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## The balancing of the rights of the accused against the rights of a witness in regard to anonymous testimony.

Anna M. Haughton

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
WAR CRIMES RESEARCH PROJECT

(In conjunction with the New England School of Law)

Memorandum for the  
Office of the Prosecutor

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The balancing of the rights of the accused against the rights of a witness in  
regard to anonymous testimony.

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Anna M. Haughton  
December, 2001

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I. The balancing of the rights of the accused against the rights of a witness in regard to anonymous testimony.

A. Issue

This memorandum examines how The International Criminal Tribunal for the Former Yugoslavia (ICTY), used judicial discretion to interpret variations in international law, Statutes, Articles, and The Rules of Procedure and Evidence of the Tribunals, as well as, common law rulings, to attempt to create a balance between the fundamental due process rights of an accused and the rights of protection due a testifying witness as pertains to anonymity.<sup>1</sup>

The landmark decision of the ICTY in *Prosecutor v. Tadic*,<sup>2</sup> established a five-prong balancing test to determine under which extreme circumstances can anonymous testimony be permitted into evidence. Opposition to the majority decision in *Tadic* state, that in making this discretionary ruling and setting out the five-prong test, The Tribunal runs the risk of damaging the ICTY's integrity in bypassing what many view as the fundamental guarantees of a defendant to face and cross-examine his accusers. Supporters of the decision, on the other hand, applaud a realistic approach to witness protection, particularly when there is a real fear of reprisals from the accused due to the nature of the crimes committed and because there is not an adequate witness protection program in existence beyond the walls of The Hague and Arusha.

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<sup>1</sup> Issue: Witness protection and disclosure including case law on disclosure of nonredacted witness statements. In e-mailing communications with Andra Mobberley she suggested parameters of issue to include: total witness anonymity, since it was considered and applied at the Hague, and countries that include statutory provisions in their evidence statutes (such as New Zealand), additionally analysis of practices across jurisdictions.

<sup>2</sup> Decision on the Prosecutors Motion requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Dusko Tadic* (para. 70) (August 10, 1995). (Herein *Tadic Decision*) <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm> [Reproduced in accompanying notebook at TAB 22]

This memorandum will evaluate critiques of the ICTY's *Tadic* decision, by opponents and proponents, in regard to permitting anonymous testimony and concerns of the Tribunal's ability to protect testifying witnesses as balanced against the fundamental rights of the accused. The *Tadic* Trial Chamber majority granted total anonymity to the witnesses, not only from the media but also from the defendant and his counsel, and relied heavily on two international cases, *Jarvie v. Magistrates* from the Supreme Court of Victoria Australia, and *Kostovski v. Netherlands* from The European Court of Human Rights.<sup>3</sup> The Court in *Jarvie* permitted an undercover officer to testify under his known pseudonym while his true identity was never revealed to the defendant at trial,<sup>4</sup> the Court in justifying its decision to balance of witness protection against the rights of the accused, claimed the frailties inherent in a human system of justice.<sup>5</sup>

The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it... A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.<sup>6</sup>

Many jurisdictions have wrestled with the contradictions between the rights of the accused to receive a "fair trial" as balanced against the protection of the witness.

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<sup>3</sup> *Jarvie v. Magistrates' Court of Victoria at Brunswick*, Supreme Court of Victoria App. Div. 1 VR 84 (1994). [Reproduced in the accompanying notebook at TAB 15] and *Kostovski v. The Netherlands* (App. No. 11454/85), Eur. Ct. H.R. (1990) 12 EHRR 434, ECHR 11454/85. 20 November 1989. [Reproduced in the accompanying notebook at TAB 16]

<sup>4</sup> *Id.* at 7-9, where the police commissioner testified to the dangers of identifying an under cover operative. [Reproduced in the accompanying notebook at TAB 15]

<sup>5</sup> *Id.* at 7-9. [Reproduced in the accompanying notebook at TAB 15]

<sup>6</sup> *Tadic Decision* at (para. 72) Citing *Jarvie v. Magistrates' Court of Victoria at Brunswick*, Supreme Court of Victoria, App. Div. 1 VR 84 (1994). [Reproduced in the accompanying notebook at TAB 22] and [TAB15]

However the majority of judicial decisions reflect the belief that the right to face ones accuser to protect the rights of the accused from any bias or false testimony is fundamental to a fair trial.

It is important that with the ongoing global concerns, such as terrorism or ethnic tensions, that the International Tribunals, the ICTY or the ICTR or the Permanent Criminal Court “establish itself as the preeminent defender of human rights and particularly the right of every accused to a fair trial according to the most exacting standards of due process required by contemporary international law.”<sup>7</sup> It is imperative that the Tribunal be looked to as a mechanism to allow for international justice and accountability. Therefore, the Tribunals of the present and future, in light of these lofty goals, must never be seen as using “unfettered discretion” but only the impartial voice of justice.

## **B. Summary of Conclusions**

### ***1. Credibility of the Court***

The integrity of the Tribunal will suffer if it is perceived to operate with “unfettered discretion” in its interpretation of the Rules of Procedure and Evidence. Justices interpreting the same Rules and Statutes in the *Tadic* decision arrived at opposing positions in relation to permitting anonymous testimony to protect witnesses, at the expense of the accused to: (1) face his accusers and; (2) to examine and cross-examine the witness. Justice McDonald’s propositions that the ICTY qualifies to operate within its own context and need not be bound by previous rulings of other judicial

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<sup>7</sup> Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*. 90 A.J.I.L. 325 (1996). [Reproduced in the accompanying notebook at TAB 43]

bodies,<sup>8</sup> contradicts with Justice Stephens' assertion that minimum guarantees offered to an accused cannot be diminished in favor of victims and witnesses. It is essential that the Tribunals now in place, and to come, represent a credible front to the international community,<sup>9</sup> and that the rights of the parties brought before it are not sacrificed through the manipulation of ambiguous language in the Statutes and Rules.

## ***2. The Balance***

The ICTY and ICTR, as well as the future Permanent International Court, face a circular dilemma. To either protect witnesses to the detriment of the accused, or to find willing eyewitnesses to testify under the risk of retribution or reprisals. The options are to initiate a functioning, financed witness protection program that encompasses the needs of the victims who must relive the horrors they have already endured to aid the Tribunal in holding criminals accountable. If this can be introduced then the issue of anonymous testimony will be moot. However if options such as *In Camera* proceedings, video testimony, screens, immunity for testimony, or plea-bargaining, fail, then the use of the balancing test introduced in *Tadic* may be required in the interim. A critique of the *Tadic* balancing proposition pointed out that if the Tribunal must resort to balancing the rights of the accused against the safety of witnesses, it suggests that the minimum rights of the

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<sup>8</sup> Natasha A. Affolder, *Tadic: The Anonymous Witness and the Sources of International Procedural Law*. 19 Mich. J. Int'l L. 445 (1998). [Reproduced in the accompanying notebook at TAB 37]

<sup>9</sup> Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*. 91 A.J.I.L. 80, 83 (1997). The author recognizes the need to find a more "nuanced way of handling of sensitive cases, still thinks that during this period of time of the necessity to build up the Tribunals credibility, it cannot be criticized for its due process rulings. [Reproduced in the accompanying notebook at TAB 44]

accused to a fair trial shows that these rights can be sacrificed on behalf of witness safety.<sup>10</sup>

Additionally, if anonymous testimony is to be permitted it should be drafted or amended into the Rules of Procedure and Evidence and not be addressed in the Trial Chamber for interpretation or “unfettered discretion.”

### ***3. Case Law Across Jurisdictions***

The Courts of England and Wales will usually compel a witness to testify, and only in certain circumstances allow written statements in place of oral testimony; such as (1) death, (2) unfit to attend trial, (3) outside of the country, and (4) the statement was made to an investigating officer.<sup>11</sup> The one unreported English case that permitted total anonymity of the witness resulted in a press blackout and an acquittal for the defendant.<sup>12</sup> The English Courts prefer to resort to *In Camera* proceedings in the situation of witness intimidation.

The European Court of Human Rights (ECHR) evaluates all cases before it to ensure the proceedings are fair. The ECHR will enter into evidence statements made by anonymous witnesses but not as sole evidence resulting in conviction of the accused, only

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<sup>10</sup> Michael P. Scharf, *Trial and Error: An assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l L. & Pol'y 167 (1997-98). Citing Monroe Leigh. [Reproduced in the accompanying notebook at TAB 179]

<sup>11</sup> Annemarieke Beijer, Cathy Copley, and André Klip, *Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice* 283 in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* (Phil Fennell, Christopher Harding, Nico Jörg, Bert Swart eds., 1995). [Reproduced in the accompanying notebook at TAB 49]

<sup>12</sup> *Id.* at 291. [Reproduced in the accompanying notebook at TAB 49]

as corroborative evidence.<sup>13</sup> For otherwise the limitations placed on a defendant would be irreconcilable with the guarantees found in Article 6.<sup>14</sup>

Similarly in the Netherlands, the Dutch Association of Judges were concerned with witnesses refusing to testify unless granted anonymity.<sup>15</sup> Legislation was proposed by the “Commission on Threatened Witnesses,” however with the ECHR’s decision in *Kostovski*, where the Netherlands were found to have violated the rights of the accused legislation may not be forthcoming.<sup>16</sup> The Dutch criminal process has no rule against hearsay evidence, and allows in all material evidence gathered at the investigative stage including witness statements which can be presented at trial.

New Zealand on the other hand, based on *R. v. Hughes*, will not allow at trial anonymous testimony even in the situation involving an undercover police officer. The New Zealand court has upheld the accuseds' rights as absolute and any changes to the common law position should be handled by Parliament.<sup>17</sup>

The United States has federal Constitutional guarantee in the Sixth Amendment which allows for the confrontation of the accused with the accuser. A recent California Supreme Court case, *Alvarado v. Superior Court of Los Angeles* attempted to challenge the ability to enter anonymous testimony at trial, but while the California Court would allow

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<sup>13</sup> *Kostovski v. The Netherlands* (App. No. 11454/85), Eur. Ct. H.R. (1990) 12 EHRR 434, ECHR 11454/85. 20 November 1989. [Reproduced in the accompanying notebook at TAB 16]

<sup>14</sup> Annemarieke Beijer at 288. [Reproduced in the accompanying notebook at TAB 49]

<sup>15</sup> *Kostovski v. The Netherlands* at (para.34) [Reproduced in the accompanying notebook at TAB 16]

<sup>16</sup> *Id.* at (para. 34). [Reproduced in the accompanying notebook at TAB 16]

<sup>17</sup> *R v. Hughes*, [1986] 2 N.Z.L.R. 129. (C. A. New Zealand). [Reproduced in the accompanying notebook at TAB 25]

protections during the pre-trial phase, the confrontation clause trumps the witnesses' safety.<sup>18</sup>

Of these jurisdictions, no cases were found to permit total witness anonymity as being the sole basis for a conviction. Several jurisdictions allow anonymous testimony to corroborate other evidence presented at Trial. Anonymity of witnesses is often permitted during pre-trial preparation to protect a witness's identity, however at trial, to protect the rights of the accused, the right to examine and cross-examine prevails.

## **II. Formation and Interpretation of the Rules of Procedure and Evidence**

### **A. Formation**

Under Article 14 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), the Tribunal is governed by the Rules of Procedure and Evidence originally created for the International Criminal Court for the Former Yugoslavia with some revision.<sup>19</sup> While the ICTY judges chose to use an adversarial approach to the Court's Rules of Procedure, as opposed to an inquisitorial process, this was not always the case

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<sup>18</sup> *Alvarado v. The Superior Court of Los Angeles County*. 5 P.3d 203 (Cal. 2000). [Reproduced in the accompanying notebook at TAB 11]

<sup>19</sup> Statute of the International Tribunal for Rwanda: S/RES/955 (1994) (Annex), 8 November 1994, reprinted in VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, VOL. 2(1998). Article 14: Rules of Procedure and evidence; provides: The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary. [Reproduced in the accompanying notebook at TAB 9]

with respect to the international courts.<sup>20</sup> Three issues in particular differentiate The ICTY from an adversarial system; (1) the admittance of hearsay evidence; (2) The Tribunal can order the parties to produce additional evidence if necessary, and; (3) The Tribunal does not permit plea-bargaining or immunity.<sup>21</sup> Other discrepancies, which have caused discord in the international community, include the judicial interpretation and the discretionary power permitted within the framework of the rules of evidence. This issue is relevant in relation to the decision in *Prosecutor v. Tadic*, where Justice Stephens' separate opinion from the majority decision brings into question the interpretation of the ICTY statute and rules and the balancing process in regard to anonymous testimony. What hangs in the balance is the court's integrity, the security of witnesses or victims and the fundamental guarantees allowed the accused. Opponents of the practice of allowing anonymous witnesses believe that the Tribunal must amend the rules so that anonymity for witnesses and victims is not an option.<sup>22</sup> While proponents

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<sup>20</sup> MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG*, 67 (1997). [Reproduced in the accompanying notebook at TAB 52]

<sup>21</sup> *Id.* at 67. In particular, the determination that the Tribunal would not permit immunity, created a great deal of disagreement. The United States wished to include a provision permitting limited immunity in exchange for testimony to prosecute military or political leaders who ordered said atrocities. "The President of the Tribunal, Antonio Cassese responded: The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhuman acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." [Reproduced in the accompanying notebook at TAB 52]

<sup>22</sup> Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under The Rules of Procedure and Evidence of The International Criminal Tribunal For the Former Yugoslavia*. 20 *Hous. J. Int'l* 381,401 (1998). [Reproduced in the accompanying notebook at TAB 40]



argue that narrowly construing the right of examination by the defendant is prudent in the Tribunal's desire to protect the victims who participate in the trial.<sup>23</sup>

## **B. Interpretation: Judicial Discretion**

Detractors of recent rulings, protest that the ambiguous language of the Rules, leaves the judges of the trial chamber "unfettered discretion to direct virtually any protective measure, for any reason."<sup>24</sup> These concerns in relation to judicial discretion may negatively impact the integrity of the court.<sup>25</sup> Judge McDonald of the ITCY, before the preparatory commission for the ICC reflected her belief in the necessity for judicial discretion and latitude in interpreting the Rules of Procedure, where she stated:

Now that the Statute is in place, you are turning to the equally important task of drafting the Rules of Procedure and Evidence. Rules are important to the Court because they establish the framework for conducting trial and appellate proceedings....That is what the Rules should be- a framework, not a straitjacket... For the judges to effectively manage and direct the proceedings, the Rules must be sufficiently flexible to allow them to exercise discretion when necessary.<sup>26</sup>

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<sup>23</sup> Alex C. Lakotos, Note: *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendant's Rights*. 46 Hastings L.J. 909, 933 (1995). [Reproduced in the accompanying notebook at TAB 42]

<sup>24</sup>Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*. 41 How. L.J. 155, 164 (1997). [Reproduced in the accompanying notebook at TAB 45]

<sup>25</sup> *Id.* at 164. Where Professor Falvey voiced that this "unfettered discretion" may damage the integrity of the court, particularly in relation to anonymous testimony. [Reproduced in the accompanying notebook at TAB 45]

<sup>26</sup> Press Release. REMARKS MADE BY JUDGE GABRIELLE KIRK McDONALD, PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, TO THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT. THE HAGUE, 30 July 1999. JL/P.I.S./425-E. <http://www.un.org/icty/pressreal/p425-e.htm>. Full Quote: "Now that the Statute is in place, you are turning to the equally important task of drafting the Rules of Procedure and Evidence. Rules are important to the Court because they establish the framework for conducting trial and appellate proceedings. They provide guidance to the parties as to what they can expect in those proceedings and bring consistency to the Court's decisions and work. While the Rules serve several important functions, we must bear in mind that they can only be a framework; the Rules cannot, no matter how well crafted, foresee every courtroom situation. That is what the Rules should be- a framework, not a straitjacket... For the judges to effectively

The international community has an interest in the fair administration of justice and in seeking vindication for war crimes committed, and in seeing those who violate international humanitarian law brought to trial.<sup>27</sup> In balancing these objectives The Tribunal must be seen as upholding internationally accepted norms within its proceedings in order to establish the veracity of the forum, and therefore procedures must comply with standard human rights guarantees.<sup>28</sup>

If the judges of the Tribunal are perceived as arrogant and fully justified in utilizing “unfettered discretion,” whereby the integrity of the court is damaged, then the overall purpose of the Tribunal in bringing war criminals to justice in a neutral and fair forum will suffer irreparable harm. Additionally, if decisions by the tribunal are consistently at odds with existing international case law and precedent concerning rights of the defense, then the Tribunal will lack the strength in the international community to hold these defendants accountable for the atrocities that have brought them before the court. The ICTY, in the decision of *Tadic*, was very cautious in analyzing and interpreting the Tribunal’s Statute and Rules, as well as the European Court of Human Right’s rulings and other case precedence before deciding to initiate the five-prong test.

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manage and direct the proceedings, the Rules must be sufficiently flexible to allow them to exercise discretion when necessary.” [Reproduced in the accompanying notebook at TAB 53].

<sup>27</sup> Christine Chinkin, *International Tribunal for the Former Yugoslavia: Amicus Curiae Brief on Protective Measures for Victims and Witnesses*, 7 Crim. L.F. 179, 183 (1996). [Reproduced in the accompanying notebook at TAB 38]

<sup>28</sup> *Id.* at 182. [Reproduced in the accompanying notebook at TAB 38]

### C. The Relevant Articles and Rules

The ICTY incorporated the standards of domestic law and case law of the European Court of Human Rights (ECHR), and recognized that these standards must be used in the context of the unique issues before the Tribunal, with special emphasis on the Tribunal's mandate to protect victims and witnesses.<sup>29</sup> The Tribunal must balance and interpret numerous ICTY articles and Rules of Procedure to preserve the rights of the accused, to protect testifying witnesses and the public, so that defendants receive a fair trial and appropriate justice.

The relevant Articles are 20(1) conduct at trial with due regard for witness protection,<sup>30</sup> Article 21(2) entitlement of the accused to a fair trial,<sup>31</sup> Article 21(4)(e), the rights of the accused,<sup>32</sup> and Article 22 protection of the witnesses.<sup>33</sup> Under the ICTY

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<sup>29</sup> *Tadic Decision* (para. 70) [Reproduced in the accompanying notebook at TAB 22]

<sup>30</sup> Statute of the International Tribunal for the Former Yugoslavia.  
<http://www.un.org/itcy/basic/staut/stat2000.htm> [Reproduced in the accompanying notebook at TAB 8]  
Article 20 (1) Commencement and conduct to trial proceedings, states:

The Trial Chambers shall ensure that a trial is fair and expeditious and that the 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.

<sup>31</sup> Statute of the International Tribunal for the Former Yugoslavia.  
<http://www.un.org/itcy/basic/staut/stat2000.htm> [Reproduced in the accompanying notebook at TAB 8]  
Article 21(2) Rights of the accused, states:

In the determination of the charges against him, the accused shall be entitled to a fair and public hearing subject to article 22 of the Statute.

<sup>32</sup> Statute of the International Tribunal for the Former Yugoslavia.  
<http://www.un.org/itcy/basic/staut/stat2000.htm> [Reproduced in the accompanying notebook at TAB 8]  
Article 21(4)(e) Rights of the accused, states:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him;

Rules of Procedure and Evidence, the pertinent rules are: Rules 69,<sup>34</sup> 75(A), 75(B)(iii) the anonymity of witnesses in the pre-trial and trial stages is addressed.<sup>35</sup>

While these rules and articles lay out the rights of the parties and the protection of witnesses, there exists sufficient room for interpretation. The Trial Chamber in *Tadic* was dependent on testimony to hold the defendant accountable, and without the ability to

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<sup>33</sup> Statute of the International Tribunal for the Former Yugoslavia.  
<http://www.un.org/icty/basic/staut/stat2000.htm> [Reproduced in the accompanying notebook at TAB 8]

Article 22 Protection of victims and witnesses, states:

The International Tribunal shall provide in its rule of procedure and evidence for the protection of victims and witnesses. Such protective measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

<sup>34</sup> Rules Of Procedure and Evidence: The International Tribunal for the Former Yugoslavia. Selected rules.  
[http://www.un.org/icty/basic/rpe/IT32\\_rev21.htm](http://www.un.org/icty/basic/rpe/IT32_rev21.htm) [Reproduced in the accompanying notebook at TAB 7 ]

Rule 69 Protection of Victims and Witnesses, states:

- (A) 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.
- (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Section.
- (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to trial to allow adequate time for preparation of the defense.<sup>34</sup>

<sup>35</sup> Rules Of Procedure and Evidence: The International Tribunal for the Former Yugoslavia. Selected rules.  
[http://www.un.org/icty/basic/rpe/IT32\\_rev21.htm](http://www.un.org/icty/basic/rpe/IT32_rev21.htm) [Reproduced in the accompanying notebook at TAB 7 ]

Rule 75 Measures for the Protection of Victims and Witnesses, states:

- (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused;
- (B) A Chamber may hold an in camera proceeding to determine whether to order:
  - (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or witness, or of persons related to or associated with a victim or witness by such means as:
    - (a) expunging names and identifying information from the Tribunals public records;
    - (b) non-disclosure to the public of any records identifying the victim;
    - (c) giving of testimony through image-or voice-altering devices or closed circuit television; and
    - (d) assignment of a pseudonym;
  - (ii) closed sessions, in accordance with Rule 79;
  - (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.<sup>35</sup>

adequately protect witnesses before the court, chose to initiate a balancing mechanism to allow anonymous testimony into evidence.

In contrast, the Rwanda Tribunal has required the Prosecutor to disclose the identity of victims and witnesses to the defense, before the trial commences, to allow for adequate cross-examination.<sup>36</sup> Additionally, the Trial Chamber of the Rwanda Tribunal has determined that a prosecutor, even in the pretrial phase, cannot withhold the identity of testifying witnesses from the defense without an order from the Trial Chamber.<sup>37</sup>

The danger to witnesses in Rwanda is even greater as Hutu militias continue to forcibly induct young men into their units while threatening to seize power.<sup>38</sup> U.N. observers have also estimated that between May and June of 1996 ninety-nine witnesses to the Rwandan genocide have been murdered by Hutu extremists.<sup>39</sup>

In *Prosecutor v. Akayesu*, measures were implemented to provide partial anonymity to protect the identity of witnesses for both the defense and prosecution.<sup>40</sup> Alphabetical pseudonyms were created to identify each witness, and no information was provided

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<sup>36</sup> 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, 540 (1998). [Reproduced in the accompanying notebook at TAB 51]

<sup>37</sup> *Id.* at 541. Where the prosecution is required to disclose the identity of witnesses and victims, and their non-redacted statements, to the defense at least fifteen to thirty days before the trial commences. See note 1806 at 541. (citing several motions and decisions by the Rwanda Tribunal). [Reproduced in the accompanying notebook at TAB 51]

<sup>38</sup> PAUL J. MAGNARELLA, *JUSTICE IN AFRICA: RWANDA'S GENOCIDE ITS COURTS, AND THE UN CRIMINAL TRIBUNAL*, (2000), 74. [Reproduced in the accompanying notebook at TAB 50]

<sup>39</sup> *Id.* at 74. Since eyewitness testimony is paramount, the loss of so many witnesses will be a detriment to the prosecutor's case. [Reproduced in the accompanying notebook at TAB 51]

<sup>40</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T. Decision of:2 September 1998, Judgment. (para. 18) <http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>

which could identify those testifying.<sup>41</sup> Additionally, screens kept the public from seeing the testifying witness but the accused and his council was able to view the witness. On defense witness was also heard *in camera* another successful method of protecting testifying witnesses.<sup>42</sup>

Many initial motions were made by the defense and prosecution in regard to witness testimony, the defense presented motions charging the prosecution with investigating the veracity of a witness's testimony.<sup>43</sup> The Chamber dismissed the motion stating that the defense's doubts to witness reliability was not sufficient to establish the intentional giving of false testimony.<sup>44</sup> The defense in *Akayesu* also claimed the inherent dangers and "fragility of human testimony," particularly in regard to eyewitness testimony.<sup>45</sup> The defense also alleged that "syndicates of informers" collaborated to concoct testimony against the accused.<sup>46</sup>

Akayesu was found guilty on 15 counts based in part on partial anonymity of the eyewitnesses.<sup>47</sup>

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[Reproduced in the accompanying notebook at TAB 20]

<sup>41</sup> *Id.* at (para. 20). [Reproduced in the accompanying notebook at TAB 20]

<sup>42</sup> *Id.* at (para. 20). [Reproduced in the accompanying notebook at TAB 20]

<sup>43</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T. Decision of:9 March 1998. Decision on the Defense Motions to Direct the Prosecutor to Investigate the Matter for False Testimony by Witness "R". <http://www.itcr.org/English/cases/Akayesu/decisions/FALSR090398.html>  
[Reproduced in the accompanying notebook at TAB 18]

<sup>44</sup> *Id.* at (para 20). [Reproduced in the accompanying notebook at TAB 20]

<sup>45</sup> *Id.* at (para 33). [Reproduced in the accompanying notebook at TAB 20]

<sup>46</sup> *Id.* at (para. 33). [Reproduced in the accompanying notebook at TAB 20]

<sup>47</sup> PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE ITS COURTS, AND THE UN CRIMINAL TRIBUNAL, 109 (2000). [Reproduced in the accompanying notebook at TAB 50]

### III. ICTY Five-Prong Test Permitting Anonymous Testimony Into Evidence

The Trial Chamber of the ICTY laid out its criteria for the determination of circumstances that would warrant the introduction of anonymous testimony in the *Tadic* Decision, the Prosecutor's Motion requesting Protective Measures for Victims and Witnesses. This five-prong test is as follows:

- 1) There must exist a real fear for the witnesses' safety or that of their family, and real grounds for fear of retribution if the witnesses identity is released.<sup>48</sup>
- 2) The witnesses testimony must be relevant and of such import that it would hinder the Prosecutor's case to proceed without it.<sup>49</sup>
- 3) The Trial Chamber must be satisfied that there exists no prima facie evidence that the witness is untrustworthy. The prosecutor is required to examine the background of the witness and be assured of no criminality and that the witness is impartial.<sup>50</sup>
- 4) The Trial Chamber's inability to provide adequate protection for witnesses has considerable weight when evaluating whether to grant anonymity.<sup>51</sup>

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<sup>48</sup> *Tadic Decision* (para. 62) In addition others can express the fears for the safety of the witness if the identity is revealed as in other family members, the Victims and Witness Unit or the Prosecutor. [Reproduced in the accompanying notebook at TAB 22]

<sup>49</sup> *Id.* at (para. 63) Since the Tribunal is particularly dependent on eyewitness testimony it often becomes critical to find the willingness of witnesses to testify. [Reproduced in the accompanying notebook at TAB 22]

<sup>50</sup> *Id.* at (para. 64). The prosecutor would disclose to the defense any report in relation to the credibility of the witness within the parameters of the anonymity sought. This is a protective mechanism to assure the witness does not possess an extensive criminal background and is acting in retaliation against the accused, for granting anonymity under these circumstances would seriously prejudice the case of the defense. [Reproduced in the accompanying notebook at TAB 22]

<sup>51</sup> *Id.* at (para. 65). The witness protection program is virtually non-existent only applying to the basic surroundings of The Hague. In addition many of the witnesses families still live within the territory of the Former Yugoslavia, as in any Tribunal the realities of retribution are that loved ones may be persecuted in retaliation or as an example to others because of the testimony of an identified witness. [Reproduced in the accompanying notebook at TAB 22]

- 5) If at all possible, the Tribunal must determine if less restrictive measures can be utilized to secure the necessary protection on behalf of the witness. For this to be satisfied the accused must suffer no additional avoidable prejudice in light of granting anonymity.<sup>52</sup>

Judge McDonald of the majority questions whether the Trial Chamber should be bound by rulings of other judicial bodies or whether the Trial Chamber should adapt those rulings to its own context.<sup>53</sup> When faced with the case law of international judicial bodies interpretation on what constitutes the minimum standards for the accused in a fair trial, Judge McDonald stressed the importance of the Tribunals “unique requirements.”<sup>54</sup> She also differentiates the Tribunal from a strictly adversarial model, and interprets the ECHR as fundamentally applicable only to ordinary criminal and civil adjudication.<sup>55</sup> Judge McDonald also stresses the affirmative obligation to protect its witnesses, for without an adequate police force and in light of ongoing conflicts, the exceptional circumstances permits derogation from international standards in regard to the admission of anonymous testimony and that this approach does not violate the right of examination or a fair trial for the accused.<sup>56</sup> Judge McDonald states that the Tribunal, under Rule

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<sup>52</sup> *Id.* at (para. 66). [Reproduced in the accompanying notebook at TAB 22]

<sup>53</sup> Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int'l L. 445, 455 (1998). [Reproduced in the accompanying notebook at TAB 37]

<sup>54</sup> *Id.* at 455. [Reproduced in the accompanying notebook at TAB 37]

<sup>55</sup> *Id.* at 456. where Judge McDonald affirms that the “International Tribunal must interpret its provisions within its own context.” Which is differentiated by its affirmative obligation to protect witnesses. [Reproduced in the accompanying notebook at TAB 37]

<sup>56</sup> *Id.* at 456. Judge McDonald also addresses the derogation provisions in the International Covenant on Civil and Political Rights (ICCPR), [Reproduced in the accompanying notebook at TAB 3] the European Convention on Human Rights, [Reproduced in the accompanying notebook at TAB 2] and the American Convention on Human Rights (ACHR). [Reproduced in the accompanying notebook at TAB 1] The McDonald judgment also refers to examples of municipal legislation permitting limits on public disclosure, such as United Kingdom Sexual Offences (Amendment) Act 1976, The Canadian



75(A) and B(iii), sees anonymous testimony as a protective measure, and that Rule 69 as specifically permitting anonymity in exceptional circumstances.<sup>57</sup>

Judge Stephens in his separate opinion, which dissents from the majority, states that it is the responsibility of the Trial Chamber to “fully respect internationally recognized standards regarding the rights of the accused.”<sup>58</sup> His concerns stem from the deviation from the standard guarantees of a “fair and public” trial found in Article 21, because of the need to protect witnesses under Article 22, which deviates from the quality of the hearing, and Article 22 was not designed to consider unfair hearings.<sup>59</sup>

The interpretations of the same sources of procedural law by both justices, and the differentiation in the weight allotted to these same sources, were able to produce two diametrically opposed positions on the use of anonymous testimony.<sup>60</sup> Since the majority has permitted the use of the five-prong test, analysis of each prong may bring clarity to the difficulty in balancing the rights of the parties.

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Criminal Code, The Evidence Act (Amendment) 1989) (Queensland), the Criminal Procedure Act of South Africa.

<sup>57</sup> Natasha A. Affolder, at 458. Where 69(c) in conjunction with 75 extends the power of the Trial chamber to grant anonymity during both pre-trial and trial stages. [Reproduced in the accompanying notebook at TAB 37]

<sup>58</sup> Id at 461. and additionally to endure that the trial is fair and expeditious and that the proceedings are conducted within the rights of the accused and according to the Rules of Procedure. [Reproduced in the accompanying notebook at TAB 37]

<sup>59</sup> Id at 461. [Reproduced in the accompanying notebook at TAB 37]

<sup>60</sup> Id at 464. [Reproduced in the accompanying notebook at TAB 37]

**A. There must exist a real fear for the witnesses' safety or that of their family, and real grounds for fear of retribution if the witnesses' identity is released.<sup>61</sup>**

In Yugoslavia , the United Nations Commission of Experts had evidence of grave violations of International Humanitarian Law, which had been conducted on a massive scale inclusive of ethnic cleansing.<sup>62</sup> The Chamber of the Tribunal had to recognize that serious aspects of armed conflict include, the systematic spread of anguish and terror amongst civilians.<sup>63</sup> The International Community has a broad interest in the safety of witnesses for the pursuit of justice “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”<sup>64</sup> For without eyewitness accounts, these crimes may go unpunished.

The witness's participation in the Tribunal's proceedings should not create an atmosphere of re-victimization whereby the witness, through testimony, must revisit the trauma of the event, “before an indifferent bureaucracy, an assaultive defense team, or an unsympathetic media.”<sup>65</sup> When evaluating the magnitude of the crimes in Yugoslavia, the “parade of horrors’ include “ethnic cleansing”, executions, detention camps, torture, starvation, sexual mutilation, mass rapes and forced pregnancies.<sup>66</sup> In Rwanda, the

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<sup>61</sup> *Tadic Decision* (para. 62). [Reproduced in the accompanying notebook at TAB 22]

<sup>62</sup> Christine Chinkin, *Due Process and Witness Anonymity*, 91 A.J.I.L. 75, 77 (1997). [Reproduced in the accompanying notebook at TAB 39]

<sup>63</sup> *Id.* at 77. [Reproduced in the accompanying notebook at TAB 39]

<sup>64</sup> *Id.* at 77 (1997). [Reproduced in the accompanying notebook at TAB 39]

<sup>65</sup> Alex C. Lakotos, Note: *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendant's Rights*. 46 Hastings L.J. 909 (1995). [Reproduced in the accompanying notebook at TAB 42]

<sup>66</sup> *Id.* at 914-916. [Reproduced in the accompanying notebook at TAB 42]

slaughter of 500,000 to 1 million Tutsis by the Hutu's, included mass killings where hundreds of thousands were murdered and thrown into mass graves, gang rapes of Tutsi women, and violent sexual mutilation.<sup>67</sup> Other nation States are dealing with internal conflict, to such proportions, that additional protections are necessary for the very judicial system that is attempting to face the political and social ills which plague the nation.

The South American nation of Columbia has been forced to operate its judicial system with “faceless Judges,” where the judges hold sessions in anonymity due to the ongoing political assassinations.<sup>68</sup> From 1988 to 1990, over 14,000 Columbians had been killed for political reasons.<sup>69</sup> Columbia was operating in a situation of “atrocities and murderous retributions committed by all combatants.”<sup>70</sup> While Columbia differs in that the nation state is attempting to bring defendants to justice within their national framework, the plight of Columbia and other nation states reflects the importance of a neutral tribunal to bring human rights violators to account for their crimes.

The purpose of reiterating the extent of the atrocities committed within these nations is to reiterate that the crimes being prosecuted are barbaric. In Yugoslavia,

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<sup>67</sup> 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 47, 55 (1998). [Reproduced in the accompanying notebook at TAB 51]

<sup>68</sup> Luz Estella Nagle, *Columbia's Faceless Justice: A necessary Evil, Blind Impartiality or Modern Inquisition?* 61 U. Pitt. L. Rev. 881, 910 (2000). [Reproduced in the accompanying notebook at TAB 46]

<sup>69</sup> *Id.* at 911 (2000). [Reproduced in the accompanying notebook at TAB 46]

<sup>70</sup> *Id.* at 910-911. Where the carnage included the indiscriminate bombing of public places and outdoor establishments, and police officers were targeted by the Cartel's promises to pay for each murdered police officer, and public figures such as journalists, judges were systematically kidnapped and murdered. “As a former Colombian judge, I believe that anonymous justice was a viable remedy at a time to preserve the lives of those dealing directly with crimes against the state, government corruption and organized criminal enterprise. Drug traffickers, guerillas, paramilitary groups and corrupt elements in the government and military killed too many judges, prosecutors, honest government officials, politicians and journalists. On paper, being faceless seemed the only way to defend the judges still possessed of integrity and honesty to fight for the rule of law at such a critical impasse in the nations history.” [Reproduced in the accompanying notebook at TAB 46]

during the reign of Tito, ethnic violence was not punished or addressed.<sup>71</sup> In attempting to avenge past violence, a spiral of retribution and counter-retribution persisted.<sup>72</sup> This would reflect a cultural perception of non-accountability and fear of reprisals. Rape survivors, besides the trauma and stigma of the crime, must cope with the violation of self, and in speaking out, may face retribution from their culture, family, husbands as well as from the actual rapist.<sup>73</sup>

The Trial Chamber acknowledges that it is reasonable to find a legitimate reaction of fear on behalf of the witnesses testifying at trial. This initial prong of the *Tadic* test should be easily met.<sup>74</sup> “It is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices.”<sup>75</sup>

With the extreme violence of the crimes, and the power which the accused once wielded, fear of confronting such a defendant may be a paralyzing prospect for any witness particularly with the knowledge of the horrific acts these individuals are capable of committing.

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<sup>71</sup> Alex C. Lakotos, Note: *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses’ Needs Against Defendant’s Rights*. 46 Hastings L.J. 909, 922 (1995). [Reproduced in the accompanying notebook at TAB 42]

<sup>72</sup> *Id.* at 922 [Reproduced in the accompanying notebook at TAB 42]

<sup>73</sup> *Id.* at 921. Particularly in Muslim society where women can be severely punished for infidelities regardless of consent. [Reproduced in the accompanying notebook at TAB 42]

<sup>74</sup> Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*. 41 How. L.J. 155, 172 (1997). [Reproduced in the accompanying notebook at TAB 45]

<sup>75</sup> *Id.* at 172 citing to *Tadic Decision*. [Reproduced in the accompanying notebook at TAB 45]

**B. The witnesses testimony must be relevant and of such import that it would hinder the Prosecutor's case to proceed without it.<sup>76</sup>**

Eyewitness testimony, unlike at Nuremberg, would be paramount to the ICTY and ICTR prosecution's case.<sup>77</sup> However, the Trial Chamber must balance the interests of both the witness and the accused and in exceptional circumstances will grant anonymity to witnesses where human rights instruments allow for the deviation from standard procedural guarantees.<sup>78</sup> Justice McDonald stated that she viewed the role of the ITCY more in line with a military tribunal, which allows for greater latitude in the admittance of evidence, while more limiting in due process rights.<sup>79</sup>

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<sup>76</sup> *Tadic Decision* at (para. 63) . [Reproduced in the accompanying notebook at TAB 22]

<sup>77</sup> MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 117 (1997). In the Nuremberg Trials the Nazi's kept their own through documentation, which diminished the need for extensive eyewitness testimony. The prosecution at Nuremberg submitted over 7 million documents. [Reproduced in the accompanying notebook at TAB 52]

<sup>78</sup> Article 15 ECHR: Derogation in Time of Emergency 15(1) In time of War or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. [Reproduced in the accompanying notebook at TAB 2]

Article 4 ICCPR: Article 4(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. [Reproduced in the accompanying notebook at TAB 3]

Article 27 of American Convention on Human Rights: Article 27. Suspension of Guarantees 27(1) In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligation under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin. (2) The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or the judicial guarantees essential for the protection of such rights. [Reproduced in the accompanying notebook at TAB 1]

In Judge Stephens' separate decision/dissent in *Tadic* he states "the authorities appear to me to provide strong support for the view that in this case to permit anonymity of witnesses whose identity is of significance to the defendant will not only adversely affect the appearance of justice being done, but is likely actually to interfere with the doing of justice."<sup>80</sup> Additionally, the Dutch lawyer assigned by the Tribunal to defend Tadic believed he could not adequately continue representation of the defendant if he, and not the defendant, was made aware of the identities of the witnesses.<sup>81</sup> Judge Stephens stated that the decision in *Jarvis v. Magistrates' Court of Victoria* was substantially different since the issue there was testimony given under the witness's real names, as opposed to false names under which they appeared in court and gave evidence.<sup>82</sup> Justice Stephens also relies on the ruling before the European Court of Human Rights, *Kostovski v. The Netherlands*,<sup>83</sup> where anonymous witnesses made out of court statements against Kostovski and co-accused parties, which were admitted into evidence, resulting in a conviction and six years imprisonment.<sup>84</sup> Kostovski complained of violations under Article 6 of the European Convention of Human Rights, claiming he

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<sup>79</sup> MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 109 (1997). Justice McDonald went on to show approval for the admittance of hearsay evidence and ex parte affidavits during the Nuremberg trials, but this actually drew a great deal of criticism about the acceptable standards of the court. [Reproduced in the accompanying notebook at TAB 52]

<sup>80</sup> *Prosecutor v. Tadic*, Case No. IT-94-1, 13 (10 August 1995) Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses. (Herein *Tadic Dissent*) <http://www.un.org/icty/tadic/trialc2/decision-e/50810pnn.htm> [Reproduced in the accompanying notebook at TAB 23]

<sup>81</sup> *Id.* at 13. (case pagination unavailable, page numbers refer to page numbers in accompanying document). [Reproduced in the accompanying notebook at TAB 23]

<sup>82</sup> *Id.* at 12. [Reproduced in the accompanying notebook at TAB 23]

<sup>83</sup> *Kostovski v. The Netherlands* (App. No. 11454/85), Eur. Ct. H.R. (1990) 12 EHRR 434, ECHR 11454/85. 20 November 1989. [Reproduced in the accompanying notebook at TAB 16]

<sup>84</sup> *Id.* at (para. 11-16). [Reproduced in the accompanying notebook at TAB 16]

was denied the right to a fair trial.<sup>85</sup> While the Government of the Netherlands stressed case-law, practice, and the need for anonymous testimony due to the increased intimidation of witnesses while balancing society's interests, the court concluded that the constraints placed on Kostovski severely affected the rights of the defense and held that the defendant did not receive a fair trial under Article 6(3)(d). Even though the ECHR ruled that Kostovski was in violation of Article 6, the Trial Chamber in Tadic still used its balancing test to justify the allowance of anonymous testimony setting itself apart from international case precedence.

In *Jarvis* the Appeals Court of the Supreme Court of Victoria Australia, permitted undercover police officers to give testimony at trial identified only by their pseudonyms.<sup>86</sup> The Australian Court presented examples of 15 United States' cases where the witness's address or place of employment was withheld from a defendant without infringing on the defendant's constitutional rights, nor their right to effective

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<sup>85</sup> *Id.* at (para. 35). [Reproduced in the accompanying notebook at TAB 16]  
Articles 6 (1) and 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which state:  
Article 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...  
Article 6(3)(d) Everyone charged with a criminal offence has the following minimum rights:...  
(d) to examine or to have examined witnesses against him and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him;... [Reproduced in the accompanying notebook at TAB 2]

<sup>86</sup> *Jarvie v. Magistrates' Court of Victoria at Brunswick*, Supreme Court of Victoria, App. Div. 1 VR 84 , 7-9 (1994). The Deputy Commissioner for the Police, through affidavit, testified that for under cover operatives the danger of injury or death was a reality since the Witness protection program which had been in operation for over 10 years was not entirely effective, and disclosure puts officers in the path of needing to relocate or serious injury if their true identities are known. [Reproduced in the accompanying notebook at TAB 15]

cross-examination.<sup>87</sup> The *Jarvis* Court goes on to state that through their examination of multiple authorities on the issue, inclusive of United States' rulings, the question of withholding from the defendant information that would determine the identity of a State or Government witness, in particular if this infringes on the defendants constitutional right to effective cross-examination, can be resolved by a "balancing test."<sup>88</sup> The opinion further states that:

the protection of undercover police operatives should be recognized as a basis for the grant of public interest immunity,<sup>89</sup> I should add that in my opinion the claim to immunity should not be confined to undercover police operatives and that it extends to other witnesses whose personal safety may be endangered by the disclosure of the Court.<sup>90</sup>

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<sup>87</sup> *Id.* at 43. [Reproduced in the accompanying notebook at TAB 15], Sample of cited cases: *United States v. Varelli*, 407 F.2d 735 (1969) [Reproduced in the accompanying notebook at TAB 34] (address refusal upheld; if government can show danger to the witness the burden can pass to the defendant to show materiality of the address)

*United States v. Palermo*, 410 F.2d 468 (1969) (trial judge refused to disclose the addresses of two witnesses and present employment; held, relevant information not before him to enable to make informed decision however; where threat of life to witness, right of defendant to have TRUE NAME, address and place of employment is not absolute), [Reproduced in the accompanying notebook at TAB 32]

*United States v. Crovedi*, 467 F.2d (1972) (refusal of name upheld), [Reproduced in the accompanying notebook at TAB 28]

*United States v. Ellis*, F.2d 638 (1972) (refusal of name upheld) [Reproduced in the accompanying notebook at TAB 30]

*United States v. Cosby*, 500 F.2d 405 (1974) (refusal of address upheld) [Reproduced in the accompanying notebook at TAB 27]

*McGrathe v. Vinzant*, 528 F.2d 681 (1976) (refusal of address of rape victim upheld: argument by defendant was rejected by the majority where defendant claimed no threat since he was in custody and had no accomplices, court states he might have friends or be acquitted). [Reproduced in the accompanying notebook at TAB 17]

<sup>88</sup> *Jarvie v. Magistrates' Court of Victoria at Brunswick* at 49-50. [Reproduced in the accompanying notebook at TAB 15]

<sup>89</sup> *Id.* at 14. There is a public interest in preserving the anonymity of informers, protection of undercover police operatives as a matter of legitimate public concern. [Reproduced in the accompanying notebook at TAB 15]

<sup>90</sup> *Id.* at 50. Opinion written by Judge Brooking. [Reproduced in the accompanying notebook at TAB 15]



Likewise in *Doorson v. Netherlands*, in the prosecution of an alleged drug dealer, six drug addicts who testified and identified the defendant remained anonymous.<sup>91</sup> The defense requested to examine the anonymous witnesses and cited the ruling in *Kostovski*, and they were refused the right.<sup>92</sup> The lawyer for the defendant was given the opportunity to put questions to the witnesses, and these questions were answered with the exception of those designed to identify the witnesses.<sup>93</sup> “The Court in *Doorson* considers, on balance, that the Amsterdam Court of Appeal was entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses.”<sup>94</sup> Additionally, the court in its ruling permitting the maintaining of the witness’s anonymity, reiterated that when “counterbalancing” procedures are utilized to lessen the defenses’ handicaps when facing anonymous testimony, this testimony should not be the sole or decisive basis for a conviction.<sup>95</sup>

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<sup>91</sup> *Doorson v. Netherlands* (App. No. 20524/92), Eur. Ct. H.R. (1996) 22 EHRR 330, [1996] ECHR 20524/92, (para. 8-10) 26 March 1996. [Reproduced in the accompanying notebook at TAB 14]

<sup>92</sup> *Id.* at (para. 23). [Reproduced in the accompanying notebook at TAB 14]

<sup>93</sup> *Id.* at (para. 25). In para. 46 of *Doorson*, In its judgment of July 1990, *Nederlandse Jurisprudentie* (Netherlands Law Reports “NJ”) 1990, no. 692, The Supreme Court considered that in light of the European Court’s ruling in *Kostovski*, that the use of anonymous statements were subject to stricter requirements as those presented in previous case law. The Rule was defined as: Such a statement must have been taken down by a judge who (a) is aware of the identity of the witness, and (b) has expressed, in the official record of such a witness, has reasoned opinion as to the reliability of the witness and as to the reasons for the wish of the witness to remain anonymous, and (c) has provided the defense with some opportunity to put questions or have questions put to the witness. This rule is subject to exceptions; thus according to the same judgment the statement of an anonymous witness may be used in evidence if (a) the defense have not at any stage of the proceedings asked to be allowed to question to witness concerned and (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and (c) the trial court makes clear that it has made use of the statement of the anonymous witness with caution and circumspection. [Reproduced in the accompanying notebook at TAB 14]

<sup>94</sup> *Id.* at (para 76). [Reproduced in the accompanying notebook at TAB 14]

<sup>95</sup> *Id.* at (para. 76). [Reproduced in the accompanying notebook at TAB 14]

**C. The Trial Chamber must be satisfied that there exists no prima facie evidence that the witness is untrustworthy. The prosecutor is required to examine the background of the witness and be assured of no criminality and that the witness is impartial.<sup>96</sup>**

The Trial Chamber in *Tadic*, by majority, established guidelines in evaluating a witnesses to ensure a fair trial when granting anonymity.<sup>97</sup> The guidelines decided upon by the Trial Chamber are as follows:

- (1) The Judges must have access to the witnesses in order to determine their demeanor, and to assess the reliability of their testimony;
- (2) The Judges must know the identity of the witnesses so that they may be able to test the witnesses reliability;
- (3) The defense must be permitted ample opportunity to question the witnesses on all issues unrelated to the witnesses identity, location, or traceability, such that incriminating information can be examined while witness retains anonymity;
- (4) The Trial chamber will not release identifying information about the witness[es] without the witnesses express consent;
- (5) The identities of the witnesses must be released when security and fear are no longer factors<sup>98</sup>

The majority decision of the Trial Chamber in *Tadic* also turned to *Kostovski*, and the ruling of the ECHR.<sup>99</sup> The Chamber interpreted the pertinent aspects of *Kostovski* as the ability for a court to initiate procedural safeguards that can be adopted when the witness's identity is not to be disclosed which when "balanced" will ensure a fair trial.<sup>100</sup> Judge McDonald, while adopting these guidelines from that same ruling of

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<sup>96</sup> *Tadic Decision* ( para. 64.) [Reproduced in the accompanying notebook at TAB 22]

<sup>97</sup> *Id.* at (para 70)]. These guidelines were drawn from *Kostovski*, which Judge McDonald claims "is not on point." [Reproduced in the accompanying notebook at TAB 22]

<sup>98</sup> *Id.* at (para. 71). [Reproduced in the accompanying notebook at TAB 22]

<sup>99</sup> *Id.* at (para. 68). Which the Trial Chamber stated was not directly on point since it does not relate to testimony of anonymous witness who will be appearing before the Chamber, and whose evidence will be subject to cross examination, and the witnesses demeanor will be observed by the judges present. [Reproduced in the accompanying notebook at TAB 22]

the European Court of Human Rights, stated “that these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses.<sup>101</sup>

**D. The Trial Chamber’s inability to provide adequate protection for witnesses has considerable weight when evaluating whether to grant anonymity.<sup>102</sup>**

The Victim’s and Witnesses Unit is organized in the Registry of the Tribunal under Rule 34.<sup>103</sup> The Unit has been designated to provide counseling and recommend protective procedures for victims and witnesses.<sup>104</sup> The Victims and Witnesses Unit only has the resources to offer limited protection.<sup>105</sup> However, many of the witnesses’ families may be living within the territories where war crimes are still taking place. Many of the witnesses of the Rwandan genocide continue to live in Zaire or Rwanda. The United Nations Human Rights Field Operation in Rwanda (HRFOR) reported the

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<sup>100</sup> *Id.* at (para. 69). The court in Kostovski determined that when the defense must labor under the handicaps of anonymous witnesses, procedures of the court can act as a counterbalance to redress any diminution of rights. [Reproduced in the accompanying notebook at TAB 22]

<sup>101</sup> Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int’l L. 445, 460 (1998). [Reproduced in the accompanying notebook at TAB 37]

<sup>102</sup> *Tadic Decision* at (para. 65). [Reproduced in the accompanying notebook at TAB 22]

<sup>103</sup> Christine Chinkin, Comment, *Due Process and Witness Anonymity*, 91 A.J.I.L. 75, 77 (1997). [Reproduced in the accompanying notebook at TAB 39]

<sup>104</sup> Alex C. Lakotos, Note: *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses’ Needs Against Defendant’s Rights*. 46 Hastings L.J. 909 (1995). [Reproduced in the accompanying notebook at TAB 42]

<sup>105</sup> Christine Chinkin, Comment, *Due Process and Witness Anonymity*, 91 A.J.I.L. 75, 77 (1997). [Reproduced in the accompanying notebook at TAB 39]

murder of 227 genocide survivors by the former Rwandese Armed forces and *interahamwe* militia, to forestall any testimony by these survivors.<sup>106</sup>

While The Tribunal acknowledges the realities of retribution where loved ones may be persecuted in retaliation or as an example to others because of the testimony of an identified witness.<sup>107</sup> The International Tribunal does not have the resources, or funds, for a long-term witness protection program, and also such a program would be of little benefit to families of witnesses who are missing or in danger.<sup>108</sup>

Commentators have stated that in answer to anonymous testimony, the court should accommodate witness safety by creating an adequate witness protection program.<sup>109</sup> One suggestion was to remove witnesses, victims, and their families to other countries under a relocation process.<sup>110</sup> Additionally, the Tribunal could appeal to the United Nations member nations to grant political asylum and new identities to the victims and their families, as these individuals could qualify for refugee status and could be reviewed under the category of persecuted ethnic minorities.<sup>111</sup> This approach would

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<sup>106</sup> 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, 535 (1998). In addition, members of the HRFOR had also been killed, motivated by fear “of being denounced for acts committed during the genocide.” Also see n. 1784 at 535. [Reproduced in the accompanying notebook at TAB 51]

<sup>107</sup> *Tadic Decision*. (para. 65). [Reproduced in the accompanying notebook at TAB 22]

<sup>108</sup> *Id.* at 65. [Reproduced in the accompanying notebook at TAB 22]

<sup>109</sup> Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under The Rules of Procedure and Evidence of The International Criminal Tribunal For the Former Yugoslavia*. 20 Hous. J. Int'l 381 (1998). [Reproduced in the accompanying notebook at TAB 40]

<sup>110</sup> *Id.* at 401. The suggestion goes on to state that this should be modeled after the United States relocation program. [Reproduced in the accompanying notebook at TAB 40]

<sup>111</sup> Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*. 41 How. L.J. 155, 176 (1997). [Reproduced in the accompanying notebook at TAB 45]

permit the witness to testify against the defendant and be free from retaliation.<sup>112</sup>

However, many witnesses and their families may not wish to leave their homes and be faced with uncertain futures in strange countries.<sup>113</sup> Additionally, the down side of granting asylum, is that false claims may be leveled against an accused, in hopes of escaping a war ravaged territory, which would undermine the credibility of legitimate victims.<sup>114</sup> Perhaps a limited asylum program may act to encourage witnesses to come forward.<sup>115</sup>

In regard to the counseling given to witnesses another suggestion is that the Unit should take additional steps to assure the testimony given by the witness is voluntary and given with informed consent.<sup>116</sup> In addition, the Unit should provide legal, as well as, psychological counseling, for while the psychological aspect is obvious as witnesses struggle with the trauma of the event, legal counseling should be considered to prepare a witness for the rigors of taking the stand, the prosecution's preparation and to guide the

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<sup>112</sup> *Id.* at 176. [Reproduced in the accompanying notebook at TAB 45]

<sup>113</sup> William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*. 12 St. John's J.L. Comm. 449, 474 (1997). The author is referring to rape crimes. [Reproduced in the accompanying notebook at TAB 48]

<sup>114</sup> *Id.* at 474. [Reproduced in the accompanying notebook at TAB 48]

<sup>115</sup> *Id.* at 474-475. where by coming forward the result may be 1) to begin getting convictions for the crime of rape; and 2) to aid in the prosecution of prominent suspects. [Reproduced in the accompanying notebook at TAB 48]

<sup>116</sup> Alex C. Lakotos, Note: *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendant's Rights*. 46 Hastings L.J. 909, 939 (1995). The author goes on to suggest that the rules should also permit the witness to stop testifying at any time if the testimony becomes too painful. He also states that an announcement by the witness of the voluntary nature of the testimony may deter future appeals on claims of coerced testimony. [Reproduced in the accompanying notebook at TAB 42]

witness through potentially abusive or harassing questions to which they may be exposed.<sup>117</sup>

The inability for the Tribunal to provide an adequate witness protection program is a substantial factor in the issue to permit anonymous testimony. For without any protection beyond The Hague or Arusha, witnesses cannot conceivably sacrifice themselves yet again to provide testimony, when retribution may be only a village away when they return home. If the Tribunal had the resources to initiate a realistic witness protection unit or program then it would be reasonable to disallow anonymous testimony as the fear of reprisals could be removed. As stated above this too has its risks as individuals seeking escape from the confines of their country may use the system to their advantage, but this is not the current state of affairs. Additionally, an international witness protection program must be realistic in not, for example, displacing the elderly and placing them in another country with no means of support let alone no means to communicate. This program would need to be quite extensive, and would require U.N. members to agree to uphold the program, financially as well as logistically.

**E. If at all possible, the Tribunal must determine if less restrictive measures can be utilized to secure the necessary protection on behalf of the witness. For this to be satisfied the accused must suffer no additional avoidable prejudice in light of granting anonymity.<sup>118</sup>**

Other levels of anonymity include partial, where the defendant can interview the witness but is unaware of the witnesses identity, or *In Camera Proceedings*, or hearing by

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<sup>117</sup> *Id.* at 939 [Reproduced in the accompanying notebook at TAB 42]

<sup>118</sup> *Tadic Decision* at (para. 66). [Reproduced in the accompanying notebook at TAB 22]

the Court in absence of the defendant.<sup>119</sup> Other common law systems have allowed the defense counsel to interview the witness without the defendant present.<sup>120</sup> Additionally, partial anonymity may allow the use of the witness's name or pseudonym, but withholding all information in regard to where the witness resides or their place of employment. In regard to crimes in rural areas this is not realistic where everyone knows everyone and identities can be easily deduced. Other processes exist to disguise a witness, by voice or through video, but the question of anonymity remains.

#### **IV. Procedure/ Case Law and Practice**

##### **A. England and Wales**

The justice system in England and Wales takes the adversarial approach in the presentation of oral evidence in court, with the trier of fact determining guilt or innocence, and in serious cases, a jury.<sup>121</sup> Witnesses are expected to appear in open court, under oath, to give oral evidence in the presence of the accused. Under the Criminal Justice Act of 1988 (sections 23-26), a witness' written statement may be admissible in place of oral testimony if: (1) the witness is dead; (2) unfit to attend trial;

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<sup>119</sup> Annemarieke Beijer, Cathy Copley, and André Klip, *Witness Evidence, Article 6 of the European Convention on Human Rights and the Principal of Open Justice* 283, 292 in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* (Phil Fennell, Christopher Harding, Nico Jörg, Bert Swart eds., 1995). [Reproduced in the accompanying notebook at TAB 49]

<sup>120</sup> Mercedeh Momeni, Note, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*. 41 *How. L.J.* 155, 176 (1997). [Reproduced in the accompanying notebook at TAB 45]

<sup>121</sup> Annemarieke Beijer, Cathy Copley, and André Klip, *Witness Evidence, Article 6 of the European Convention on Human Rights and the Principal of Open Justice* 283, 285 in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* (Phil Fennell, Christopher Harding, Nico Jörg, Bert Swart eds., 1995). [Reproduced in the accompanying notebook at TAB 49]

(3) he is outside the UK; and (4) he made the statement to the police or investigating officer.<sup>122</sup> However these statements will only be admitted if the court agrees to admit them as evidence in the interests of justice and at the discretion of the trial judge, but the court realizes this limits the right of the defendant to examine the witness.<sup>123</sup>

In regard to the protection of witnesses the Courts of England and Wales will usually compel a witness to testify, but the court will look to of the possibility of witness intimidation, and examine other options such as an *in camera* hearing.<sup>124</sup> The English Court in *R. v. Brindle*, an unreported case, permitted total anonymity under what they viewed as extraordinary circumstances, where justifiable fear existed, and the defense had no knowledge of the witness's identity.<sup>125</sup> In this case, the defendants were acquitted, and the media was restricted in what they were permitted to publish, which

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<sup>122</sup> *Id.* at 286. Also see, The Law Commission For England and Wales, Part II Present Law, [www.lawcom.gov.uk/library/lc245/pt2/htm](http://www.lawcom.gov.uk/library/lc245/pt2/htm) Section 23 2.14 which discusses that a statement made by a person in a document shall be prima facie admissible in criminal proceedings, as evidence of any fact stated, of which oral testimony by him or her would have been admissible...and 2.21 of The Criminal procedure and Investigations Act of 1996, where the prosecutor will examine a reluctant witness, the witness evidence will be put in writing, ... the prosecutor must serve it on the defense like other evidence. Then the deposition can be used at committal proceedings, and at trial under previously stated provisions, and the statement, on which no-cross examination has taken place will be prima facie admissible at trial even though the declarant will not be there to testify. [Reproduced in the accompanying notebook at TAB 49] and [TAB 5]

<sup>123</sup> Annemarieke Beijer at 286. This in combination with the emphasis of the English courts on oral evidence, restricts the use of such provisions. [Reproduced in the accompanying notebook at TAB 49]

<sup>124</sup> *Id.* at 290. The author cites to *Attorney General v. Leveller Magazine* [1979] AC 440. Where the identity of a witness for the prosecution was kept from the public in the interests of national security. [Reproduced in the accompanying notebook at TAB 49]

<sup>125</sup> *Id.* at 291. Where the Court cited *R. v. Brindle*, (unreported Central Criminal Court, 28 April 1992). Where the witness refused to testify without a grant of anonymity. The Court adopted measures to permit the public and the defense to hear the testimony of the witness but the identity was preserved through the use of screens. The prosecution argued that they would submit the written statements of the witness if anonymity was not permitted, under the provisions of the Criminal Justice Act of 1988 (sections 23-6). [Reproduced in the accompanying notebook at TAB 49]



caused an outcry as many felt this was setting a dangerous precedent for future criminal proceedings.<sup>126</sup>

### **B. European Court of Human Rights (ECHR)**

The ECHR, under Article 6 of the Convention, acknowledges the right of the accused to hear all evidence in his presence, but there exists room for exceptions.<sup>127</sup>

These exceptions include the witness's fear of reprisals and that under these exceptional circumstances the trial court may, in its discretion, hear witnesses in the absence of the defendant. The ECHR considers it its responsibility to evaluate the proceedings as a whole and to ensure that they were conducted in a "fair" manner, including the use of procedural safeguards such as taking and introducing evidence.<sup>128</sup> The ECHR has looked at the case law of *Unterpertinger*, *Kostovski*, *Windisch*, *Asch*, and have determined that when it is impossible to question a witness, and when authorities had made all attempts to secure the witnesses' presence, earlier statements may be used, for Article 6 of the ECHR does not guarantee an unlimited right of the accused to a direct examination of a witness, and as such, hearsay evidence may be accepted under special circumstances.<sup>129</sup>

In *Unterpertinger*, the defendant was charged by the Austrian Regional Court with assaulting his wife and step-daughter based on statements taken from the victims, as these witnesses refused to testify in court.<sup>130</sup> On appeal before the ECHR the Court

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<sup>126</sup> *Id.* at 291. [Reproduced in the accompanying notebook at TAB 49]

<sup>127</sup> *Id.* at 288. [Reproduced in the accompanying notebook at TAB 49]

<sup>128</sup> *Id.* at 288. [Reproduced in the accompanying notebook at TAB 49]

<sup>129</sup> *Id.* at 289. [Reproduced in the accompanying notebook at TAB 49]

<sup>130</sup> *Unterpertinger v. Austria* (App. no. 9120/80), Eur. Ct. H.R. (1991) 13 EHRR 175, 1986 ECHR 9120/80. 24 November 1986. [Reproduced in the accompanying notebook at TAB 35]

determined that the Austrian Court did not use the statements only as information, but as “proof of the truth of the accusations made by the women at the time.”<sup>131</sup> The ECHR found that Mr. Unterpertinger did not receive a fair trial and that Article 6(1) of the Convention was breached along with the principals in Article 3(d).<sup>132</sup>

In *Asch v. Austria*, a similar case involving domestic violence, statements given to the police by the live-in partner of the defendant were admitted before the Austrian Regional Court that resulted in the defendant’s conviction.<sup>133</sup> The Witness/victim refused to testify. However, on appeal before the ECHR on grounds of Article 6 violations, the Court found that the Regional Court had used other evidence in conjunction with the victim’s statement to reach its decision, inclusive of medical certificates corroborating injuries and in-court police testimony recounting the victim’s descriptive statements, therefore no Article 6 violation was found.<sup>134</sup>

Another Austrian case brought before the ECHR, *Windisch v. Austria*, where the defendant was accused of a café burglary based on the testimony of two anonymous witnesses who were never identified to the accused, nor to the court.<sup>135</sup> Police officers

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<sup>131</sup> *Id.* at (para. 33). It was for the Appeals Court to determine from the material presented, and the relevant evidence, if Mr. Unterpertinger had been convicted solely on testimony while his rights (to examine witnesses) were restricted. [Reproduced in the accompanying notebook at TAB 35]

<sup>132</sup> *Id.* at (para. 33). Respondent State required to pay compensation to Mr. Unterpertinger. (para. 36). . [Reproduced in the accompanying notebook at TAB 35]

<sup>133</sup> *Asch v. Austria* (App, no. 12398/86) Eur. Ct H.R. (1993) 15 EHRR 597, 1991 ECHR 12398/86. 26 April 1991. [Reproduced in the accompanying notebook at TAB 12]

<sup>134</sup> *Id.* at (para. 28). Where the defendant did not examine the police officer, or call other witnesses. The defendant claimed that the victim caused her own injuries. [Reproduced in the accompanying notebook at TAB 12]

<sup>135</sup> *Windisch v. Austria* (App. no. 12489/86), Eur. Ct. H.R. (1991) 13 EHRR 281, 1990 ECHR 12489/86. 27 September 1990. [Reproduced in the accompanying notebook at TAB 36]

testified to the reliability of the witnesses and to what the witnesses had seen.<sup>136</sup> The ECHR held that since no one had witnessed the actual commission of the crime, and that the only evidence was the identification made by the two anonymous witnesses to the defendants' presence at the scene, which was the central issue in the investigation and resulted in his conviction, created such limitations on the Mr. Windisch as to be deemed an unfair trial.<sup>137</sup>

The Trial Chamber in *Tadic* relied heavily on the rulings of the ECHR in *Kostovski v. The Netherlands*.<sup>138</sup> The ECHR discussed procedural safeguards under Netherlands' law that was the basis for the balancing test the Trial Chamber of the ICTY incorporated. The Netherlands Code of Criminal Procedure (CCP) allows judges greater discretion where the magistrate acts to collect the evidence to convict or exculpate the suspect.<sup>139</sup> In actual practice, based on case precedence in the Netherlands, hearsay

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<sup>136</sup> *Id.* at (para. 14). The pertinent Domestic law in regard to the taking of evidence at trial is governed by Articles 246 and 245 of the Code of Criminal Procedure (Strafprozessordnung) where: "Article 247 (1) provides that 'witnesses and experts shall be called separately and heard in the presence of the accused.' The presiding judge and the other members of the court, the public prosecutor, the accused, the party seeking damages and their representatives may question them (Article 249). However, in certain exceptional circumstances, their previous statements may be read out at the hearing (Article 252). No provision deals expressly with statements made by anonymous witnesses and hearsay evidence." The trial court assesses the evidence based on Article 258 which reads: "(1) in passing judgment the court shall only have regard to what has occurred at the trial... (2) The court has to examine the evidence carefully and conscientiously with regard to its trustworthiness and conclusiveness separately and in its entirety. The judges do not decide upon the question whether or not a particular fact has been proven according to formal rules of evidence, but only according to their own conclusions drawn on the basis of their careful examination of all evidence before them." (para. 17-18 in *Windisch*). [Reproduced in the accompanying notebook at TAB 36]

<sup>137</sup> *Id.* at (para. 31). The ECHR held violations of para. 3(d) along with para. 1 of Article 6 of the Convention, and according to Article 50, and required Austria to pay costs and expenses. [Reproduced in the accompanying notebook at TAB 36]

<sup>138</sup> *Kostovski v. The Netherlands* (App. No. 11454/85), Eur. Ct. H.R. (1990) 12 EHRR 434, ECHR 11454/85. 20 November 1989. [Reproduced in the accompanying notebook at TAB 16]

<sup>139</sup> *Id.* at (para. 24). "Under Article 338 CCP, a finding that the accused has been proved to have committed the acts with which he is charged may be made by a judge only if he has been so convicted through investigation at the trial by the contents of 'legal means of evidence.' The latter consist, according

evidence can be introduced as evidence but with caution, and declarations made by the accused or witnesses to police officers in official reports are permissible evidence.<sup>140</sup>

Where “in the great majority of cases witnesses are not heard at trial but either only by police or also by the examining magistrate.”<sup>141</sup> The ECHR, while looking to the Netherlands law and practice, and the needs for witness protection as balanced against the interests of society, the witnesses and the accused, concluded that the evidence on these anonymous statements alone was insufficient to convict.<sup>142</sup> The limitations placed on the defendant were irreconcilable with the guarantees found in Article 6, and Mr. Kostovski was found to have been denied a fair trial.<sup>143</sup>

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to Article 339 CCP, exclusively of (i) what the judge himself has observed; (ii) statements made by the accused; (iii) statements made by a witness; (iv) statements made by an expert; and (v) written documents.

- (1) A statement by a witness is understood to be his statement, made in the investigation at the trial, of facts or circumstances which he himself has seen or experienced.
- (2) The trial judge cannot accept as proven that the defendant has committed the act with which he is charged, solely on the statement of one witness.”

Additionally, under Article 288 CCP the Court can block a question from being put to the witness by the accused, defense council or the public prosecutor.

Under Article 292 CCP, the Court can order an accused to leave the Court room and examine the witness out of the accuseds’ presence, and no reasons need be given for such an order by the Court, however the defense council may question the witness during this absence.

Under Article 295 CCP, “An earlier statement by a witness who, having been sworn in or admonished to speak the truth in accordance with Article 216 para 2, has died or, in the opinion of the court, is unable to appear at the trial should be considered as having been made at the trial, on condition that it is read aloud there.”

And anonymous statements fall under Article 334 CCP and Article 339 CCP, “(1)where written documents... (2) official reports...drawn up in legal form by bodies and persons who have proper authority and containing their statement of facts or circumstances which they themselves have seen or experienced...2. the judge can accept as proven that the defendant has committed the act with which he is charged, on the official report of the investigating officer.” [Reproduced in the accompanying notebook at TAB 16 ]

<sup>140</sup> *Id.* at (para. 28). [Reproduced in the accompanying notebook at TAB 16]

<sup>141</sup> *Id.* at (para. 29). The presence of defense council when witnesses are examined is not obligatory, however, the large majority of examining magistrates invite defense council and the accused to attend when hearing witnesses. [Reproduced in the accompanying notebook at TAB 16]

<sup>142</sup> *Id.* at (para 44). [Reproduced in the accompanying notebook at TAB 16]

<sup>143</sup> *Id.* at (para. 45). [Reproduced in the accompanying notebook at TAB 16]

The ECHR has held that a fair trial can be had without the right to examine the witness as in *Asch*, where statements were provided without witness testimony. And while the ECHR has considered that under extreme circumstances and with substantial corroborative evidence anonymous testimony may be evaluated, it will not allow for a conviction solely on the testimony of an anonymous witness where the defense has no ability to examine the witnesses, and strips the defendant of fundamental rights to a fair trial.

### **C. Netherlands**

In 1983, the Dutch Association of Judges was concerned with the increased incidents of witness harassment and threats of violence which subsequently led to witnesses refusing to testify unless they were granted anonymity.<sup>144</sup> The prevalence of organized criminality in the region led to the introduction of “the Commission on Threatened Witnesses” which considered proposals for future legislation allowing for the anonymity of witnesses.<sup>145</sup> The legislation was to forbid evidence of statements made by anonymous witnesses unless under extreme circumstances where exceptions would be made if the risks to the witness were unacceptable.<sup>146</sup> This proposed legislation was put on hold awaiting the outcome of the *Kostovski* case and since the ECHR found The

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<sup>144</sup> *Kostovski v. The Netherlands* at (para. 34). [Reproduced in the accompanying notebook at TAB 16]

<sup>145</sup> *Id.* at (para. 34). The Commission with only one dissent concluded: “In some cases one cannot avoid the anonymity of witnesses. Reference is made to the fact that at present there are forms of organized criminality of a gravity that the legislature of the day would not have considered possible.” [Reproduced in the accompanying notebook at TAB 16]

<sup>146</sup> *Id.* at (para. 34). [Reproduced in the accompanying notebook at TAB 16]

Netherlands to have violated Mr. Kostovski's Article 6 rights, this legislation may have been shelved.<sup>147</sup>

Generally, The Dutch criminal process allows all material evidence into court and has no rule against the presentation of hearsay evidence.<sup>148</sup> The judges must use caution when evaluating such statements, and most of the Dutch process involves the results of the pre-trial investigation.<sup>149</sup> The witness's statements can be used at trial whether or not the defendant is present, and the court while allowing the defendant to call a witness, may refuse to permit the witness to testify if it believes that no harm will come to the defense.<sup>150</sup> The Court permits *in camera* hearings,<sup>151</sup> hearing by the Court without the presence of the defendant,<sup>152</sup> and witness anonymity.<sup>153</sup> The Dutch Court's interpretation

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<sup>147</sup> *Id.* at (para. 34). [Reproduced in the accompanying notebook at TAB 16]

<sup>148</sup> Annemarieke Beijer, Cathy Cobley, and André Klip, *Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice* 283 in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* (Phil Fennell, Christopher Harding, Nico Jörg, Bert Swart eds., 1995). [Reproduced in the accompanying notebook at TAB 49]

<sup>149</sup> *Id.* at 286-287. Out of court declarations can be used whether or not the witness is called. The Dutch system relies on the official inquiry over the adversarial aspects of the English courts. [Reproduced in the accompanying notebook at TAB 49]

<sup>150</sup> *Id.* at 287. [Reproduced in the accompanying notebook at TAB 49]

<sup>151</sup> *Id.* at 292. But the law demands that there must be sufficient reason, and utilize Article 6 as a guideline in particular, fear of reprisals. [Reproduced in the accompanying notebook at TAB 49]

<sup>152</sup> *Id.* at 292. In this case the defendant is removed from the courtroom during testimony, while the public, press and defense counsel remains, and filled in on the contents of the testimony after the witness is removed. [Reproduced in the accompanying notebook at TAB 49]

<sup>153</sup> *Id.* at 292. The Dutch Court allows various levels of anonymity, partial (where the defense questions the witness while the witness never identifies themselves by name or address) and Full anonymity, where the judge will question the witness during the preliminary investigation and the defense can submit questions which the judge decides whether or not to answer. Telecommunication devices can also be used to protect the identity and still allow for questions. [Reproduced in the accompanying notebook at TAB 49]

of the *Kostovski* ruling was that judicial procedures can counterbalance the inequalities to the defense when it is impossible to allow for a witness to be questioned.<sup>154</sup>

#### **D. New Zealand**

The landmark cases tried before the New Zealand Court of Appeals pertaining to witness anonymity are: *R. v. Hughes* and *R. v. Hines*. The Court in *R. v. Hughes* faced the issue of disclosure of an undercover police officers' true name in giving evidence during a drug offense trial.<sup>155</sup> The Justices within *Hughes* argued strongly on both sides of the issue, with the majority taking the deliberate position that the accused and defense council have the absolute right to know the identity of a witness for the prosecution.<sup>156</sup> The Dissent in *Hughes* argued that an undercover officer should not reveal his identity unless compelled by a presiding judge who views the disclosure to be of such relevance to the facts that withholding the information would be contrary to the interests of justice.<sup>157</sup>

In *R. v. Hines*, a witness came forward after viewed a stabbing from a portable toilet, and only gave a statement after being assured of his anonymity.<sup>158</sup> The accused

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<sup>154</sup> *Id.* at 295. Where the conditions include 1) the judge knows the identity of the witness; 2) the judge states in his opinion that the witness is credible; and 3) questions by the defense can be submitted to the witness in writing. [Reproduced in the accompanying notebook at TAB 49]

<sup>155</sup> *R. v. Hughes*, [1986] 2 N.Z.L.R. 129. (C. A. New Zealand). [Reproduced in the accompanying notebook at TAB 25 ]

<sup>156</sup> *R. v. Hines*, [1997] 3 N.Z.L.R. 529, 588 (C. A. New Zealand). Discussing *R. v. Hughes* . [Reproduced in the accompanying notebook at TAB 24]

<sup>157</sup> *R v. Hughes* at 129. Justice Cook, dissenting took into consideration holdings of courts in Denmark and the United States. In regard to the Danish Courts, J. Cook cites to JP. Anderson in [1985] Crim. LR where it is stated that Danish Law now allows for anonymous witnesses in a limited class of cases, which was initially a position taken by the Supreme Court by majority, "All this is elementary law set out in chapter 18 on witnesses in the Act on Court Procedure." *R.v.Hughes* at 137. [Reproduced in the accompanying notebook at TAB 25]

<sup>158</sup> *R. v. Hines* at 535, 536. The trial court chose not the call Witness A, and the defense at the close of the Crown case applied for a discharge under s 347 of the Crimes Act of 1961 because the Crown referred to

was the president of a local gang, and other witnesses came forward to testify against the accused.<sup>159</sup> The Appeals Court in *Hines* was faced with whether the Judge was at liberty to depart from the previous ruling in *Hughes*, and thereby change the common law of New Zealand, or let the case precedent stand,<sup>160</sup> while the Dissent presented three relevant statutory developments,<sup>161</sup> seeking change the Court majority ruled that it should continue to follow *Hughes* and that any future changes in the law should be decided by Parliament.<sup>162</sup> Both of these landmark cases cited United States cases within their opinions. In particular, the dissent in *Hughes* pointed out that since the United States is subject to the Constitutional rights, and the Sixth Amendment rights of the accused, and New Zealand offers no formal constitutional guarantees, the courts of New Zealand should have a “freer hand,” but traditional respect for a fair trial does not reflect any real

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evidence based on Witness A. The trial court aborted the Trial and a new trial was ordered. At the second Trial the judge ruled against the Crown’s attempt to keep the identity of Witness A from the defense. [Reproduced in the accompanying notebook at TAB 24]

<sup>159</sup> *Id.* at 535. [Reproduced in the accompanying notebook at TAB 24]

<sup>160</sup> *Id.* at 534. “these questions involve an assessment of the relevant considerations of precedent, legal principal and policy, not least the respective roles of the judiciary and the legislature in determining complex public interest questions.” [Reproduced in the accompanying notebook at TAB 24]

<sup>161</sup> *Id.* at 574. Justice Thomas’ Dissent section (8) presents three related statutory developments: 23AA of the Evidence Act 1908, where complainants in sexual offense cases do not have to disclose their addresses or occupation, unless the trial court considers the evidence to be directly relevant in the interests of justice. 13A of the same Act, allows undercover officers in certain criminal cases viewed as serious, to give evidence under their assumed name without disclosing their true identity. (the justice states that this should also apply to the public at large who might be fearful of reprisals.) and s 344C of the Crimes Act where the prosecution must provide the names and identification of testifying witnesses, however the judge may, on application, make an order excusing the prosecutor from providing the accused with this information. [Reproduced in the accompanying notebook at TAB 24 ]

<sup>162</sup> *Id.* at 534. Justice Thomas goes on to state in his dissent that there are “dangers in adopting a ‘leave it to Parliament’ attitude in an area so central to the Court’s function in the administration of justice.” [Reproduced in the accompanying notebook at TAB 24]



distinction.<sup>163</sup> In addition, the *Hines* decision determining the absolute rights of the accused to know the identity of his accuser reflects little difference on this point between New Zealand and the United States.

### **E. United States**

The Sixth Amendment to the U.S. Constitution provides the right of a criminal defendant “to be confronted with the witnesses against them.”<sup>164</sup> Often in the United States domestic trials, adult rape victims are protected, in that their identities are not released to the media or public.<sup>165</sup> Children's identities are also kept from the public in cases of molestation or sexual abuse.<sup>166</sup> Likewise situations where individual witnesses or their families have been threatened, the testimonies of undercover agents, or trials pertaining to trade secrets all have permitted anonymity from the public and media.<sup>167</sup> However in the United States the accused has a Constitutionally protected right to face his accusers.

The Supreme Court of California recently reversed the California Appeals Court in *Alvarado v. The Superior Court of Los Angeles County*, when the Appeals Court granted an order authorizing the prosecutor to refuse to disclose the identities of witnesses prior

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<sup>163</sup> *R v. Hughes* at 138. [Reproduced in the accompanying notebook at TAB 25]

<sup>164</sup> Kellye L. Fabian, Note and Comment: *Proof and Consequences: An Analysis of the Tadic & Akayesu Trials*. 49 DePaul L. Rev. 981, 1004 (2000). [Reproduced in the accompanying notebook at TAB 41]

<sup>165</sup> *Id.* at 1004. [Reproduced in the accompanying notebook at TAB 41]

<sup>166</sup> *Id.* at 1004. [Reproduced in the accompanying notebook at TAB 41]

<sup>167</sup> *Id.* at 1004. [Reproduced in the accompanying notebook at TAB 41]

to, and during trial.<sup>168</sup> The witness was thought to be in grave danger as he witnessed a murder in the County jail, where the victim had been referred to as a “snitch,” and the witness continued to be incarcerated at the same facility.<sup>169</sup> The Appeals Court found that the trial court has exercised its discretion in authorizing the prosecution to permanently withhold the names of the witnesses’ identities from the defense “since it would place them in mortal danger...” The Supreme Court of California, unlike in earlier case precedent did not have to analyze the order of non-disclosure at pre-trial, but during trial, which implicates the defendants’ right to confrontation under the federal Constitution.<sup>170</sup>

The Court citing *Smith v. Illinois*,<sup>171</sup> where the United States Supreme Court has ruled that:

Yet when the credibility of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’ through cross-examination must necessarily be to ask the witness who he is and where he lives...to forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.”

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<sup>168</sup> *Alvarado v. The Superior Court of Los Angeles County*, 5 P.3d 203 (Cal. 2000). [Reproduced in the accompanying notebook at TAB 11]

<sup>169</sup> *Id.* at 210. The accused was also a member of the “Mexican Mafia” a gang within the facility that intimidated and threatened other witnesses such as writing on cell walls “your dead.” [Reproduced in the accompanying notebook at TAB 11]

<sup>170</sup> *Id.* at 214. [Reproduced in the accompanying notebook at TAB 11]

<sup>171</sup> *Id.* at 215. [Reproduced in the accompanying notebook at TAB 11] *Smith v. Illinois*, 390 U.S. 129, 131 (1968). Where the defendant convicted of narcotics sale, and the principal witness for the prosecution was asked their name, he gave a name and defense council asked if it was his real name, he replied no. the trial court sustained the prosecutor’s objection to asking the witnesses real name. The United States Supreme Court observed that there had not been a complete denial of defendant’s rights. [Reproduced in the accompanying notebook at TAB 26]

Many federal Court decisions have held that if the true identity of a witness is deemed to be inconsequential to material issues before the court, then non-disclosure is permissible as long as it does not prejudice the defense.<sup>172</sup> However all decisions where the identity of the witness was crucial, or the prosecution failed to state cause for non-disclosure, the courts uniformly have concluded that at the time of trial disclosure is required.<sup>173</sup> Therefore, the California Supreme Court in *Alvarado* ruled that discretion at the pre-trial phase is reasonable under § 1054.7 of the California Penal Code, while the “witnesses safety must yield to petitioner’s right to confrontation under the U.S. Const. amend. VI. Prosecution witnesses [are] not permitted to testify anonymously at trial.”<sup>174</sup>

The legislature has also aided in protecting witnesses through the extensive witness protection program existing in the United States, in particular, to shield witnesses against reprisals. United States Code, Title 18 chapter 224- Protection of witnesses, permits the Attorney General of the United States to authorize and provide for relocation and protection of witnesses that are involved in an official proceeding on behalf of the Federal or state government, concerning an organized criminal activity or otherwise serious offense.<sup>175</sup> The Witness Protection program within the United States allows

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<sup>172</sup> *Id.* at 218. [Reproduced in the accompanying notebook at TAB 11]

<sup>173</sup> *Id.* at 220. [Reproduced in the accompanying notebook at TAB 11] also citing *United States v. Palermo*, 410 F. 2d 468 (7<sup>th</sup> Cir. 1969). [Reproduced in the accompanying notebook at TAB 32] and *United States v. Fuentes*, 988 F. Supp. 861 (E.D. Pa. 1997) [Reproduced in the accompanying notebook at TAB 31]

<sup>174</sup> *Id.* at 203. [Reproduced in the accompanying notebook at TAB 11]

<sup>175</sup> United States Code, Title 18-Crimes and Criminal Procedure, Chapter 224-Protection of Witnesses. <http://www4.law.cornell.edu/uscode/18/3521.casc.html> where section 3521.(b)(1)(A) authorizes the Attorney general to provide suitable documents to enable the person to establish a new identity. And (G) refuse to disclose the identity of location of the person relocated or protected. [Reproduced in the accompanying notebook at TAB 10]

sufficient protection for a testifying witness who would be placed in danger because of their participation in the judicial proceedings.<sup>176</sup>

All of the above countries to some degree allow partial anonymity from the press or the media, particularly in cases involving sexual assault, narcotics or organized crime. Children are most frequently protected from media exposure. In the United States, where the strictest standards exist in relation to the defendant's rights under the U.S. Constitution the U.S. Legislature realized that when it depended on witnesses to testify, particularly in high profile criminal cases, it was paramount to protect those testifying through the enactment of a Federal Witness Protection Program. However these programs are cost prohibitive to many nations.

## **V. Conclusion**

In examining the alternatives the current and future International Tribunals are faced with they seem daunting and cyclical. If a Tribunal is unable to protect witnesses from retribution because they testify against a war criminal, then the Tribunal will have fewer and fewer witnesses to bring justice forward, and to hold these violators of international human rights law accountable. On the other hand if the Tribunal grants anonymity to testifying witnesses, then the integrity of the court may suffer irreparable harm as the rights of the accused: 1) to a "fair trial" and; 2) to examine and cross-examine witnesses, is sacrificed to protect the witness.

Many nations have allowed partial anonymity, or pre-trial anonymity under extreme circumstances, particularly: 1) child witnesses; 2) undercover police agents and;

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<sup>176</sup> *Id.* at 1. section 3521 (a)(1). [Reproduced in the accompanying notebook at TAB 10]

3) in drug or organized crime cases. Anonymity is often granted from the public and media in rape cases. Additionally several nations that disallow anonymity provide in its stead a functioning witness protection program for the witnesses, including relocation with a new identity.

Before the court resorts to balancing the rights of witnesses against an accused, the Rules of Procedure and Evidence should unequivocally state the Tribunal's position, either for or against witness autonomy. If the Rules prohibit witness autonomy then a functioning witness protection program must be in place so that the identified witnesses, will have sanctuary after aiding the Tribunal with their testimony.

If the rules grant anonymity, then to protect the integrity of the Court, and avoid perceptions of arrogance on the part of the ruling justices to interpret the current Rules with "unfettered discretion," the international community must come to a determinative decision to amend the current Rules before it reaches any Trial Chamber. Likewise this would put the defendant on notice that anonymous testimony will be permitted. However, courts across many jurisdictions have found alternatives to total anonymity, and if granted it should not be the sole basis for conviction but only used to corroborate other evidence at trial.

The International Criminal Tribunals should be the champions of human rights and therefore due process. Beyond the importance of the Tribunals' credibility lies the paramount importance of having an International Court system where all are treated fairly, particularly the violators of human rights, so that when they are held accountable, the verdict will not be tainted with allegations of false testimony or bias.