

Memorandum for the
Office of the Prosecutor
International Criminal Tribunal for Rwanda

COURTROOM TECHNOLOGY:
A Comparative Analysis of its Application, Due Process and Public Policy
Issues for Victims and the Accused

Judith L. D'Ambrosio
New England School of Law
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I. Introduction and Summary of Conclusions:

This memorandum addresses topic number 20—use of courtroom technology.

Focusing upon national/domestic legislation in both common and civil law legal systems, this memorandum highlights the various uses of courtroom technology, the legal issues that derive from such use and whether it would be permissible and appropriate for the Rwandan tribunal to use courtroom technology during its proceedings.

After researching this issue, it appears that using courtroom technology would be appropriate in most circumstances and would not overly infringe upon an accused's right to examine witnesses. Balancing issues involving judicial fairness, courtroom technology safeguards the judicial process by providing a fair trial to all parties, the state, the accused, the victims and the witnesses.

II. Factual Background

The issues addressed in this memorandum arise due to the increased need to protect victims and witnesses testifying before the tribunal. Many victims of random violence, including rape and torture, fear testifying in the presence of the accused and/or fear having their identities made known to the public. This fear stems from a concern to avoid retaliation and intimidation for themselves and their families upon giving testimony. Considering similar situations in South Africa and the International Tribunal for the Former Yugoslavia, these fears and concerns are not even slightly unfounded. Using courtroom technology in the Rwandan tribunal seems especially appropriate because many of the victims and witnesses are usually randomly chosen by the perpetrators, thus minimizing the normal risks associated with witness anonymity, such as prejudicial motives held by witnesses against the accused or fabricating testimony for ulterior purposes.

The nature of the crimes themselves generally deters victims and witnesses to come forward to report the atrocities they have experienced. Providing anonymity to those involved will help increase the reports of violence, thereby increasing the amount of relevant evidence necessary to obtain a more complete investigation into the matters. Additionally, the crimes for which the witnesses and victims will be testifying to are not the only evidence that will be presented. A conviction for the accused will not hinder on the testimony of one or two witnesses alone. In many countries, this is a significant factor for determining whether or not to use courtroom technology. Considering this along with the fact that the counsel for the accused still retain the right to vigorously cross-examine the witnesses, states have generally allowed courtroom technology to be utilized in situations similar to those the tribunal are dealing with today.

III. Legal Discussion

Legal systems around the globe are learning how to utilize the benefits that technology can bring into the courtroom.¹ Judges and lawyers are finding that technology can increase judicial efficiency by saving the court time and money in areas from document filing to witness testimony.² “With increasing frequency, witnesses who formerly could only appear in court via deposition transcripts and videotapes now testify live from remote locations via videoconferencing.”³ Judges, in particular those presiding over high-technology courtrooms, find that the technology employed not only speeds up

¹ See Frederic I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. REV. 799, 800 (1999) [reproduced at Tab B1].

² See *id.* at 800-801. Electronic filing is already in use in a number of U.S. courtrooms and the capability of presenting evidence electronically, to be used around the world, is increasing in frequency. See *id.*

³ Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 185 (2000) [reproduced at B2].

trials but also “provides better justice because it increases juror comprehension.”⁴ The use of such technology, however, especially in the area of witness testimony, evokes concerns about whether or not the technology overly impinges upon a defendant’s right to a fair trial.⁵ Specifically, legal minds have inquired into whether or not using technology to shield a witness’ identity from a defendant, or allowing a witness to testify outside of the physical presence of the defendant, intrudes upon a defendant’s right to confront that witness.

Before determining whether or not the ICTR should adopt technology measures that will shield the witnesses’ identities from defendants, the tribunal needs to consider many factors, including: 1) the different methods of courtroom technology available; 2) whether the use of courtroom technology would overly intrude upon a defendant’s right to confrontation; 3) whether or not the defendants’ and the witnesses’ interests are deserving of the same considerations in the tribunal’s inquisitorial setting as opposed to those found in an adversarial setting; 4) what interests is the tribunal seeking to protect when utilizing courtroom technology and would courtroom technology be a legitimate way to protect those interests; 5) what are the overall pros and cons for utilizing courtroom technology; and 6) considering the method of, and the costs associated with, courtroom technology, which device or devices would work best for the tribunal.

⁴Lederer, *supra* note 1 at 814-15.

On video evidence presentation, defined as simultaneous display of evidence to judge, jury, and court via individual monitors, eighty-three percent of judges surveyed felt that the technology helped them manage court proceedings better and ninety percent of jurors surveyed felt that they were able to see evidence clearly and follow attorney presentations, and that the video display was an easier way to present certain evidence.

Id. at 815.

⁵ *See id.*

There are many methods of courtroom technology that are in use in legal systems around the world. For purposes of this memorandum however, this discussion will focus upon those methods used for purposes of witness protection. A witness' desire to receive protection and/or remain anonymous from the defendant must be balanced against the defendant's right to receive a fair trial.⁶ Domestic and international legal systems, however, emphasize that the notion of a fair trial does not exclusively belong to that of the defendant—it also applies to the prosecution and the witnesses involved.⁷ The defendant's interest in confronting or examining witnesses historically is meant to guarantee the trustworthiness of the evidence presented—to ensure that the witness realizes the gravity of the accusations and the forcefulness of his or her testimony under oath, in the presence of the defendant. The prosecution's interest in conducting a fair trial is connected to the desire of presenting as much relevant testimony and evidence as possible, to conduct a trial that provides the appearance of legitimacy, thus furthering public acceptance and confidence in the judicial process. The witness' interest in obtaining a fair trial is complex. On the one-hand, ensuring that the defendant's rights are fully complied with will ultimately strengthen any conviction handed down by a judge or jury. Thus, allowing a witness to testify in open court, in the defendant's presence, does provide a degree of trustworthiness and authenticity to the proceedings. Alternatively, the content of the witness' testimony may create uncomfortable or even dangerous situations for the witness if left to testify in such a manner. The witness may request to testify outside of the view of the defendant because, either the witness fears for

⁶ See generally, Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA L. Rev. 1381 (2001)[reproduced at B3].

⁷ Christine Chinkin, *Amicus Curiae Brief On Protective Measures For Victims And Witnesses*, 7 CRIM. L. FORUM 179,202 (1996) [hereinafter Amicus Brief] [reproduced at B4].

the safety of himself or others, or because he fears that giving testimony in view of the defendant would cause severe traumatic stress upon seeing the defendant.

Receiving protection from, or remaining anonymous from, the defendant can be achieved in many ways and these methods will be explored below.

A. Descriptions of Technology

Videolink technology is one method used to provide witness testimony to the court outside of the defendant's presence.

At its most basic level, videoconferencing is a method of two-way communication that links multiple locations through audio and video technology. The key to the technology is a device known as a CODEC [Coder/DE-Coder], which encodes video signals at one location, sends the data over a transmission circuit, and decodes the signal for viewing at another location. Ideally, videoconferencing enables people at different locations to see and speak with each other in close to real time.⁸

While witness testimony is being conducted in a separate room or a separate location altogether, a television screen is showing it live in the courtroom so that the defendant, the jury and the public can view all aspects of the testimony. Generally, the defendant will also be afforded the right to have contact with his lawyer during the testimony process, as to not interfere with the defendant's right to counsel. Through the use of a microphone and listening device, the defendant, while viewing the witness' live testimony, can communicate with his lawyer so that the lawyer can properly structure his examination of the witness. Legal scholars have suggested that videolink testimony involves little jeopardy to a defendant's right of confrontation because the defendant is still observing the testimony as it happens, there is the opportunity for cross-examination,

⁸ Roth, *supra* note 3 at 189. "Continuous advances in the industry have given us a color image that reflects speech and movement close to real time and near broadcast quality." *Id.*

and when audio and image distortion is not employed, the witness' identity does not remain anonymous.⁹

Videolink technology can be used in conjunction with voice and image distortion. This is utilized when a witness' identity is deemed to warrant anonymity for protection reasons. Voice distortion can also be used when a witness gives testimony from behind a screen so as to preserve his or her anonymity from the defendant and/or the public.

B. Protection and Anonymity v. Right of Confrontation

Videolink technology is generally utilized when the witness expresses or exhibits fear about physically being in the defendant's presence while testifying. The witness' request for the use of videolink, thus stems not from the desire to remain anonymous from the defendant or the public, but from the desire to avoid further emotional and psychological trauma which would likely result if they would have to see the defendant in person. A witness' videolink transmission can be altered in some cases using audio and/or image distortion. This method is utilized when the witness has a fear of seeing the defendant and also has a fear of being recognized, usually to avoid retribution upon providing testimony. Most countries using videolink have passed legislation designating when the use of the technology can and should be employed.

i. United States

An accused in the United States is guaranteed by the Sixth Amendment to have the "right to a speedy and public trial, by an impartial jury [and] . . . to be confronted

⁹ David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 424 (2002)[reproduced at B5]. "Other means of protecting witnesses [such as video link testimony] are likely to be equally, if not more, effective [than complete anonymity] and involve no jeopardy to the pivotal interest of any civilized society in the fair administration of criminal justice. *Id.*

with the witnesses against him[.]”¹⁰ While this right is deemed fundamental, the U.S. Supreme Court has held that this right is not an absolute right and must give way to “considerations of public policy and the necessities of the case [at hand].”¹¹

The U.S. Supreme Court in *Maryland v. Craig*,¹² upheld a Maryland statute that permitted a judge to receive testimony from a child abuse victim via videolink.¹³ The child victim in *Craig* feared being in the defendant’s presence and it was determined through the use of expert testimony that the child “would have some or considerable difficulty in testifying in [the defendant’s] presence.”¹⁴ Before granting the witness’ request for videolink however, the Supreme Court held that U.S. trial courts must first: (a) conduct an inquiry in which evidence is received on whether videolink is necessary to protect the welfare of the particular child (b) find that the child witness will be traumatized by the defendant’s presence, not just by the courtroom experience in general, and (c) find that the child’s emotional distress is more than de minimis.¹⁵

The “de minimis” requirement established in *Craig* requires a showing that the trauma that would be suffered by the child witness would be greater than mere

¹⁰ U.S. CONST. amend. VI. [reproduced at D1]

¹¹ *Maryland v. Craig*, 497 U.S. 836, 845 (1989)[reproduced at A1].

¹² 497 U.S. 836 (1989).

¹³ See MD. CODE ANN. § 9-102 (1989). In relevant part, child testimony can be taken outside of the courtroom via videolink if:

- (i) The testimony is taken during the proceeding; and
- (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

Id.

¹⁴ *Craig*, 497 U.S. at 842.

¹⁵ See *id.* at 838.

nervousness or excitement.¹⁶ Other trial courts in the United States however, require that the prosecution show a “substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court.”¹⁷ In cases of child abuse and victimization, the expert medical opinion of a qualified psychiatrist or other doctor detailing the potential and substantial harm the child would suffer if confronted with the abuser, generally fulfills the requirement.¹⁸ Inquiry into the child’s reaction to confronting the defendant and into the possible benefits of videolink testimony generally must be put into evidence at trial.¹⁹ For example, in *Cumbie v. Singletary*,²⁰ the Court reversed the trial court’s decision of allowing the child witness to testify via videolink because the court did not take into evidence any *specific* findings that the child would suffer trauma in the presence of the defendant.²¹ At the trial level, the prosecution had the child’s mental health counselor testify generally about the child’s personality and reaction to her abuse, not about the potential trauma the child would suffer if required to testify in open court about the events.²² Since *Craig*, Congress enacted the Child

¹⁶ *See id.*

¹⁷ *See generally* *Dufrane v. State*, 853 S.W.2d (Tx. 1993)[reproduced at A2]. *See also* *Cumbie v. Singletary*, 991 F.2d 715 (1993)[reproduced at A3].

¹⁸ *See Dufrane*, 853 S.W.2d 86 (Tx. 1993) (accepting doctor’s medical opinion that four-year old child abuse victim would suffer “long-term psychological harm from a face-to-face confrontation with the Appellant.” The court also noted that “the closed-circuit system would help psychologically distance the child from the Appellant.”) *Id.* at 91.

¹⁹ *See Cumbie*, 991 F.2d at 722.

²⁰ 991 F.2d 715 (1993).

²¹ *See id.* at 722.

²² *See id.* at 715.

Victims' and Child Witnesses' Rights act which codified the holding in the case and over thirty-five state legislatures have since enacted similar statutes.²³

Observations of the child by the trial judge can and has been admitted as evidence of potential trauma the child will face if confronted with an abuser, thus satisfying the requirements of *Craig*. In *State v. Delgado*,²⁴ when a child abuse victim was brought into the courtroom to testify against the defendant about the abuse she suffered at his hands, the child's adverse reaction to the situation warranted the *trial judge* to request videolink in order to "protect [the child's] emotional well-being."²⁵ On appeal the Court approved the trial judge's actions noting that "[a] judge should listen to a child's statements, observe her reactions and draw inferences from physical manifestations to determine whether there is a substantial likelihood of 'severe emotional and mental distress.'"²⁶ *Delgado* illustrates that wide deference is given to United States trial judges when assessing the possible trauma to victims who request to testify via videolink. Thus, reliance upon the witness' demeanor instead of, or in addition to, the presentation of expert medical testimony is one possible way to satisfy the requirements of *Craig*.

Under certain circumstances, non-disclosure of a witness' identity from the defendant, including name, address and occupation or through the use of screens, is also not deemed to violate the Confrontation Clause.²⁷ For example, in *Delaware v. Van*

²³ See 18 U.S.C. § 3509(b) (1994) [reproduced at D2]; see also Roth, *supra* note 3 at 194.

²⁴ 742 A.2d 990 (N.J. 2000) [reproduced at A4].

²⁵ *Id.* at 993.

²⁶ *Id.*

²⁷ See Chinkin, *supra* note 7 at 197.

*Arsdall*²⁸ the Court “held that the accused’s right to full confrontation must occasionally give way to competing government interests, including prevention of victim harassment, jury prejudice, confusion of issues, or danger to witnesses.”²⁹ When witnesses’ personal safety is potentially at risk, the witnesses have, historically, been able to testify without disclosing facts relating to their identities.³⁰ The non-disclosure of witness identity, in many cases, was not considered a violation of the Sixth Amendment. Before ruling on issues of anonymity, whether through the use of pseudonyms, screens, or withholding of information, state and federal courts must first ascertain that full disclosure of the witness’ identity would endanger the witness’ personal safety. The court must then weigh the possible harm to the witness against the possible harm that may result to the defense upon non-disclosure of the witness’ identity.³¹ The threat of harm to the witness, however, must be “actual and not a result of conjecture.”³²

When a witness is deemed to be crucial to the prosecution’s case, U.S. courts have been reluctant to conceal any identifying information.³³ When witnesses are essential to the prosecution’s case and there is a genuine fear of physical harm or

²⁸ 475 U.S. 673 (1986) [reproduced at A5].

²⁹ See Chinkin, *supra* note 7 at 197.

³⁰ See *id.* See also U.S. v. Crovedi, 467 F.2d 1032 (7th Cir. 1972); U.S. v. Ellis, 468 F.2d 638 (9th Cir. 1972); U.S. v. Rangel, 534 F.2d 147 (9th Cir. 1976); Clark v. Lewis, 506 U.S. 838 (1992); McGrath v. Vinzant, 528 F.2d 681 (1st Cir. 1976) (refusing to reveal witness’ identity despite the fact that the accused was in custody and theoretically not a danger; accused may be acquitted or rely on accomplices to carry out threat to the witness).

³¹ See Lusty, *supra* note 9 at 380. Possible harm to the defense could result in ineffective cross-examination, non-discovery of impeaching evidence, false statements, prior convictions, etc.

³² *Id.* at 381.

³³ See *id.* at 382. See also People v. Brandow, 12 Cal. App.3d 749 (1970) (refusing to grant anonymity to witness who received death threats because the identity of the witness was deemed an essential element of the prosecution).

retaliation against the witness, state and federal courts tend to place more emphasis upon the defendant's constitutional right to confront his accusers and rely upon witness protection programs and/or criminal laws against retaliation and harassment to protect the witness' safety.³⁴

ii. *United Kingdom*

The right to examine witnesses is a fundamental right for every accused in the United Kingdom. As in the United States however, "it is now well established that there may be occasions upon which the interests of justice require that the identity of witnesses should be withheld [from the defendant]."³⁵

Similar to the United States, the United Kingdom has frequently permitted videolink to be used at trial when there is a specific concern about potential trauma that may result if the witness testifies in the defendant's presence. For example, in *R. v. Lee*,³⁶ the trial court allowed a child, who witnessed his father setting fire to his mother's home, to provide testimony via videolink.³⁷ The trial court had authority to do so pursuant to section 32 of the Criminal Justice Act of 1988.³⁸ The defendant's counsel

³⁴ *See id.*

³⁵ *R. v. Watford Magistrates Court Ex parte Lenman and Others* [1993] Crim. LR 388 (Eng.)[reproduced at A6].

³⁶ *R. v. Lee*, [1996] 2 Cr. App. Rep. 266 (Eng. Court of Appeal)[reproduced at A7].

³⁷ *See id.*

³⁸ *See id.* Section 32 of the Criminal Justice Act of 1988 provides in pertinent part:
A person other than the accused may give evidence through a live television link in proceedings to which subsection (1A) below applies if:
(b) the witness is a child . . .

but evidence may not be so given without the leave of the court. Subsection (2) provides:
This subsection applies:

- (a) to an offence which involves an assault on, or injury or a threat of injury to, a person;
- (b) to an offence under section 1 of the Children and Young Persons Act of 1933;
- (c) to an offence under the Sexual Offences Act of 1956, the Indecency with Children Act 1960,

argued that since the defendant did not specifically “harm” or “threaten to harm” the child, videolink technology could not be used.³⁹ Construing the statute broadly, the Court held that “threat of injury” includes not just threats made directly to the witness from the defendant, but also involves looking at the “consequences of the offender’s activity, which viewed objectively, must present the threat. If they do, then the unlawful activity, the commission of the offence, involves a threat of injury within the meaning of the subsection.”⁴⁰ Based on this reasoning, the Court concluded that the child witness did suffer a threat of injury if he would have to be subjected to provide testimony in the defendant’s presence because of the traumatizing nature of the experience he witnessed.⁴¹

The circumstances of the defendant’s activity however, needs to rise to the level of a threat of intimidation—not just embarrassment of a general fear of testifying—in order to satisfy the requirements of section 32 of the English Criminal Justice Act. For example, in *R. v. Redbridge*,⁴² the defendant approached two teenage girls for sex and, after being refused, the defendant slapped the girls’ bottoms over their clothes. During the defendant’s trial for indecent assault, the witnesses requested to testify via videolink because they feared “embarrassment” over having to give live testimony in public.⁴³ The

the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978; and
(d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counseling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above.

See id.

³⁹ *See id.*

⁴⁰ *R. v. Lee*, [1996] 2 Cr. App. Rep. 266 (Eng. Court of Appeal).

⁴¹ *See id.*

⁴² *R. v. Redbridge Youth Court*; *R. v. Bicester Youth Court*, [2001] 2 Cr. App. Rep. 458 (Eng.) [reproduced at A8].

judge rejected the request stating that the level of embarrassment the witnesses may feel in providing live testimony did not warrant a finding that there existed a “threat of intimidation” as interpreted under section 32 of the Criminal Justice Act of 1988.⁴⁴ In making its determination, the Court considered many factors including: (a) the similar ages of the witnesses and the defendant—this reduces the potential of intimidation by an older defendant upon a younger witness; (b) the nature and gravity of the offence charged and of which the witnesses would have to testify to (indecent assault for slapping the girls’ bottoms whilst fully clothed was not deemed to be a very serious offence); (c) the Crown did not offer any evidence that the witnesses would suffer any trauma or intimidation if required to give live testimony in front of the defendant; (d) the opportunity for both the prosecution and the defense to present their evidence under equal circumstances, without unnecessarily disadvantaging any party; and (e) whether the evidence would be deemed more reliable if adduced by way of videolink.⁴⁵ The Court ultimately concluded that videolink testimony would not be justified after considering the above factors.

In *R. v. Bicester*,⁴⁶ three witnesses requested videolink testimony because they feared testifying in the defendant’s presence.⁴⁷ One of the witnesses, an eleven year-old

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.* “The impact of the witnesses’ evidence through an electronic medium may be lessened and the circumstances in which the recorded interview was made may affect the quality and reliability of evidence. Moreover, the best evidence rule would be breached and the accused may be disadvantaged by being unable to confront the witness in the court room.” *Id.*

⁴⁶ *R. v. Redbridge Youth Court; R. v. Bicester Youth Court*, [2001] 2 Cr. App. Rep. 458 (Eng.).

⁴⁷ The defendant was charged with inflicting grievous bodily harm upon the victims. The defendant allegedly pulled out an air gun and began shooting at tin cans. He then pointed the gun at one of the victims and shot him in the face from a short distance, hitting him in the cheek. *See id.*

boy, was personally threatened by the defendant before trial; and the other two witnesses, eight and thirteen year-old boys, possessed a strong fear about seeing the defendant and about providing testimony in his presence.⁴⁸ Considering the factors mentioned in *Redbridge*, the court granted the request for videolink testimony.

On appeal, the Court highlighted the legislative purpose of section 32, declaring that it was to provide “conditions which are most conducive to ensuring that a child is able to give as full an account as possible of the events in question . . . where there is a real risk that the quality of the evidence given by that child would be so affected or that it might even be impossible to obtain any evidence from that child [videolink testimony is warranted.]”⁴⁹ Thus, the Court concluded that a balancing test should be accomplished—balancing the rights of the defendants to see and hear the witnesses in court against rights of witnesses to create an atmosphere conducive to providing the best possible evidence.⁵⁰ The Court favored videolink testimony because it still provides the defendant with the opportunity to observe and hear the witnesses’ testimony.⁵¹ The Court, in affirming the lower court’s ruling rejecting videolink testimony in *Redbridge*, emphasizes though, that the prosecution must convince the Court that a witness will suffer trauma or intimidation—and not just embarrassment—before videolink will be ordered. This message was also emphasized when the Court affirmed *Bicester’s* judgment providing videolink testimony to the eight and eleven-year old boys, but reversed the ruling for the thirteen year-old boy. The Court determined that the district judge was “not concerned

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *See id.*

about the quality of [the eleven-year old boy's] evidence, nor did he express any concern about the witness' willingness to give evidence once he got to court, but justified the making of the order on the 'ease' with which he might be brought to court. That is not, in itself, a justifiable reason making the [videolink] order."⁵²

Scotland also recognizes the importance of reaching out to "vulnerable witnesses" in order to encourage them to report crimes and to assist in the prosecution of those crimes.⁵³ "Vulnerable witnesses"—Asian women, homosexuals, and rape victims—are the targets of a legislative proposal that will allow these witnesses to provide evidence from behind a screen or via videolink.⁵⁴ The legislation was prompted by a concern that these witnesses, due to their cultural experiences and/or nature of their victimization, are not able or willing to provide the best possible evidence without some sort of protection from the court. If these witnesses were permitted to testify outside of the defendant's view, then, it is argued, more witnesses and victims would come forward to testify, thereby increasing the rate of convictions for the corresponding crimes.⁵⁵

As it stands, Asian women are classified as "vulnerable witnesses because their cultural background means many have had little contact with men who are not family

⁵² *Id.*

⁵³ See Murdo MacLeod, *Gay Witnesses To Get Special Rights In Court Protection Plan*, SCOTLAND ON SUNDAY, April 28, 2002. [reproduced at C1]

⁵⁴ *See id.*

⁵⁵ See Comment: *Law Would Be A Blow*, EVENING NEWS-SCOTLAND, February 15, 2002. [reproduced at C2].

It is little wonder that most rape victims do not report their abuse to the police in the first Place when the prospect of a court case is so terrifying. And given the woeful number of Convictions for rape—just one in 20 cases—this is in urgent need of remedy.

Id.

members and could therefore be intimidated in court.”⁵⁶ Also, victims of sex attacks often feel as if they are abused all over again by facing their attackers in court.⁵⁷ The proposed Scottish legislation is thus being viewed as a tool to aid in the fact-finding process.

Besides the use of videolink testimony, the United Kingdom provides anonymity to witnesses, in certain circumstances, through the use of screens, and audio/image distortion.⁵⁸ In *R. v. Watford*,⁵⁹ victims of a violent and random street attack by a group of youths were allowed to testify through the use of pseudonyms, screens and with the aid of voice distortion. The victims feared being recognized by the defendants and feared that they may be the subjects of further violence if they provided testimony.⁶⁰ The defense challenged the order, claiming that without identifying the witnesses, the defendants’ fundamental right to examine the witnesses would be violated.⁶¹ The Court refused to overturn the anonymity order based on a “theoretical prejudice” when there was “clear evidence of fear before the magistrate.”⁶²

⁵⁶ MacLeod, *supra* note 32.

⁵⁷ *See* Comment, *supra* note 34.

⁵⁸ *See* *R. v. Watford*, [1993] Crim. LR 388 (Eng.).

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See id.* The defense was concerned that some of the witnesses may potentially have “some axe to grind, some bias or some reason for making up [their] account[s] against a particular applicant and that unless the applicants are able to see or hear the witness giving evidence they may be prejudiced in the instructions which they can give to their legal advisors.” *Id.*

⁶² *R. v. Watford*, [1993] Crim. LR 388 (Eng.).

Screens were deemed necessary and held not to affect the parties' rights to a fair and public trial in the very high profile *Bloody Sunday* case.⁶³ The tribunal was formed in 1998 specifically to conduct public hearings about the events that happened in Derry, Ireland on January 30, 1972.⁶⁴ Arguing that the witnesses involved would be in danger for their lives upon returning to Londonderry for trial, their lawyers requested the use of videolink technology to ensure their safety and to avoid a potentially public-charged atmosphere.⁶⁵ The tribunal rejected the request for videolink but did allow screens to be used in order to shield the witnesses' identities from the public. The tribunal focused upon the witnesses' objective and subjective fears about giving testimony without some sort of anonymity. The witnesses did not fear the parties in the case, their fear stemmed from having their identities revealed to the public—a fear of retribution.

Fear of retribution was deemed to be an acceptable reason for infringing upon the parties' Article II right that a "full and proper investigation into the deaths of the deceased will be carried out."⁶⁶ The tribunal noted that this right "does not necessarily carry with it a right to participate in the inquiry in a particular way or necessitate a particular form of inquiry or investigation."⁶⁷ Even though the witnesses' testimony was given behind screens, the tribunal still held that it was given in "public" because the

⁶³ See *In the Matter of an Application By the Next of Kin of Gerard Donaghy for Judicial Review and in the Matter of a Decision of the Bloody Sunday Inquiry*, [2002] (Court of Appeal) [hereinafter *Bloody Sunday*] [reproduced at A9].

⁶⁴ See Ruth O'Reilly, *Derry Ruling Is A Disgrace Says General Saville Inquiry: Bloody Sunday Paras Must Return to Ulster To Give Evidence*, BIRMINGHAM POST, Aug. 3, 2001 [reproduced at C3]. On January 30, 1972, a British parachute regiment opened fire during a civil rights march, killing 13 men. See *id.*

⁶⁵ See *id.*

⁶⁶ *Bloody Sunday*, [2002] (Court of Appeal).

⁶⁷ *Id.*

lawyers for the next of kin still conducted a live cross-examination of the witnesses, the testimony was heard by the public and will be available to the public through transcripts. The fact that the next of kin themselves, or members of the general public, did not view the testimony personally does not, the tribunal held, prejudice or hinder a full investigation into the events in question.⁶⁸

iii. *Canada*

The Canadian Constitution provides a criminal defendant with the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”⁶⁹ There is no specific guarantee in the Canadian Constitution for a criminal defendant to confront or examine witnesses against him. Canadian Courts have held that while the criminal defendant is entitled to a fair hearing, it does not entitle him to the most favorable procedures that could possibly be imagined.”⁷⁰ In fact, the Supreme Court held that “if one has a right to confrontation in Canada it is not an absolute right and it is ‘subject to qualification in the interests of justice.’”⁷¹

The Canadian legislature specifically grants witnesses the opportunity to testify via videolink. Section 486 of the Canadian Criminal Code provides that a child witness (under the age of eighteen) may:

testify outside the court room or behind a screen or other device that would allow the complainant or witness not to see the accused, if the judge or justice

⁶⁸ *See id.*

⁶⁹ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d) [reproduced at D3].

⁷⁰ R.v. L. (D.O.), [1993] 4 S.C.R. 419, 454 [reproduced at A10].

⁷¹ R. v. Levogiannis, [1993] 67 O.A.C. 321. (emphasis added) [reproduced at A11].

is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant or witness.⁷²

Additionally, the Canadian legislature provides that a witness (regardless of age) can testify via videolink from *anywhere* in Canada, not just in a separate room in the courthouse, as long as “it would be appropriate when considering all the circumstances, including (a) the location and personal circumstances of the witness; (b) the costs that would be incurred if the witness had to be physically present; and (c) the nature of the witness’ anticipated evidence.⁷³ A witness can also give testimony *outside of* Canada, via videolink, unless “one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.”⁷⁴

The constitutionality of § 486 was challenged and upheld by the Supreme Court of Canada in *R. v. Levogiannis*.⁷⁵ The witness involved was a victim of child abuse and, due to his fear of seeing the defendant, he was permitted to give testimony behind a screen which “would allow the complainant not to see the accused.”⁷⁶ The State’s interest in the physical and psychological well-being of the child witness was deemed an important interest that, in some cases, could outweigh the defendant’s right to face his accuser.⁷⁷ It is important to note, however, that the screen utilized blocked the witness’ view of the accused but not the accused’s view of the witness.⁷⁸

⁷² Criminal Code, R.S.C., ch. XV § 486(2.1) (2001) [reproduced at D4].

⁷³ Criminal Code, R.S.C., ch. XXII § 714.1 (2001)[reproduced at D5].

⁷⁴ Criminal Code, R.S.C., ch. XXII §714.2(1) (2001) [reproduced at D5].

⁷⁵ *R. v. Levogiannis*, [1993] 67 O.A.C. 321 [reproduced at A11].

⁷⁶ *Id.*

Notably § 714 lists factors that a court should consider when making an order for videolink testimony, yet, it is silent as to whether or not a witness must prove present or future harm as a result of testifying.⁷⁹ This could be construed as if the Canadian legislature intended to liberally apply the rule, yet caselaw indicates differently. Specifically, in *R. v. Young*⁸⁰ and *R. v. Raj*,⁸¹ videolink orders were denied to the witnesses involved. In *Young*, the judge denied the order because he was not satisfied that the witness would be “inconvenienced or that he is not fully accessible, plus the additional factor that the costs of requiring his attendance are not significantly more than would be incurred for the video conference.”⁸² Meanwhile in *Raj*, a videolink order was denied because it was perceived that taking evidence by that method would impact negatively on the defense’s ability to cross-examine the witness.⁸³ The defense had agreed to the use of videolink at the pretrial hearing but was dissatisfied with the result. The defense argued that it was difficult to observe the “body language” of the witness

⁷⁷ *See id.*

⁷⁸ *See id.*

An order under s. 486(2.1) simply blocks the complainant’s view of the accused and not vice versa. The wording of s. 486(2.1) merely provides that the screen ‘would allow the complainant not to see the accused’. The evidence is given and the trial is conducted in the usual manner, including cross-examination.

Id.

⁷⁹ *See supra* notes 74-75.

⁸⁰ *R. v. Young*, [2000] SKQB 419 [reproduced at A12].

⁸¹ *R. v. Raj*, [2002] B.C.D. 1563 [reproduced at A13].

⁸² *R. v. Young*, [2000] SKQB 419. The costs associated with providing videoconferencing elsewhere in Canada would be approximately \$400-\$500, while the cost of obtaining the witness’ presence at trial would be approximately \$800-\$1,200. *See id.*

⁸³ *R. v. Raj*, [2002] B.C.D. 1563.

due to the use of a single camera angle.⁸⁴ Without much reasoning, the court held that this was a sufficient burden upon the defense's ability to perform cross-examination.⁸⁵

iv. *New Zealand*

The New Zealand Bill of Rights Act of 1990 grants an accused with the right of examination of witnesses for the prosecution, but that right is not deemed to be absolute.⁸⁶ The legislature specifically granted a judge with permission to maintain a witness' anonymity with § 13 of the Evidence Act 1908.⁸⁷ Complete anonymity to witnesses however is not commonly used and more judges seem to rely upon the use of videolink or screens to protect a witness' interests.⁸⁸

In *Police v. L*,⁸⁹ three witnesses to gang violence were permitted to testify via videolink because they exhibited a credible and existing fear against the defendants.⁹⁰

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See Police v. L* [1997] D.C.R. 841 [reproduced at A14].

⁸⁷ *See Lusty, supra* note 9 at 400. § 13C(4) of the Evidence Act 1908 states that a judge may make an order permitting a witness to testify anonymously at trial if satisfied that:

- (a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
- (b) Either:
 - (i) There is no reason to believe that the witness has a motive or tendency to be untruthful, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
 - (ii) The witness's credibility can be tested properly without disclosure of the witness's identity; and
- (c) The making of the order would not deprive the accused of a fair trial.

Id.

⁸⁸ *See id.* at 401. "At the time of writing there had been at least three cases in which anonymity orders were made under the new scheme, but in none had any witnesses actually testified anonymously at trial." *Id.*

⁸⁹ *Police v. L* [1997] D.C.R. 841.

⁹⁰ *See id.* The defendants had been charged with the murder of a witness in another gang related trial and the witnesses were concerned that gang members would try to prevent the witnesses from giving evidence at this trial. *See id.*

Additionally, the court reasoned that the cost of obtaining appropriate security measures to secure the protection of the witnesses if they were to give testimony in-person would be extremely burdensome.⁹¹ The court stated that child witnesses in New Zealand are routinely afforded protection through the use of screens and videolink testimony and based on that, in appropriate cases, “the Court [ought to] exercise its inherent power to protect non-child witnesses, in non-sexually related cases.”⁹²

Similarly in *R. v. Dunnill*,⁹³ a witness requesting anonymity, and the use of either screens or videolink during testimony was granted the latter and not the former. This case involved gang violence and had strong implications of retribution and violence toward the witness. However, the judge pointed out that the accused already found out the witness’ name and because of that “there seems to [] be no particular reason why she should not give her name in open Court.”⁹⁴ Had the witness’ name not been known by the accused, the judge reasoned that after balancing all factors, he would have supported a full-blown witness anonymity order.⁹⁵

v. *South Africa*

A defendant, under South Africa’s Constitution § 35(3), has the right to a fair trial and the right to challenge evidence presented.⁹⁶ Similar to common law jurisdictions, the

⁹¹ *See id.* Protection measures would include obtaining secure accommodation for the three witnesses, security to escort them to and from court each day, security checks on all persons entering the court, and the deployment of bomb detection personnel to check the court and surrounds each day. *See id.*

⁹² *Id.*

⁹³ *R. v. Dunnill* [1998] 2 N.Z.L.R. 341[reproduced at A15].

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *See* 1996 (3) BCLR 402 (SE) [reproduced at A16].

right to challenge evidence is not absolute and any modification of a defendant's right to cross-examination does not necessarily violate his right to a fair trial.⁹⁷ In *Klink v. Regional Court Magistrate*,⁹⁸ a child witness, who was a victim of rape, requested to testify behind a screen or through an intermediary⁹⁹ so as to avoid any future mental stress or suffering. The Court held that the witness would be permitted to testify out of sight of the accused and that to do so would not infringe on any constitutional right of the defendant.¹⁰⁰

Like New Zealand, complete anonymity for witnesses, however, is not as easily obtained for witnesses. Despite open hostility towards witnesses, particularly under apartheid, South African courts have consistently refused to grant witnesses anonymity during the trial process.¹⁰¹ In *S. v. Leepile*,¹⁰² the Court refused anonymity to a witness despite the existence of publications openly calling for the assassination of known informants because there was no specific language in the Criminal Procedure Act granting the judge to authorize it.¹⁰³ In *S. v. Mangina*,¹⁰⁴ a parliamentary committee

⁹⁷ *See id.*

⁹⁸ 1996 (3) BCLR 402 (SE) [reproduced at A16].

⁹⁹ § 170(A) of the Criminal Procedure Act 51 of 1977 “empowers a court to appoint a competent person as an intermediary through whom a witness under the age of 18 years may give his or her evidence when it appears to the court that for the witness to testify in the normal manner would cause undue mental stress or suffering.” *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *See Lusty, supra* note 9 at 401.

¹⁰² 1986 (4) SA 187 *cited in* Lusty, *supra* note 9 at 402.

¹⁰³ *See Lusty, supra* note 9 at 402-03. § 153(2) of the Criminal Procedure Act of 1977 states:

If it appears to any Court in criminal proceedings that there is a likelihood that harm might result to any person, other than the accused, if he testifies at such proceedings, the Court may direct –

- (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the Court;

considered whether or not witness anonymity should be adopted for those who witnessed organized or violent crimes and who may fail to testify for fear of reprisals.¹⁰⁵ Parliament rejected complete anonymity, instead choosing to rely upon the witness protection program which was established by the Witness Protection and Services Act of 1998.¹⁰⁶ Reliance upon a witness protection program instead of providing anonymity is a costly alternative. Other countries, like New Zealand, faced with similar choices have opted for anonymity to avoid the extreme consequences that witness protection programs create.¹⁰⁷

vi. *European Court of Human Rights*

Articles 6(1) and 6(3)(d) of ECHR guarantees an accused with the right to a fair trial, including the “minimum” requirement” of a right to “examine or have examined” adverse witnesses.¹⁰⁸ The new Youth Justice and Criminal Evidence Act of 1999 provide “vulnerable witnesses” with the ability to give evidence by videolink or to give evidence in private.¹⁰⁹

(b) that the identity of such persons shall not be revealed or that it shall not be revealed for a period specified by the Court.

Id.

¹⁰⁴ 1994 (2) SACR 692 (C) *cited in* Lusty, *supra* note 9 at 403.

¹⁰⁵ *See* Lusty, *supra* note 9 at 403.

¹⁰⁶ *See id.*

¹⁰⁷ *See* R. v. Dunnill, [1998] 2 N.Z.L.R. 341.

I think it unreasonable to suggest that the secret witness should be protected in terms of the witness protection program . . . [t]his would involve . . . a change of identity, a relocation within New Zealand or perhaps out of New Zealand, and a substantial severing of connection with family, 349 friends and support networks. I think that that is too big an ask of someone in the position of the [witness] here.

Id.

¹⁰⁸ *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, art. 6. [hereinafter ECHR] [reproduced at D6].

¹⁰⁹ *See* Conference Report, *Protecting Victims of Crime in the European Union*, (November 2001) at <http://www.victimology.nl/erareportnov20011.pdf> [reproduced at B6].

Whether a witness obtains complete anonymity however seems to be granted on a case-by-case basis. The Court, in reviewing convictions, has looked to see if the conviction resulted wholly or partially upon anonymous witness testimony. For example, in *Kostovski v. Netherlands*,¹¹⁰ the EC overturned a judgment against a defendant based primarily upon two anonymous civilian witnesses. The Court reasoned that to rely solely upon such evidence without providing the defense an opportunity to learn the identity of the witnesses deprives the defendant of any opportunity for effective cross-examination.¹¹¹ In *Doorson v. Netherlands*,¹¹² however, the Court upheld a conviction for the defendant based partially on the evidence of two civilian witnesses. The Court determined that the witnesses demonstrated a genuine fear of reprisal if they were to testify without protection. It reasoned that a fear of reprisal could warrant an order for anonymity without violating a defendant's right to a fair trial if two conditions were met:

The first condition is that the handicap to the accused from witness anonymity must be 'sufficiently counterbalanced by the procedures followed by the judicial authorities' to enable 'the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on [their] reliability'. The second and overriding condition is that 'even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based wither solely or to a decisive extent on anonymous statements'.¹¹³

The cases stemming from the ECHR demonstrates the concern that the court has for conducting and providing the appearance of a fair trial. While the defendant's right to confront witnesses is an important component of the notion for a fair trial, the ECHR,

¹¹⁰ (1989) 12 EHRR 434 cited in *Lusty*, *supra* note 9 at 411.

¹¹¹ *See id.* "If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable." *Id.*

¹¹² (1996) 22 EHRR 330 [reproduced at A17].

¹¹³ *Id.*

similar to other international forums, has deemed that the trial as a whole must also be fair. This is exemplified in *Kurup v. Denmark*.¹¹⁴ During the trial, the defendant did not have access to the witnesses' identities, nor was he present in the courtroom when the witnesses gave evidence.¹¹⁵ Despite this however, the ECHR ruled that since the defendant's lawyer had access to the witnesses' identities, the right to a fair trial was not violated, even though the defendant's lawyer could not reveal the witnesses' identities to the defendant.¹¹⁶

vii. *Germany, Denmark, and Israel*

The right to a fair trial is not as thoroughly guaranteed nor safeguarded in various civil law countries as it is in common law countries. For example, in Germany, a witness' identity can be kept anonymous throughout the entire criminal process.¹¹⁷ Witness credibility and evidentiary relevance are left to the discretion of the presiding judge and the defendant's lawyer is not provided with an opportunity to assess the witness' credibility for himself.¹¹⁸ Similarly in Denmark, the Supreme Court has held that where a witness' life and safety is endangered by giving evidence, the witness will not be compelled to testify, but if the witness insists on giving such testimony, then that witness shall receive anonymity from the court.¹¹⁹ This is consistent with the Denmark Act on Court Procedure which "does not make explicit whether the accused has the right

¹¹⁴ (App. No. 11219/84) *cited in* Amicus Brief, *supra* note at 7.

¹¹⁵ *See* Amicus Brief, *supra* note 7 at 203.

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 199

¹¹⁸ *See id.*

¹¹⁹ *See id.*

to know the identity of prosecution witnesses.”¹²⁰ The Israel Evidence Ordinance of 1979, § 10A(b) allows an anonymous written statement of a person to be entered into evidence provided that the person is not a witness before the court and that court is satisfied that the person was dissuaded or prevented from testifying in person.¹²¹ Just like in the ECHR however, Israeli courts refuse to convict a defendant on the basis of this type of evidence alone, it would require other supporting evidence to support the anonymous statement.¹²²

viii. *The International Criminal Court (ICC)*

The Rome Statute provides that an accused brought before the ICC is to be provided with a fair trial, consisting of the right to counsel, the right to examine witnesses and the right to remain silent.¹²³ The right of an accused to examine witness, however, is not meant to be interpreted strictly. Articles 64 and 69 of the statute allow judges to make independent rulings on the relevance and/or admissibility of any evidence.¹²⁴ For example, the Court may allow testimony to be given “*viva voce*, recorded testimony by means of video or audio technology as well by introduction of documents or written transcript.”¹²⁵ These protective measures are specifically made subject to Rule 68 which

¹²⁰ Amicus Brief, *supra* note 7 at 199.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See* Rome Statute, art. 67 [reproduced at D7].

¹²⁴ Rome Statute, art. 64 and 69 [reproduced at D7].

¹²⁵ Rome Statute, art. 69.2 [reproduced at D7].

states that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹²⁶

Recognizing the importance of safeguarding witnesses in need, the Rome statute designates the ICC with the power to create a Victims and Witness Unit (VWU) which provides protective measures and appropriate assistance to “others who are at risk on account of testimony by such witnesses.”¹²⁷ The VWU will provide protective measures to witnesses, others who are at risk on account of testimony given by such witnesses and victims who appear before the Court.¹²⁸ Most protective measures will occur at the trial stage and even “witnesses who are testifying on behalf of the same party will not [have to] be in a position to have their identities disclosed to each other.”¹²⁹ Using the VWU in this manner is also consistent with similar arrangements in the ICTY and the ICTR:

At the ICTY and ICTR, either party, victim or witness concerned or the victims and witness unit itself may request measures such as *in camera* hearings or one-way closed circuit television. The victims and witnesses units may also request that the Court expunge identifying materials from the record, insure non-disclosure of the records, use image or voice altering devices, or assign pseudonyms to a witness. Witnesses requiring additional protective measures at the ICTY were 103 in 1999 and 143 in 1998, and 83 at the ICTR in 1999 and 32 in 1998.¹³⁰

ix. *The International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR)*

¹²⁶ Rome Statute, art. 68 [reproduced at D7].

¹²⁷ Rome Statute, art. 43.6 [reproduced at D7].

¹²⁸ See Thordis Ingadottir, Francoise Ngendahayo & Patricia Viseur Sellers, *The International Criminal Court: The Victims and Witnesses Unit (Article 43.6 of the Rome Statute) A Discussion Paper*, 25 (March 2000) at www.pict-pcti.org/publications/VWU.pdf. [reproduced at B7].

¹²⁹ *Id.*

¹³⁰ *Id.*

The Yugoslav statute also provides an accused with the right to a fair and public trial, including the right to examine or have examined witnesses against him.¹³¹ The statute, however, states that these rights are “subject” to article 22 which requires special protection measures for victims.¹³² These protection measures “shall include, but not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.”¹³³ Similarly, the ICTY Rules of Procedure and Evidence reflects the importance of witness protection as exemplified in the ICTY statute. Sub rule 69(c) states that “the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.”¹³⁴ This rule, however, is subject to Rule 75 which allows a judge to “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.”¹³⁵

The most significant case for the protection of victims’ rights in the ICTY is *Prosecutor v. Tadic*.¹³⁶ In *Tadic*, the tribunal held that the identities of certain witnesses could be withheld from the accused in order to protect those witnesses and ensure conditions more favorable to eliciting testimony from victims.¹³⁷ Anonymity was deemed warranted due to the “exceptional circumstance[s]” of the enduring conflict and

¹³¹ See ICTY Statute, rule 21(2) [reproduced at D8].

¹³² See ICTY Statute, rule 22 [reproduced at D8].

¹³³ *Id.*

¹³⁴ ICTY Rules of Procedure and Evidence, rule 69(c) [reproduced at D9].

¹³⁵ ICTY Rules of Procedure and Evidence, rule 75 [reproduced at D9].

¹³⁶ *Prosecutor v. Tadic*, Case No. IT-94-I (Trial Chamber, ICTY, Aug. 10 1995), at <http://www.un.org/icty/ind-e.htm> [reproduced at A18].

¹³⁷ See *id.*

because there was more than a generalized concern of witness safety that existed.”¹³⁸

Additionally, the tribunal was concerned about the availability of witnesses for the trial if protection was not secured. The tribunal therefore linked “the integrity of the fact-finding process with the physical and psychological security of witnesses and victims.”¹³⁹

The *Tadic* court established a five-part test for determining whether a witness qualifies for anonymity:

- (1) that there be a ‘real fear for the safety of the witness or her or his family,’
- (2) that the testimony be important to the prosecutor’s case, (3) that there be ‘no prima facie evidence’ of untrustworthiness, (4) that the witness not be a part of an effective witness protection program, and (5) that measures taken be ‘strictly necessary.’¹⁴⁰

Relying on this test, the *Tadic* court awarded anonymity to the requesting witnesses in the form of withholding names and other identifying data from the defense, as well as using voice and image altering devices for some witnesses.¹⁴¹

The *Tadic* dissent however, focused upon the disadvantage to the defense by not being able to know the identity of the prosecution’s witnesses. It was this dissent that the tribunal focused upon in *Prosecutor v. Blaskic*.¹⁴² While ultimately agreeing with the holding in *Tadic*, the *Blaskic* tribunal denied shielding the witnesses’ identity from the defendant. The tribunal feared that, due to the high profile nature of the defendant, the

¹³⁸ *See id.*

¹³⁹ DeFrancia, *supra* 6 at 1414. The majority held that “the ICTY was not bound to observe the standards established by decisions of other international bodies interpreting the right to a fair trial because of the ICTY’s status as an ad hoc institution ‘comparable to a military tribunal, which often has limited rights of due process’. Lusty, *supra* note 9 at 335.

¹⁴⁰ *Tadic*, *supra* note 137.

¹⁴¹ *See id.*

¹⁴² *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, (Trial Chamber I, ICTY, Mar. 2, 2000), at <http://www.un.org/icty/judgement.htm>.

use of anonymous witnesses in the trial would have brought about increased speculation and criticism about the trial.¹⁴³ This same reasoning can be found in later cases involving high profile defendants such as *Brdanin & Talic*.¹⁴⁴ In these scenarios, the notion of “fair trial” and the appearance of such requires placing the rights of the accused ahead of requests for witness anonymity. Thus, while the ruling of *Tadic* still remains persuasive authority for the ICTY, the movement has, in some circumstances, been away from the use of anonymous witness testimony.¹⁴⁵

The right of the accused to examine witnesses in the ICTR however, has, historically, been given more weight by the tribunal. ICTR rule 69(c) states that “the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time to prepare for preparation of the prosecution and the defence.”¹⁴⁶ Unlike the ICTY, this rule is given preference over the ICTR rule 75 which provides protective measures for witnesses.¹⁴⁷ The ICTR places great emphasis on the Witness Management Unit to provide for witness and victim safety rather than extending protective measures inside of the courtroom. This reliance on the Witness Management Unit is significant because it provides the message that, despite the continuing hostility in

¹⁴³ See DeFrancia, *supra* note 7 at 1418.

¹⁴⁴ See Prosecutor v. Brdanin & Talic, Case No. IT-99-36 (Trial Chamber II, ICTY, July 3, 2000), at <http://www.un.org/icty/ind-e.htm>.

¹⁴⁵ See DeFrancia, *supra* note 7 at 1420.

¹⁴⁶ ICTY rule 69(c).

¹⁴⁷ See ICTR rule 75 states: “A Judge or a Chamber may . . . order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused. . . . Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as: (a) expunging names and identifying information from the Tribunal’s 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. *Id* [reproduced at D10].

the environment, “witness vulnerabilities do not require that the identities of the witness be permanently withheld from the accused.”¹⁴⁸

C. Efficiency Considerations Associated With Courtroom Technology

Devices utilized for anonymity purposes, such as screens and distortion equipment, have minimal costs associated with them. Where the technology has been employed, videolink technology in particular, has been a way to conserve judicial resources without dramatically altering the judicial process.¹⁴⁹ Besides using the technology in trials for vulnerable witnesses, videolink technology has also been used in arraignments of defendants.¹⁵⁰ This was the case with the arraignment of the alleged Unabomber, Theodore J. Kaczynski. Instead of transporting the defendant from prison in Sacramento, California for his arraignment in a New Jersey federal court, videolink was used. This method saved the court time and money—the videolink arraignment cost about \$45, whereas the estimated costs of transporting the defendant would have exceeded \$30,000.¹⁵¹ The United States is not the only country using videolink for this purpose. Videolinks have now been set up in 80 of the 133 magistrates courts in England and Wales and are used to offset the cost of ferrying prisoners to and from court for preliminary hearings.¹⁵² In the preliminary hearing of Maxine Carr, the use of videolink

¹⁴⁸ DeFrancia, *supra* note 7 at 1422.

¹⁴⁹ *See generally*, Lederer, *supra* note 1.

¹⁵⁰ *See* Roth, *supra* note 3 at 187. “Currently, the judiciary’s use of videoconferencing generally ‘appears to be more acceptable for earlier, shorter, low visibility steps of the criminal justice process (bookings, lineups, first appearances, arraignments).’” *Id.* at 187.

¹⁵¹ *See id.* at 190-91.

¹⁵² *See* Peter Allen, *Maxine Avoids Trip To Court: Girlfriend in Video link From Holloway Prison*, DAILY MAIL, Aug. 29, 2002 [reproduced at C4]. It is estimated that 5 million pounds of taxpayer money is spent for this purpose a year.

saved the court an estimated 20,000 pounds in addition to lessening the chances of public disorder that might have resulted due to the defendant's presence at court.¹⁵³

Often videolink is utilized when a witness lives outside of the court's jurisdiction and it would be either to burdensome, financially or physically, to transport the witness to the courtroom to provide testimony. For example, in *Harrell v. State*,¹⁵⁴ the court granted permission for witness testimony to occur via videolink as long as the procedure is "(1) justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation—oath, cross-examination, and observation of the witness's demeanor."¹⁵⁵ Additionally, Canada's revised Criminal Code allows for the use of video testimony, rather than in-person witness testimony in similar situations.¹⁵⁶ Last year, a Canadian court permitted videolink testimony from more than a dozen witnesses in different countries in the trial of two defendants charged with Internet fraud.¹⁵⁷ Due to the use of the technology, the judiciary saved a tremendous amount of money and the witnesses were not terribly inconvenienced.¹⁵⁸ The Melbourne Magistrates Court contemplated a witness' financial

¹⁵³ *See id.*

¹⁵⁴ 709 So.2d 1364 (Fla. 1998) [reproduced at A19].

¹⁵⁵ *Id.* at 1369. Where a motion to present testimony via videolink is brought, it is imperative for the party bringing the motion to "(1) verify or support by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing and (2) establish that the witness's testimony is material and necessary to prevent a failure of justice." *Id.* at 1371.

¹⁵⁶ *See id.*

¹⁵⁷ *See* Mike McIntyre, *Pair Guilty In High-Tech Case Watched By World's Legal Eyes*, WINNIPEG FREE PRESS, May 19, 2001 [reproduced at C5].

¹⁵⁸ *See id.* "Instead of buying plane tickets, hotel rooms and meals for all the witnesses to come to Winnipeg and testify, the Justice Department can reduce costs by keeping the people in their home towns to testify. For the price of a long-distance phone call, and perhaps some rented studio space, prosecutors can

and time limitations last year during the trial of Konrads Kalejs, who was allegedly involved in the Latvian Holocaust experience during the Second World War.¹⁵⁹ The defendant's only witness, Andrew Ezergailis, petitioned the court to testify via videolink—the use of a videolink to the US from Australia would have cost about \$2000 an hour.¹⁶⁰ These considerations were taken under advisement by the magistrate

D. Conclusion

For the above reasons, the Rwandan tribunal should consider utilizing courtroom technology for the purpose of witness protection. Various countries have used videolink, voice and image distortion, screens, and pseudonyms as protective measures for those giving testimony under duress and fear. Using these devices to protect witnesses, in most circumstances, has been an acceptable way to ensure a fair trial to all parties and has not been an overly excessive burden upon an accused's right to examine the witnesses against him. Moreover, the financial costs associated with such measures are minimal, thus increasing the attractiveness of the option.

effectively build their case without huge expenses and inconveniences for its witnesses. . . . All witnesses, either through video or audio, were subjected to the usual rigours of direct and cross-examination.” *Id.*

¹⁵⁹ See Toby Hemming, *US Holocaust Expert To Give Evidence For Kalejs*, THE AGE, April 28, 2001 [reproduced at C6].

¹⁶⁰ See *id.*