the *Tadić* case: "A fundamental issue raised by this motion is whether, in interpreting and applying the Statute and the Rules of the International Tribunal, the Trial Chamber is bound by interpretations of other judicial bodies or whether it is at liberty to adapt those rulings to its own context."<sup>7</sup>

The Trial Chamber further stated:

Although Article 14 of the ICCPR was the source for Article 21 of the Statute, the terms of that provision must be interpreted within the context of the "object and purpose" and unique characteristics of the Statute. Among those unique considerations is the affirmative obligation to protect victims and witnesses. [...] This affirmative obligation to provide protection to victims and witnesses must be considered when interpreting the provisions of the Statute and Rules of the International Tribunal. In this regard it is also relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses. These considerations are unique: neither Article 14 of the ICCPR nor Article 6 of the European Convention on Human Rights ("ECHR"), which concerns the rights to a fair trial, list the protection of victims and witnesses as one of its primary considerations. As such, the interpretation given by other

<sup>5</sup>SC Res 808, UN Doc. S/Res/808 (22 February 1993); SC Res 827, UN Doc. S/Res/827 (3 May 1993).

<sup>6</sup>This question was examined in an article by Natasha A. Affolder: "Tadić, The Anonymous Witness and the Sources of International Procedural Law," 19 *Michigan Journal of International Law* (No. 2 1998) at p. 445.

<sup>7</sup>Supra note 3 at para. 17.



judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations. In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.<sup>8</sup>

This is more so that this Tribunal cannot offer witness and victims support on the ground.

In the *Delalić* case however, the Trial Chamber stated: "[D]ecisions on the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR") have been found to be authoritative and applicable. This approach is consistent with the view of the Secretary General that many of the provisions in the Statute are formulations based upon provisions found in existing international Instruments (See paragraph 17 of the Report)."<sup>9</sup>

I fully support the ruling of the Trial Chamber in the *Delalić* decision. If the International Tribunal should not feel bound by the standards set out in international human rights instruments, how can one expect states to do so? It is crucial to the work of the Tribunal that it has credibility and support in the world community. In order to achieve and uphold such credibility, the Tribunal must hold on to the highest standards of human rights, and as a tribunal created by the United Nations, it must at least feel bound by instruments created by its parent organ.

In any case, judges of the Tribunal, even though acting independently, are nationals of member states of the UN or state parties to these international instruments, or, by the principle of *jus cogens* are bound by the said instruments.

The Secretary General's Report paragraph 106 reads as follows:

It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.

I agree with these sentiments. However, the Trial Chamber in interpreting the ICTY Statute and relevant human rights instruments is entitled to take

<sup>8</sup>Id., paras. 26-27.

<sup>9</sup>*Prosecutor v. Delalić and Others, Decision on the Motions by the Prosecutor for Protective Measures for the Prosecution Witnesses pseudonymed "B" through "M", Case No. IT-96-21-T, 28 Apr. 1997 at para. 27.*



into consideration the unique situation of the Tribunal, the situation of the witnesses and the lack of means for protecting the witnesses on the ground. This does not mean that these instruments and their interpretation by other organs, is less relevant to the Tribunal. It merely means that the legal instruments should be interpreted in the factual context of each case before the Tribunal, as in any other case before any other judicial body given the task to interpret legal instruments.

### 3.2 The balancing of interests

The contrast in the language of Article 20(1) of the ICTY Statute indicates that the right of the accused to a fair trial has priority:

The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses. (emphasis added)

Rule 75(A) further indicates such a priority:

A Chamber may [...] order appropriate measures for the privacy and protection of victims and witnesses, *provided that the measures are consistent with the rights of the accused*. (emphasis added)

Article 22 of the Statute requires that “[t]he International Tribunal *shall provide* in its rules of procedure for the protection of victims and witnesses”. The Secretary General’s Report states in paragraph 99 that “[t]he Trial Chamber should also provide appropriate protection for victims and witnesses during the proceedings”, and further in paragraph 108:

In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault. Such measures should include, but should not be limited to the conduct of *in camera* proceedings, and the protection of the victim’s identity.

Although the ICTY Statute and the Secretary General’s Report emphasise the need for protective measures for witnesses, the relevant articles of the ICTY Statute give no room for undermining the fairness of the trial. Besides, ICTY Rules are secondary legislation and as such cannot override the spirit of the ICTY Statute.

Among the rights of the accused provided for in the ICTY Statute are: the right to a fair and public hearing (Article 21.2), subject to Article 22;



Tribunal, the situation of the witnesses on the ground, and their interpretation by other means merely means that the legal context of each case before other judicial body given the

interests

of the ICTY Statute indicates priority:

fair and expeditious and that the rules of procedure and accused and *due regard* for the (added)

measures for the privacy and at the measures are consistent

International Tribunal shall of victims and witnesses". paragraph 99 that "[t]he Trial protection for victims and in paragraph 108:

committed in the former tional Tribunal to ensure the protection measures should and evidence for victims and assault. Such measures should of *in camera* proceedings, and

General's Report emphasise the relevant articles of the the fairness of the trial. and as such cannot override

in the ICTY Statute are: the (12), subject to Article 22;

adequate time for the preparation of his defence (Article 21.4 (b)); the right to be present at his trial (Article 21.4 (d)); and the right to examine the witnesses against him (Article 24.4 (e)).

In the following, I will go through some of the most important protective measures and discuss whether they are likely to affect the rights of the accused.

(a) *Closed sessions and other confidentiality measures*

Both the ICTY Statute (Arts. 20.4 and 22), the Secretary General's Report (paragraph 108) and the ICTY Rules (Rules 75(B) and 79) mention explicitly the conduct of *in camera* proceedings and the protection of the victim's identity as necessary protective measures. The question whether to allow various measures of confidentiality has been raised before the Trial Chambers in numerous motions.<sup>10</sup> The practice of the Tribunal is that such measures are only to be taken when absolutely necessary.

Closed sessions and non-disclosure to the public and the media of the identity of witnesses are measures that are well known to national legal systems. In many national systems it is more the rule than the exception that, cases of rape or sexual assault and other cases, where there is a special need for protection of the privacy of victims and witnesses, are held *in camera*. *In camera* hearings do not, however, affect the fairness of the trial. Nor is the use of closed hearings to protect vulnerable witnesses considered to be in violation of the right to a public trial as secured in Article 14 of the ICCPR or Article 6 of the ECHR or other similar instruments, even if an entire trial is held *in camera*. Thus, these instruments allow exceptions from the principle of public trial under such circumstances.<sup>11</sup>

The public nature of a trial is mainly for education purposes. It is important that people generally understand how the law is applied to facts that constitute crimes. It is also important that people identify the accusations and the accusers to avoid 'framed' trials. The public is also offered an opportunity to assist the administration of justice as they have a choice to respect the law or to suggest changes to the law or the system of justice. This is more true of trials at national level. Having said that, lack of publicity still does not affect the rights of the accused to a fair trial.

In the *Tadić* case, the Trial Chamber stated:

With regard to the limitation on the accused's right to a public trial, this Trial Chamber has to ensure that any curtailment of the accused's right to a public

<sup>10</sup>See for example *Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness "R"*, Case No. IT-94-1-T, 31 July 1996; *Prosecutor v. Furundžija, Decision on Prosecutor's Motion Requesting Protective Measures for Witnesses "A" and "D" at Trial*, Case No. IT-95-17/1-T, 11 June 1998.

<sup>11</sup>ICCPR Art. 14. 1: "[...] The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice [...]" (emphasis added).



hearing is justified by a genuine fear for the safety of witness R and/or the members of witness R's family. [...] In balancing the interests of the accused, the public and witness R, this Trial Chamber considers that the public's right to information and the accused's right to a public hearing must yield in the present circumstances to confidentiality in light of the affirmative obligation under the Statute and the Rules to afford protection to victims and witnesses.<sup>12</sup>

As the application of protective measures is open to the accused and his witnesses, the use of confidentiality measures does not affect the right to equality of arms.

*(b) Measures aimed at protecting witnesses from retraumatisation*

One-way closed circuit television, allowing the witness to testify without seeing the accused, and restrictions on the questions that the parties may ask the witness are aimed at protecting the witness from the trauma of reliving the atrocities. Such measures are in particular relevant for witnesses who have been victims of sexual violence and other forms of personal violence.

ICTY Rule 96 deals with evidence in cases of sexual assault:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
- (v) prior sexual conduct of the victim shall not be admitted in evidence.

ICTY Rule 75(C) states: "A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation."

The restrictions on consent as a defence and evidence regarding prior sexual conduct are stronger in the ICTY Rules than in many national legal systems. These restrictions are, however, well founded, as they help minimise the trauma for one of the most vulnerable groups of witnesses with a minimum of effect on the accused's right to defend himself. The pattern of sexual violence during the war in the former Yugoslavia shows that the defence of consent and evidence of prior sexual conduct is less relevant in cases before the Tribunal than in most cases before national courts. Women of all ages and also young girls were raped indiscriminately, some being subjected to gang rapes, circumstances under which evidence of prior sexual conduct and consent as a defence is very unlikely to be relevant. Limitations on the defence of consent and evidence of prior sexual conduct are,

<sup>12</sup>Supra note 3 at para. 6.



of witness R and/or the interests of the accused, that the public's right to a fair trial must yield in the affirmative obligation of victims and witnesses.<sup>12</sup>

to the accused and his not affect the right to

malisation  
ness to testify without  
that the parties may ask  
the trauma of reliving  
want for witnesses who  
of personal violence.  
al assault:

be required;

ictim

was had reason to fear  
oppression, or  
submit, another might

the accused shall satisfy  
relevant and credible;  
admitted in evidence.

necessary control the  
production

regarding prior  
national legal  
as they help  
witnesses with  
the pattern of  
that the  
relevant in  
women  
being  
sexual  
limitations  
and

therefore, unlikely to affect the right of the accused to defend himself.<sup>13</sup> As regards ICTY Rule 75(C), this rule does not affect the right of the accused to a fair trial, as the guarantee of a fair trial does not contain a right to intimidate or harass witnesses.

(c) *Anonymity – non-disclosure of the identity of witnesses to the Defence*

Rule 69(A) provides for non-disclosure to the defence of a witness' identity until such person is brought under the protection of the Tribunal. This rule is only to be used in exceptional circumstances. The identity shall however, be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence pursuant to Rule 69(D). The non-disclosure of the identity of a witness until a short period before commencement of trial proceedings does not violate the right of the accused to prepare his defence, as most of the defence can be prepared without knowledge of the identity of a witness. When the identity, within a reasonable time before the trial, is disclosed to the Defence, there should be sufficient time to prepare the remainder of the defence case. What constitutes a reasonable time does, however, differ from case to case, depending among other things on the role of the witness.

A different situation occurs, however, if the Prosecutor applies for complete non-disclosure to the accused and his counsel of the identity of a witness. The question whether to allow anonymous witnesses to testify before the Tribunal was discussed in the *Tadić* case<sup>14</sup>, the *Blaškić* case<sup>15</sup> and the *Delalić* case<sup>16</sup>.

Only in one decision has a Trial Chamber granted complete anonymity for a witness during trial. This was in the *Tadić* case, decision of 10 August 1995, to which Judge Stephen gave a separate opinion.<sup>17</sup>

In the majority ruling, the Trial Chamber stated that: "[t]he situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*."<sup>18</sup>

<sup>13</sup>The Cross-Examination Right before the ICTY was examined in an article by Alex C. Lakatos, "Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights," 46 *Hastings Law Journal* (No. 3 March 1995), at pp. 932-937.

<sup>14</sup>*Supra* notes 3 and 4.

<sup>15</sup>*Prosecutor v. Blaškić, Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, Case No. IT-95-14-T, 5 Nov. 1996.

<sup>16</sup>*Prosecutor v. Delalić and Others, Decision on the motions by the Prosecutor for protective measures for the protection of witnesses pseudonymed "B" through "M"*, Case No. IT-96-21-T, 28 Apr. 1997.

<sup>17</sup>The decision has been examined and commentated in the following articles: Monroe Leigh, "The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused," 90 *AJIL* (1996) 235; Christine M. Chinkin, "Due Process and Witness Anonymity," 91 *AJIL* (1997) 75; Monroe Leigh, "Witness Anonymity Is Inconsistent with Due Process," 91 *AJIL* (1997) 80; and Affolder, *supra* note 6 at p. 445.

<sup>18</sup>*Supra* note 3 at para. 61.



The Trial Chamber then listed five conditions, which the Prosecutor needs to satisfy before a measure of anonymity would be granted: real fear for the safety of the witness or his or her family (1); the testimony of the particular witness must be important to the Prosecutor's case (2); the Trial Chamber has to be satisfied that there is no prima facie evidence that the witness is untrustworthy (3); ineffectiveness or non-existence of a witness protection program (4); and, finally, any measures taken should be strictly necessary. If less restrictive measures can secure the required protection, that measure should be applied.<sup>19</sup>

In the *Blaškić* case, Trial Chamber I, referred to the ruling by Trial Chamber II in the *Tadić* decision regarding exceptional circumstances and stated: "But it is public knowledge that this situation no longer exists and the Prosecutor cannot benefit from it. This Trial Chamber is not satisfied that the case-file demonstrates the existence of an 'exceptional case,' the prerequisite for taking into consideration the five conditions which might lead to the granting of the protective measures the Prosecutor has requested."<sup>20</sup> Trial Chamber I, however, seems to support the five categories set out by Trial Chamber II in the *Tadić* decision.

In my view, however, the legal instruments of this Tribunal do not allow anonymous witnesses at trial. The ICTY Statute states in Arts. 20(1) and 21(2) the right of the accused to a "fair trial". Article 21(4) (e) specifically guarantees the accused the right to "examine, or have examined, the witnesses against him".

Article 22 of the ICTY Statute states that "the International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses". Rule 75(B) lists protective measures that a Chamber may order. Non-disclosure of the witness' identity to the accused and his counsel is not among the listed protective measures. The ICTY Rules so far do not provide for non-disclosure of the identity of a witness to the accused during the trial. In my view, in order for a Trial Chamber to order such non-disclosure, this would have to be provided for through amendment of the Rules, because I think it is such a drastic step, since it may hamper fair cross-examination of the unknown witness.

Further, ICTY Rule 69(A) and (C) state:

*In exceptional circumstances, the Prosecutor 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 such person is brought under the protection of the Tribunal. [...] 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 the preparation of the defence. (emphasis added)*

<sup>19</sup>Id. paras. 62–66.

<sup>20</sup>Supra note 15 at para. 45.



First, ICTY Rule 69(A) states that non-disclosure may only be ordered in 'exceptional circumstances'. Second, it states that the identity must be disclosed when the person is brought under the protection of the Tribunal. And third, Rule 69(C) states that the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence. The disclosure discussed here is to the accused, not to the public.

In my view, granting of witness anonymity during trial is inconsistent with the ICTY Rules. In his Separate Opinion in the *Tadić* decision, Judge Stephen stated: "But as to any general anonymity in the case of witnesses who have had dealings with the defendant and are known to him, I would regard it as curious indeed for the Rules, after such specific and elaborate provisions for full disclosure, to introduce so radical a concept of anonymity by such indirect and ambiguous wording,"<sup>21</sup> and further: "I can conclude my survey of the Rules by saying, in sum, that they give no support for anonymity of witnesses at the expense of fairness of the trial and the rights of the accused spelt out in Article 21."<sup>22</sup> In the *Blaškić* case Trial Chamber I unanimously concurred with the above quoted opinion.<sup>23</sup>

Further, witness anonymity is only consistent with the ICTY Statute and the ICCPR and other relevant human rights instruments if it does not affect the accused's right to a fair trial, to prepare his defence and to cross-examine the witnesses against him. I believe that it is rare to find situations where witness anonymity does not affect these fundamental rights.

In his Separate Opinion, Judge Stephen stated: "My conclusion therefore is that the Statute does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21 and in particular the "minimum guarantee" in (4)."<sup>24</sup>

Judge Stephen further stated about the combination of an anonymous witness and other protective measures:

The consequence could be that to the defence the accuser would appear as no more than a disembodied and distorted voice transmitted by electronic means. Yet this could be the means of bringing before the Chamber evidence which the prosecution has described as either very important or important, evidence which could lead to the accused's conviction on very serious charges.<sup>25</sup>

In *Kostovski v. The Netherlands*, the European Court of Human Rights stated: "How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-

<sup>21</sup>Supra note 4 at para. 13.

<sup>22</sup>Id. p. 15.

<sup>23</sup>Supra note 15 at para. 34.

<sup>24</sup>Supra note 4 at p. 11.

<sup>25</sup>Id., p. 12.



examination of the Prosecution witnesses if he does not know from where and by whom he is accused?"<sup>26</sup>

Judge Stephen seems to leave open the possibility for witness anonymity in two situations, in which he finds that the right of the accused to a fair trial is not threatened: under-cover police witnesses, where the accused has known the witness in the past but only under a false name, the false name can be revealed; and where the witness has been a mere chance observer who is not known to the accused at all. Judge Stephen found that for these categories of witnesses, different considerations apply. Although the non-disclosure of the witness' identity may prevent the defence from conducting prior inquiry, Judge Stephen concluded that such non-disclosure is not problematic, as he found that it does not prevent the defence from conducting a proper cross-examination of the witness.<sup>27</sup>

I do not fully agree with Judge Stephen that allowing anonymous mere chance observer witnesses does not affect the cross-examination. In cases where the defence wishes to question whether an alleged eyewitness was present at the crime scene, it could be necessary for the defence to know the witness's identity in order to disprove the whereabouts of the witness. Further, if the defence finds reason to examine the credibility of a witness, this could be difficult without the knowledge of the witness identity, especially as such investigations could require knowledge of the witness' past and other identifying information.

Concerning the argument that witnesses who were victims of sexual violence have a special need for protection, Judge Stephen stated: "What does make their case special is the combination of possible social consequences of it becoming generally known in communities in the former Yugoslavia that a woman has been a rape victim and also the often acute trauma facing one's attacker in court and being made to relieve the experience of the rape. The customary protection measures to guard against these two possible consequences are *in camera* proceedings, devices to avoid confrontation with the accused in court and careful control of cross-examination. That being so, it leads me to the conclusion that it is measures such as those, and not any wholesale anonymity of witnesses, that Article 22 primarily contemplates."<sup>28</sup>

<sup>26</sup>*Kostovski v. Netherlands*, 1989 Series A No. 166, The European Court of Human Rights, para. 25.

<sup>27</sup>*Supra* note 4 at pp. 13-14.

<sup>28</sup>*Id.*, p. 11.



not know from where

for witness anonymity  
the accused to a fair trial  
where the accused has  
name, the false name  
mere chance observer  
en found that for these  
oly. Although the non-  
fence from conducting  
non-disclosure is not  
ent the defence from  
s.<sup>27</sup>

wing anonymous mere  
-examination. In cases  
alleged eyewitness was  
he defence to know the  
abouts of the witness.  
credibility of a witness,  
the witness identity,  
wledge of the witness'

vere victims of sexual  
Stephen stated: "What  
on of possible social  
munities in the former  
id also the often acute  
made to relieve the  
asures to guard against  
dings, devices to avoid  
ful control of cross-  
on that it is measures  
nesses, that Article 22

#### 4. CONCLUDING REMARKS

It is clear from the discussions above that the Tribunal has to apply unusual measures to discharge its mandate without undermining the established doctrines of criminal law. It has an unusual status, consequently it can only operate taking into account its uniqueness while at the same time remaining credible as an instrument of international justice for all: victims, witnesses and accused persons.