IT-94-1-T
10 August 1995
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5078
192

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-94-1-T
Date: 10 August 1995
Original: English

IN THE TRIAL CHAMBER

Before: **Judge McDonald, Presiding**
Judge Stephen
Judge Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision: **10 August 1995**

PROSECUTOR

v.

DUŠKO TADIĆ A/K/A "DULE"

DECISION ON THE PROSECUTOR'S MOTION REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan

Ms. Brenda Hollis
Mr. William Fenrick

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Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Krstan Simić

DECISION

Pending before the Trial Chamber is the Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor on 18 May 1995, which contains thirteen separate prayers for relief in respect of seven alleged victims or witnesses who are referred to by the pseudonyms A, F, G, H, I, J and K and one prayer concerning all witnesses who may testify in this case. The Defence has filed a Response objecting in part and agreeing in part to the protective measures sought. Two briefs have been submitted by *amicus curiae*, one by Professor Christine Chinkin, Dean and Professor of International Law, University of Southampton, United Kingdom ("Brief of Professor Chinkin") and a joint brief filed by Rhonda Copelon, Felice Gaer, Jennifer M. Green and Sara Hossain, all of the United States of America, on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, New York; the Center for Constitutional Rights, New York; the International Women's Human Rights Law Clinic of the City University of New York, New York; and the Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services, both of Cambridge, Massachusetts ("the Joint U.S. Brief").

At the request of the Prosecutor, which was not opposed by the Defence, the motion was heard *in camera* on 21 June 1995. Since that date, additional confidential filings giving details of prior media contact, if any, with the pseudonymed witnesses have been made by both parties pursuant to an Order of this Trial Chamber of 23 June 1995. In that same filing, the Prosecutor has amended two of his prayers for relief. The Prosecutor has also withdrawn the request for relief in respect of the witness pseudonymed A and now seeks only delayed disclosure to the accused of the identity of the witness pseudonymed F, not non-disclosure, based on evidentiary issues surrounding the testimony of that witness.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties, and the written submissions of the *amicus curiae*,

HEREBY ISSUES ITS DECISION.

191
5076

DISCUSSION

I. Factual Background

1. Duško Tadić ("Tadić") is the first accused to appear before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"). Tadić was surrendered to the jurisdiction of the International Tribunal by the Federal Republic of Germany in April 1995, pursuant to an indictment and warrants of arrest issued by the Tribunal in February 1995. Tadić made his initial appearance before this Trial Chamber on 26 April 1995 when he was formally charged and pleaded not guilty to all charges against him.

2. Tadić is charged with crimes arising out of six separate incidents which are alleged to have occurred at the Omarska camp in the Opstina of Prijedor between June and August 1992, an incident arising out of the surrender of the Kozarac area in May 1992 and a further set of charges in connection with events in the villages of Jaskići and Sivci in June 1992. The charges involve the commission of serious violations of international humanitarian law including, *inter alia*, forcible sexual intercourse or rape, wilful killing or murder, wilfully causing grave suffering or serious injury, torture, cruel treatment and the commission of inhumane acts and are alleged to constitute grave breaches of the Geneva Conventions of 12 August 1949 as recognized by Article 2 of the Statute of the International Tribunal ("the Statute"), violations of the laws or customs of war as recognized by Article 3 of the Statute and crimes against humanity as recognized by Article 5 of the Statute.

II. The Pleadings

3. The Prosecutor seeks fourteen separate protective measures for the protection of alleged victims and witnesses, as follows (after amendment of Prayers 3 and 11, and withdrawal of the request in respect of the witness pseudonymed A):

Prayer (1) : that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms F, G, H and I, being victims and/or witnesses of the crimes alleged in Charges 4.1 to 4.4, 5.1 and 5.29 to 5.34 of the indictment against the accused shall not be disclosed to the public or to the media;

Prayer (2): that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms J and K, witnesses who will testify concerning Charge 11 of the indictment against the accused shall not be disclosed to the public or to the media;

Prayer (3): that all hearings to litigate the issue of protective measures for pseudonymed witnesses shall be in closed session;

Prayer (4): that the names, addresses, whereabouts and other identifying information concerning F, G, H, I, J and K shall be sealed and not included in any of the public records of the International Tribunal;

Prayer (5): that, to the extent the names of, or other identifying data concerning, any of these victims and witnesses are contained in existing public documents of the International Tribunal, those names and other identifying data shall be expunged from those documents;

Prayer (6): that documents of the International Tribunal identifying these witnesses shall not be disclosed to the public or the media;

190
5074

Prayer (7): that testimony of these witnesses shall be given by one-way closed circuit television;

Prayer (8): that testimony of these witnesses may be given using voice and image altering devices or by not transmitting the image to the accused and the defence;

Prayer (9): that the testimony of these witnesses be heard in closed session;

Prayer (10): that the pseudonyms F, G, H, I, J and K be used whenever referring to these witnesses in proceedings before the International Tribunal and in discussions among parties to the trial;

Prayer (11): In the alternative: (a) that the prosecution may withhold from the defence and the accused the names of, and other identifying data concerning witnesses G, H, I, J and K. The prosecution shall disclose to the defence and the accused the name and complete statement of witness F in sufficient time to allow the defence to prepare for trial, but no earlier that one month in advance of the firm trial date. The Prosecution may redact from witness F's statement witness F's current address and whereabouts, and information disclosing the present address and whereabouts of the witness' relatives.

or (b) that the prosecution shall disclose to the defence and the accused the names and the complete statements of witnesses F, G, H, I, J and K in sufficient time to allow the defence to prepare for trial, but no earlier than one month in advance of the firm trial date. The prosecution may redact from the statements the witnesses' current addresses and whereabouts and information disclosing the present addresses and whereabouts of the witnesses' relatives;

Prayer (12): that the accused, the defence attorneys and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of these victims and witnesses or other identifying data concerning these witnesses to the public or to the media, except to the limited extent such disclosure to

members of the public is necessary to adequately investigate the witnesses. Further order that such necessary disclosure be done in such a way as to minimize the risk of the victims' and witnesses' names being divulged to the public at large or to the media;

Prayer (13): that the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall notify the Office of the Prosecutor of any requested contact with prosecution witnesses or the relatives of such witnesses and that the Office of the Prosecutor shall make arrangements for such contact;

Prayer (14): that the public and the media shall not photograph, video record or sketch witnesses who are victims of the conflict in the former Yugoslavia when these witnesses are entering the International Tribunal building, exiting from the International Tribunal building or while they are in the International Tribunal building.

4. The protective measures sought fall into five categories: those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media (Prayers 1 - 6, 9, 10 and 12); those seeking protection from retraumatization by avoiding confrontation with the accused (Prayer 7); those seeking anonymity, whereby the victims and witnesses would not be identified to the accused and his counsel (Prayers 8 and 11 (a)); miscellaneous measures for certain victims and witnesses (Prayers 11 (b) and 13); and, finally, Prayer 14 seeks general measures for all victims and witnesses who may testify before the International Tribunal in the future. The Prosecutor has served the Defence with redacted statements of the pseudonymed witnesses.

5. The Prosecutor contends that the protective measures sought are necessary to allay the fears of the victims and witnesses that they or members of their family will suffer retribution, including death or physical injury, if they testify before the International Tribunal and that unless they receive the protection sought, the witnesses will not testify. The measures are also said to be necessary to protect the privacy of the victims and witnesses. The Prosecutor asserts

that the measures sought are authorized by the Statute and the Rules of Procedure and Evidence adopted by the International Tribunal ("the Rules").

6. The Defence agrees to the granting of the measures requested in Prayers 1, 3 (as amended), 4, 5, 6, 9, 10, 12, 13 and 14. However, the Defence seeks dismissal of Prayers 2, 7, 8 and 11 (as amended), and contends that these measures would deny the accused his right to a public hearing and would infringe his right to a fair trial.

7. The Defence argues that the right to a fair trial, as protected by Article 20 of the Statute, evokes certain minimum standards which, as the Statute is silent on the point, can only be understood by reference to decisions in other jurisdictions, in particular, the European Court of Human Rights. One of these minimum standards is the right for the accused to examine, or have examined, the witness under the same conditions as witnesses against him. The Defence contends that this means that the accused must be in a position to understand what the witness is saying and be able to assess and challenge that evidence. It is argued that this can only be done if the accused is not limited as to the questions he puts and is able properly to prepare for the examination of the witness. Therefore the Defence asserts that the identity of the witness must be disclosed to the accused in advance of the trial.

8. In its subsequent filings, the Defence has stated that the release of the nicknames used to refer to the pseudonymed witnesses while in the Omarska camp will be sufficient in respect of witnesses F, G, H and I and that all it requires in respect of witnesses J and K is their address at the time of the alleged offence. The Defence asserts that it has no interest in knowing the present whereabouts of any of the pseudonymed witnesses.

9. The Defence further argues that there are only very limited circumstances in which the identity of the witness can be withheld from the accused and still permit the accused a fair trial, with the proper exercise of the right to examine the witnesses against him. Those circumstances arise in the situation where the witness is not a victim of the alleged offence but a fortuitous bystander and there is no other relationship between the witness and the accused. The actual identity of the witness is then irrelevant.

10. The briefs submitted by the two *amicus curiae* generally support the position of the Prosecutor. The Brief of Professor Chinkin recognizes the right of the accused to a fair trial and addresses the question of how to balance this right with the rights of private individuals, the public interest in the proper administration of justice and the interests of the international community in seeing those accused of violations of international humanitarian law brought to trial. Professor Chinkin addresses both non-disclosure to the public (confidentiality) and to the accused (anonymity), and discusses how non-disclosure to the accused can be made compatible with the right to a fair trial and is justified by policy considerations in sexual assault cases.

11. The Joint U.S. Brief also addresses these issues and supports most of the relief sought by the Prosecutor, although in some cases the Trial Chamber is invited to extend its protection even further. The brief also urges the International Tribunal to establish a process whereby victims and witnesses can be consulted about their concerns and the dangers they face, especially in view of the ongoing conflict, and advised as to the protection available, and thus give fully-informed consent.

III. The Powers of the International Tribunal

12. The International Tribunal was established by the Security Council in the first half of 1993 as a measure to maintain or restore international peace and security pursuant to Chapter VII of the Charter of the United Nations. Resolution 827, containing the Statute of the International Tribunal, was adopted in May 1993, giving the International Tribunal jurisdiction "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", in accordance with the provisions of the Statute.

13. The power of the Trial Chamber to grant measures for the protection of victims and witnesses arises from the provisions of the Statute and of the Rules. Article 20 of the Statute provides in paragraph (1) that the Trial Chamber shall ensure that a trial is fair and

1 88
5070

expeditious, with "due regard for the protection of victims and witnesses". Article 22 of the Statute, entitled *Protection of victims and witnesses*, reads as follows:

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

14. Measures for the protection of victims and witnesses are provided for in a number of places in the Rules, in particular, in Rules 69, 75, 79 and 89. The main provision is in Rule 75, as amended in June 1995. This Rule, *Measures for the Protection of Victims and Witnesses,* reads as follows:

> (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
>
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:
>
> (a) expunging names and identifying information from the Chamber'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;
>
> (ii) closed sessions, in accordance with Rule 79;
>
> (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
>
> (C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

15. Rule 69, *Protection of Victims and Witnesses*, as amended in June 1995, provides for protective measures at the pre-trial stage as follows:

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

16. Rule 79, *Closed Sessions*, provides in Sub-rule (A) that:

(A) The Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;
(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
(iii) the protection of the interests of justice.

Finally, Rule 89, entitled *General Provisions*, provides guidance to the Trial Chamber as to the rules of evidence it should apply, in particular, in Sub-rules (B), (C) and (D):

(A) . . .

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) . . .

187
5058

IV. Sources of law that the International Tribunal should apply in interpreting its Rules and Statute

17. A fundamental issue raised by this motion is whether, in interpreting and applying the Statute and Rules of the International Tribunal, the Trial Chamber is bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context. The Defence argues that the case law of other international judicial bodies interpreting the right of an accused to a fair trial establishes the minimum standard which must be preserved in all judicial proceedings, including those of the International Tribunal. In contrast, the Prosecutor argues that while the case law of other international bodies is relevant for interpreting this right, its application must be tailored to the unique requirements mandated by the Statute of the International Tribunal.

18. Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant. Article 31 of the Vienna Convention states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27.) The object and purpose of the International Tribunal is evident in the Security Council resolutions establishing the International Tribunal and has been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace. (First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/150 (1994) at para. 11 ("Annual Report").) In the case of the International Tribunal, the context of the Statute is indicated by the Report of the Secretary-General of 3 May 1993 (U.N. DOC S/25704), which contained a draft statute adopted by the Security Council without amendment.

19. The Report of the Secretary-General gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal.

Although the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies. *(Id.* para. 17.) This lack of guidance is particularly troubling because of the unique character of the International Tribunal. It is the first international criminal tribunal ever to be established by the United Nations. Its only recent predecessors, the International Military Tribunals at Nuremberg and Tokyo, were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature. *(Id.* para. 3.) In addition, the Nuremberg and Tokyo Tribunals were multinational but not international in the strict sense as only the victors were represented. (*Id.* para. 10.) By contrast, the International Tribunal is not the organ of a group of States; it is an organ of the whole international community. (*Id.* para. 10.)

20. As a body unique in international law, the International Tribunal has little precedent to guide it. The international criminal tribunals at Nuremberg and Tokyo both had only rudimentary rules of procedure. The rules of procedure at Nuremberg barely covered three and a half pages, with a total of 11 rules, and all procedural problems were resolved by individual decisions of the Tribunal. At Tokyo there were nine rules of procedure contained in its Charter and, again, all other matters were left to the case-by-case ruling of the Tribunal. *(Id.* para. 54.) Both tribunals guaranteed certain minimum rights to the accused to ensure a fair trial. These rights included: (1) the right to be furnished with the indictment in a language which the defendant understands; (2) the right to a translation of the proceedings in a language which the defendant understands; (3) the right to assistance of counsel; and (4) the right to present evidence and to cross-examine witnesses called by the prosecution.[1]

21. Although the Judges of the International Tribunal looked to the Nuremberg and Tokyo tribunals when drafting the Rules, these tribunals provided only limited guidance. In addition to the lack of detail, the Judges were conscious of the need to avoid some of the flaws noted in

[1]Art. 24(g) of the Charter of the International Military Tribunal at Nuremberg provides that "[t]he Prosecution and the Defense shall interrogate and may cross-examine any witness and any defendant who gives testimony," while art. 9(d) of the Charter of the International Military Tribunal for the Far East states that "[a]n accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine."

the Nuremberg and Tokyo proceedings. *(Id.* para. 71.) The Nuremberg and Tokyo trials have been characterized as "victor's justice" because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war. *(See* Röling and Cassese, *The Tokyo Trial and Beyond* 50-55 (1993).) Therefore, the International Tribunal is distinct from its closest precedents.

22. Another unique characteristic of the International Tribunal is its utilization of both common law and civil law aspects. Although the Statute adopts a largely common law approach to its proceedings, it deviates in several respects from the purely adversarial model. (Annual Report, *supra*, para. 71.) For example, there are no technical rules for the admission of evidence and the Judges are solely responsible for weighing the probative value of evidence. Secondly, a Chamber may order the production of additional or new evidence *proprio motu*. Thirdly, there is no plea-bargaining. (*Id.* paras. 72-74.) As such, the International Tribunal constitutes an innovative amalgam of these two systems.

23. A final indication of the uniqueness of the International Tribunal is that, as an ad hoc institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand. *(Id.* para. 75.) The International Tribunal therefore decided, when preparing its Rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. Among these is the fact that the abuses perpetuated in the region have spread terror and anguish among the civilian population. The Judges feared that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives. This was particularly troubling given that, unlike Nuremberg, prosecutions would, to a considerable degree, be dependent on eyewitness testimony. (Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* at 242.)

24. In drafting the Rules, therefore, the Judges of the International Tribunal endeavored to incorporate rules that addressed issues of particular concern, such as the protection of victims and witnesses, thus discharging the mandate of Article 22 of the Statute. (Annual Report,

supra, para. 75.) Provisions are made for the submission of evidence by way of deposition, i.e., testimony given by a witness who is unable or unwilling to testify in open court (Rule 71). Another protection is that arrangements may be made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness is brought under the protection of the International Tribunal (Rule 69). Additionally, appropriate measures for the privacy and protection of victims and witnesses may be ordered including, but not limited to, protection from public identification by a variety of methods (Rule 75). Also relevant is the establishment of a Victims and Witnesses Unit within the Registry to provide counselling and recommend protective measures (Rule 34). Additionally, the Judges recognized that many victims of the conflict in the former Yugoslavia are women and have therefore placed special emphasis on crimes against women in the Rules. (Annual Report, *supra*, para. 82.) The Rules make special provisions as to the standard of evidence and matters of credibility of the witness which may be raised by the defence in cases of sexual assault (Rule 96). In particular, no corroboration of a victim's testimony is required and the victim's previous sexual conduct is inadmissible. Additionally, if the defence of consent is raised, the Trial Chamber may consider factors that vitiate consent, including physical violence and moral and psychological constraints.

25. In drafting the Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights. The Report of the Secretary-General emphasizes the importance of the International Tribunal in fully respecting such standards. (Report of the Secretary-General, *supra,* para. 106.) The drafters of the Report recognized that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future. *(See* Morris and Scharf, *supra*, at 175.) In response to these concerns, the drafters adopted a liberal approach in procedural matters. Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR").

185
5061

In fact, the Statute provides greater rights than the ICCPR by extending judicial guarantees to the pre-trial stage of the investigation.

26. Although Article 14 of the ICCPR was the source for Article 21 of the Statute, the terms of that provision must be interpreted within the context of the "object and purpose" and unique characteristics of the Statute. Among those unique considerations is the affirmative obligation to protect victims and witnesses. Article 22 provides that such measures shall include the protection of the victim's identity. Article 20 (1) of the Statute requires: "full respect for the rights of the accused and due regard for the protection of victims and witnesses." Further, Article 21 states that the right of an accused to a fair and public hearing is subject to Article 22. Pursuant to those mandates, Rules were promulgated which relate to the protection of victims and witnesses, as referred to above.

27. This affirmative obligation to provide protection to victims and witnesses must be considered when interpreting the provisions of the Statute and Rules of the International Tribunal. In this regard it is also relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses. These considerations are unique: neither Article 14 of the ICCPR nor Article 6 of the European Convention of Human Rights ("ECHR"), which concerns the right to a fair trial, list the protection of victims and witnesses as one of its primary considerations. As such, the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations. In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.

28. The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of

Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence. This is evident in the case law of those countries which have conducted their own war crimes trials. For example, much reliance has been placed during war crimes trials on affidavits, i.e., signed statements by a witness made before trial. Defence counsel have often objected to the use of such evidence, mainly on the ground that, unlike a witness appearing in court, affidavits cannot be cross-examined. However, it has been noted that: "there can be no doubt as to their admissibility under the laws governing at least most of the countries which have conducted trials of offences under international criminal law." *(Law Reports of Trials of War Criminals*, vol. XV, 198 (1949).) A further example of the more elastic rules of evidence permissible before those courts which have tried war criminals is found in the greater frequency with which hearsay evidence is admitted, when compared to proceedings before most courts dealing with offences purely under national law. *(Id.* at 199.)

29. In addition, the rights for the accused provided by the International Tribunal clearly exceed those contained in Article 105 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, which provides for the rights of a prisoner of war in criminal proceedings. Article 105 includes only the right to counsel, the right to be informed of the charges, and the rights of the accused to receive relevant documents, to have adequate time and facilities to prepare the defence, to have access to an interpreter, to confer privately with counsel, and to call witnesses.

30. As such, the Trial Chamber agrees with the Prosecutor that the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses within its unique legal framework. While the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as "fair trial", whether or not the proper balance is met depends on the context of the legal system in which the concepts are being applied.

1 84
5062

V. Confidentiality

A. Public Hearing

31. Several of the Prosecutor's requests have direct implications for the accused's right to a public hearing. Although in this case the Defence has agreed to these requests for most witnesses, Article 20 of the Statute obligates the Trial Chamber to ensure that the trial is fair and conducted in accordance with the Rules. The Trial Chamber is cognizant that, in many respects, it is establishing legal precedents in uncharted waters. The Prosecutor has advised that he may seek protective measures for other witnesses and the Defence, if it chooses, may also apply for protection. Therefore, it is important that the Trial Chamber's interpretation and application of the Statute and Rules be explained with some specificity.

32. The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair. As the European Court of Human Rights noted: "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of . . . a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ." *(Sutter v. Switzerland*, decision of 22 February 1984, Series A, no. 74, para. 26.) In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal. As such, the Judges of this Trial Chamber are, in general, in favour of an open and public trial. This preference for public hearings is evident in Article 20 (4) of the Statute, which requires that: "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." Also relevant is Rule 78, which states that: "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."

33. Nevertheless, this preference for public hearings must be balanced with other mandated interests, such as the duty to protect victims and witnesses. This balance is expressly required in Rule 79, which provides that the press and public may be excluded from proceedings for various reasons, including the safety or non-disclosure of the identity of a

victim or witness. As such, in certain circumstances, the right to a public hearing may be qualified to take into account these other interests.

34. These qualifications on the right to a public hearing are permitted under the Statute and Rules. Article 20 (4) of the Statute provides for the possibility of closed hearings and Article 20 (1) requires that due regard be given for the protection of victims and witnesses. Article 21 (2) provides that the accused is entitled to a fair and public hearing "subject to Article 22", which requires that provisions be made for the protection of victims and witnesses, including *in camera* proceedings and the protection of the identity of the victim or witness.

35. Several of the Rules relate to the balance between the protection of victims and witnesses and the accused s right to a public hearing. Rule 69 allows for the non-disclosure at the pre-trial stage of the identity of a victim or witness who may be in danger until the witness is brought under the protection of the International Tribunal. This non-disclosure applies to the press and public as well as to the accused. Rule 75 allows for the taking of appropriate measures to protect victims and witnesses, provided such measures are consistent with the rights of the accused. As already noted, Rule 79 provides that the press and public may be excluded from proceedings for reasons of public order or morality; the safety or non-disclosure of the identity of a victim or witness; or the protection of the interests of justice.

36. Measures to protect the confidentiality of victims and witnesses are also consistent with other human rights jurisprudence. Article 21 of the Statute states that the accused shall be entitled to a fair and public hearing subject to Article 22 (the protection of victims and witnesses, including *in camera* proceedings and protection of the victim's identity). The Defence argues that Article 22 should not be construed as an exception to the right of a public hearing contained in Article 21 as, in the perception of the ICCPR and the ECHR, the protection of victims and witnesses is not sufficient to set aside the right of the accused to a fair and public hearing. What is essential to recognize, however, is that the Statute of the International Tribunal, which is the legal framework for the application of the Rules, does provide that the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial. As noted above, the Trial Chamber must interpret the

183
5060

provisions of the Statute and Rules within the context of its own unique framework. Therefore, just as the ICCPR and ECHR provide for the limitation of the right to a public trial to protect public morals, the Statute authorizes limits to the right to a public trial to protect victims and witnesses. This is explicit in Rule 75.

37. Even if the rulings of other international judicial bodies were binding on the Trial Chamber, they would not necessarily prohibit measures to protect the confidentiality of victims and witnesses, as these bodies tend to balance the interests of the victims and witnesses with the rights of the accused without the affirmative duty to do so. Article 14 (1) of the ICCPR and Article 6 (1) of the ECHR state that everyone is entitled to a fair and public hearing. Nevertheless, both articles provide that the press and public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice.

38. In construing Article 6 (1) of the ECHR, the European Court of Human Rights has noted that the publicity requirement in Article 6 (1) applies to any phase of a proceeding which affects the determination of the matter at issue. *(Axen v. Federal Republic of Germany*, decision of 8 December 1983, Series A, no. 72.) Nevertheless, this case held that the proceedings as a whole must be examined to determine whether the absence of certain public hearings is justified. (*Id.* para. 28.) The Court has also held that the right to publicity may not necessarily be violated if both parties to a proceeding consent to it being held *in camera*. *(Le Compte, Van Leuven and De Meyere v. Belgium*, decision of 23 June 1981, Series A no. 43, para. 59.) In general, the Commission and the Court consider whether one of the specific conditions listed on Article 6 (1) prevails before accepting that a given *in camera* proceeding has not been conducted in violation of that article. In a similar vein, this Trial Chamber must determine if one of the specific interests it has an obligation to consider, such as the protection of victims and witnesses, mandates a limitation on public access to information.

39. Measures to prevent the disclosure of the identities of victims and witnesses to the public are also compatible with principles of criminal procedure in domestic courts. There is a growing acceptance in domestic jurisprudence of the need to protect the identity of victims

and witnesses from the public when a special interest is involved. Several common law countries allow for the non-disclosure to the public of identifying information relating to certain victims and witnesses. The United Kingdom prohibits disclosure to the public of identifying information of a complainant in a sexual assault case, including any still or moving pictures, except at the discretion of the court. (The Sexual Offences (Amendment) Act 1976 s. 4.) Canadian legislation guarantees anonymity from the public upon application to the court. (Canadian Criminal Code s. 442(3).) In Queensland, Australia, the Evidence Act (Amendment) 1989 (Queensland) allows additional protection during the testimony of a "special witness" including the exclusion of the public and or the defendant or other named persons from court. (Brief of Professor Chinkin at 4 - 6.) South African law also provides for the non-disclosure for a certain period of time of the identity of a witness in a criminal proceeding if it appears likely that harm will result from the testimony (Criminal Procedure Act of South Africa 51/1977, sec. 153(2)(b)) and has provisions for closing the courtroom during the testimony of victims in cases of sexual assault.

40. Even the United States of America, with its constitutionally-protected rights to a public trial and free speech - which thus places great importance on the right of public disclosure - is more amenable than in the past to measures to protect victims and witnesses. The Supreme Court of the United States has held that state sanctions imposed on the press for disclosing the identities of sexual assault victims before trial may be constitutional, and three state statutes provide for such sanctions.[2] *Florida Star v. BJF*, 491 U.S. 524 (1989). Other United States courts have also noted that the accused's right under the Sixth Amendment to a public trial is not absolute and must, in some cases, give way to other interests essential to the fair administration of justice. *(Waller v. Georgia*, 467 U.S. 39, 46 (1984).) In this regard, courts have been willing to close certain proceedings to account for the concerns of witnesses. If a partial closure is requested, i.e., excluding only certain spectators, there must be a "substantial reason" for such closure, whereas a full closure to the public and press requires an "overriding interest." (For partial closure see *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied* 469 U.S. 1208 and for total closure see *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and *Waller*, 467 U.S. 39 (holding that tests set out in

[2]Florida, Georgia and South Carolina have statutory prohibitions of disclosure by the media. *See* Brief of Professor Chinkin 5.

Press-Enterprise govern total closures).) Partial closures of the courtroom have been justified on the grounds of a witness' fear of retribution from perpetrators still at large (*Nieto v. Sullivan*, 879 F.2d 743 (10th Cir.), *cert. denied*, 110 S. Ct 373 (1989)); to protect the dignity of an adult witness during a rape trial (*United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), *cert. denied* 434 U.S. 1076 (1977), *see also Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir.), *cert. granted* 468 U.S. 1206 (1983), *vacated* and *remanded*, 739 F.2d 531 (1984), in which protection of an adult prosecution witness from embarrassment was held to be sufficient for partial closure of a rape trial); and to protect a minor rape victim from fear of testifying before disruptive members of the defendant's family (*U.S. v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989) *see also Geise v. United States*, 262 F.2d 151, 155 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) in which the reluctance and fear of a child witness in a rape case to testify in the presence of a full courtroom justified closure of the courtroom to all but press, members of the bar, and close friends and relatives of the defendant). Complete closure for a limited time has been justified to protect the safety of a witness and his family (*United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)); to preserve confidentiality of undercover agents in narcotics cases (*United States ex. rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975)); and to protect disclosure of trade secrets (*Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974)). Twenty-six state statutes allow for closure of trials to protect witnesses.[3]

41. States following the civil law model also provide for measures to prevent the disclosure of identity of certain victims and witnesses from the public and press. For example, Swiss law provides that, in cases of sex crimes, the authorities and private persons are not permitted to publicize the victim's identity if it is necessary to protect the interests of the prosecution or if the victim requests non-disclosure. The possibility also exists to close the courtroom during the victim's testimony. (Bundesgesetz Über die Hilfe an Opfer von Straftaten, art. 5, *and see* Joint U.S. Brief 29.) In Denmark, if a victim in an incest or rape case so requests, the trial must be held *in camera*, in which case no publicity of the proceedings is allowed. In certain cases the press is allowed access to the courtroom but is

[3]State statutes that allow for closure of trials include: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New York, North Carolina, North Dakota, South Dakota, Utah, Vermont, Virginia and Wisconsin.

prohibited from reporting identifying information. (Administration of Justice Act, sec. 29 and 31.) In Germany, publicity can be restricted or even excluded in order to protect the accused and witnesses. (Gerichtsverfassungsgesetz sec. 170.) In Greece, the Constitution provides for an exception to the principle that the trial must be held in public in cases where publicity is deemed to cause prejudice to morals or to the private lives of the parties. Particularly in cases of rape, members of the public may be excluded if their presence might cause grievous suffering or defamation of the victim. (Code of Criminal Procedure art. 30. *See* Christine van den Wyngaert, *Criminal Procedure Systems in the European Community* (1993).)

42. In these jurisdictions confidentiality is justified if special considerations exist, such as in cases involving sexual assault. In the context of the conflict in the former Yugoslavia, even in cases not concerning sexual assault, sufficient considerations to justify confidentiality may be found in the fear of reprisals during an ongoing conflict, particularly given the mandated duty of the International Tribunal to protect victims and witnesses and the inability of the International Tribunal to guarantee the safety of the victim or witness due to the lack of a fully-funded and operational witness protection programme at this moment in time.

43. The Trial Chamber has also considered in this respect the confidential submissions by the Prosecutor and the Defence concerning prior media contact with the witnesses for whom this protection is sought. Of the six witnesses, three are stated to have had no media contact, two have given interviews in which the name and identity of the witness has been withheld or disguised and one, who had previously given interviews in which the identity was disclosed, is now in a national witness protection programme.

44. The Trial Chamber therefore accepts the arguments of the Prosecutor and grants the relief sought in Prayers 1, 2, 3, 4, 5, 6, 9, 10 and 12 in respect of witnesses F, G, H, I, J and K.

B. Victims and Witnesses in Cases of Sexual Assault

45. Four of the witnesses who are sought to be protected by the confidentiality measures ordered by the Trial Chamber are allegedly victims of, or witnesses to, cases of sexual assault. The Prosecutor has requested, in Prayer 7, pursuant to Rule 75 (B)(i)(c), that all of the

pseudonymed witnesses be permitted to give testimony through closed circuit television and thereby be protected from seeing the accused. This is intended to protect them from possible retraumatization. The Trial Chamber regards such measures as particularly important for victims and witnesses of sexual assault.

46. The existence of special concerns for victims and witnesses of sexual assault is evident in the Report of the Secretary-General, which states that protection for victims and witnesses should be granted, "especially in cases of rape or sexual assault." (Report of the Secretary-General, para. 108.) It has been noted that rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim. *(See* Marcus and McMahon, *Limiting Disclosure of Rape Victims' Identities* 64 S. Cal. L.Rev. 1019, 120 (1991) and sources cited therein.) It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim s family and community. (Brief of Professor Chinkin at 4.) In addition, traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time. (Judith Lewis Herman, M.D., *Trauma and Recovery* (1991) 72, cited in the Joint U.S. Brief.)

47. The need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognized in the domestic law of some States. *(See id.* at 22-28, *and see* Brief of Professor Chinkin at 5-6.) As noted above, several states limit the public disclosure of identifying information about victims and witnesses of sexual assault and provide for the full or partial closure of the courtroom during the victims' testimony. Several other methods are utilized to accommodate the special concerns of these victims while testifying, such as the use of one-way closed circuit television. South Africa allows the use of closed circuit television in cases of sexual offences where a child witness is involved. *(See* Joint U.S. Brief at 23.) In the United States, several of the constituent states allow closed circuit television in the courtroom, and the Supreme Court held in *Maryland v. Craig* that one-way closed circuit television can be used without violating the Sixth Amendment right to confrontation when the court finds it necessary to protect a child witness from psychological harm. (497 U.S. 836 (1990).)

48. Another such method is the use of depositions and video conferences. For example, in the United States thirty-seven constituent states permit the use of videotaped testimony of sexually abused children.[4] In Queensland, Australia, state law provides that when certain witnesses, including victims of sexual assault, testify the court may take measures to protect the witness, such as the use of videotaped evidence in lieu of direct testimony or obscuring the witness' view of the defendant. (The Evidence Act (Amendment) 1989 (Queensland).) Other mechanisms utilized to accommodate victims of sexual assault include image- and voice-altering devices, screens and one-way mirrors.

49. In consideration of the unique concerns of victims of sexual assault, a special Rule for the admittance of evidence in cases of sexual assault was included in the Rules of the International Tribunal. Rule 96 provides that corroboration of the victim's testimony is not required and consent is not allowed as a defence if the victim has been subject to physical or psychological constraints. Finally, the victim's prior sexual conduct is inadmissible.

50. In determining where the balance lies between the right of the accused to a fair and public trial and the protection of victims and witnesses, consideration has been given to the special concerns of victims of sexual assault. These concerns have been factored into the balance on an individual basis for each witness for whom protection is sought. Witness F is an alleged victim of forcible sexual intercourse. Witnesses G, H and I are alleged victims of or witnesses to sexual mutilation. The measures sought by the Prosecutor are appropriate to protect the privacy rights of witnesses F, G, H and I. These measures in no way affect the accused's right to a fair and public trial. The protective measures sought pursuant to Rule 75 will afford these witnesses privacy and guard against their retraumatization should they choose to testify at trial. Given the individual circumstances of these four witnesses, the Trial Chamber has determined that protective measures are warranted, and are allowed by the Statute and Rules.

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[4]Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. Cited in *Maryland v. Craig*, 497 U.S. 836, n.2 (1990).

180
5054

51. However, the Trial Chamber believes that adequate protection can be provided to certain of these witnesses without resort to closed circuit television, which involves removing the witness from the courtroom. Alternative methods such as the installation of temporary screens in the courtroom, positioned so that the witness cannot see the accused but the accused may view the witness via the courtroom monitors may also be suitable, depending upon the technical practicalities, for any witness for whom full anonymity is not ordered by the Trial Chamber and will give the Trial Chamber the benefit of observing directly the demeanour of the witness.

52. The Trial Chamber grants the relief sought in Prayer 7 or other similar protection as may be arranged by the Registry of the International Tribunal with the approval of the Trial Chamber in respect of witnesses F, G, H and I but denies the relief in respect of witnesses J and K.

VI. Anonymity

A. General principles and application

53. Two of the Prosecutor's requests relate to non-disclosure of the identities of certain witnesses to the accused. Prayer 11, as amended, and Prayer 8 are concerned with keeping the name, address, image, voice and other identifying data of witnesses G, H, I, J and K from the Defence. The Prosecutor is also seeking to keep the present address and whereabouts of witness F and relatives of witness F from the Defence. Furthermore, the Prosecutor requests that the identity of F and her complete statement, redacted only for the above stated purpose, be released to the Defence no earlier than one month in advance of the firm trial date.

54. The underlying reasons for the disclosure of the identity of witnesses are clear. As the European Court of Human Rights noted:

> 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. Testimony or other declarations inculpating an accused may well be

> designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.
> *(Kostovski*, paragraph 42, ECHR series A, Vol. 166, 23 May 1989.)

Therefore the general rule must be that: "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument." *(Id.* para. 41.)

55. However, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a "fair trial". A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses. In a case before the Supreme Court of Victoria, Australia, *Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others*, (1994) V.R. 84, 88, Judge Brooking, when pronouncing on whether anonymity of a witness is in conformity with the principle of a fair trial stated:

> The "balancing exercise" now so familiar in this and other fields of the law must be undertaken. On the one hand, there is the public interest in the preservation of anonymity . . . On the other hand, there is the public interest that . . . the defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to credit, as may assist in securing a favourable outcome to the proceedings. There is also the public interest in the conduct by the courts of their proceedings in public.

56. Similarly the European Court of Human Rights, when determining whether non-disclosure of the identity of a witness constitutes a violation of the principle of fair trial, looks at all the circumstances of the case. *(See Kostovski, supra* paras. 43, 45.) The Court identifies any infringement of the rights of the accused and considers whether the infringement was necessary and appropriate in the circumstances of the case. The Brief of Professor Chinkin suggests that it is in the public interest for the International Tribunal to discharge its obligation to protect victims and witnesses and the Trial Chamber so finds.

57. Under the Statute of the International Tribunal this balancing of interests is reflected in Article 20, which demands full respect for the rights of the accused and due regard for the protection of victims and witnesses to ensure a fair trial. The qualification of the rights of the

accused to accommodate anonymity of witnesses is further elaborated in Article 21 (2) of the Statute, which provides that the accused is entitled to a fair and public hearing "subject to Article 22". Article 22, in turn, requires that provisions be made for the protection of victims and witnesses.

58. Within the context of the Rules, anonymity of witnesses at the trial stage is provided for in Sub-rules 75 (A) and (B)(iii). Measures granting anonymity to a witness pursuant to this provision remain subject to the requirement of Rule 75 (A) that they be "consistent with the rights of the accused."

59. In Rule 69 (C), the right of the accused to learn the identities of the witnesses against him in sufficient time prior to trial is made subject to a decision under Rule 75, thereby extending the power of the Trial Chamber to grant anonymity to a witness at the trial stage to the pre-trial stage.

60. In a leading opinion before the English Court of Appeal, *R. v. Taylor*, transcript of decision at 17 (Ct. App. Crim. Div. 22 July 1994), Lord Justice Evans stated that:

> Whether or not in a particular case the exception [to the right of a defendant to see and to know the identity of his accusers, including witnesses for the prosecution brought against him] should be made is pre-eminently a matter for the exercise of discretion by the trial judge.

Such discretion must be exercised fairly and only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined witnesses against him.

61. The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees. *(See* Article 15 of the ECHR, Article 4 of the ICCPR and Article 27 of the American Convention on Human Rights.) The fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification. Guidance as to which other factors are relevant when balancing all interests with respect to granting anonymity to a witness can be found in domestic law.

62. First and foremost, there must be real fear for the safety of the witness or her or his family: "[T]here must be real grounds for being fearful of the consequences if the evidence is given and the identity of the witness is revealed." (*R. v. Taylor, supra* at 17, 18.) Judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness, e.g., the family of the witness, the Prosecutor, the Victims and Witnesses Unit, as well as by the witness himself. In this case, the Defence has expressed concern that a subjective feeling of fear be allowed to satisfy this criterion. Insofar as the Defence means that there should always be an objective basis to underscore a feeling of fear, such as the horrendous nature and ruthless character of the alleged crimes, then that is a submission with which the Trial Chamber, by majority decision, agrees.

63. Secondly, the testimony of the particular witness must be important to the Prosecutor's case: "[T]he evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it." *(Id.* at 18.) In this respect it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical.

64. Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy. To this end the Prosecutor must have examined the background of the witness as carefully as the situation in the former Yugoslavia and the protection sought permit. There should be no grounds for supposing that the witness is not impartial or has an axe to grind. Nor can non-disclosure of the identity of a witness with an extensive criminal background or of an accomplice be allowed. Granting anonymity in these circumstances would prejudice the case of the defence beyond a reasonable degree. The report by the Prosecutor on the reliability of the witness would need to be disclosed to the defence so far as is consistent with the anonymity sought. *(See R. v. Taylor, supra* at 19.)

65. Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case. *(See Jarvie, supra* at 84, 88.) A number of the

178
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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 in revenge for having given evidence or in order to deter others. Family members may still be held in prison camps. Others fear that even as refugees in other countries they may be at risk. The International Tribunal has no police force that can care for the safety of witnesses once they leave the premises of the International Tribunal. The International Tribunal has no long-term witness protection programme nor the funds to provide for one. In any event, any such programme could not be effective in protecting family members of witnesses in cases in which the family members are missing or held in camps.

66. Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable. *(See R. v. Taylor, supra* at 19.)

67. The right of the accused to examine, or have examined, the witnesses against him, is laid down in Article 21(4) of the Statute of the International Tribunal. Anonymity of a witness does not necessarily violate this right, as long as the defence is given ample opportunity to question the anonymous witness. Witness anonymity will restrict this right to the extent that certain questions may not be asked or answered but, as noted above and as is evidenced in national and international jurisdictions applying a similar standard, it is permissible to restrict this right to the extent that is necessary.

68. The Defence concedes the fact that protective measures have to be balanced with the rights of the accused and that knowledge of the identity of a witness may not, in all circumstances, be essential for the concept of a fair trial. The Defence does contend, however, that there is a bottom line below which the rights of the accused may not be compromised. The Defence argues that this bottom line is best described in the *Kostovski* case before the European Court of Human Rights. The *Kostovski* case is not directly on point, as it does not relate to the testimony of unidentified witnesses who will be present in court, whose evidence will be subject to cross-examination, and whose demeanour is being observed by the Judges of the Trial Chamber. However, the *Kostovski* case does indicate that procedural safeguards

can be adopted to ensure that a fair trial takes place when the identity of the witness is not disclosed to the accused.

69. In the *Kostovski* case the European Court of Human Rights, when determining whether there had been a violation of the Convention, "ascertained whether the proceedings considered as a whole . . . were fair." *(See Kostovski, supra* para. 39.) The Court concluded that "in the circumstances of the case the constraints affecting the rights of the defence were such that [the accused] cannot be said to have received a fair trial." *(Id.* para. 45.) It concluded, however, that the handicaps under which the defence has to labour when anonymity is provided can be counterbalanced by the procedures followed by the court. *(Id.* para. 43.) Thus, according to the European Court of Human Rights, certain safeguards built into the procedures followed by a court of law can redress any diminution of the right to a fair trial arising out of a restriction of the right of the accused to examine or have examined witnesses against him.

70. The majority of the Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure a fair trial when granting anonymity. It believes that some guidance as to what standards should be employed to ensure a fair trial can be ascertained both from the case law of the European Court of Human Rights and from domestic law. It recognizes, however, that these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses. The following guidelines achieve that purpose.

71. Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. *(Id.* para. 43.) Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness. *(Id.* para. 43.) Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable. The release of nicknames used in the camps clearly falls into this latter category and the majority of the Trial Chamber will therefore not allow the release of this information concerning witnesses who have been granted anonymity without the express

consent of these witnesses. Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness. *(See* Article 68 of the German Criminal Code of Procedure (StPO).)

72. Questions relating to the reliability and the relationship of the witness to the accused or the victim by the defence must be permitted. If this information is released, knowledge of the identities of the witnesses would not add considerably to the information which the defence needs to cross-examine them about the events to which they testify. It may prevent questioning them about their past history, which could go to their credibility, but such restriction of the right of the accused would seem to be permissible in the light of the circumstances. As Judge Brooking observed in the *Jarvie* case:

> The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it . . . A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.
> *(See Jarvie, supra* at 90.)

73. According to the Defence, the bottom line formulated in the *Kostovski* case is that the accused should be given a proper opportunity to question and challenge a witness and to be informed about particulars which may enable the accused to demonstrate that the witness is prejudiced. These rights are sufficiently safeguarded by the procedural guidelines ensuring a fair trial as outlined above. As long as the Trial Chamber adheres to these guidelines, the Trial Chamber should order appropriate measures for anonymity of vulnerable witnesses, bound as it is by its mandated obligation to offer protection to them in the process of conducting a fair trial.

74. The Rules, especially Rule 89, give the Trial Chamber wide latitude with respect to the receipt of evidence. In this Rule, perhaps more than anywhere else in the Rules, there is a departure from some common law systems where technical rules of evidence predominate. Sub-rules 89 (C) and (D) provide that the only limit on the receipt of relevant evidence is that it has probative value, and it may be excluded only if it is substantially outweighed by the need to ensure a fair trial. Anonymous testimony may be both relevant and probative.

75. The limitation on the accused's right to examine, or have examined, the witnesses against him, which is implicit in allowing anonymous testimony, does not, standing alone, violate his right to a fair trial. Indeed, the Defence recognizes that, under certain circumstances, anonymous testimony is consistent with a fair trial. If the party offering anonymous testimony is able to meet the guidelines set out herein, the testimony should be allowed.

76. Now that the framework in which anonymity may function has been set out, the Trial Chamber has to look at the specific circumstances of this case to determine whether to grant anonymity would be an appropriate measure for witness protection. In this regard, the Trial Chamber has paid particular attention to the confidential filings by the parties concerning prior media contact.

77. Initially, the Trial Chamber must consider the factors that apply to all witnesses. First, with respect to the objective aspect of the criterion that there must be real fear for the safety of the witness, it is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices. The alleged crimes are, without doubt, of a nature that warrants such a finding. Secondly, the Prosecutor has sufficiently demonstrated the importance of the witnesses to prove the counts of the indictment to which they intend to testify. Thirdly, no evidence has been produced to indicate that any of the witnesses is untrustworthy. Fourthly, the International Tribunal is in no position to protect the witnesses and or members of their family after they have testified. When applying these principles to the specific circumstances that can justify anonymity in an individual case, the evidence with regard to each of the five witnesses pseudonymed G, H, I, J and K must be examined separately.

78. Witness G was allegedly forced to participate in the sexual mutilation of Fikret Harambašić in charge 5 of the indictment. According to a Declaration filed by one of the investigators from the Office of the Prosecutor, witness G originally ruled out the prospect of testifying before the International Tribunal. However, witness G did indicate that he would consider the possibility if "stringent procedures to ensure his confidentiality and security" were implemented. The Defence is aware of the true name of this witness as witness G has, in

the past, appeared in the media without disguising his identity. The Defence is not aware, however, of a new identity under a national witness protection programme. The Trial Chamber, by majority, orders that the present identity and whereabouts of witness G be withheld from the Defence. His former identity need not be withheld from the Defence because that identity is already known to them.

79. Witness H was also allegedly forced to participate in the sexual mutilation of Fikret Harambašić in charge 5 of the indictment. The Defence asserts that it believes that it knows the identity of witness H, who has refused to testify unless: "[the] identity and that of [the] family is completely protected". Because of the reasonable fear of retaliation felt by the witness and because the Prosecutor has met the guidelines for anonymity set out above, the majority decision of the Trial Chamber is to order that the identity of witness H and other identifying information be withheld from the Defence.

80. Witness I is a witness to the alleged sexual mutilation in charge 5 of the indictment. According to the Prosecutor, this witness has had no media contact. On behalf of witness I, the Prosecutor has submitted a Declaration from one of his investigators stating that:

> [B]ased on my observations, it is my opinion that the emotional impact of public disclosure of his victimization would be profound and irreparable. There is a strong likelihood that [witness] I would decline to participate in the proceedings if public disclosure was a condition of his testimony.

This statement fails to satisfy the threshold requirement that the witness requests anonymity from the accused. The Trial Chamber has granted the request of the Prosecutor for confidentiality for witness I from the public and the media, measures which are designed to give witness I the protection from "public disclosure" that he seeks. The obligation of the International Tribunal to protect witnesses should not go beyond the level of protection they are actually seeking.

81. It is alleged that witnesses G, H and I together support charge 5 of the indictment. Witness G has been denied anonymity by the Trial Chamber insofar as it relates to his former identity of which the Defence is already aware. Witness I is also alleged to be a witness to this

mutilation. As noted above, it has been asserted that there is "a strong likelihood" that witness I would decline to give evidence if public disclosure was a condition of his testimony. The Trial Chamber has declined to allow witness I to testify anonymously but has granted full confidentiality to protect against public disclosure. The Prosecutor has not disclosed whether he will have other evidence regarding this charge and, of course, the Trial Chamber does not mean to suggest that additional evidence is required. At this stage of the proceeding, however, the accused is not denied a fair trial by the decision to permit witness H to testify anonymously.

82. According to the Prosecutor, witnesses J and K have had no media contact. Both fear reprisals against themselves and members of their families. Again it is asserted by the Prosecutor that witness J will not testify unless the identity is protected. Witness K has also requested that the identity and the identity of family members be protected. The Defence requests the release of the addresses of these witnesses at the time of the alleged offence in order to examine neighbours about the events of charge 11. Neither their identity nor their image is needed for an effective cross-examination, for the Defence asserts that its need is to "examine neighbours". Because of the reasonable fear of retaliation felt by these witnesses and because the Prosecutor has met the guidelines for anonymity set out above, the Trial Chamber, by majority decision, orders the non-disclosure of the identities and other identifying information relating to witnesses J and K.

83. It is alleged that witnesses J and K are "critical witnesses" to charge 11, for they are said to have observed armed forces beat and shoot persons in their neighbourhood. The Defence asserts that:

> [D]isclosure of names and/or images will not be necessary for an effective examination of their statements if their addresses at the time of the events as described in the indictment will be disclosed to the defence.
>
> The defence has no interest in data concerning present whereabouts of any witness for the prosecution.

As the Defence has indicated that it does not need to observe the images of these witnesses while testifying, the accused is not denied his right of cross-examination if the images of

witnesses J and K are distorted or otherwise withheld from the accused. However, the Trial Chamber is not persuaded that it is necessary to release the addresses of the witnesses at the time that the alleged crimes took place in order to examine the circumstances of that charge. Revealing the former addresses of witnesses J and K is tantamount to revealing their identity. A less precise description will be sufficient to place the witnesses in their proper setting without giving actual addresses. The majority of the Trial Chamber believes that these witnesses are bystanders. Therefore, their contextual identity is sufficient to assure the accused a fair trial. Providing the Defence with their general locality meets the requirement of contextual identification, for this information will be sufficiently precise to allow the Defence to make enquiries of others in the vicinity as to what they saw of the incidents of which J and K speak. The Trial Chamber finds that withholding their addresses will not deny the accused his right to a fair trial. Judge Stephen concurs with such decision subject to confirmation by the Prosecutor that witnesses J and K were, indeed, mere bystanders. The Prosecutor is directed to provide the Defence with the above general locality for witnesses J and K not less than thirty (30) days in advance of the firm trial date.

84. The Trial Chamber, by majority, finds that the Prosecutor has met the necessary standard to warrant anonymous testimony in respect of witnesses H, J and K. If, after considering the proceedings as a whole, as suggested in *Kostovski*, the Trial Chamber considers that the need to assure a fair trial substantively outweighs this testimony, it may strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused. It would be premature for the Trial Chamber to determine now that such testimony must be excluded.

85. This balancing of interests shows that, on the one hand, there is some constraint to cross-examination, which can be substantially obviated by the procedural safeguards. On the other hand, the Trial Chamber has to protect witnesses who are genuinely frightened. In this situation the Trial Chamber, by majority, grants anonymity to witnesses G (of present identity only), H, J and K as requested by the Prosecutor in his Prayer 11 (a). The Prosecutor's Prayer in the alternative is denied.

86. As Lord Justice Beldam in the judgement given by the Queen's Bench Divisional Court in the British case of *R. v. Watford Magistrates' Court* [1992] T.L.R. 285 stated:

> [I]t would be pointless to withhold the identity of the witnesses or the means by which they could be identified if at the same time the circumstances in which they gave evidence were such that they could by other means, either because of their appearance, or because of the sound of their voices, easily be identified.
> (Cited in *R.v. Taylor*, *supra* at 15.)

Therefore the Trial Chamber, by majority, orders that the voices and images of witnesses H, J and K be altered to the extent that this will be necessary to prevent their identities from becoming known to the accused. The Prosecutor's Prayer 8 is granted in respect of these three witnesses H, J and K but denied in respect of witnesses F, G and I.

B. Release of edited recorded eyewitness testimony to the media.

87. In view of the right of the public to learn about the administration of justice in the International Tribunal, and especially because the International Tribunal has been established to prosecute serious violations of international humanitarian law in which the world community has a special interest, the Trial Chamber has decided that, after review by the Victims and Witnesses Unit, edited recordings and transcripts of the proceedings shall be released to the media. Editing will take place at the discretion of the Coordinator of the Victims and Witnesses Unit for the necessary protection of the witnesses, subject to the overall control of the Trial Chamber.

VII. Miscellaneous and general measures sought

88. The Prosecutor's request for measures to protect the identity of witness A has been withdrawn. The Prosecutor intends to release details of the identity of witness A as early as reasonably practicable and, in any event, prior to the commencement of the trial. The Defence asks for the identity to be released right away, asserting that, as the request for protection has been withdrawn, any further denial of information constitutes an inequality of examination.

The Trial Chamber agrees with the Defence and orders the identity of witness A to be released immediately.

89. Furthermore, in his alternative Prayer 11 (a), the Prosecutor asks for delayed disclosure of the identity of witness F and the Defence consents to this. The Defence requests that the nickname as used in the camp also be released. The Trial Chamber orders in accordance with both requests. The release of the nickname is necessary to enable the Defence to place this witness in context. Rule 67 (A) requires that the identity of each witness shall be notified to the defence "as early as reasonably practicable and in any event prior to the commencement of the trial". In exceptional circumstances where disclosure of identity is ordered under Rule 69, Sub-rule (C) requires that the identity be disclosed "in sufficient time prior to the trial to allow adequate time for preparation of the defence". The Trial Chamber therefore orders that the identity and nickname of witness F be released not less than thirty days in advance of the firm trial date in order to allow the Defence sufficient time to prepare its case.

90. The Prosecutor has also sought non-disclosure of the current address of witness F and of the relatives of witness F. The Defence has confirmed that it has no interest in the present whereabouts of any witness. The Trial Chamber therefore grants this request.

91. The Prosecutor has already delivered to the Defence the redacted statements of witnesses G, H, I, J and K. The Trial Chamber has determined that witnesses H, J and K are entitled to full anonymity and therefore no further information needs to be disclosed to the Defence concerning the statements of these witnesses. The Trial Chamber, by majority, orders that the full statements of witnesses G and I, redacted only so far as may be necessary to preserve the anonymity of witnesses H, J and K and the current identity of witness G, be released to the Defence not later than thirty days in advance of the firm trial date.

92. The Trial Chamber has thus disposed of all of the requests for protection made by the Prosecutor with the exception of those contained in Prayers 13 and 14. In view of the measures for the protection of witnesses ordered by the Trial Chamber, the relief sought in Prayer 13 flows as a logical consequence and is granted accordingly.

93. Prayer 14 raises a number of practical difficulties for the Trial Chamber in that the enforcement of the powers of the International Tribunal in respect of contempt of its Orders and Decisions depends, as with many of its other powers, on the cooperation of States. However, the Trial Chamber grants the relief requested in Prayer 14 in so far as it relates to the six protected witnesses in the matter now before it.

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173

DISPOSITION

For the foregoing reasons **THE TRIAL CHAMBER**, being seized of the Motion filed by the Prosecutor, and

PURSUANT TO RULE 75,

HEREBY GRANTS the Prosecutor's requests contained in Prayers 1, 2, 3, 4, 5 and 6, Prayer 7 (in respect of witnesses F, G, H and I only), Prayer 8 (in respect of witnesses H, J and K only), Prayers 9 and 10, Prayer 11 (a) (as to witnesses G, H, J and K only) and Prayers 12, 13 and 14 and **ORDERS AS FOLLOWS**:

(1) the identity of witness A shall be released to the Defence immediately;

(2) the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms F, G, H, I, J and K shall not be disclosed to the public or to the media;

(3) all hearings to litigate the issue of protective measures for pseudonymed witnesses shall be in closed session;

(4) the names, addresses, whereabouts and other identifying information concerning F, G, H, I, J and K shall be sealed and not included in any of the public records of the International Tribunal;

(5) to the extent the names of, or other identifying data concerning, any of these victims and witnesses are contained in existing public documents of the International Tribunal, those names and other identifying data shall be expunged from those documents;

(6) documents of the International Tribunal identifying these witnesses shall not be disclosed to the public or the media;

(7) the testimony of witnesses F, G, H and I may be given by one-way closed circuit television or such other method as will avoid the retraumatization of these witnesses;

(8) the testimony of witnesses F, G, H, I, J and K shall be heard in closed session: however, edited recordings and transcripts of these sessions shall be released to the public and the media after review by the Victims and Witnesses Unit of the International Tribunal;

(9) the pseudonyms F, G, H, I, J and K shall be used whenever referring to these witnesses in proceedings before the International Tribunal and in discussions among parties to the trial;

(10) the Prosecutor shall disclose to the Defence and the accused the name and complete statement of witness F not less than thirty days in advance of the firm trial date. The Prosecution may redact from witness F's statement witness F's current address and whereabouts, and information disclosing the present address and whereabouts of the witness' relatives;

(11) the Prosecutor may withhold from the Defence and the accused the current identity of, and other identifying data concerning, witness G and the names of, and other identifying data concerning, witnesses H, J and K;

(12) the Prosecutor shall disclose to the Defence and the accused the complete statements of witnesses G and I, redacted only so far as may be necessary to preserve the anonymity of witnesses H, J and K and the current identity of witness G, not later than thirty days in advance of the firm trial date;

(13) the Prosecutor shall provide the Defence with details of the general locality for witnesses J and K not less than thirty days in advance of the firm trial date;

(14) the testimony of witnesses H, J and K may be given using voice and image altering devices to the extent necessary to prevent their identities from becoming known to the accused;

(15) the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall not disclose the names of these victims and witnesses or other identifying data concerning these witnesses to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witnesses adequately;

(16) any such disclosure shall be done in such a way as to minimize the risk of the victims' and witnesses' names being divulged to the public at large or to the media;

(17) the accused, the defence counsel and their representatives who are acting pursuant to their instructions or requests shall notify the Office of the Prosecutor of any requested contact with prosecution witnesses or the relatives of such witnesses and the Office of the Prosecutor shall make arrangements for such contact;

(18) the public and the media shall not photograph, video record or sketch the six protected witnesses appearing in this matter while they are in the precincts of the International Tribunal.

5277

THE TRIAL CHAMBER DENIES the request in Prayer 7 in respect of witnesses J and K, the request in Prayer 8 in respect of witnesses F, G and I and the alternative request in Prayer 11 (b).

Gabrielle Kirk McDonald
Presiding Judge

Dated this tenth day of August 1995
At The Hague
The Netherlands

[Seal of the Tribunal]