

Case Western Reserve University School of Law

**Memorandum for the
Office of the Prosecutor**

**ISSUE: Witness protection
#19**

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I. Introduction and Summary of Conclusions.

A. Issues

This memorandum is a comparative study of the rules of procedure and evidence in a representative number of common law and civil law jurisdictions. The specific focus of this survey is on the rules of procedure and evidence that help reduce the trauma of witnesses, especially in relation to rape. At all times, the memorandum will focus on those rules that protect the witness while not impinging upon the rights of the accused.¹

B. Necessity for rules of procedure and evidence that reduce the trauma of witnesses, especially rape victims.

The existence of witness friendly rules of procedure and evidence not only minimize the psychological trauma for witnesses, it also serves several important judicial goals. The successful conviction of a criminal in both common law and civil law countries is extremely dependant upon the cooperation of witnesses. This dependence is particularly acute in sexual assault cases since most crimes of sexual violence do not occur out in the open. Even when committed in the context of war, when prosecuting rape, courts must depend almost exclusively on the statement of the victim or a co-conspirator. Witnesses will be more likely to come forward if the prosecutor can ensure their physical and mental well-being. The high occurrence and prevalence of sexual crimes will not be reduced until impunity for the perpetrators becomes less pronounced through higher convictions and stronger punishments.

¹ Issue # 19: Examination of witnesses- Complete a comparative study of rules of procedure and evidence available in a representative number of common law and civil law jurisdictions to reduce the trauma of witnesses, particularly in relation to rape, that do not impinge upon the rights of defense.

In the International Tribunal for the Former Yugoslavia, (ITCY) prosecutors learned quickly just how dependent they were on witnesses for their success. The first criminal brought to trial was Dusko Tadic. The indictment against him accused Tadic of participating in and aiding and abetting the commission of rape, gang rape, sexual mutilation and other sexual violence.² Unfortunately, the prosecutor was forced to remove the rape charges after its only rape witnesses suddenly refused to testify. She explained that she was no longer willing to tell her story because there had been threats against herself and her family.³ The rape charge failed because there were no willing living witnesses.

The ability of a judicial body to protect witnesses gives the court power and legitimacy. In order to administer justice a court or tribunal must be taken seriously if it is to have a maximum deterrent effect against future crimes. If criminals are able to stop witnesses from testifying by harming their families, intimidating them in the courtroom, sullyng their reputation or by any other means, then the judicial process will become ineffective. A court's legitimacy will suffer if either victims and witnesses or defendants are harmed.⁴

Since legal systems around the world vary depending on their history and culture, each has different rules of procedure and evidence that protect witnesses. This memo will broadly explore the protections afforded witnesses in civil law countries including

² Prosecutor v. Tadic, IT-94-1, Trial Second Amended Indictment, counts 2-4, 8-9 (Dec 14, 1995), <http://www.un.org/itcy/indictment/english/tad-2ai951214e.htm> (accessed September 15, 2002) reproduced in notebook tab # 1

³ Rana Lehr-Lehnardt, *One Small Step for Women: Female Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. Pub. L. 317 (2002) reproduced in notebook tab # 2
William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*, 12 St. John's J. Legal Comment 449, 457 (1997). Reproduced in notebook tab # 3

⁴ Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 49 Hastings L.J. 909, 932 (1995). Reproduced in notebook tab # 4

France, Germany, Denmark and Israel; common law countries including the United States, Canada, New Zealand, United Kingdom, and Australia; and military/international courts including the ITCY, the International Criminal Court, and the European Court of Human Rights. The rules of procedure and evidence can be divided into three broad categories; witness anonymity, rape shield provisions/limits on cross-examination, and outside victims support.

Witnesses in rape and sexual assault cases should be granted varying degrees of witness anonymity. Since the Tribunal does not have the resources to provide witnesses with police protection or witness relocation program, witness anonymity is the only way that the Tribunal can guarantee a witnesses' safety.

The second way that the Tribunal can protect witnesses' is by limiting cross-examination. With respect to rape victims, questions about their sexual history or general morality should not be allowed. Judges should also limit the tone and kinds of questions from the defense in order to stop the accused from unduly intimidating the witness.

Lastly, the Tribunal can provide counseling and other services to make rape witnesses more comfortable. These provisions are directly linked to the amount of resources available to the Tribunal. While such provisions would greatly reduce trauma to witnesses, increasing such services is unlikely. Perhaps a wealthy non-government organization could step in to fill these gaps.

II. Legal Discussion

A. The Rights of the Accused

A survey of the rules of procedure and evidence in countries around the world reveals a wide variety of methods to reduce the trauma of testifying for witnesses. In all

jurisdictions the legislature and courts work to ensure that the protection of witnesses does not impinge upon the rights of the accused. The rights of the accused vary depending upon whether it is a civil law country, common law country or a military tribunal. This paper will focus on the rights of the accused, as they exist in the International Criminal Tribunal for Rwanda. The Statute and Rules of Procedure and Evidence for the Tribunal is basically the same as the Statute and Rules for the International Criminal Tribunal for Yugoslavia. Both purport to be a blend of traditions from the common as well as civil law traditions.

According to Article 21 of the Statute for the International Tribunal for Rwanda, the accused has a right to examination. Section e states that the accused has the right to: “examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”⁵ While the Tribunal also assigns other rights to the accused, the right to cross-examine and confront witnesses is the right that most impacts how witnesses are treated.

Much of the work of the ITCY has been centered around ascertaining exactly what the right to cross-examine encompasses. The largest point of contention that the Tribunal judges have argued over is which sources of law should dictate the rights of the accused. This debate has been especially acute in the ITCY. Some ITCY Judges and scholars argue that the Statute and Rules of Procedure and Evidence should be interpreted with internationally recognized standards. Submissions to the Secretary General in the United Nations on drafting the Statute all asked that basic human rights guarantees,

⁵ Statute of the International Tribunal for Rwanda.. <http://www.ictt.org/wwwroot/ENGLISH/basicdocs/statute.html#20>, article 20§ e. (visited September 15, 2002) reproduced in notebook tab # 5

including those articulated in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) be applied and included. However, in the course of deciding whether or not to accept the prosecutions motion for witness protection, the ITCY majority rejected the idea that “the case law of other international judicial bodies interpreting the right of an accused to a fair trial establishes the minimum standards which must be preserved in all judicial proceedings, including those of the International Tribunal.”⁶

The scope of the rights of the accused in the ITCY depends upon which side of the debate is stronger. If it is accepted that the Tribunal has the power to interpret the Statute itself, then it is up to the Judges how the rights of the accused embedded in the ITCY will be interpreted. On the other hand, if the ICCPR is accepted as the lowest threshold for the rights of the accused then Article 14 and the interpretations of that right by the Human Rights Committee governs.

Article 14 (3) (d)- (e) of the ICCPR states:

In determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

⁶ Legal scholars and Tribunal judges are split on whether to follow Judge McDonald’s assertion that the Tribunal should interpret the rights of the accused on their own or Judge Stephens (and the Secretary General’s) belief that rights of the accused are determined by internationally accepted standards and the International Covenant on Civil and Political Rights. The debate is so large that a proper analysis of the rights of the accused cannot be completed in this memo, but might be a valuable topic for future researchers. See generally:
Natasha A. Affolder, *The Sources of International Procedural Law: Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int’l L. 445 (1998) reproduced in notebook tab # 6
Monroe Leigh, *Editorial Comment: Witness Anonymity is Inconsistent with Due Process*, 91 A.J.I.L. 80 (1997) reproduced in notebook tab # 7
Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 Int’l Legal Persp. 111 (1998) reproduced in notebook tab # 8
Antonia Sherman, *Sympathy for the Devil: Examining A Defendant’s Right to Confront Before the International War Crimes Tribunal*, 10 Emory Int’l L. Rev. 833 (1996) arguing against the ICCPR being the lowest threshold. She acknowledges that the Secretary-General wanted the applicable standards governing the rights of the accused to be those found in the ICCPR. However she asserts that the ICCPR only governs a state and since the ITCY is not a state, it cannot accede to the ICCPR and is not obligated to follow it. Reproduced in notebook tab # 9

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing....

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 witnesses against him.⁷

The Human Rights Committee (HRC) interprets and applies the ICCPR.

According to the HRC, Article 14 (3) (e) was “designed to guarantee to the accused the same legal powers of compelling attendance of witnesses and of examining or cross-examining any witness as are available to the prosecution.” In several cases the HRC attempted to flesh out exactly what Article 14 encompasses. In *Antonaccio v Uruguay*, the HRC found that the complainant’s Article 14 rights were violated by a trial held in absentia. They ruled this way because he was unable to present his own witnesses, but also because he was unable to cross-examine the witnesses against him.⁸

The HRC’s evaluation of Article 14 has not expressly ruled that the right to confront a witness under the ICCPR encompasses a right to direct confrontation. It is easy to understand why they would not draw this conclusion. The ICCPR is designed to provide minimum guidelines for both civil and common-law countries. Given the fact that the legal traditions of many of the countries party to the ICCPR vary so widely, the HRC has chosen to guarantee rights that fit into the framework of both systems.

The right to confront and examine witnesses against the accused is one that exists in many legal traditions around the world. Striking a balance between the need to protect witnesses and the right of the accused to examine them is an issue that judges around the world struggle with.⁹

⁷ International Covenant on Civil and Political Rights, *reprinted in* United Nations, Human Rights: A Compilation of International Instruments 24-25. reproduced in notebook tab # 10

⁸ Antonia Sherman, 854. reproduced in notebook tab # 9

⁹ *Id.* At 854-856.

B. Rules of Procedure and Evidence that reduce the trauma to witnesses around the world: Witness anonymity

For many witnesses, especially those who are also victims of rape, the prospect of being identified by their attacker or the public at large holds them back from testifying at trial. Some fear that if their attacker discovers their identity they will harm them or their families. In certain communities, victims feel tremendous shame and embarrassment when members of their community learn that they were sexually assaulted through media or court publications. Fear of becoming an outcast or suffering further humiliation often stops them from testifying.¹⁰

The anonymity of witnesses can be preserved to varying degrees. A court may choose to not protect a witness' identity at all by allowing the publication of witnesses' names in the indictment and all public documentation. This would include publication of their names by the media. Some jurisdictions choose to preserve a witness' anonymity in the media and in public documentation by only allowing those formally involved in the trial to have access to the identity of witnesses. Any information including means of identification such as photographs or sketches of witnesses would be removed from all public records. The media would also be prohibited from publishing information about witnesses.¹¹

A court can also choose to keep the identity of witnesses from the accused. By denying the accused access to the names or identifying features of witnesses the court can

¹⁰ Jocelyn Campanaro, *Women War and International Law: The Historical Treatment of Gender Based War Crimes*, 89 Geo. L.J. 2557 (2001) this article addresses the effects of rape generally, reproduced in notebook tab # 11

¹¹ Simon Bronitt, *The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the Rape Shield?*, 8 Crim. L.F. 259 (1997) reproduced in notebook tab # 12

preserve the witnesses' anonymity. Testimony could be with technology that alters the witnesses' voice, from behind a screen or with closed circuit televisions in order to keep the witnesses' identity from the defendant. Court officials, including the judges of the court or tribunal would have the witness' information. In some circumstances the identity of the witness would be kept from the perpetrators' attorneys as well.¹²

Judicial bodies in common and civil law countries have grappled with exactly how and when to grant witness anonymity and to what degree. An examination of the rules developed in a representative number of civil and common-law countries reveals a general pattern. In most countries the question of when to grant witness anonymity and to what extent requires striking a balance between the threat to the witness and the rights of the accused.

Common Law Countries

Britain's treatment of witness anonymity and confidentiality measures

Through court rulings and legislation from Parliament, England and Wales offer witnesses levels of anonymity depending upon the circumstances of the case. According to the Victim's Charter, if a person has been raped or sexually assaulted their identity will

¹² The information from this section was gathered from several sources including:
Simon Bronitt, *The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the Rape Shield?*, 8 Crim. L.F. 259. (1997) reproduced in notebook tab # 12
Christine Chinkin, *International Tribunal for the Former Yugoslavia: Amicus Curiae Brief on Protective Measures for Victims and Witnesses*, 7 Crim. L.F. 179 (1996) reproduced in notebook tab # 13
Due Process and Witness Anonymity, 91 A.J.I.L. 75 (1997) reproduced in notebook tab # 13
Rana Leher-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. Pub. L. 317 (2002). Reproduced in notebook tab # 2
Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57 (1999) reproduced in notebook tab # 14
William T. Pizzi, *Crime Victims in German Courtrooms*, 32 Stan. J. Int'l L. 37 (1996). Reproduced in notebook tab #15
Prosecutor v Dusko Tadic, Case No. IT-94-1-T, reprinted in 7 Crim. L.F. 139 (1996), 105 ILR 599 (1997).
United Kingdom Home Office, *Victim's Charter*, <http://www.homeoffice.gov.uk/cpd/pvu/vichap.htm> (accessed September , 2002) reproduced in notebook tab # 16

not be revealed in court, ever. It is a criminal offence for anyone to publish the name, address, photograph or other details of a rape or sexual assault victim.¹³

Some witnesses are permitted to give evidence under pseudonyms and from behind screens with their voices disguised through voice-distortion equipment. A series of cases established how judges should evaluate when to allow testimony under such circumstances. In *Regina v D.J.X., S.C.Y. and G.C.Z.*, the Court of Appeals focused on the judge's duty to ensure that justice was served. According to the opinion, "the learned judge has the duty on this and on all other occasions of endeavoring to see that justice is done... What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies."¹⁴ The court in *Regina v D.J.X., S.C.Y. and G.C.Z.* believed that the decision to allow a witness to testify behind a screen and with voice alteration was largely up to the judge's discretion.

A few years later another British court developed a more detailed test to decide when to grant anonymity. The test in *Regina v Watford Magistrates Court ex parte Lenman and Others* involved assessing the risk to the administration of justice with the witnesses' fear for their safety. The bench must be satisfied that there was a real risk to the judicial process because a witness on reasonable grounds feared for his safety. When this happened, then it was within the judges' powers to take appropriate steps to ensure the witness's safety.¹⁵

¹³ United Kingdom Home Office, "Victim's Charter," <http://www.homeoffice.gov.uk/cpd/pvu/vichap.htm> (accessed September 15, 2002). Reproduced in notebook tab # 17

¹⁴ *R. v. D.J.X., S.C.Y and G.C.Z.*, 91 Cr. App. R. 36, 40 C.A. 1990 reproduced in notebook tab # 18

¹⁵ *Regina v. Watford Magistrates Court ex parte Lenman and Others*, T.L.R. 285, (1992) reproduced in notebook tab #19

The court allowed three witnesses to testify anonymously in a murder trial in the case of *Regina v Brindle and Brindle*. According to this case the test for granting such anonymity centered on whether:

There is a real danger that a witness will not give evidence because of a genuine fear of the consequences if his identity becomes known, then the witness must be given such protection as the Court is able to provide. I use the word ‘genuine fear’ as opposed to ‘justified fear’ because it seems to me that it is the state of mind of the witness, which is vital. If he is afraid, and if that fear is genuine, then it is not conclusive that no direct threat has been made to him. It seems to me (the judge_ sufficient if he genuinely fears retribution and that fear may stem from what some might call rumor or gossip....¹⁶

This test elicited criticism for reflecting so little consideration for the rights of the accused. Later courts fine-tuned this approach to witness anonymity to reflect the needs of the defendant as well as his accusers.

Applying *Regina v Watford Magistrates Court ex parte Lenman and Others*, the court in *Regina v Taylor* found that the right to see and know the identity of witnesses could be denied in “rare and exceptional circumstances” only. It also established guidelines for judges when they considered whether or not they should allow a witness’ identity to be kept from both the public and the accused.

1. There must be real ground for fear of the consequences if the evidence were given and the identity of the witness was revealed.
2. The evidence must be sufficiently relevant and important to make it unfair to make the Crown proceed without it.
3. The Crown must satisfy the court that the creditworthiness of the witness has been fully investigated and disclosed.
4. The court must be satisfied that there would be no undue prejudice to the accused although some prejudice is inevitable, even if it is only the qualification placed on the right to confront the witness as accuser.
5. The court should balance the need for protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness.¹⁷

¹⁶ *Regina v. Brindle and Brindle* T.L.R. 345 (1985). Reproduced in notebook tab # 20

¹⁷ *Id.*

Britain's Criminal Justice Act provides for an even more extreme form of anonymity for a witness. According to the Criminal Justice Act, 1988 section 23 (1) a statement made by a witness can be admissible in court as a substitute for the witnesses actually testifying when: "the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders and *the person who made it does not give oral evidence through fear or because he is kept out of the way.*"¹⁸ Attorneys for the defense would obviously prefer that a witness testify from behind a screen with voice alteration, than have their statement read in court. The anonymity granted under this provision of the Criminal Justice Act completely deprives the accused' right to confront through cross-examination.¹⁹

Degrees of Anonymity in Australia

The controlling case in Australia concerning when the court may conceal the identity of its witness from the accused is *Jarvie and Another v. Magistrates Court of Victoria*. While the case concerns a claim for anonymity for an undercover police operative, the Judge expressly noted that the ruling was not limited to police operatives. The decision applied "to other witnesses whose personal safety may be endangered by the disclosure of their identity."²⁰ The opinion draws a parallel between witness anonymity and the principles of exclusion of evidence based on public interest immunity.

¹⁸ Criminal Justice Act 1988, Ch. 33, s. 23 (Eng) reproduced in notebook tab # 21

Natasha A. Affolder, *The Sources of International Procedural Law: Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int'l L. 445, 456. (2002) reproduced in notebook tab # 6

Christine Chinkin, Amicus Brief, reproduced in notebook tab # 13

¹⁹ Many legal scholars have criticized this provision arguing that the impact on the rights of the accused is too extreme. In practice, the author was unable to find a case that used the Criminal Justice Act 1988 section 23 (1). "If witnesses to truly terrifying events...are not prepared to be identified in Court, but are prepared to attend and testify from behind a screen, it is in the interests of justice that there should be a power to allow them to do so." Comment [1993] Crim. L. Rev. 389, 390.

²⁰ *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others* [1994] 84, 99 S. Ct. Vict. Reproduced in notebook tab # 22

In Australia, certain documentary evidence can be excluded if their disclosure is contrary to public interest. This precedent was set in the case of *Duncan v. Cammell, Laird & Co Ltd.*²¹ The court in *Jarvie*, found that the principles in that case applied to oral as well as documentary evidence. According to the opinion the relevant factors in witness anonymity is whether there is a real threat of danger, injury, or death to the witness and the non-effectiveness of witness protection programs.

The *Jarvie* court emphasized weighing all factors against the value of knowing the identity of the witness to the preparation of the defense. If there was good reason to believe that disclosure of the witness' identity may be of substantial assistance to the defendant in preparing their case then witness anonymity should not be granted in Australian courts. However, the court pointed out that if knowing the witness' identity would only be of slight assistance then it should be granted. The Australian court emphasized that anonymity will not be granted lightly. It disregarded reasons such as the prevention of embarrassment to the witness, invasion of privacy or personal damage as a result of media coverage.

The Australian Evidence Act 1989 makes provisions for "special witnesses." A special witness is "a person who in the court's opinion would be likely to suffer severe emotional trauma or would be likely to be so intimidated as to be disadvantaged as a witness."²² The Act allows for special arrangements to be made for the giving of

²¹ M.I. Aronson, N.S. Reaburn, M.S. Weinberg, *Litigation Evidence and Procedure* 180 (Butterworths 1979). 24 reproduced in notebook tab # 23

²² Evidence Act Amendment, Section 21A(1)(b), (1989)(Austl.) 25 reproduced in notebook tab # 24
Natasha A. Affolder, *The Sources of International Procedural Law: Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int'l L. 445, 456 (2002) reproduced in notebook tab # 6

evidence by these witnesses including exclusion of the public or the defendant from the court. It also allows for the admission of videotaped testimony instead of direct.²³

The United State, the Sixth Amendment and grants of anonymity

In general United States courts shy away from granting witness confidentiality or anonymity except where children are involved. The Sixth Amendment of the United States Constitution ensures that the accused has the right to confront any witnesses against him. The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him” which courts have found, “means more than being allowed to confront the witness physically.”²⁴ “The main and essential purpose of confrontations is to secure for the opponent the opportunity of cross-examination.”²⁵ The United States grant of a right to confrontation is different than the ITCR’s right to examination.

Courts in the United States extremely reluctant to impinge upon this right and therefore rarely grants any degree of witness anonymity. However, there are several Federal court cases in which the court has recognized that the rights afforded by the Sixth Amendment are not absolute. The rulings in these cases are narrow and usually concern releasing the address of a witness or his/her family’s address. Testimony under pseudonyms, behind screens or with voice alteration has not been allowed except when the witness was a child or someone with diminished mental capacity.

In *Delaware v Van Arsdal*, 475 U.S. 673 (1986) the Supreme Court found that the defendant’s right to full confrontation must occasionally give way to competing government interests including the prevention of victim harassment, jury prejudice,

²³ *Id.*

²⁴ *Davis v Alaska*, 415 U.S. 315 (1974). Reproduced in notebook tab # 25

²⁵ *Id.*, 315-316.

confusion of issues or danger to witness. While the case concerned the limits of cross-examination, other judges could use this ruling to support an argument for some degree of witness anonymity.²⁶

In *United States v Rich*, F.2d 415 (2nd Cir. 1958) the Supreme Court held that withholding the address of a witness because of personal danger to him/her was acceptable.²⁷ In *United States v Crovedi*, 467 F.2d 1032 (7th Cir. 1972) United States Court of Appeals in the 7th Circuit upheld a ruling that the new identities and location of two witnesses be kept from the defense and the public at large. The witnesses were given immunity in exchange for their testimony against a co-conspirator. In order to guarantee their safety the government placed them and their families in witness protection. The court ruled that there was “no abuse of discretion in a determination that these witnesses had reason to fear that disclosure of their present identities would endanger themselves and their families.”²⁸

United States v. Rangel, 534 F.2d 147 (9th Cir. 1976) granted a similar protection to witnesses who feared for their safety. The Seventh Circuit “did not establish a rigid rule of disclosure (of the true name, home address and phone number of informants), but rather discussed disclosure against a background of factors weighing conversely, such as personal safety of the witness.”²⁹ *United State v. Ellis*, 468 F.2d 638 (9th Cir. 1972) upheld the right to suppress the real name, residence and occupation of under cover police officers.³⁰

²⁶ *Delaware v Van Arsdal*, 475 U.S. 673 (1986) reproduced in notebook tab # 26

²⁷ *United States v Rich*, 262 F.2d 415, 419 (2nd Cir. 1958) reproduced in notebook tab # 27

²⁸ *United States v Crovedi*, 467 F.2d 1032, 1035. (7th Cir. 1972) reproduced in notebook tab # 28

²⁹ *United States v Rangel*, 534 F.2d 147, 148. (9th Cir. 1976) reproduced in notebook tab # 29

³⁰ *United States v. Ellis*, 468 F. 2d 638, 639. (9th Cir. 1972) reproduced in notebook tab #30

The important point of these Supreme Court and Federal cases is that courts will rarely grant witness anonymity. On the few occasions that they do the anonymity usually only extends to the address, real name or other personal identification of the witness. It does not allow for witnesses to testify from behind screens, with voice alteration or through written statements.

Journalists and the media are generally permitted to print the names of rape victims and other judicial witnesses.³¹ The First Amendment protects the publication of truthful information. In order to override that protection a state must show a compelling interest.³² Generally, rape victims will not win privacy suits brought against newspapers or news agencies that identify them. Some reason that publishing the victim's name and a personal detail promotes truth and helps reduce the stigma of sexual crimes. Others argue that publishing a rape victims' name may cause embarrassment and cause victims to be reluctant to future crimes.³³

It should be noted that while they are under no legal obligation to do so, most reporters do not print the names of rape or sexual assault victims. Many of the large media corporations in the United States have made non-disclosure a corporate policy.³⁴

³¹ Michelle Johnson, *Of Public Interest: How Courts Handle Rape Victims' Privacy Suits*, 4 Comm. L. & Pol'y 201, 203 (1999) reproduced in notebook tab # 31

³² Id. At 206.

³³ Id, 201.

³⁴ D.W. Denno, *Perspectives on Disclosing Rape Victim's Names*, 61 Fordham L. Rev. 1113, 1113 (1993) reproduced in notebook tab # 32

New Zealand's take on witness anonymity

In response to several court cases that ruled against witness anonymity, Parliament enacted the Evidence Witness Anonymity Amendment Bill. It later became sections 13B to 13J of the Evidence Act 1908.

According to the legislation a judge may make an order permitting a witness to testify anonymously at trial if he is 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' 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' 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' identity and
- c) the making of the order would not deprive the accused of a fair trial.³⁵

The Civil Law and Anonymity

Grants of anonymity are less controversial in civil law countries since the judicial process is not an adversarial one as it is in common law countries. Judges control civil law trials. They are not structured as adversarial contests, which makes it easier to accommodate the interests of victims at trial without disturbing the adversarial balance that is central to common law criminal trials. Like most legal issues in civil law countries a great deal of discretion is given to the judge in determining issues of witness anonymity. As one commentator observed in civil law countries "the general tendency is to rely on the skill, competence and experience of a professional judge."³⁶

³⁵ Evidence Act 1908, Section 13b, subsection 13C (4) (1908) (N.Z.) reproduced in notebook tab # 33

³⁶ Nigel Zaltman, *Admitting Statements of Missing or Intimidated Witnesses: Section 23(3) of the Criminal Justice Act 1988 Compared with the Israeli Experience*, Crim. L. Rev. 478, 479 (1992) reproduced in notebook tab # 34

German courts view of witness anonymity

The German Criminal Procedure Code (Strafprozeßordnung, StPO) has several provisions that allow German judges to protect a witness' identity. Chapter VI § 68 (3) states: "If there is reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to state personal particulars or to state particulars only of an earlier identity."³⁷

Part II Chapter VI § 247 a. allows the judge to examine a witness in another place. The examination can take place elsewhere if "there is an imminent risk of serious detriment to the well-being of the witness were he to be examined in the presence of those attending the main hearing."³⁸ The judge must first assess whether "that risk cannot be averted in some other way, namely removing the defendant and by excluding the public."³⁹

When a witness' security is in question, a German judge may decide not to divulge the identity of a witness at any state of the criminal process. In these circumstances, the witness is permitted to testify to a police officer. The officer will then present the witness' testimony in court. The court may create a list of questions it wishes to be asked of the witness before they testify to the officer. Since this process provides the defense with no opportunity to examine the witness, the court requires further circumstantial evidence to convict when such anonymity is granted.⁴⁰

³⁷ Criminal Procedure Code [C. Crim.] Chapter 6, § 68 (3) (Germany). Reproduced in notebook tab # 35 <http://www.iuscomp.org/gla/statutes/StPO.htm> (accessed 09/28/02).

³⁸ *Id.*, Part II, Chapter 6 § 247 a.

³⁹ *Id.*

⁴⁰ A specific site to the German Criminal Procedure Code could not be found in this instance. However, this information is sited in:

Denmark's view of witness anonymity

The Denmark Act on Court Procedure is one of the few codes that does not explicitly grant the accused a right to know the identity of prosecution witnesses. The Danish Supreme Court has addressed witness anonymity several times. Generally they have held that a witness whose life and safety will be endangered by giving evidence is not obligated to do so. However, if they are prepared to give evidence in spite of the danger, the anonymity may be granted.⁴¹

Israel's Evidence Ordinance permits anonymity

Israel's Evidence ordinance permits a small degree of witness anonymity. Section 10A (b) allows the "written statement of a person to be submitted in evidence provided it is made by a person who is not a witness before the court and the court is satisfied that improper means have not been used to dissuade or prevent the person from testifying."⁴² However, in order to protect the accused from bias a person cannot be convicted in Israel on the basis of this statement alone.

France's provisions for witness's confidentiality

Oddly, a survey of the French Criminal Procedure Code does not reveal a single provision addressing witness confidentiality or anonymity. Since the majority of French jurisprudence remains un-translated this in no way means that the French have not addressed this subject.

However, given the fact that magistrates and judges are responsible almost exclusively for the examination of witnesses, the French may have less of a need to

Christine Chinkin, *International Tribunal for the Former Yugoslavia: Amicus Curiae Brief on Protective Measures for Victims and Witnesses*, 7 *Crim. L.F.* 179, 198-199 (1996). Reproduced in notebook tab # 13

⁴¹ *Id.*

⁴² *Id.*, 199.

specifically address such concerns. The right to confrontation does not exist in France in the same fashion as in American and British courts. Witnesses may be examined without the defendant being present at the discretion of the judge. The magistrate or judge must simply report the findings of the examination to the defense.⁴³

Anonymity and the ITCY

The ITCY had an opportunity to evaluate issues of anonymity in its very first trial. The ITCY Prosecutors' office filed a motion asking for protective measures applicable to witnesses in the case of Prosecutor V Tadic. They asked that some of their witnesses receive "confidentiality" meaning that they would not be identified to the public and the media. For others they requested "anonymity" which would prohibit the victims and witnesses from being identified by the accused or his lawyers.⁴⁴

The issue of confidentiality or public disclosure was easier for the ITCY to evaluate because the Rules of Procedure expressly provide for such measures. The Trial Chamber granted the motion and ordered that the names and details of witnesses only be given in closed sessions. In arriving at this decision, the Trial Chamber consulted the Rules and Statute of the Tribunal. Rule 75 outlines the measures that judges can take in order to protect victims and witnesses. First "a Judge or a Chamber may...order appropriate measures for the privacy and protection of witnesses, provided that the

⁴³ Richard S. France and Gerald L. Kock, trans. *The American Series of Foreign Penal Codes: The French Code of Criminal Procedure Revised Edition*, (Rothman and Co.: Littleton 1988). Articles 101-?
Reproduced in notebook tab # 36

⁴⁴ These motions were heard in camera by Judges Gabrielle Kirk McDonald of the United States, Lal Chand Vohrah of Malaysia and Sir Ninian Stephen of Australia
International Criminal Tribunal for the Former Yugoslavia, *Decision of the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* (Aug 10, 1995)
<http://www.un.org/itcy/100895pm.htm> (official pagination not available) [hereinafter Decision of the ITCY Trial Chamber] reproduced in notebook tab # 37

measures are consistent with the rights of the accused.” The rule further allows judges to order:

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 witnesses 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.⁴⁵

Given the wording of Rule 75, it was easy for the Trial Chamber to find in favor of the Prosecutors’ motion that certain witnesses receive confidentiality. The decision to grant or deny motions of confidentiality for witnesses and victims was left mostly to the discretion of the Trial Chamber. The Trial Chamber has ordered similar measures of confidentiality in other ITCY cases. In the Celebici Camp case, they granted a motion filed jointly by the prosecution and the defense. The motion asked that the names of potential witnesses or other identifying data not be released to the public or the media.⁴⁶

On the issue of anonymity, the Trial Chamber did not find that the Rules of Procedure and Evidence or the Tribunal’s Statute authorized such a motion. However, on the basis of customary international law the Trial Chamber produced a five-prong test that must be met in order to grant a motion of witness anonymity. First there must be an “existence of a real fear for the safety of the witness.”⁴⁷ According to the Trial Chamber, this prong should be evaluated through an objective perspective. In order to support this

⁴⁵ International Criminal Tribunal for Yugoslavia Rules of Procedure and Evidence, IT-32-Rev.24, http://www.un.org/icty/basic/rpe/IT32_rev24.htm (accessed September 2002). reproduced in notebook tab # 38

⁴⁶ Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57, 23-24 (1999). Reproduced in notebook tab # 14

⁴⁷ Decision of the ITCY Trial Chamber pp 62-66 this sight applies to 1-5 of the five prong test.

requirement they relied upon *Regina v. Taylor*, a case from Britain. The British court echoed the Trial Chamber's requirement almost verbatim by ruling that "there must be real grounds for being fearful of the consequences if the evidence given and the identity of the witness is revealed."⁴⁸

Secondly, the prosecution has to show that the "testimony of the witness [is] sufficiently relevant and important to the case." Next "there must be no prima facie evidence of the witness's unworthiness in any way. This requirement focuses on the reliability of the witness. By including this requirement the Trial Chamber seemed to be protecting the ITCY from testimony of witnesses with extensive criminal backgrounds. In their opinion, the Trial Chamber required the Prosecutor to perform a thorough background check of witnesses and file a report of their reliability with the Court and the Defense."⁴⁹

The fourth element of the test is that no witness protection program exists. This prong reflects the circumstances under which ITCY witnesses live. The Trial Chamber recognized that most potential witnesses "live in the territory of the former Yugoslavia or have family members who still live there and fear that they or their family members may be harmed, either out of revenge for rendering evidence or in order to deter others."⁵⁰ These circumstances hold true for witnesses under the ITCR as well. Since the Tribunal has no police force that can guarantee the safety of witnesses before during and after the proceedings or a long-term witness protection program, witness anonymity might be the most effective protective measure available.

⁴⁸ *Id.*

⁴⁹ 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 Tribunal for the Former Yugoslavia*, 41 *How. L.J.* 155, 165-166 (1997). Reproduced in notebook tab # 39

⁵⁰ Decision of the ITCY Trial Chamber, 66.

The last element is that less restrictive protective measures are unavailable. This requirement highlights the Chamber's concern for the defendant's rights. While they acknowledged that some prejudice would happen if anonymity was granted they also noted that the ITCY "must be satisfied that the accused suffers no undue avoidable prejudice."⁵¹

The defense argued that granting witnesses anonymity violated the accused right to "examine or have examined witnesses against him" that the Statute of the ITCY grants him⁵². In spite of this argument the Trial Chamber stood by their decision, ruling that provided the Defense is given an opportunity to question an anonymous witness the accused rights have not been violated.⁵³ They further instituted procedural guidelines to further protect the accused in situations under which anonymity has been granted. These procedural guidelines are based on the European Court of Human Rights decision in *Kostovski v Netherlands*.⁵⁴

First, "the judges must be able to observe the demeanor of the witness, in order to assess the reliability of the testimony."⁵⁵ The judges must know the identity of the witness so that they can test the witness' reliability. Also, the defense "must be allowed ample opportunity to question the witness of issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain incriminating

⁵¹ *Id.*

⁵² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law. <http://www.un.org/itcy/basic.htm> (visited September 2002). correct pagination unavailable. Hereinafter ITCY Statute.

⁵³ Decision of the Trial Chamber, p. 67.

⁵⁴ *Kostovski v The Netherlands* (1990) 12 EHRR 434 reproduced in notebook tab # 41

⁵⁵ *Id.*, p. 71. This provision makes sense since it is the ITCY judges who will ultimately decide the fate of the accused. His evaluation of the witnesses' testimony will have the greatest effect on the defendant's case.

information.⁵⁶ Finally, once the reasons to fear for the security of the witness has passed their identity must be released.

The Trial Chamber's decision prompted widespread criticism from many legal scholars primarily in the United States and Australia. While the majority found support in international law for allowing witness anonymity, Judge Stephen strongly dissented. His dissenting opinion supports other protective measures, but rejects the use of completely anonymous witnesses as contrary to the Statute, The Rules and "internationally recognized standards of the rights of the accused."⁵⁷ Judge Stephens agrees with the majority that witnesses need to be protected, however he suggests that they should be limited to in camera proceedings and careful control of cross-examination. Witness protection methods should not include "any wholesale anonymity of witnesses." In the end he grants "most of the relief sought by the prosecution, much of which is assented to by the defense" but stopped short of "denying to the defense, including the accused, the right to see and hear witnesses give evidence before the Tribunal and know their identity."⁵⁸

⁵⁶ *Id.*, 83.

⁵⁷ David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 Sydney L. Rev. 361, (2002) reproduced in notebook tab# 42
Natasha A. Affolder, *The Sources of International Procedural Law: Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 Mich. J. Int'l L. 445, 447 (2002) reproduced in notebook tab # 6

Decision of the Trial Chamber

Judge Stephens' dissent and the ruling by the Trial Chamber in general has been the subject of the research of law students and professors in the last seven years. The scholars support or criticism is usually determined by the national legal system from which they come. Jurisdictions that generally favor witness anonymity usually side with the majority, while those from jurisdictions that shy away from witness anonymity usually side with Judge Stephen. Ironically, the opinion of the majority was written by Judge McDonald, a former U.S. district court judge while Judge Stephens was a former governor-general of Australia and judge of the Australian high court.

⁵⁸ International Criminal Tribunal for the Former Yugoslavia, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measure for the Victims and Witnesses (Aug. 10, 1995) <http://www.un.org/icty/50810pmm.htm> (official pagination not available) [hereinafter dissenting opinion] reproduced in notebook tab # 43

In arriving at his conclusion, Judge Stephens relies on many of the same cases that Judge McDonald does he just interrupts them differently. First he relies upon the wording of the Statue of the Tribunal and the legislative history provided by the Secretary General's Report. According to Judge Stephens, "the Statute does not authorize anonymity of witnesses where this would in a real sense affect the right of the accused specified in Article 21 and in particular the minimum guarantee in (4).⁵⁹"

Next he takes issue with the majority's interpretation of when not disclosing a witness' identity is acceptable. According to Stephens, such a measure is only contemplated in Rule 69 as a pre-trial measure until the witness is within the ITCY's protection.⁶⁰ According to him, rule 75 can be limited to preventing the disclosure of the witnesses' identity to the public or the media. He does not agree that Rule 75 B (iii) was meant to include the use of anonymous witnesses. If the Secretary General had intended such an outcome he would not have "introduced so radical a concept by indirect and ambiguous wording, especially after specific and elaborate provisions for full disclosure have been made."⁶¹ The fact that Rule 75A is made expressly subject to the "rights of the accused" also lead Jude Stephens to find that the use of anonymous witnesses is inconsistent with the Rules of Procedure and Evidence.⁶²

Judge Stephan also looks at the same ECHR case that Judge McDonald discussed, *Kostovski v Netherlands*. The case found that using anonymous witnesses "involved limitation on the rights of the defense which were irreconcilable with the guarantees

⁵⁹ Dissenting Opinion

⁶⁰ *Id.*

⁶¹ Dissenting Opinion

⁶² *Id.*

contained in Article 6.⁶³”(Convention for the Protection of Human Rights and Fundamental Freedoms) Article 6 outlines the right to examine witnesses and according to Judge Stephens bears a striking resemblance to the right to examine found in Article 21 (4) (e) of the Tribunal’s Statute. The Statute is based on the International Covenant of Civil and Political Rights, which was based on the ECHR.⁶⁴

He also distinguishes *Taylor* and *Jarvie*, two of the cases relied upon by the majority. First he points out that the witnesses in *Jarvie* were undercover police officers. Their identity was already known to the defendant but not their true names.⁶⁵ He distinguishes *Taylor* by pointing out that the counsel for the defense was permitted to see the witness and cross examine her while the defendant watched on a video screen.⁶⁶

It is difficult to properly evaluate the majority’s decision without first putting it in the proper context. The proceedings of the Tribunal are sufficiently different that those of domestic courts or other international adjudicatory bodies. Given the limited and unique scope of crimes before the Tribunal, the rules of procedure and evidence should not be viewed through the critical eye of American or European jurisprudence. The Tribunal’s statute limits them to prosecuting rape as a war crime, genocide, or a crime against humanity. The very nature of these crimes requires that the Prosecutor establish a pattern of behavior. In the context of a war crime (or genocide or crime against humanity), the actual identity of the witness matters less than in most rape trials. In domestic courts when a person is accused of rape, the reliability and motives of the accuser are relevant to the defense. In the context of a military conflict, rape is not just

⁶³ Id.

⁶⁴ Id.

⁶⁵ *Jarvie v. The Magistrates’ Court of Victoria at Brunswick* reproduced in notebook tab # 22

⁶⁶ Dissenting Opinion.

rape, it is a military strategy designed to defeat the enemy. Women in Rwanda were not raped or sexually assaulted because of who they were as individuals. They were targeted because their ethnic identity.

Another point that should be taken into consideration is the unique nature of the ITCY's procedure. There are no jury trials as there are in an adversarial system like the United States. The fact that a panel of judges will decide the fate of the accused serves to balance out any damage that might be done to the accused when witness anonymity is granted.

The International Criminal Court's take on witness anonymity

The Rules of Procedure and Evidence of the International Criminal Court were written after the Preparatory Commission surveyed the rules of the dominant legal systems, the ITCY and the ITCR. The ICC Rules for witness anonymity are similar to the ones found in the ITCY. Since the ICC came into existence in July 2002 and has not yet prosecuted anyone, it remains to be seen how these rules will be applied.

Subsection II provides measure for the "protection of victims and witnesses." Rule 87 of Subsection II allows the court to protect a witness' identity by withholding the release to the public or press of the identity or location of a witness.⁶⁷ It also allows the ICC to expunge any information that may lead to the witness' identification from the public records of the Chamber.⁶⁸ The Court will hold in camera hearings to determine when such measures are necessary.

⁶⁷ Preparatory Commission for the International Criminal Court, *Finalized draft text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2001/1/Add.1 (New York: United Nations Publications, 2000), reproduced in notebook tab # 44

⁶⁸ *Id*

Justices of the ICC may allow testimony to be presented by electronic or other special means “including the use of technical means enabling the alteration of pictures or voice” under rule 87.⁶⁹ They may also assign a pseudonym to the witness.⁷⁰

The European Court of Human Rights

Issues of witness anonymity have come up frequently in the European Court of Human Rights. In general the Court has deferred to national courts, encouraging them to determine their procedure provided they are fair. The European Court of Human Rights tends to take a case-by-case analysis of whether or not varying degrees of witness anonymity violate the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, Convention).

The complainant in *Unterpertinger v Austria* argued that there was a violation of Article 6 (3) (d)⁷¹ because two of the witnesses against him refused to appear in court. He was convicted on the basis of statements made by the witnesses to the police. The accused was given no opportunity to examine them.

The court found a violation of Article 6 (3) (d) because the accused rights were greatly restricted by his inability to question the witnesses against him. However, they did point out that just because a witness refusing to testify prevents the defense from examining the witness orally does not automatically create a violation of Article 6 (3) (d). To support this conclusion they pointed to the fact that Austria was not the only country

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Article 6 §§ 1 and 3 (d) of the Convention provides that :In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ..3. Everyone charged with a criminal offence has the following minimum rights (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

who's Code of Criminal Procedure permitted witnesses to refuse to testify. The violation was based on the unique facts in the specific case.⁷²

Both the majority and Judge Stephen relied upon *Kostovski v the Netherlands* in deciding whether to grant witness anonymity or not. According to the ECHR, the use of statements by anonymous witnesses is subject to stricter requirements than those established in previous case law. It established these stricter requirements in the following rule: a witness' statement

“must have been taken down by a judge who (a) is aware of the identity of the witness, (b) has expressed, in the official record of the hearing of such a witness, his 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.

The court also stipulated that a written document containing the statement of an anonymous witness may be used in evidence if:

(a) the defense has not at any stage of the proceedings asked to be allowed to question the witness concerned, (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources and (c) the trial court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection.⁷³

In *Delta v France*, the European Court agreed that there had been a violation of Article 6 (3) (d) because the state failed to bring a key witness of a robbery to court. The French court relied only upon the statements of the witnesses to the police in order to convict. The conviction did not (as *Kostovski* dictates) rely upon any other evidence. The

⁷²European Court of Human Rights, *Unterpertinger v Austria*, Application # 00009120/80, <http://hudoc.echr.coe.int/hudoc.asp> (accessed November 2002) reproduced in notebook tab # 45

⁷³ *Kostovski v The Netherlands* (1990) 12 EHRR 434 reproduced in notebook tab #41 and European Court of Human Rights, *Visser v the Netherlands* Application # 26668/95 <http://hudoc.echr.coe.int/hudoc.asp> (accessed November 2002) reproduced in notebook tab # 45

All of the European Court of Human Rights, are behind tab # 45 to save space. They are separated by colored tabs.

defense was given no opportunity to confront the witnesses. Since France was unable to make an argument of special circumstances justifying anonymity, the European Court found a violation.⁷⁴

In an Austrian case, the accused was convicted based on the testimony of two anonymous witnesses. The two witnesses in *Windisch v Austria* said that they saw a man who they identified as the accused behaving suspiciously in the street. They did not see him commit the crime in question. Since they feared reprisal, their names were not released to the court, nor was the court able to see their body language to gauge their credibility. This was the only evidence used to obtain the conviction. Since the Austrian court instituted no procedural guidelines to help soften the blow to the defense of witness anonymity (like the judge being able to see the witness and the need for other evidence to convict), the European Court found a violation of the accused rights.⁷⁵

The accused in *Isgro v Italy* complained to the European Court because he was convicted in Italy on the basis of statements made to the investigating judge by a witness who did not appear at trial. The accused did know the witness' identity and had been given an opportunity to put questions to the witness through the judge. The European Court found no violation of his rights because he had been able to ask questions and discuss the witness' statements in court. They also found no violation because there was other evidence to support the conviction.⁷⁶

⁷⁴ European Court of Human Rights, *Delta v France*, Application # 00011444/85, <http://hudoc.echr.coe.int/hudoc.asp> (accessed November 2002) reproduced in notebook tab # 45

⁷⁵ European Court of Human Rights, *Windisch v Austria*, Application # 00012489/86, <http://hudoc.echr.coe.int/hudoc.asp> (accessed November 2002) reproduced in notebook tab # 45

⁷⁶ European Court of Human Rights, *Isgro v Italy*, application # 00011339/85, <http://hudoc.echr.coe.int.asp> (accessed November 2002) reproduced in notebook tab # 45

In most cases involving witness anonymity, the European Court finds a violation of Article 6 (3). Their rulings demonstrate their desire to encourage domestic trials to be fair by allowing the accused the right to examine a witness against them. Their tendency to find against witness anonymity does not mean that they are wholly against it. The European Court evaluates the fairness of a trial by looking at it holistically. In order for there not to be an Article 6 violation, a domestic court must create procedural safeguards that restore the balance between the rights of the accused and the witness when they use anonymity. The *Kostovski v the Netherlands* case demonstrates the fact that the European Court recognizes situations in which witness anonymity must be granted. This case outlines the circumstances under which it can be granted.

C. Judicial Limits on Cross-Examination and Rape Shield Laws

Another way in which rules of procedure and evidence can reduce witness trauma is by limiting cross-examination. Depending on the jurisdiction, some courts forbid certain types and lines of questioning when the witness is a victim of sexual assault. Issues concerning a victim's past sexual history or general morality are not allowed in most common or civil law courts. These rules are often called "Rape Shield provisions." The International Criminal Court and the International Criminal Tribunal for Yugoslavia also forbid questioning a victim of sexual assault about these issues. A few rules of procedure and evidence direct judges generally to limit testimony that they believe might re-traumatize a witness.

Australia, Canada, United Kingdom and the United States enact Rape Shield Laws

Until recently, a rape victim's reputation for sexual license and her sexual history were seen as relevant to her credibility as a witness and to the issue of consent.⁷⁷ Most common law countries have enacted legislation that bars the defense from bringing up evidence of a victim's sexual history.⁷⁸ Canada's Criminal Code makes it impermissible to challenge the credibility of a complainant by adducing evidence of her sexual reputation.⁷⁹ Australia⁸⁰ and England have almost identical statutes.⁸¹ At the federal level evidence of past sexual behavior is generally inadmissible in the United States.⁸² Most states have adopted similar legislation.⁸³

Regardless of where rape shield laws exist, the goal is the same: to protect women from further victimization by the legal process. The Canadian Supreme Court summarized the goal of rape shield laws "The rape shield amendments strongly evidence Parliament's desire to instate guidelines to prevent the diversion of sexual assault trials into inquiries into the moral character and past behavior of the complainant."⁸⁴

⁷⁷ Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 Crim. L.F. 327 (1993). Reproduced in notebook tab # 46

⁷⁸ In a study of the operation of rape shield laws in England over a one-year period in the early 1980's, a scholar found that sexual history evidence was admitted in 96 percent of rape trials. Another study in Australia by the government showed that in 84 percent of sexual assault trials from 1994-1995 evidence of the victim's sexual experience was admitted.

Zsuzsanna Adler, "Rape on Trial (1987).

⁷⁹ Canadian Criminal Code § 276-277, R.S.C. 1985, ch. C-46 (Can.) reproduced in notebook tab# 47

⁸⁰ Crimes Act, 1900, § 409 (Austl. N.S.W.) reproduced in notebook tab # 48

⁸¹ Sexual Offences (Amendment) Act, 1976, § 2 (Eng.). reproduced in notebook tab # 49

⁸² United States Fed. R. Evid. 412 reproduced in notebook tab # 50

⁸³ The majority of the states in the US have rape shield laws three examples are Illinois, Montana and New Jersey:

725 Ill. Comp.Stat. Ann. 5/115-7 (1997) reproduced in notebook tab# 50

Mo. Ann. Stat. § 491.015 (1996) reproduced in notebook tab# 50

N.J. Stat. Ann. § 2A: 84A-32.1 (1996) reproduced in notebook tab # 50

⁸⁴ *R. V. Osolin*, [1993] 4 S.C.R. 595, 86 C.C.C.3d 481, 500 (Can.). reproduced in notebook tab# 47 included with Canadian Criminal Code.

International Criminal Tribunal for Yugoslavia

The Rules of Procedure and Evidence of the ITCY include a vague and rather opened provision that limits cross-examination of a witness. Rule 75(C) reads “a chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.”⁸⁵ So far no cases have addressed how this rule should be applied by the Tribunal. However, it does appear to grant the Tribunal the power to limit the tone and kinds of questions asked of a witness in order to make her more comfortable.

Rule 96 of the ITCY Rules of Procedure and Evidence is the Tribunal’s version of a rape shield provision. It provides that in cases of sexual assault “prior sexual conduct of the victim shall not be admitted in evidence.”⁸⁶ Such a provision is especially important for a war crimes tribunal because it ensures that victims of sexual assault will not be placed on trial themselves. Women who as a result of the military conflict were forced to act as prostitutes (or made the choice on their own) will not have that information presented in court. War often places women in compromising situations that in the past have been used to defeat their claims of sexual assault. Rule 96 (iv) bars the defendant from entering such evidence and shields women from certain cultural stigmas relating to her moral fabric.

International Criminal Court

The principles of evidence in cases of sexual violence under the ICC are found in Rule 70. According to this rule, the “credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature or the

⁸⁵ United Nations, “Rules of Procedure and Evidence,” U.N. Doc. IT-32-Rev-24 http://www.un.org/icty/basic/rpe/IT32_rev24htm (accessed September 2002), 38. correct pagination is not available. Reproduced in notebook tab #38

⁸⁶ *Id.*, 49.

prior or subsequent conduct of a victim or witness.” This rule is support in rule 71, which is almost a replica of Rule 70. Rule 71 states that “a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.⁸⁷”

This provision is important because it reflects international acceptance of rape shield laws. It is becoming more accepted in countries around the world as well as in the international arena that it is unacceptable to place victims of sexual assault on trial. It also shifts the focus of sexual assault from the perception of the attacker to that of the victim.

Common law countries: Germany

The German Criminal Procedure Code does not have a rule that expressly prohibits questions concerning a victim’s past sexual history. However, Chapter VI § 68a gives directions on “questions concerning degrading facts and previous convictions.” Specifically §68a directs that “questions concerning facts which might dishonor the witness or a person who is his relative...or which concern their personal sphere of life are to be asked only if essential.⁸⁸”

D. Police Protection, counseling measures and other methods of emotional support to reduce witness trauma

United States

In the last twenty years, there has been what some commentators call a “victims’ movement” in the United States. This movement led to the enactment of The Victims of

⁸⁷ Preparatory Commission for the International Criminal Court, *Finalized draft text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2001/1/Add.1 (New York: United Nations Publications, 2000), 37 reproduced in notebook tab # 44

⁸⁸ Criminal Procedure Code [C. Crim.” Chapter 6, § 68 (a)1 (Germany). <http://www.iuscomp.org/gla/statutes/StPO.htm> (accessed 09/28/02).reproduced in notebook tab# 35

Crime Act of 1984. This act established a Crime Victims Fund that disburses monies to state victim compensation funds and to victim assistance projects throughout the country. As a result victim service programs are available in almost every state. These programs include counseling, legal consultation, victim compensation and victim advocacy. Since victims and witnesses are often synonymous in cases of sexual assault, these programs help to create a less caustic environment for rape victims who join the judicial process.

The United States also has a federal witness relocation program that provides witnesses whose safety is threatened with a new identity in a new location. The program is most often utilized by witnesses in organized crime cases, but can extend to sexual assault victims as well.

United Kingdom

In the United Kingdom, the rights and services afforded victims are found in the Victim's Charter. According to the Charter, as soon as a crime is reported the police refer it to Victim Support. Victim Support is an independent registered charity that receives its financial support from the government. Normally Victim Support will send the victim a letter or phone her to arrange a visit within four working days of the reported crime. Each victim is guaranteed confidentiality and is never charged for the services provided by Victim Support. The service offers emotional support through counseling as well as help with legal issues.

The Victim's Charter also lays out the legal process and other services available to victims. It outlines what the victims should expect once the criminal is apprehended, how to be a witness and what court proceedings will be like. Witnesses who fear for their safety are advised of the protection services available to them through the police.

According to the Charter, witnesses may bring a friend for support when they testify or have someone from the Witness Service accompany them to court. The Charter also stipulates exactly how victims will be informed of the legal status of their case and the release date of their attacker.⁸⁹

The information and services embedded in the Victim's Charter provide support for victims of all kinds of crimes but especially those who have been sexually assaulted. The Charter makes victims an essential part of the legal process and validates their sacrifice by participating in it. Victims are not kept in the dark as in other jurisdictions or some military tribunals. The Victim's Charter empowers victims and encourages future victims to participate in judicial proceedings.

International Tribunal for Yugoslavia

When the United Nations Security Council agreed to create the ITCY, they directed the judges to create rules of procedure and evidence that would protect witnesses. In response to this mandate the drafters included Rule 34 which creates a Victims and Witnesses Unit. The Unit should consist of qualified staff to: "recommend protective measures for victims and witnesses..." and to provide counseling and support for them, in particular case of rape and sexual assault.⁹⁰ The only other provision of the Rule is that "due consideration [be] given, in the appointment of staff to the employment of qualified women."⁹¹

⁸⁹ United Kingdom Home Office, "Victim's Charter," <http://www.homeoffice.gov.uk/cpd/pvu/vichap.htm>, pg 1-6. Documents relating to the Victim's Charter can be accessed through this website as well including booklets concerning how to prevent crime, criminal injuries compensation, United Kingdom Court Service Headquarters, the special circumstances for child witnesses, and support for the victim's family.

Reproduced in notebook tab # 17

⁹⁰ ⁹⁰ United Nations, "Rules of Procedure and Evidence," U.N. Doc. IT-32-Rev-24 http://www.un.org/icty/basic/rpe/IT32_rev24htm (accessed September 2002), 16. reproduced in notebook tab # 38

⁹¹ *Id.*

As with many of the ITCY rules, Rule 34 lack specificity concerning how and what the Victims and Witnesses Unit is expected to do. The success of Rule 34 is dependent upon the resources afforded by the United Nations to the Tribunal. Currently, the ITCY does not have the funds to support a police force to provide witnesses with physical protection. It does provide a limited amount of counseling and support to victims who are called to testify. Witnesses of sexual assault have complained that they have not been given enough support and protection. Through no fault of its own the ITCY in practice has been unable to carry out the proscriptions of Rule 34.

International Criminal Court

During the planning period of the ICC, the focus of many delegations was on ways to protect victims and witnesses. NGOs lobbied extensively for provisions and services that would both respect and support victims who came forward to participate in the administration of justice. Perhaps in response to the disappointment of the ITCY's Victim and Witnesses Unit, the drafters of the ICC's Rules of Procedure and Evidence were much more specific about what they expected from their Victims and Witnesses Unit. Again, since the ICC is still in the process of formalization it remains to be seen how the provisions of the Victims and Witnesses Unit will play out. The success of the unit will be directly dependent upon the monetary resources available to the ICC from signature countries.

Under Rule 16 through the registrar, the ICC will provide victims and witnesses with help in obtaining legal advice and representation.⁹² They will also create "agreements on relocation and provision of support services." Rule 17 provides for

⁹² *United Nations, Rules of Procedure and Evidence of the International Criminal Court* UN-PCNICC-2000-1-ADD.1, 17. reproduced in notebook tab # 44

“adequate protective and security measures” and formulation of “long and short term place for their protection.”⁹³ It also asks that the Unit assist witnesses in “obtaining medical psychological and other appropriate assistance.” The Unit is responsible for training all parties to the court in “issues of trauma, sexual violence, security and confidentiality.”⁹⁴

Rule 19 lays out the requirements for “expertise in the Unit.” The Unit will hire “as appropriate persons with expertise in” witness protection and security, gender and cultural diversity, and psychology in criminal proceedings among other things.⁹⁵

If the Victims and Witnesses Unit of the ICC is able to function at the full capacity outlined in the Statute it will provide witnesses and victims with a full range of protective measures. Not only will their physical safety be ensured, but they will also have access to mental and legal support. These provisions along with the long term protective measures promised by the Unit will help more victims come forward to testify against their attackers. The existence of the Unit in no way impinges upon the rights of the defense since it does not affect their right to confrontation, cross examination or create prejudice against the defendant.

III. Conclusion

Finding rules of procedure and evidence that reduce trauma to witnesses is imperative for the success for the International Tribunal for Rwanda. Unlike past military tribunals, the ICTR (as well as the ICTY) is extremely dependant upon witness testimony to obtain their convictions. The Nuremberg prosecutors had the luxury of being

⁹³ *Id.*

⁹⁴ *Id.*, 18.

⁹⁵ *Id.*

able to depend upon extensive documentary evidence in order to obtain convictions. Such evidence does not exist for the ITCR.

Witness anonymity does not impinge upon the right of the accused to confront all witnesses. The accused is still granted an opportunity to cross-examine the witness even if he is unaware of her identity. Furthermore, in the context of a war crime the actual identity of the witness matter less than in domestic courts. Women in Rwanda were not attacked because of who they were personally, but instead because of their ethnic background. The goal of rape in war is not to attack the woman herself, but to defeat the enemy without regard to their individual identities.

Rape shield laws also do not infringe upon the rights the accused. They simply reflect a growing acceptance of the fact that all women deserve protection and have a right to choose when and with whom they engage in sexual relations. The protection is not diminished simply because a woman is a prostitute or not a virgin.

Finally, the services provided by witness and victims protection programs do not harm the rights of the accused. They merely provide support and in no way stop the accused from confronting the victim or examining them.

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