

CONCLUSION

The Court lived up to its historic challenge by responsibly addressing the momentous question posed by the General Assembly about the legal status of a threat or use of nuclear weapons. As suggested, alternative readings of international law were plausible, but the conclusions reached by the Court represent a large step forward with respect to doctrinal clarification. As the majority itself suggests, there remains significant work to be done, through either a specific prohibition of nuclear weapons or nuclear disarmament, but the direction of effort is clear, and of great encouragement to all those who have struggled since 1945 for the legal prohibition and physical elimination of nuclear weapons. As with other normative projects, such as the abolition of slavery and the repudiation of apartheid, perseverance, struggle and historical circumstance will shape the future with respect to nuclear weaponry, but this process has been pushed forward in a mainly beneficial direction by this milestone decision of the World Court.

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DUE PROCESS AND WITNESS ANONYMITY

In the April 1996 issue of the *Journal*, Monroe Leigh strongly criticized the pretrial ruling of the trial chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 in *Prosecutor v. Tadić*,¹ which held that “the identities of several victims and witnesses can be indefinitely withheld from the accused and his counsel.”² Justice Stephen vigorously dissented from the ruling of the chamber. Mr. Leigh claims that the majority’s ruling will deny the accused a fair trial and *may* lead to the conviction of accused persons on the basis of tainted evidence.³ I would argue that he has failed to take into account the full details of the chamber’s judgment, which recognized in particular that the accused’s right to know and confront prosecution witnesses is not absolute but may have to be balanced against other important interests.

It is undoubted that those accused of offenses under the jurisdiction of the Tribunal must receive a fair trial in accordance with the human rights standards laid down in international instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6)⁴ and the International Covenant on Civil and Political Rights (Article 14).⁵ This is required by the Statute of the Tribunal (Article 21).⁶ Accordingly, in drafting the Rules of Evidence and Procedure of the Tribunal, the judges incorporated throughout guarantees for the conduct of proceedings in accordance with international standards of fair trial and due process. The credibility and legitimacy of the Tribunal depend upon its fulfilling these guarantees, as does its value in setting precedents for future war crimes trials at either the international or the domestic level.

Nevertheless, the requirements of a fair trial cannot be determined in the abstract. The Tribunal was established during an armed conflict amid real fears for the safety of

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¹ *Prosecutor v. Tadić*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, UN Doc. IT-94-1-T (Aug. 10, 1995) [hereinafter Decision].

² Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235, 236 (1996).

³ Judges McDonald and Vohrah constituted the majority of the chamber.

⁴ Nov. 4, 1950, 213 UNTS 221, 228 [hereinafter European Convention on Human Rights].

⁵ Dec. 16, 1966, 999 UNTS 171, 176 [hereinafter ICCPR].

⁶ Article 21 is titled “Rights of the accused” and 21(2) specifies that the accused is entitled to a “fair and public hearing.” See Statute of the Tribunal, UN Doc. S/25704, annex (1993), 32 ILM 1192, 1198 (1993).

those who cooperated with it, as well as their families. Article 20 of the Statute requires trial chambers to ensure that proceedings are conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Article 21 (2) is made subject to Article 22, headed “Protection of victims and witnesses.”⁷ Leigh comments that this qualification is not found in the human rights conventions, but they were not drafted in the midst of an armed conflict in which a UN Commission of Experts had already collected evidence of grave breaches of international humanitarian law, committed on a massive scale, and of “ethnic cleansing.”⁸ The chamber acknowledged that it had to operate within the unique legal framework of the Tribunal. Among the Tribunal’s unique characteristics is the “affirmative obligation to protect witnesses and victims” mandated by Article 22 and fleshed out by Rules 69 and 75.⁹ Accordingly, the chamber held that the safety of victims and witnesses must be balanced against the right of the accused to a fair trial. It “had to take into account the most conspicuous aspects of the armed conflict” in former Yugoslavia, including the spread of “terror and anguish” among the civilian population. This factor was especially significant since prosecutions at the Tribunal, unlike those at Nuremberg, “would, to a considerable degree, be dependent on eyewitness testimony.”¹⁰ However, unlike many domestic jurisdictions confronting the issue of witness security, the Tribunal cannot operate an effective protection program that extends across national boundaries to the many places where witnesses are now located. The Victims and Witnesses Unit set up within the Registry of the Tribunal under Rule 34 has very limited resources and can offer only minimal counseling and protection to witnesses while they are present in The Hague to give evidence.

The interest in the safety of victims and witnesses also forms part of the broader interest of the international community in the pursuit of justice. The Security Council established the Tribunal under Chapter VII of the United Nations Charter to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”¹¹ The Tribunal’s functions have been described as threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of international peace.¹² Its jurisdiction signals to the international community the unacceptability under international law of atrocities committed during armed conflict. If the unwillingness of witnesses to testify prevents it from successfully prosecuting those who have been indicted, those objectives are undermined. The crucial question, therefore, is whether a fair trial includes an absolute right to know the identity of one’s accuser.

The requirements of a fair trial generally include a public hearing in which the accused has the opportunity “[t]o 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.”¹³ This language is replicated in Article 21(4)(e) of the Statute of the Tribunal. However, exceptions are recognized. For example, Article

⁷ Article 22, 32 ILM at 1199, provides: “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.” Leigh, *supra* note 2, at 236, comments that this language is “unfortunately not free from ambiguity.”

⁸ The Commission of Experts was established pursuant to SC Res. 780 (Oct. 6, 1992), 31 ILM 1476 (1992). For its final report, see UN Doc. S/1994/674 (1994).

⁹ See Decision, paras. 17–26. For the Tribunal’s Rules of Procedure and Evidence, *as amended*, see UN Doc. IT/32/Rev.7 (1996). See especially Rule 69 in Part Five, Pre-Trial Proceedings, and Rule 75, in Part Six, Proceedings before Trial Chambers.

¹⁰ Decision, para. 23.

¹¹ SC Res. 827 (May 25, 1993), 32 ILM at 1203, 1204.

¹² International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, First Annual Report, UN Doc. A/49/150, para. 11 (1994), *cited in* Decision, para. 18. See also Decision, paras. 17–26.

¹³ ICCPR, *supra* note 5, Art. 14(3)(e), 999 UNTS at 177; European Convention on Human Rights, *supra* note 4, Art. 6(3)(d), 213 UNTS at 228; American Convention on Human Rights, Nov. 22, 1969, Art. 8(2)(f), 1144 UNTS 123, 147–48.

6(1) of the European Convention on Human Rights permits limitations to the right to a public trial in several cases, including where the private life of the parties so requires and where in the opinion of the Court publicity would prejudice the interests of justice.¹⁴ Moreover, fair-trial provisions are not explicitly included among the nonderogable articles of either the European Convention or the International Covenant, indicating that they are not absolute but may be qualified in the exceptional circumstances of a public emergency if strictly required by the exigencies of the situation.

The chamber sought guidance in national jurisprudence and in that of the European Commission and Court of Human Rights. However, it considered that Article 6 of the European Convention on Human Rights could have only limited relevance since that Convention (in common with the International Covenant on Civil and Political Rights) does not specify witness protection as among its primary objectives. The European Court, in *Kostovski v. The Netherlands*, had concluded that the disadvantages that an accused must face when addressing the evidence of an anonymous witness can be counterbalanced by safeguards provided by the trial court.¹⁵ Similarly, while domestic courts regularly emphasize the importance of protecting the right of the accused to a fair trial, including knowing the identity of prosecution witnesses, it has been accepted that exceptions may be justified by the need to adjust the balance of fairness.¹⁶

The chamber explicitly recognized the need to balance competing interests. It did not accord blanket anonymity to all who might claim it. It drew upon case law from various jurisdictions and listed in the judgment factors to be weighed against the accused's right to a fair trial.¹⁷ First, there must be a real fear for the safety of the witness. The chamber added that "the ruthless character of an alleged crime justifies such fear of the accused and his accomplices." Second, the prosecutor must demonstrate the importance of the witness to proving the counts of the indictment to which the evidence relates. Third, there must be no evidence to suggest that the witness is untrustworthy. Fourth, the Tribunal itself is in no position to offer protection to the witnesses or their families after receiving their testimony.

These factors are sufficiently flexible to allow the particular facts of each claim to be taken into account. In some cases the identity of the accuser may be crucial to the establishment of guilt, while in others it may not be. For example, where a charge is based upon command authority, it will be necessary for the prosecution to establish that violations of the laws of war occurred in a particular location and that they can be linked to the accused's authority. In these circumstances the identity of the individual witnesses testifying to the occurrence of particular events would be less relevant than their location and the chain of command.

The chamber also provided guidelines to be followed when evidence is taken from an anonymous witness. The judges must know each witness's identity and must be able to observe the witnesses' demeanor to assess the reliability of testimony. In the absence of a trial by jury, the judges are the decision makers as to both fact and law, and confidence in their ability to weigh all aspects of the evidence is crucial to the credibility

¹⁴ Similar language is used in the ICCPR, *supra* note 5, Art. 14(1), 999 UNTS at 176.

¹⁵ 166 Eur. Ct. H.R. (ser. A) at 3 (1989).

¹⁶ For example, *Jarvie v. Magistrates Court of Victoria at Brunswick*, 1995 Vict. Rep. 84 (Sup. Ct.); *Regina v. Taylor*, 1994 T.L.R. 484 (Ct. App.); *Regina v. Watford Magistrates Court ex parte Lenman*, 1992 T.L.R. 285 (Q.B.); *Regina v. DJX, SCY, GCZ*, 91 Crim. App. 36 (Eng. 1990); *Regina v. Hughes* [1986] 2 N.Z.L.R. 129 (Ct. App.). In *Regina v. Hughes*, President Cooke of the New Zealand Court of Appeal (dissenting) and in *Jarvie*, Judge Brooking listed some American cases where witness safety was a factor to be taken into account. *Siegfriedt v. Fair*, 982 F.2d 14 (1st Cir. 1992); *Clark v. Ricketts*, 958 F.2d 851 (9th Cir. 1991); *United States v. Rangel*, 534 F.2d 147 (9th Cir. 1976); *United States v. Ellis*, 468 F.2d 638 (9th Cir. 1972); *United States v. Crovedi*, 467 F.2d 1032 (7th Cir. 1972); and cases from state courts, including *Jackson v. State*, 544 N.E.2d 853 (Ind. 1989); *Castle v. Texas*, 748 S.W.2d 230 (Crim. App. 1988); *People v. Stanard*, 365 N.E.2d 857 (N.Y. 1977).

¹⁷ Decision, para. 77.

of the Tribunal. The defense must be given ample opportunity to question the witness on issues unrelated to identity and current whereabouts. This principle conforms with the requirement in Article 21(4)(e) that the accused is entitled "to examine, or have examined, the witnesses against him." Finally, the anonymity is not to be permanent, but will last only so long as there is reason to fear for the witness's security.

Many of the arguments presented to the Tribunal in support of anonymity related specifically to charges of sexual abuse. Indeed, the Secretary-General of the United Nations stated that protection should be provided to victims "especially in cases of rape or sexual assault."¹⁸ While the Tribunal did not limit its ruling to these cases,¹⁹ it was aware of the particular features of such trials and referred to the attention given in the Rules of Procedure and Evidence to crimes committed against women.²⁰ This context cannot be ignored when assessing the chamber's ruling. Rape is notoriously under-reported and convictions are hard to secure in domestic criminal courts. Unless one believes that many women put themselves through the ordeal of a rape trial to make false accusations against men,²¹ this is a cause for concern. Writers have described the retraumatization of a victim through having to confront her alleged rapist at trial, and describe what he did to her in the face of hostile defense questioning.²² Societal pressures may also weigh against an admission of having been raped. The UN Special Rapporteur on violence against women states that "[s]evere traumatization, feelings of guilt and shame are accompanied by the fear of rejection by husband or family and by the fear of reprisals against themselves and their families."²³ In the *Tadić* trial, the subsequent refusal to testify of one of the witnesses accorded anonymity by the chamber underlines the reality of these fears. It also suggests that Leigh's hopes that witnesses will testify without the shield of anonymity, for example if they have been granted asylum or the benefits of a witness protection program, may be optimistic, although some have done so.

The argument that human rights standards have been defined by men in accordance with male assertions of what constitutes the most fundamental guarantees required by individuals is highlighted in the conflict between the rights of the accused to a fair trial and the right of the victim to equality before the law and to be free from fear of further abuse.²⁴ Women typically feature in a criminal trial as victims and witnesses, while more men than women appear as accused. It is not surprising that the guarantee of a fair trial

¹⁸ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, para. 108 (1993), 32 ILM 1159, 1185.

¹⁹ The first subsequent decision in which the guidelines laid down in the decision of August 10, 1995, were applied concerned the request for anonymity by a witness who had been a guard at Trnopolje Camp, where he had committed serious crimes for which he was convicted by a court in Bosnia-Herzegovina. His identity was not revealed. The prosecution asserted that he was a key witness and feared reprisals against his family by his coperpetrators if it became known that he had given evidence to the Tribunal. The chamber ordered that his identity be disclosed "not less than thirty days in advance of a firm trial date." Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, UN Doc. IT-94-1-T (Nov. 14, 1995).

²⁰ Decision, para. 24.

²¹ See REGINA GRAYCAR & JENNY MORGAN, *THE HIDDEN GENDER OF LAW* 339-41 (1990), on the likely low level of false complaints of rape.

²² E.g., JENNIFER TEMKIN, *RAPE AND THE LEGAL PROCESS* (1987); JUDITH ROWLAND, *RAPE: THE ULTIMATE VIOLATION* (1986).

²³ Radhika Coomaraswamy, Preliminary Report on Violence against Women, its causes and consequences, UN Doc. E/CN.4/1995/42, para. 281 (1994).

²⁴ See, e.g., Charlotte Bunch, *Women's Rights as Human Rights: Towards a Revision of Human Rights*, 12 HUM. RTS. Q. 486 (1990); Hilary Charlesworth, *What are "Women's Human Rights"?*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58 (Rebecca Cook ed., 1994); C. M. Chinkin, *Women's Rights as Human Rights under International Law*, in UNDERSTANDING HUMAN RIGHTS 553 (Connor Gearty & Adam Tomkins eds., 1996).

is seen by many as more fundamental than the victim's interests, and those of other potential victims. Leigh argues that the Tribunal must "establish itself as the preeminent defender of human rights and particularly of the right of every accused to a fair trial according to the most exacting standards of due process required by contemporary international law."²⁵ For many women, the Tribunal's jurisdiction over rape (as a crime against humanity) and the willingness of the prosecution to bring indictments for "forcible sexual penetration" (as a grave breach of the Geneva Conventions, torture, enslavement and crimes against humanity) are of paramount importance in breaking the long silence about the incidence of violent sexual abuse in armed conflict.²⁶ This move forward will be prejudiced if fear prevents witnesses from giving their testimony.²⁷ The very act of rape constitutes an assault upon the victim's autonomy and human identity.

The inadmissibility under Rule 96 of evidence relating to the victim's prior sexual conduct also suggests that there is little reason for the accused to know the witness's identity.²⁸ This exclusion is not solely for the benefit of women, for men too are victims of sexual assault and may also be reluctant to testify against their assailants. The Rules of Procedure and Evidence and indictments are innovative as well for their gender neutrality.

The chamber's decision is carefully constructed to give appropriate weight to both sets of interests and not to give automatic priority to those of the accused. In conjunction with the further protections accorded to victims of sexual assault in Rule 96 of the Rules of Procedure and Evidence,²⁹ the decision is to be welcomed for its recognition that individual rights cannot always be absolute but must be weighed against those of other individuals. It also provides guidance for trials of charges of sexual abuse that might be followed by domestic criminal courts and thus improve the chances of convictions for these serious offenses.

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²⁵ Leigh, *supra* note 2, at 237.

²⁶ Statute of the Tribunal, *supra* note 6, Art. 5(g), 32 ILM at 1193–94. In its indictments issued on June 26, 1996, the prosecution alleged 62 counts of crimes committed against women. They included crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war relating especially to rape, torture, outrages upon personal dignity, persecution, willfully causing great suffering, enslavement and inhuman treatment. See Prosecutor v. Gagović, Review of Indictment Pursuant to Article 19(1) of the Statute, Case IT-96-23-1 (June 26, 1996). On "forcible sexual penetration," see *id.*, para. 4.8. On the long history of rape in armed conflict, see SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

²⁷ The Tribunal's press release accompanying the indictment of June 26 states: "The indictment is of major legal significance as it is the first time that sexual assaults have been diligently investigated for the purpose of prosecution under the rubric of torture and enslavement as a crime against humanity." Press release CC/PIO/093-E (The Hague, June 27, 1996).

²⁸ Rule 96 of the Rules of Procedure and Evidence, *supra* note 9, provides: "In cases of sexual assault: . . . (iv) prior sexual conduct of the victim shall not be admitted in evidence."

²⁹ Rule 96 also provides, in cases of sexual assault, that

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

* The author submitted an amicus brief under Rule 74 of the Rules of Procedure and Evidence, in *Prosecutor v. Tadić*, arguing in favor of anonymity of victims and witnesses. It is published in the 1996 *Criminal Law Forum*. The author thanks Patty Blum, Paul Hoffman, Joan Fitzpatrick and Virginia Leary for their helpful comments on this Editorial Comment.