

WITNESS ANONYMITY IS INCONSISTENT WITH DUE PROCESS

Even though these comments are not likely to be published until after the *Tadić* trial has reached judgment, I would like to make three points in response to Ms. Chinkin's challenge to my critique of the trial chamber's two-to-one interim decision to hear testimony from some witnesses whose identity is to be withheld indefinitely from the accused and his counsel. The first point is technical; the second and third are more general.

The first point is that the two judges who formed the majority in the trial chamber were without authority to make such a ruling. Neither the text of the Statute of the Yugoslav Tribunal nor its published rules authorize the use of witnesses whose names are withheld from the accused. Article 22 of the Tribunal Statute, which Ms. Chinkin relies on, clearly requires that such measures as are taken for the protection of victims and witnesses must be spelled out in the Tribunal's Rules of Procedure and Evidence. It is an issue for the whole eleven-member Tribunal, not for the discretion of a majority of a trial chamber. Ms. Chinkin does not address this requirement.

Indeed, there is no Tribunal rule that she could point to which authorizes withholding from Tadić the identities of witnesses against him and doing so throughout the trial. It is significant, I think, that the prosecutor's formal application requested that identity be withheld only until thirty days before the beginning of the trial. Even more significant is the fact that the rules which do relate to protection of victims and witnesses require that the identity of the witness "shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence" (Rule 69 (B)).¹ In addition, Rule 75(A) requires that whatever measures are adopted for the protection of victims and witnesses must be "consistent with the rights of the accused." The same rule has elaborate and highly specific provisions regarding the requirements and preconditions for authorizing *in camera* trials, but there is not one word in the Rules about withholding the identity of witnesses from the accused *during trial*. Yet the latter is far more prejudicial to the due process rights of an accused than an *in camera* trial at which the accused will be present, will know the identity of witnesses against him, and will have the right of cross-examination. Every trial lawyer knows that effective cross-examination depends in major part on careful advance preparation. And this in turn depends on knowing the identity of accusing witnesses.

Thus, I maintain that the majority in the trial chamber—even if it did not accept my view that the minimum guarantees of Article 21(4) are nonderogable on a case-by-case basis—has exceeded its authority under both the Statute and the Rules. The issue should have been referred to the full Tribunal for the adoption of an appropriate modification of the Rules if a majority of the eleven-member Tribunal were persuaded that two members of the trial chamber were right. The more so in view of the fact that no interlocutory appeal seems to be available on this fundamental issue. So much for the procedural deficiencies of the majority's decision.

The substantive issue is much more important. I think when paragraph 4 of Article 21 (Rights of the accused) of the Statute speaks of "minimum guarantees" and lists in subparagraph (e) the right of the accused "to examine, or have examined, the witnesses against him," it means exactly what it says.² It is a minimum guarantee. The fact that paragraph 2 of Article 21 says that the accused shall be entitled to "a fair and public

¹ See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Rules of Procedure and Evidence, *as amended* Oct. 6, 1995, UN Doc. IT/32/Rev.6 (1995) [hereinafter Rules].

² See Statute of the International Tribunal, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993) [hereinafter Statute].

hearing, subject to article 22 of the Statute,” does not affect the minimum guarantee of paragraph 4(e). That guarantee is textually separate. Further, when one looks at Article 22, it provides that 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.” I believe that this Article 22 provision applies only to the right to a public hearing, as the dissenting judge, Sir Ninian Stephen, made clear in his dissent.

Even if one adopts Ms. Chinkin’s interpretation that the minimum guarantees in paragraph 4 of Article 21 are diminished by the provisions in Article 22—which I would not concede, nor did Judge Stephen—the fact is that it would be necessary for the Tribunal not only to have authorized such a procedure, but also to have provided specifically in its Rules of Procedure and Evidence for the conditions under which the use of unidentified witnesses would be permitted. But when one looks at the Rules of Procedure, there is not one single word authorizing the use during trial of unidentified witnesses or, indeed, specifying the conditions under which unidentified witnesses could be used.

The second and more general point has to do with the accused’s right to a fair trial, which I regard as an absolute minimum. Ms. Chinkin at the outset seems to agree with that overall concept. Thus, she affirms that “those accused . . . must receive a fair trial in accordance with the human rights standards laid down in international instruments.”³ Nevertheless, in other paragraphs this formulation is modified. For example, she later endorses the view of the majority of the trial chamber “that the safety of victims and witnesses must be balanced against the right of the accused to a fair trial.”⁴ Does Ms. Chinkin believe that the accused is entitled to something less than a fair trial if such a derogation is necessary to the protection of witnesses and victims? Ordinarily, in municipal legal systems any balancing takes place in the prosecutor’s office before trial. The prosecutor either decides to go to trial without the witness or abandons the case or the particular charge. He does not consider whether the rights of the accused should be curtailed in order to protect a witness. It is a radical proposition to suggest that the minimum rights of the accused to a fair trial can be diminished in order to protect witnesses and victims. This point was made in Judge Stephen’s dissent, which Ms. Chinkin makes no attempt to rebut. He said that, “while Article 22 specifically contemplates non-public hearings, it certainly does not contemplate unfair hearings.”⁵

Elsewhere, Ms. Chinkin frames the issue in terms I would accept: “The crucial question . . . is whether a fair trial includes an absolute right to know the identity of one’s accuser.”⁶ She answers this question in the negative. But, as Judge Stephen points out, the minimum guarantees listed in Article 21(4) (such as the right of the accused to be present at his trial, the right to counsel, the right to examine witnesses against him) are not textually qualified by Article 22. The same is true for the presumption of innocence guaranteed by Article 21(3). Would Ms. Chinkin maintain that the presumption of innocence is subject to qualification by the balancing that she reads into Article 22? That precious presumption has been a favorite target of authoritarian regimes throughout history.

I submit that Sir Ninian Stephen’s is the better view. Only the public nature of the trial is subject to the limitation of Article 22 in favor of the protection of victims and witnesses.

³ Christine M. Chinkin, *Due Process and Witness Anonymity*, *supra* p. 75, 75.

⁴ *Id.* at 76.

⁵ 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) (Stephen, J., dissenting).

⁶ Chinkin, *supra* note 3, at 76.

His interpretation not only accommodates the use of *in camera* hearings to protect witnesses and victims from being exposed to the trauma of a public trial, but also guarantees the right of the accused to be present and to examine witnesses against him.

Ms. Chinkin also makes the point that “fair-trial provisions [of the European Convention on Human Rights and the International Covenant on Civil and Political Rights] [which are replicated in Article 21(4)] are not explicitly included among the nonderogable articles of either the European Convention or the International Covenant, indicating that they are not absolute.”⁷ It is true enough, of course, that some of the minimum guarantees in those instruments are derogable. Article 4 of the International Covenant reads:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. [Here note that the Article 14 fair-trial guarantees of the Covenant are not listed as nonderogable.]

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.⁸

But no similar general derogation clause was included in the Yugoslav Statute. Even if it had been—presumably with appropriate modifications—the *Tadić* case does not rise to the level called for by the phrases “public emergency which threatens the life of the nation”; “the existence of which is officially proclaimed”; and “not inconsistent with their other obligations under international law.” The United Nations has made no such public proclamation of a suspension of minimum due process guarantees in international criminal cases arising in Bosnia. Presumably, such a suspension would not be on a case-by-case basis but, rather, on an across-the-board basis. Instead, the United Nations, with full knowledge of local ethnic and religious animosities, proclaimed in the Yugoslav Statute the abiding requirement that these minimum guarantees be respected, with the sole exception that the public-trial guarantee may give way to an *in camera* hearing if the Rules of Procedure and Evidence so provide.⁹ A similar exception is specifically recognized in the human rights treaties. This is very different from accepting testimony from unidentified witnesses.

The third and final point: if nothing else, the publication of our differing views illustrates the priorities that Ms. Chinkin and I espouse. She obviously regards the creation of the Yugoslav Tribunal as presenting an opportunity to secure the adoption of a new set of rules and procedures for the protection of victims and witnesses in sensitive criminal cases.

In general, I do not oppose her objective of promoting a more nuanced handling of sensitive cases.¹⁰ On the other hand, at this time it is of overriding importance that the first international criminal tribunal established since Nuremberg should exercise its

⁷ *Id.* at 77.

⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

⁹ See Statute, *supra* note 2, Art. 20(4), and Rules, *supra* note 1, Rule 79.

¹⁰ In the *Tadić* case, the rape charges were withdrawn before the trial began.

jurisdiction in such a way as to establish the credibility of international criminal tribunals on a basis that cannot be criticized from a due process point of view. This is important not only for the assurance of justice to the accused, but also for the reputation of this Tribunal, and for the effect the record of this Tribunal will have on public acceptance of a permanent international criminal court. In my view, international law has not yet accepted the position that the accused's right to a fair trial is subject to discount and "balancing" in order to provide anonymity to victims and witnesses.

The issue raised here has several striking similarities to the issue raised by the proposed victims' rights amendment to the U.S. Constitution—and at least one fundamental difference, which I will come to later. The proposed constitutional amendment, as introduced by Senators Kyl and Feinstein and Congressman Hyde, would create in victims of violent crime a fundamental right (1) to be informed of the trial; (2) to be present at all stages of the trial; (3) to be heard at sentencing; (4) to object to plea bargains or release from custody; (5) to be given notice of any release or escape; and (6) to receive full restitution from the convicted offender. Doubtless, this proposal will be refined during the legislative process, which is likely to be lengthy and controversial, even though it was endorsed in principle by both of the principal candidates for President in the recent election.

What is most significant about the proposed constitutional amendment is that, in its present form, it does not specifically modify any due process rights guaranteed to an accused under the Constitution. And Senator Kyl stated in introducing the measure that it would not infringe on constitutional rights of any accused person. Thus, it is fundamentally different from the "balancing" endorsed by Ms. Chinkin.

Ms. Chinkin's position, if generally adopted, would equate the hard-won constitutional rights of the accused, which are embodied in the International Covenant and derived from national judicial experience over many centuries, with victims' rights, which are in the process of being defined. And she would leave it to an international court of limited tenure to balance, on a case-by-case basis, the historically developed rights of the accused against the emerging rights of victims. Surely, the rights of victims should be defined on a more rigorous basis—if not in a constitution, at least in the Rules of Procedure and Evidence of the Yugoslav Tribunal.

As these comments are being written, the trial chamber has just begun to hear the defense side of the *Tadić* case. The chamber has already provisionally allowed the prosecutor to put at least one unidentified witness on the stand. I understand that counsel for *Tadić* may wish to put one or more unidentified witnesses on the stand to help establish *Tadić's* alibi defense. If this should happen, there is the additional risk that the trial may be characterized as a contest between oath helpers. To avoid this risk, I hope the trial chamber, at the end of the trial, will decide to strike out the testimony of those witnesses whose identities have been withheld from *Tadić* and his counsel. This is a step that the majority of the trial chamber in paragraph 84 of its interim decision of August 10, 1995, indicated it might take if necessary to assure a fair trial.

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THE HELMS-BURTON ACT: EXERCISING THE PRESIDENTIAL OPTION

The provisions of the Helms-Burton Act¹ authorizing lawsuits by U.S. nationals against foreign firms that "traffic" in property expropriated by Cuba have caused much contro-

¹ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, 110 Stat. 785 (1996).